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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

DAVID O'DEA,

Appellant,

vs.

CITY OF TACOMA, a municipal subdivision of the State of Washington;
and the TACOMA POLICE DEPARTMENT, an agency of the City of Tacoma,

Respondents.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 18-2-08048-2

BRIEF OF APPELLANT

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I. INTRODUCTION

Lt. David O’Dea was wrongfully terminated by the Tacoma Police Department (hereafter TPD) when he chose life over death. Even though TPD’s Use of Force Policy recognizes and respects the value of all human life, and Lt. O’Dea made a conscious decision not to shoot at or “target” the imminent threat of death or serious bodily injury, he was terminated.

The trial court granted the City of Tacoma’s summary judgment motion holding that because Lt. O’Dea acted outside of TPD’s Use of Force Policy, his termination was warranted. Respectfully, the trial court erred because Lt. O’Dea’s conduct was clearly authorized by TPD’s Use of Force Policy. Clearly, any law enforcement officer may, and should, consider, and use, less than deadly force when facing an imminent threat of death or serious bodily injury. Because Lt. O’Dea chose life over death as both TPD policy and established case law allow, this Court should reverse the trial court’s decision and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the City's summary judgment motion because material issues of fact exist surrounding Lt. O'Dea's use of force.

2. The trial court erred when it granted the City's summary judgment motion when Lt. O'Dea's termination was in violation of the public policy that values all human life.

3. The trial court erred when it ruled a law enforcement officer must use deadly force and eliminate the threat when confronted with a life-threatening situation.

4. The trial court erred when it granted the City's summary judgment motion as needlessly killing an individual violates our public policy that favors human life when an alternative to the use of deadly force exists.

5. The trial court erred when it assumed facts not in evidence when it suggested that Lt. O'Dea's "random" shots placed other citizens in danger while he defended himself against the deadly threat he faced.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it granted the City's summary judgment motion when Lt. O'Dea's used his training and tactics when determining the appropriate level of force to use when addressing the threat before him?

(Assignments of Error 1, 2, 3 and 4)

2. When a law enforcement officer is faced with an imminent threat of death or serious bodily injury, must he use deadly force and eliminate the threat when a lesser amount of force is appropriate?

(Assignments of Error #1, 2, 3 and 4)

3. Whether the trial court erred when it granted the City's summary judgment motion when the chief policy maker, Chief Ramsdell, acknowledged that shooting at a vehicle could be appropriate under certain circumstances?

(Assignments of Error #1, 2, 3 and 4)

4. Whether the trial court erred when it granted the City's summary judgment motion when the plaintiff's expert acknowledged that shooting at a vehicle could be appropriate under certain circumstances?

(Assignments of Error #1, 2, 3 and 4)

5. Whether the Shooting Review Board's conclusions established that reasonable minds can differ as to the appropriate level of force that Lt. O'Dea was required to use when he faced an imminent threat of death or serious bodily injury?

(Assignments of Error #1, 2, 3 and 4)

6. Whether the trial court erred when it granted the City's summary judgment motion when the court commented that Lt. O'Dea was shooting "randomly" which could needlessly harm somebody when no evidence suggests that such "random" shooting occurred?

(Assignments of Error #5)

IV. STATEMENT OF THE CASE

A. Procedural History

On May 11, 2018, appellant Lt. O’Dea filed a complaint for damages against the City of Tacoma and the Tacoma Police Department (hereafter TPD) for wrongful termination, intentional and negligent infliction of emotional distress, and defamation. CP 1-40. On September 5, 2019, defendants filed a motion for summary judgment, with supporting materials. CP 43-64, 65-139, 140-214. Lt. O’Dea filed a response and supporting materials on October 2, 2019. CP 215-239, 240-515. Plaintiff filed errata on October 3, 2019. CP 516-518. Defendants filed a reply on October 14, 2019. CP 519-530, 531-631, 632-635. On October 18, 2019, Pierce County Superior Court entered an order granting defendants’ motion for summary judgment, dismissing all of Lt. O’Dea’s claims against the City of Tacoma and TPD. CP 636-638. Lt. O’Dea filed a notice of appeal on October 24, 2019. CP 639-644.

B. Facts

On August 6, 2016, Lt. O’Dea was working patrol as a Police Lieutenant and Shift Commander for TPD. As was his habit, Lt. O’Dea was monitoring his radio on scan mode while he was in the north end of the city on an administrative task when he heard Officer Huebner's initial call requesting an additional unit and a supervisor in the south end of the city. CP 242, 251.

Officer Huebner had been dispatched to a reported traffic accident. As Lt. O’Dea continued to the police station to complete his administrative task, he heard Officer Huebner’s second call for a supervisor and ETA from that call. Because no other supervisor responded, Lt. O’Dea advised Dispatch that he was responding. CP 242-43, 252.

When Lt. O'Dea arrived at the scene, he observed Officers Huebner, Waddell and Koskovich present, standing by a maroon Nissan. Officers Koskovich and Waddell were standing on either side of the Nissan with their handguns drawn at the low ready position focused on the occupant. The Nissan was running and was occupied by a single person, Jose Mendoza Davalos, who was sitting in the driver's seat. Lt. O'Dea noted that Mendoza Davalos had a hoodie pulled up over his head despite the warm weather, and he was slouched down in the driver's seat. Officer Huebner was standing behind a patrol car that was parked behind the Nissan. The patrol car was running and its emergency lights were operating. CP 243, 253-54.

When Lt. O'Dea spoke to Officer Huebner, Officer Huebner explained that he was dispatched to the location for a report of a traffic accident. After arriving at the location and conducting his investigation, Officer Huebner determined it was a road rage incident involving Mendoza Davalos, who Officer Huebner deemed the aggressor. Officer Huebner allowed the other involved driver to leave due to Mendoza Davalos' erratic behavior. CP 243, 253-54.

Officer Huebner said that while he was trying to discuss the traffic incident with Mendoza Davalos, Mendoza Davalos was not cooperative. After interacting with Mendoza Davalos, Mendoza Davalos began to leave the parking lot in his vehicle with Officer Huebner following. Rather than leave the parking lot, however, Mendoza Davalos looked into his rearview mirror, smiled and put his car in reverse and rammed Officer Huebner's patrol vehicle. CP 243, 255.

Lt. O'Dea asked Officer Huebner if Mendoza Davalos had committed a crime and Officer Huebner said "yes". Lt. O'Dea asked Officer Huebner if he had probable cause to arrest Mendoza Davalos and Officer Huebner replied he did. Lt. O'Dea asked Officer Huebner if he

had a plan to remove Mendoza Davalos from the Nissan. Officer Huebner said he did not. CP 244, 254-55.

While receiving Officer Huebner's briefing, Lt. O'Dea could hear and see Officers Waddell and Koskovich providing verbal commands to Mendoza Davalos to turn off the car, show his hands, and exit the vehicle. Officer Waddell advised that Mendoza Davalos was reaching around inside of the Nissan as if he was looking for a weapon. The inside of the vehicle had not been searched. CP 244, 256, 310-11.

While officers were standing at the low ready over the vehicle, Mendoza Davalos called 911. The 911 dispatcher conferenced a Spanish interpreter into Mendoza Davalos' 911 call. Through the interpreter, the 911 dispatcher asked Mendoza Davalos if he had a gun, but he did not answer. Mendoza Davalos told the dispatcher that the officers should put their guns down or he would run over them. CP 311, 314.

While the 911 dispatcher was talking to Mendoza Davalos on the phone, Lt. O'Dea advised Dispatch to have Tacoma Fire respond and stage in the event their assistance was needed. He did this for several reasons:

- 1) Mendoza Davalos was refusing to exit the vehicle; if force was used, he might be injured;
- 2) to administer aid in case any officers were injured as well as making sure Officer Huebner was not injured; and
- 3) Mendoza Davalos's actions were not rational, and Lt. O'Dea felt that Mendoza Davalos might be suffering some sort of mental health crisis, suffering from the effects of drugs, or experiencing some kind of health crisis.

CP 244, 257-58.

While dispatch was relaying the information about Mendoza Davalos, Lt. O'Dea directed Officer Huebner to move his patrol car closer to the Nissan to better pin it against the concrete parking curb in front. Suddenly, Mendoza Davalos' vehicle surged over the concrete curb it was against. Out of his peripheral vision, Lt. O'Dea saw Officer Waddell, who was standing at the left front fender of Mendoza Davalos' vehicle, violently move backward as if he had been struck by the vehicle. CP 245, 262-63.

Officer Huebner rushed past Lt. O'Dea in an apparent attempt to flee to safety, going between Lt. O'Dea and the trunk of his patrol car while Lt. O'Dea moved north and away from the Nissan. CP 245, 263.

As Lt. O'Dea moved, Mendoza Davalos accelerated and backed his vehicle over the curb and into the vehicle parked to its immediate left with such force that it pushed the vehicle entirely out of the parking space and into the vehicle next to it, partially pushing that vehicle out of its parking space. Lt. O'Dea believed that Mendoza Davalos was going to continue to force his way out of the parking lot while he was backing up, and Lt. O'Dea continued to try to stay to the north and out of the vehicle's path. Lt. O'Dea observed Officer Koskovich, with what appeared to be a flashlight in his hand, break out the Nissan's front passenger window as it was accelerating forward. The Nissan then stopped, pulled forward, and made a tight right turn. Lt. O'Dea could see the front wheels of the Nissan turn sharply to the right, and he now believed that Mendoza Davalos was going to continue to make the right turn and exit the parking lot through the only entrance/exit to the south. CP 245, 266-269.

As Lt. O'Dea continued to move out of the vehicle's path the Nissan continued to accelerate forward in a tight right-hand turn. As Lt. O'Dea now moved laterally through the parking lot, he noted that the Nissan was now making a left-hand turn, travelling and

accelerating directly toward him. Lt. O'Dea believed Mendoza Davalos was trying to run him over as there was no entrance/exit to the north. Lt. O'Dea also feared that Mendoza Davalos might have already seriously injured Officer Waddell as Lt. O'Dea could no longer see him. CP 245, CP 266-69.

When the vehicle was about 5 to 7 feet in front of him and was continuing to accelerate, Lt. O'Dea drew his department issued handgun. Lt. O'Dea clearly recalled being center mass of the vehicle, with headlights equidistant apart and the engine revving. Lt. O'Dea did not believe that he had enough time or distance to escape. Lt. O'Dea feared for his life and believed that Mendoza Davalos was going to use the Nissan to intentionally kill him. As the Nissan continued to accelerate toward Lt. O'Dea, he raised his handgun from low ready position to a firing position. CP 246, 269-71.

Lt. O'Dea did not have a clear sight-line of Mendoza Davalos as he was sitting low in the Nissan, and was short in stature. Lt. O'Dea also knew that other officers were on scene, and while none were in his direct line of sight, Lt. O'Dea was unsure exactly where they were if he was to fire through the windshield at Mendoza Davalos, thus risk striking the other officers present. Lt. O'Dea realized he had to act quickly, as he had no more time. Applying the OODA loop principles taught by TPD, Lt. O'Dea determined his best option would be to shoot at the vehicle and get inside of Mendoza Davalos's OODA loop, allowing Lt. O'Dea enough time to reach the vehicles parked to his right. CP 246, 269-71, 335-36.

As the Nissan continued to close the distance, Lt. O'Dea continued to laterally move away. Everything was happening simultaneously. Lt. O'Dea cleared his backdrop for the angle of his shooting. During the process of electing to shoot, Lt. O'Dea considered that Mendoza Davalos may have mental health issues, given his behavior, and that his primary duty

as a police officer is to preserve life. As the vehicle rapidly approached at approximately 15-20 miles per hour, Lt. O'Dea began firing while moving laterally and rotating his body to keep a clear sight line while the Nissan continued to accelerate toward him. Lt. O'Dea continued to move and fire until the Nissan's front left tire went flat and it began to veer its wheels to the right in an effort to escape the rounds being fired, and the vehicle and Mendoza Davalos were no longer a deadly threat. Lt. O'Dea barely escaped being struck by the vehicle. The vehicle was close enough to him that he could have reached out and touched it with his hand. CP 246-47. It was a life-threatening situation. CP 380-81.

Lt. O'Dea believed he disabled the vehicle because the left front tire was flat and fluids were leaking from the vehicle. Mendoza Davalos was taken into custody, safely, a few moments later. The time from when Mendoza Davalos accelerated toward Lt. O'Dea and when Lt. O'Dea fired "[t]he shots from start to finish were – within 2 seconds of themselves." CP 246, 270, 279, 338, 340-41.

While Lt. O'Dea was shooting there were no officers or civilians in his line of sight and he was sure of his backdrop, the pavement of the parking lot. No officer or civilian lives were in danger. CP 247, 274-75. Lt. O'Dea believed that he had options outside of deadly force to save not only his life but the life of the suspect and his fellow police officers and he took those options. CP 267-270.

Officer McNeely advised Lt. O'Dea that he had received a laceration on his chin and a bruise that appeared on his left forearm that he attributes to being struck by Mendoza Davalos' vehicle. CP 297, 401.

The other police officers involved, Officers Huebner, Waddell and Koskovich, prepared incident reports regarding this event. Officer Huebner confirmed that Mendoza

Davalos threatened to run them over. CP 351. When asked about his observations of Mendoza

Davalos' driving as he approached Lt. O'Dea, Officer Huebner stated as follows:

Reopelle: Okay. How fast do you think, I mean can you approximate at all?

Huebner: At that distance, it was a very short distance, maybe fifteen, twenty miles an hour trying to accelerate to a dead end.

...

Reopelle: Okay. How far away was Lieutenant O'Dea from the car?

Huebner: Five feet, maybebetween five and ten feet. It wasn't far. It was very close.

CP 353-54.

Officer Koskovich described the Mendoza Davalos driving events as follows:

Koskovich: He was rapidly accelerating. It was not slow by any means. Um, I can't estimate a speed but I remember hearing the sound of the motor reeving and I remember him taking off at a quick pace.

Reopelle: Okay. And so what, how is the Lieutenant reacting?

Koskovich: Uh, I observed him back pedal away from the car. I observed him at some point I believe he drew his firearm or had a firearm. I knew he had a firearm in his hand. And then he, **he fired in the direction of the car as it's driving at him.**

CP 368.

Consistently, Officer Waddell reported as follows:

Waddell: And I wasn't exactly sure where the Lieutenant was. I just know he was right in between that Ford Escape and, and the suspect vehicle. So, I mean it could have easily been

Reopelle: The Lieutenant was pinned between the suspect's vehicle and that Escape?

Waddell: Right.

Reopelle: Okay.

Waddell: There was and the, the gap was closing quickly cause he was accelerating.

Reopelle: Okay. So how far do you think that car was away from the Lieutenant when it started to make its right hand turn?

Waddell: Uh, feet, maybe three, four feet, maybe five, somewhere in that area.

Reopelle: So, that's pretty close.

Waddell: Very, very, very close. It was very close quarters.

Reopelle: Okay. And so then when are the shots fired in relation to that?

Waddell: Basically, as the vehicle, if this would be the Lieutenant, the car is going this direction, right as the car about gets here as I'm, I'm running this direction, is right when I start hearing the shots and the car is kinda just brushing by him while the sho, while the shots were happening right in this, right in that spectrum of time.

Reopelle: Okay. And so, correct me if I get this wrong, okay, cause I want this to be your words but I'm watching you draw this here. So, you're kinda drawing that the Lieutenant starts shooting when the, when the, when the vehicle is slightly in front of him but then the car passes him and he continues shooting.

Waddell: It's pretty simultaneous and quickly but he stopped shooting right as basically the front half of the vehicle had passed him. That's about when the string of shots happened is when right, he had about a couple feet before the car was gonna hit him. And then he, it appeared that's when he started shooting and then right when the car was passed him only, only like a couple feet and this is happening instantaneously that's when the shots kinda stopped.

CP 381 (emphasis added).

The City relies on the Deadly Force Review Board's finding where four of the six board members determined that Lt. O'Dea's use of force was outside Department policy.

Significantly, however, Lt. O'Dea was not asked to participate at that Review Board hearing, and the synopsis of the incident stated that Lt. O'Dea did not start shooting until after the vehicle passed him, which is false and misleading. CP 314. The information provided to the Deadly Force Review Board was incomplete and inaccurate. It failed to state that there were bullet strikes moving front to back at the front end of Mendoza Davalos' vehicle or present any

information about those bullet strikes as evidenced by a Department forensic marker that was located on the front end of the vehicle when it was examined by the appellant's forensic expert after Lt. O'Dea was terminated. CP 72-73. The City failed to mention any of this highly relevant information to the Deadly Force Review Board.

Even with incomplete and inaccurate information and no information from Lt. O'Dea, the officer who used the force, two Board members, Lt. Fred Scruggs and Lt. Alan Roberts, found that Lt. O'Dea's use of force was reasonable and within Departmental policy due to extraordinary circumstances. CP 319, 322, 323-25. Additionally, the two citizen Board members stated that although Lt. O'Dea's actions might not be within policy, both citizens believed that Lt. O'Dea should, at the most, be reprimanded, and offered retraining, but that he should not lose his job. CP 326-28, 329-331.

Finally, in Mendoza Davalos' guilty plea, he admitted trying to assault Lt. O'Dea with his vehicle. CP 385-403.

Respectfully, the trial court erred when it granted the City's summary judgment motion as material issues of fact exist, which precludes summary judgment being granted.

V. ARGUMENT

A. STANDARD ON MOTION FOR SUMMARY JUDGMENT

This Court reviews summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). On summary judgment, the appellate court construes all evidence and reasonable inferences in favor of the nonmoving party. Id. Summary judgment is appropriate when the record shows "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c); see Keck, 184 Wn.2d at 370. A fact is material if it affects the case's outcome. Keck, 184 Wn.2d at 370 n.8. A genuine issue of material fact exists if the evidence would be sufficient for a reasonable jury to find in favor of the nonmoving party. Id. at 370. "If reasonable minds can reach only one conclusion on an issue of

fact, that issue may be determined on summary judgment." Sutton v. Tacoma Sch. Dist. No. 10, 180 Wn.App. 859, 865, 324 P.3d 763 (2014).

The party moving for summary judgment has the initial burden to show there is no genuine issue of material fact. Lee v. Metro Parks Tacoma, 183 Wn.App. 961, 964, 335 P.3d 1014 (2014). A moving defendant can meet this burden by showing that there is an absence of evidence to support the plaintiff's claim. Id. Once the defendant has made such a showing, the burden shifts to the plaintiff to set forth specific facts that show a genuine issue of material fact. See Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 169, 273 P.3d 965 (2012). Summary judgment is appropriate if a plaintiff fails to show sufficient evidence to establish the existence of an element essential on which he or she will have the burden of proof at trial. Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 179, 313 P.3d 408 (2013).

Because material issues of fact exist regarding Lt. O'Dea's use of force under the circumstances he faced, the trial court erred when it granted the City's summary judgment motion.

B. LT. O'DEA'S TERMINATION VIOLATED PUBLIC POLICY THAT FAVORS THE PROTECTION OF HUMAN LIFE.

The trial court granted the City's summary judgment motion based on the City's position that Lt. O'Dea's conduct was outside of TPD's Use of Force Policy. Respectfully, however, the trial court erred as Lt. O'Dea's actions followed the training he received and were consistent with TPD's Use of Force Policy. Further, Lt. O'Dea's conduct followed TPD's Policy that respects the value of all human life, which is consistent with Washington law that prioritizes the protection of human life.

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1. Public Policy Values Human Life.

As this Court is aware “[s]ociety places the highest priority on the protection of human life. This fundamental public policy is clearly evidenced by countless statutes and judicial decisions.” Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 944, 913 P.2d 377 (1966).

In Gardner, the plaintiff, an armored car driver, left his truck when he witnessed a woman run from the bank while being chased by a man with a knife. Gardner left his vehicle and successfully tackled the suspect and disarmed him.

Loomis’ “fundamental” company rule forbids armored truck drivers from leaving their trucks unattended, and the employee handbook stated that violation of this rule would be grounds for termination. Gardner, 128 Wn.2d at 934-35. Mr. Gardner was fired for violating this truck rule by exiting his truck during this incident.

Upon reviewing case law surrounding “at will” employee terminations, the court noted that “employees may not be discharged for reasons that contravene public policy.” Id. at 935. The court held that Gardner’s discharge was wrongful:

We find that Gardner's discharge for leaving the truck and saving a woman from an imminent life threatening situation violates the public policy encouraging such heroic conduct. This holding does not create an affirmative legal duty requiring citizens to intervene in dangerous life threatening situations. We simply observe that society values and encourages voluntary rescuers when a life is in danger. Additionally, our adherence to this public policy does nothing to invalidate Loomis' work rule regarding drivers' leaving the trucks. The rule's importance cannot be understated, and drivers do subject themselves to a great risk of harm by leaving the driver's compartment. Our holding merely forbids Loomis from firing Gardner when he broke the rule because he saw a woman who faced imminent life-threatening harm, and he reasonably believed his intervention was necessary to save her life. Finally, by focusing on the narrow public policy encouraging citizens to save human lives from life threatening situations, we continue to protect employers from frivolous lawsuits.

Gardner, 128 Wn.2d at 950.

Here, the City asserts that Lt. O’Dea’ actions violated TPD’s Deadly Force Policy when he chose not to shoot at or “target” Mendoza Davalos when his actions threatened Lt. O’Dea’s life. Although Gardner establishes a common law wrongful discharge claim in violation of public policy, the trial court failed to apply the elements to this case as nothing within TPD’s Use of Force Policy requires an officer to use deadly force when faced with a situation of imminent death or serious bodily injury.

2. *TPD’s Use of Force Policy Recognizes the Sanctity of Human Life.*

An officer's use of force is measured under an objective reasonableness standard, in light of the totality of the circumstances. Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). See also Tennessee v. Garner, 471 U.S. 1, 8-9, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

(internal citations omitted) Graham, 490 U.S. at 396.

In applying this standard, courts have repeatedly admonished that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (emphasis added) "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Id. at 396-97. Officers are not required to use the least intrusive means when responding to exigent

circumstances; they only need act within the range of reasonable conduct. Scott v. Henrich, 39 F.3d 912,915 (9th Cir. 1994).

Use of deadly force is reasonable where the officer has probable cause to believe the suspect poses a threat of death or serious physical harm to the officer or others. Garner, 471 U.S. at 11.

Here, Lt. O’Dea testified that Mendoza Davalos posed a threat of death or serious bodily injury to him as Mendoza Davalos’ vehicle accelerated toward him. Lt. O’Dea’s beliefs were consistent with officers who witnessed the event and who believed that Mendoza Davalos’ actions posed a threat of death or serious bodily injury to Lt. O’Dea. CP 368, 422, 426, 441, 444-45. Given that all officers present acknowledged that Lt. O’Dea faced a life or death situation, his actions in defending himself per Graham supra, cannot be judged with 20/20 hindsight.

3. Tacoma Police Department’s Use of Force Policy

TPD’s Use of Force Policy is set forth in subsection 3.1 CP 457-67. The Policy grants officers discretion in determining what level of force is necessary when addressing any given situation. The Use of Force Policy does not establish “absolutes” as to what level of force must be used to address a threat.

Significantly, TPD’s use of deadly force is permissive, not mandatory, when an officer is faced with an imminent threat of death or serious bodily injury. If a reasonable alternative to the use of deadly force exists, an officer may choose such alternative, and his actions will still be within Policy and cannot be judged with 20/20 hindsight.

Consistent with the reasonableness standards set forth in Graham, supra, TPD defines the reasonable officer standard as follows:

- *Reasonable Officer Standard* – Standard of professional conduct relating to force application based on training, experience, facts and perceptions known to the Officer at the time. The Reasonable Officer Standard is based on the Objective Reasonableness Standard.
- *Objective Reasonableness Standard* – The courts use a balancing test consisting of a citizen’s right to be secure against unreasonable seizures and the need for government intrusion on those rights (law enforcement). In other words, the force used by an officer must be balanced against the heinousness of a person’s activities and the threat they pose.

CP 458. Further, TPD defines the principles of deadly force application as follows:

B) Principles of Deadly Force Application

The Tacoma Police Department recognizes and respects the value of all human life. Procedures and training are designed to resolve confrontations prior to escalation to the point *deadly force* may be applied. During the performance of their duties and as a last resort, Officers may apply *deadly force* when confronted with an *imminent danger* of death or *serious bodily injury* to protect themselves or others.

Officers are not required to place themselves or others in immediate danger of death or *serious bodily injury* before using *deadly force*. The necessity to use *deadly force* arises when there is no reasonable alternative to using such force and, without it, the Officers or others would face imminent danger of death or *serious bodily injury*.

CP 465.

Deadly Force - The use of any *force* that is likely to cause death or *serious bodily injury*. *Deadly force* does not include *force* that is not likely to cause death or *serious bodily injury* but unexpectedly results in death or *serious bodily injury*. Designed to be employed with a *life threatening* subject.

CP 464.

In applying the appropriate Use of Force, the Policy states as follows:

Risk is assessed objectively based on the on-scene *reasonable Officer’s* perspective taking into account the facts and circumstances of the particular situation that are known to the Officer. Due to the fact that Officer-citizen confrontations occur in environments that are potentially unpredictable and are tense, uncertain and rapidly evolving, **Officers may use *tools and tactics* outside the parameters of departmental training.**

CP 457-58.

Lt. O’Dea received firearm training from TPD and from the Navy. Significantly, part of Lt. O’Dea’s TPD training involved the Observe, Orient, Decide, Act (OODA) loop principles which were succinctly explained by former TPD Range Sergeant, James Barrett. CP 472-478. In essence, it involves the officer’s ability to observe and react to a situation. Id.

Importantly, Sgt. Barrett recognized the TPD Use of Force Policy authorizes an officer, who is faced with the potential of death or serious bodily injury, to consider tactics that are outside of training provided by TPD. CP 469-472.

Lt. O’Dea used all of his training when defending himself against Mendoza Davalos’ perceived life-threatening attack. Lt. O’Dea determined that he did not need to target or “eliminate” the threat facing him in order to save himself and Mendoza Davalos. In essence, the City is critical because Lt. O’Dea fired his weapon but did not target the threat. Nowhere within TPD’s Policy does it require an officer to target or eliminate the threat. In fact, the Policy expressly allows officers to “use tools and tactics outside the parameters of departmental training” when responding to a situation. Lt. O’Dea used a tactic outside the parameters of his training, successfully spared a life in the process, yet was terminated. Nothing is more patently offensive.

4. Lt. O’Dea’s Termination Violates the Holding in Gardner Which Recognized a Wrongful Termination Claim in Violation of Public Policy.

The following discussion of the four Gardner elements supports Lt. O’Dea’s wrongful discharge claim in violation of public policy.

a. Clarity Element.

Clearly, Lt. O’Dea was terminated because he did not “target” Mendoza Davalos and eliminate the threat. In support, Chief Ramsdell testified as follows:

Q All right. So had Lieutenant O'Dea shot at Mr. Davalos when Mr. Davalos was coming toward him, are you saying that would not have been a policy violation?

A If Lieutenant O'Dea at the time believed that his life was in imminent threat of death or serious bodily injury, and the subject was going at him, and he really felt that his life was in danger, if he shot at the subject, that would be within policy --

Q Okay. All right.

A -- and the appropriate thing to do --

Q All right. Very good.

A -- if his life was in jeopardy --

Q All right.

A -- or others.

CP 481.

Even though Lt. O'Dea clearly believed his life was in danger, he made a conscious decision not to shoot or "target" Mendoza Davalos because of concerns about his fellow officers' location and his concerns that Mendoza Davalos may be suffering from mental deficiencies. Lt. O'Dea was aware that if he shot at Mendoza Davalos, but missed, he might endanger his fellow officers. Additionally, shooting Mendoza Davalos would not eliminate Lt. O'Dea's possible death or serious bodily injury as the vehicle would continue toward him if Mendoza Davalos was no longer able to control his vehicle. CP 491.

Further, TPD's Policy of when to use deadly force is elective, not mandatory. The City argues, without authority, that whenever a police officer shoots his or her firearm, such discharge constitutes a deadly force application. Respectfully, such position is inconsistent with the deadly force definition set forth within TPD's Use of Force Policy and doesn't allow law

enforcement officers any alternative choices, even though the Policy allows alternatives and Lt. O'Dea exercised an alternative per TPD's Policy.

Per the TPD's deadly force definition, Lt. O'Dea did not apply deadly force, although he did fire his handgun. His intention was to get inside of Mendoza Davalos' own OODA loop and thereby to not be struck by his vehicle and to not harm his fellow officers. Lt. O'Dea's actions are consistent with the learned opinion of Chief D.P. Van Blaricom, plaintiff's police procedures expert who testified as follows:

Q. Well, then I am a little confused, Chief, because if you're faced with a deadly force situation, aren't police officers trained to shoot the person who is creating the threat?

A. If there's no viable alternative, yes.

...

Q. But in this case, what is your understanding? Did Mr. O'Dea discharge his firearm to neutralize a threat or to stop the vehicle?

A. I don't think he explained whether he was trying to neutralize the threat or stop the vehicle. What he did was fire at the vehicle to cause it to change course, and it in fact was successful.

...

Q. Okay. So you would agree with me that firing a weapon at a vehicle is not likely to be effective in stopping the vehicle?

A. Not in stopping it. You may very well cause it to change course.

CP 490-492.

Even if this Court determines that Lt. O'Dea's discharge of the firearm constitutes deadly force, TPD Policy does not require him to "target" the individual, or as Chief Ramsdell testified, make Mendoza Davalos a "stat".

Q. Okay. Anybody from the prosecutor's office contact you?

A· Well, typically when anybody uses force against another person -- for example, when we have an officer-involved shooting and we actually hit somebody or someone dies, we treat that as a criminal -- that is a criminal investigation. We count that as a stat. If it's a fatality, we count that as a homicide.

CP 480.

Further, and perhaps most importantly, Lt. O'Dea is authorized to use tools and tactics outside the parameters of Department training when trying to avert a dangerous situation, per TPD's Use of Force Policy, and per the testimony of Sgt. James Barrett. CP 469-472. Chief Van Blaricom testified that shooting at the person is clearly warranted if no viable alternative exists. CP 490-91. Here, Lt. O'Dea decided an alternative existed and he chose that alternative. Lt. O'Dea's choice spared Mendoza Davalos' life, yet Lt. O'Dea was terminated because of his life-sparing decision.

Lt. O'Dea's conduct was heroic, not violative of the Police Department's Use of Force Policy. Accordingly, he satisfies the clarity element.

b. Jeopardy Element.

The City claims that Lt. O'Dea's use of deadly force was both unreasonable and unnecessary because he lacked probable cause to believe Mendoza Davalos presented an imminent threat. Clearly, the City is mistaken. Lt. O'Dea agrees that the use of deadly force was an option that he elected not to use. He certainly could have done so based upon Mendoza Davalos' actions. See CP 481. Further, the City is using 20/20 hindsight in its review of Lt. O'Dea's actions and decisions to justify its basis for termination when the event Lt. O'Dea found and responded to was tense, very uncertain, and occurring rapidly. See Graham, supra, at 396-97.

As testified to by Chief Ramsdell, had Lt. O’Dea targeted Mendoza Davalos, he would have saved his job because the shooting would have been within Policy. CP 484. But because Lt. O’Dea spared Mendoza Davalos’ life, he was terminated. Chief Ramsdell testified that in all officer involved shootings where the officer “targeted” the threat, no termination occurred. CP 485-86, 486-87, 490-92, 493-505, 511, 513. Significantly, Chief Ramsdell says it would have been better had Lt. O’Dea shot Mendoza Davalos. CP 484. Given that Lt. O’Dea was terminated for not shooting Mendoza Davalos, Chief Ramsdell is accurate. But given the uproar around the country involving officer involved shootings, where citizens are needlessly killed, Lt. O’Dea’s decision to save a life rather than to take a life should be applauded.

Lt. O’Dea’s actions of recognizing and respecting the value of human life is consistent with Washington’s public policy as announced in Gardner, is consistent with TPD’s Policy of respecting human life, and is consistent with the reasonable officer standard as Lt. O’Dea, and only Lt. O’Dea, perceived the level of threat confronting him. But because Lt. O’Dea respected human life, he was terminated. By choosing life over death, Lt. O’Dea satisfies the jeopardy element.

c. Causation Element

Without question, Lt. O’Dea was terminated because he did not “target” Mendoza Davalos. Chief Ramsdell testified as follows:

Q All right. So had Lieutenant O'Dea shot at Mr. Davalos when Mr. Davalos was coming toward him, are you saying that would not have been a policy violation?

A If Lieutenant O'Dea at the time believed that his life was in imminent threat of death or serious bodily injury, and the subject was going at him, and he really felt that his life was in danger, if he shot at the subject, that would be within policy --

Q Okay. All right.

A -- and the appropriate thing to do --

Q All right. Very good.

A -- if his life was in jeopardy --

Q All right.

A -- or others.

CP 481.

With respect to shooting at a vehicle, the Chief stated as follows:

A It's not within our policy to shoot at a vehicle. It's not in our training to shoot at a vehicle or shoot at the tires. That's not what we're -- that's not within the policy.

CP 483.

Lt. O'Dea was terminated because he determined that deadly force was not necessary in addressing Mendoza Davalos's threat. He chose Mendoza Davalos' life over death. The City relies upon the Deadly Force Review Board's determination that Lt. O'Dea's conduct was outside the Department Policy. Respectfully, a review of the Deadly Force Review Board findings illustrates that two police lieutenants voted that Lt. O'Dea's use of force was appropriate given the circumstances and for the reasons stated above. Additionally, the two citizen members commended Lt. O'Dea for not killing Mendoza Davalos, but believed he could use some retraining if this use of force was outside Department Policy. See CP 326-331.

Significantly, given that summary judgment cannot be granted when material issues of fact exist, the findings by the Shooting Review Board illustrate that significant material issues of fact exist. Of the six individuals that were on the Board, two voted that the shooting was out of policy, CP 313-18, two voted that the shooting was reasonable and within Department policy due to extraordinary circumstances with a recommendation of no further action, CP 319-

25, and the two citizen members indicated that the force was not reasonable and not within Policy, but recommended retraining as opposed to termination. CP 326-31. Accordingly, there are material issues of fact given the findings of the Shooting Review Board.

Also, as set forth above, it is unclear as to what information was provided to the Deadly Force Review Board as such hearings are not recorded and all that is provided is a synopsis. Clearly, Lt. O'Dea was not present, nor was all of the forensic evidence presented that established that Lt. O'Dea shot while the vehicle rapidly approached him. CP 72-73, 314.

Chief Ramsdell testified that shooting at a vehicle is not within TPD's Use of Force Policy, but could be done if it was the last resort. CP 482. Respectfully, Chief Ramsdell is in error. Pursuant to TPD's Use of Force Policy, Paragraph 3.1.6(e), the policy states as follows regarding deadly force used against a subject in a moving vehicle.

Deadly Force should not be used against a subject in a moving vehicle unless it is necessary to protect against imminent danger to the life of the Officer or others.

CP 465 (underlines added). Clearly, shooting at a vehicle is authorized under limited circumstances, and, significantly, Chief Ramsdell has ratified, as within Policy, prior officer involved shootings where the officer shot at a vehicle as opposed to targeting the specific threat. CP 485-86, 490-92, 493-505, 511, 513. Given that the operative standard is "should not" as opposed to "shall not", Lt. O'Dea's actions fall within policy as his actions were necessary to protect against imminent danger to his life.

Because Lt. O'Dea's actions were within Department Policy, as he was not required to use deadly force against Mendoza Davalos, Lt. O'Dea has established the causation element as his termination focused on his decision not to kill Mendoza Davalos. Again, by choosing life over death, Lt. O'Dea was terminated.

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5. *Pretextual Reason for Discharge*

The City argues Lt. O’Dea was terminated for violating the Use of Force Policy and because his decision to shoot constituted a pattern of poor judgment. CP 53-54. Although Lt. O’Dea acknowledges his prior discipline for a pursuit violation, his termination is based on the City’s position that he violated the Use of Force Policy by not targeting Mendoza Davalos.

Contrary to the City’s 20-20 hindsight and its re-creation of the facts, Lt. O’Dea reasonably believed Mendoza Davalos presented an imminent threat of death or serious bodily injury, which fact was confirmed by all officers present at the scene and by Mendoza Davalos’ own admission. The City’s entire argument centers on its assertion that Lt. O’Dea did not have probable cause to shoot because if he had probable cause, he would have targeted Mendoza Davalos. More succinctly, he had to shoot at Mendoza Davalos to save his job.

Respectfully, Lt. O’Dea’s use of force in this situation was consistent with TPD’s Use of Force Policy that allows police officers to use “tools and tactics outside the parameters of department training.” CP 457-58. Because Lt. O’Dea used tactics outside the parameters of department training, Lt. O’Dea saved Mendoza Davalos’ life. Unfortunately, saving Mendoza Davalos’ life caused Lt. O’Dea’s termination. Accordingly, Lt. O’Dea satisfies all of the Gardner factors, and this Court should reverse the trial court’s decision.

Because the trial court granted the City’s motion on the wrongful termination claim, it also dismissed the remaining claims without analysis. As such, appellant relies upon his arguments set forth in his responsive pleadings at CP 215-239, 240-515, 516-518, and such will not be repeated here.

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VI. CONCLUSION

All over the country, we hear and read about officer-involved shootings wherein citizens are needlessly killed, or seriously injured, by the actions of a law enforcement officer. Routinely, the officer is found to have acted “reasonably” when using deadly force. Here, Lt. O’Dea made the decision to not use deadly force against Mr. Mendoza Davalos even though his police chief testified that by doing so, he would not have been fired. Respectfully, what happened to Lt. O’Dea is a travesty.

Lt. David O’Dea was terminated because he acted reasonably. He was faced with a life and death situation, and he made the decision to spare the life of a person who presented with an imminent threat of death or serious bodily injury. Lt. O’Dea’s actions fell clearly within the parameters of the Tacoma Police Department’s Use of Force Policy, yet the City of Tacoma terminated him.

The trial court erred when it granted the City’s summary judgment motion because it failed to recognize that TPD’s Use of Force Policy authorized Lt. O’Dea to respond in the manner he did based upon the threat he faced. Based on the facts and perceptions confronting Lt. O’Dea on August 6, 2016, he was authorized, but not mandated, to target the source of the threat: Mr. Mendoza Davalos. But rather than targeting Mendoza Davalos, Lt. O’Dea chose an alternative that spared Mr. Mendoza Davalos’ life, and likely saved his own life. For that, he was terminated. Because material issues of fact exist regarding Lt. O’Dea’s termination, and Lt. O’Dea’s conduct was consistent with TPD’s Use of Force Policy, he

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respectfully urges this Court to reverse the trial court's decision and remand for further proceedings.

DATED THIS 27th day of March, 2020.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By:



Brett A. Purtzer
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

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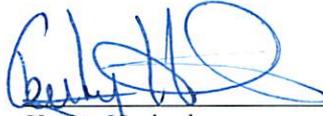
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Signed at Tacoma, Washington this 27th day of March, 2020.



Kathy Herbstler

HESTER LAW GROUP, INC., P.S.

March 27, 2020 - 4:51 PM

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