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No. 54240-4-II

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

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

Appellant, Lt. O’Dea, relies upon the statement of facts and procedural history set forth in his opening brief.

II. ARGUMENT

A. LT. O’DEA PROPERLY SETS FORTH A WRONGFUL DISCHARGE CLAIM IN VIOLATION OF PUBLIC POLICY.

As set forth in Lt. O’Dea’s opening brief, the City of Tacoma discharged Lt. O’Dea because he protected Mr. Mendoza Davalos’ life instead of killing him. For this act of heroism, he was discharged. The City’s argument is based solely on its belief that Lt. O’Dea lacked probable cause to discharge his firearm because he did not shoot at Mr. Mendoza Davalos. City’s brief at 13. What the City ignores is that the State charged Mr. Mendoza Davalos for his felonious assault of Lt. O’Dea, and Mr. Mendoza Davalos subsequently entered a guilty plea. CP 385-403. The City further argues that when Lt. O’Dea decided to discharge his firearm, it could only be to target Mr. Mendoza Davalos and for no other purpose. The City’s argument raises TPD’s Use of Deadly Force Policy to a level not contemplated or supported: If you use your firearm to defend yourself, it must be to target the threat and you must disregard both the public policy that “places the highest priority on the protection of human life” and TPD’s stated policy that it “respects the value of all human life.” Compare CP 465 with Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 944, 913 P.2d 377 (1996).

The City uses 20/20 hindsight in its argument that Lt. O’Dea lacked probable cause to believe that Mr. Mendoza Davalos’ actions presented an imminent threat of death or serious bodily injury. Unequivocally, Lt. O’Dea testified that he thought he was going to die because Mr. Mendoza Davalos was driving his vehicle directly at him when he began to shoot. CP 246-47. Further, Mr. Mendoza Davalos stated in his guilty plea statement that he made Lt. O’Dea

believe that he was going to run his vehicle into him and made him shoot. CP 385-403. Other officers at the scene in their written and sworn police reports, interviews conducted by Criminal Investigative Division detectives, and their sworn statements provided to Internal Affairs investigators, all believed that Lt. O'Dea was confronted with a life-threatening threat. CP 353-54, 368, 380, 422, 426, 441, 444-45. Further, the information provided to the Deadly Force Review Board was incomplete and inaccurate as it failed to state that there were bullet strikes moving from front to back at the front of the Mendoza Davalos vehicle and failed to present any information regarding the bullet strikes based upon an examination by Lt. O'Dea's experts including a vehicle maintenance and repair expert and forensic science expert. CP 72-73. As such, material issues of fact exist that precludes granting summary judgment on behalf of the City.

When Lt. O'Dea began shooting, the Mendoza Davalos' vehicle was accelerating directly toward him. That it veered off as Lt. O'Dea continued to shoot does not lessen the fact that Lt. O'Dea had probable cause to begin shooting when the vehicle rapidly approached him. The City's 20/20 hindsight review of the facts, and its distorted public policy view that if deadly force is employed it must be to target the threat, is in direct conflict with its own written policies. Respectfully, Lt. O'Dea's decision not to shoot at Mr. Mendoza Davalos furthered the public policy and TPD's policy that values human life as recognized by four of the Deadly Force Review Board members. CP 182-88, 189-91, 192-94, 195-97. That Lt. O'Dea was terminated for furthering such policies supports his wrongful discharge claim.

B. THE JEOPARDY ELEMENT

The City's argument that "plaintiff's argument makes it clear that he has no perspective of the situation and no understanding as to why he was terminated" (City's brief at 15),

incorporates 20/20 hindsight in assessing what Lt. O'Dea faced, and directly violates the law as announced in Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Exacerbating the City's 20/20 hindsight in its review of Lt. O'Dea's actions is its constantly everchanging reasoning for its termination of Lt. O'Dea. The City initially proffers that Lt. O'Dea shot at Mr. Mendoza Davalos after his vehicle had passed him and was no threat. The City then states that Lt. O'Dea was terminated because he shot at Mr. Mendoza Davalos' vehicle which is violation of its policies. Later the City argued that Officer Koskovich's life was endangered by Lt. O'Dea's actions even though in Officer Koskovich's own sworn police report and multiple statements to various investigators fails to mention this critical element. All these prior assertions are now contrary to the City's current argument that Lt. O'Dea was fired because he did not shoot at Mr. Mendoza Davalos because he lacked probable cause to shoot. 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. In ignoring both policies of valuing human life, Chief Ramsdell testified as follows:

Q. Okay. Do you think it would have been better to shoot him?

A. Yes.

CP 484.

Respectfully, Lt. O'Dea reasonably believed his life was in imminent threat of death or serious bodily injury when he began shooting, yet he made a conscious decision not to shoot at or target Mr. Mendoza Davalos. As Lt. O'Dea testified, at the time he began shooting, he believed he was going to die. CP 246-47. As such, he clearly satisfies the jeopardy element. Further, the City ignores the fact that by shooting at Mr. Mendoza Davalos' vehicle, Lt. O'Dea's actions likely saved both of their lives. Had Lt. O'Dea shot Mr. Mendoza Davalos not only would Mr. Mendoza Davalos have been killed, but his vehicle would have continued toward Lt. O'Dea as Mr. Mendoza Davalos would no longer be able to control his vehicle. CP 491.

The City picks and chooses phrases from TPD's Use of Force Policy that support its argument, yet ignores the overall policy regarding the sanctity of human life or consider the entirety of TPD's use of force policy with respect to Lt. O'Dea's situation. First, the City argues that an officer should not fire warnings shoots. Lt. O'Dea did not fire any warning shots. Second, and contrary to the City's argument, TPD's use of force policy allows deadly force to be used against a subject in a moving vehicle when "it is necessary to protect against *imminent danger* to the life of the Officer or others." CP 594. TPD's Use of Force Policy does not contain an absolute prohibition against shooting at a subject in a moving vehicle but rather states that "[d]eadly 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. Further, the City fails to acknowledge that with respect to TPD's Use of Force Policy, Lt. O'Dea is authorized to respond to a situation with "tools and tactics outside the parameters of department training." CP 457-58.

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.

Id.

The Policy is dynamic, not static, as the Policy cannot specify how an officer is to respond to each use of force situation that might arise. The Policy acknowledges that confrontations occur in environments that are potentially unpredictable and tense, uncertain and rapidly evolving and that reasonable timing and tactics shall be the determining factors.

Here, Lt. O'Dea faced an unpredictable, tense, uncertain and rapidly evolving situation, and he used tactics outside the parameters of his TPD training, which saved both his and Mr. Mendoza Davalos' life. Even Chief Ramsdell acknowledged that shooting at a vehicle, although not specified within TPD's Use of Force Policy, could be appropriate if it was the last resort, which opinion was also consistent with the opinion of Lt. O'Dea's expert, Chief D.P. Van Blaricom. CP 482, 490-91. Clearly, in this situation, shooting at a vehicle is authorized under constrained circumstances. As set forth in appellant's opening brief, Chief Ramsdell has ratified, as within policy, prior officer involved shootings where officers shoot at a moving vehicle as opposed to targeting a specific threat. CP 485-86, 490-92, 493-505, 511, 513. The City fails to acknowledge any of these cases, which is understandable, because they do not support the City's argument in any fashion. Respectfully, Lt. O'Dea satisfies the jeopardy element.

C. THE CITY'S IMPROPER POLICY BASED CONDUCT CAUSED LT. O'DEA'S TERMINATION

The City argues that Lt. O'Dea cannot establish causation. The City is in error as Chief Ramsdell states that it would have been appropriate for Lt. O'Dea to have shot Mr. Mendoza Davalos. Here, clearly, Lt. O'Dea was discharged for failing to shoot Mr. Mendoza Davalos. In

prior officer involved shooting cases, those officers who did not shoot at and either injure or kill a subject were not terminated and their shootings were all ruled as within TPD policy and justified. CP 485-86, 493-505, 511, 513. As such, no basis, in fact, exists for Lt. O'Dea's discharge.

The City acknowledges that Lt. O'Dea had probable cause to use deadly force, which was acknowledged by Officer Koskovich, one of the officers at the scene. CP 632-35, City's brief at 20-21. The City further states that had Lt. O'Dea fired his weapon at that point in time, "he would have had probable cause to believe that at that moment Mr. Mendoza Davalos presented an imminent threat of death or bodily harm and such a belief would have been objectively reasonable." City's brief at 21.

Respectfully, that's exactly what Lt. O'Dea testified. Lt. O'Dea had probable cause to shoot as he believed that Mr. Mendoza Davalos presented an imminent threat of death or bodily harm at the time he started to shoot. This shooting event lasted approximately 2 seconds and was rapidly evolving. CP 338. That Lt. O'Dea was running and attempting to get out of the way of Mr. Mendoza Davalos' vehicle as he began to shoot simultaneously does not change the fact that he had probable cause to shoot. Lt. O'Dea was attempting to create a moment in time that would allow him to escape Mr. Mendoza Davalos' path while also holding fast to the value of human life. A moment in time versus Mr. Mendoza Davalos becoming, as Chief Ramsdell states, a statistic, to remain within what TPD now claims to be policy. Further, given the facts in the light most favorable to the non-moving party, this establishes the error in the City's argument that Lt. O'Dea lacked probable cause to shoot. As such, the trial court erred in granting summary judgment.

The City cites Lt. O’Dea’s prior discipline for violating TPD pursuit policy, for which he was already sanctioned. Given that Lt. O’Dea’s present case did not violate any TPD policy, no basis existed for his termination particularly since Lt. O’Dea was a 22-year veteran with a single violation. Accordingly, and based upon all of the evidence in this case, and based upon the material issues of fact to be considered, the trial court erred in granting the City’s summary judgment motion.

D. THE CITY HAD NO OVERRIDING JUSTIFICATION FOR TERMINATING LT. O’DEA

As set forth, Lt. O’Dea has presented a prima facie case of wrongful termination in violation of public policy. Under such circumstances, the City must articulate a reason to support his termination. Here, the City inaccurately argues that Lt. O’Dea should never have fired his firearm because he lacked probable cause to shoot. As set forth above, Lt. O’Dea clearly had probable cause to believe that Mr. Mendoza Davalos presented an imminent threat of death or serious bodily injury.

The additional problem with the City’s argument is that it ignores the overriding TPD policy that values human life. Lt. O’Dea furthered that overriding policy when he determined not to shoot Mr. Mendoza Davalos when an appropriate alternative existed. Given that using deadly force is permissive, not mandatory, as nothing within the policy prevents an officer from choosing to spare a person’s life, that Lt. O’Dea did not target Mr. Mendoza Davalos does not support his termination. The City also suggests that this event establishes a “pattern of poor judgment” and “previous disciplinary history” that unquestionably warranted termination. City’s brief at 23. Here, Lt. O’Dea had one prior disciplinary matter in a 22-year career and it does not establish a history. As such, no “pattern” of prior disciplinary actions or “pattern” of poor judgment exists to support the City’s argument.

The City is not free to pick and choose which sections of the Use of Force Policy it wants to follow at a given point in time based on the situation at hand or who the officer is and which sections it wants to ignore any more than it can, and did, pick and choose what evidence it used against Lt. O'Dea and what evidence it withheld. The entirety of the Use of Force Policy is to be considered for any particular situation, as is all of the evidence related to the event.

Here, Lt. O'Dea acted appropriately under the circumstances. He was facing a life-threatening situation, and his actions saved both his and Mr. Mendoza Davalos' lives. Although the City relies heavily upon the Deadly Force Review Board in support of its argument, importantly, Lt. O'Dea was not allowed to testify at that hearing to present his evidence or hear and see the evidence presented against him contrary to his request to do so. CP 76-77, 86-87. TPD knowingly scheduled the Deadly Force Review Board on a day that Lt. O'Dea had been previously given permission to be unavailable. Id. When confronted with this issue, Assistant Chief McAlpine responded that TPD would advise the Board that Lt. O'Dea simply choose not to be present. Id. Lt O'Dea objected to the purported explanation and the Board was rescheduled to a day that Lt. O'Dea was available, yet he still was not allowed to be present at the hearing or present any evidence. Id.

Further, although the City argues that Lt. O'Dea's use of force was clearly outside of Policy, four members present at the Deadly Force Review Board were in favor of retaining Lt. O'Dea, acknowledging the inimitable circumstances Lt. O'Dea faced. Accordingly, no factual basis existed for Lt. O'Dea's termination. That the City has not terminated other officers who engaged in comparable conduct, yet terminated Lt. O'Dea, establishes that significant material issues of fact exist that require a jury to determine whether Lt. O'Dea's termination was appropriate.

E. THE SUPERIOR COURT ERRED IN DISMISSING LT. O'DEA'S
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND
OUTRAGE CLAIMS

The City cites Nelson v. Duvall, 197 Wn.App. 441, 387 P.3d 1158 (2017) suggesting that this Court should decline to consider the Lt. O'Dea's tort claim of negligent infliction of emotional distress and outrage because these claims were not raised on appeal. Respectfully, that is not what occurred. In the trial court's decision, the judge stated as follows with respect to Lt. O'Dea's remaining claims: "With that the outrage and negligent infliction claims also are extinguished." RP 20:16-17. The court did not address either claim aside from dismissing them.

Respectfully, the court did not make a detailed analysis of these claims, simply stated that because the discharge was appropriate that these claims would be dismissed as well. Although the City is correct that this court may affirm summary judgment on any basis supported by the record, the trial court did not set out a basis. Accordingly, and as set forth in Lt. O'Dea's opening brief, given that there was no analysis presented by the trial court regarding these two tort claims, Lt. O'Dea appropriately relied upon the briefing submitted to the trial court. CP 215-239, 240-515, 516-518.

1. Negligent Infliction of Emotional Distress.

In a negligence claim, the plaintiff must establish that (1) the defendant owes the plaintiff a duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury. Cameron v. Murray, 151 Wn.App. 646, 651, 214 P.3d 150 (2009).

To recover for negligent infliction of emotional distress (NIED), the plaintiff must prove the four elements of negligence as well as objective symptomatology. Kloepfel v. Bokor, 149 Wn.2d 192, 199, 66 P.3d 630 (2003). A proximate cause of an injury is defined as a cause

that, in a direct sequence, unbroken by a new, independent cause, produces the injury complained of and without which the injury would not have occurred. Fabrique v. Choice Hotels Int'l, Inc., 144 Wn.App. 675, 683, 183 P.3d 1118 (2008). Issues of negligence and proximate cause are generally not susceptible to summary judgment. Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Only when reasonable minds can reach but one conclusion may questions of fact be determined as a matter of law. Id. at 703-04.

With regard to objective symptomology of emotional distress, neither testimony from doctors nor medical records are necessary to prove emotional distress damages. See Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005) (plaintiff's testimony can provide sufficient evidence of anguish and distress).

The City's argument that Lt. O'Dea's claim for negligent infliction of emotional distress is not cognizable in his termination case is patently false. See Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986) (upon establishing liability for the tort of wrongful termination in violation of public policy, an employee is entitled to recover damages for emotional distress upon a showing of actual anguish or emotional distress); see also Nord v. Shoreline Sav. Ass'n, 116 Wn.2d 477, 805 P.2d 800 (1991).

Here, in addition to the evidence that supports Lt. O'Dea's wrongful discharge claim in violation of public policy, he also presented evidence of objective symptomology. Lt. O'Dea's treating practitioner, Timothy McTighe, MS, LMFT, confirmed that during his treatment of Lt. O'Dea, Lt. O'Dea exhibited objective symptomology resulting from his termination. CP 514-15. As such, Lt. O'Dea's negligent infliction of emotional distress claim should be determined by the jury.

2. *Intentional Infliction of Emotional Distress.*

The tort of intentional infliction of emotional distress, otherwise known as the tort of outrage, is an acknowledged theory for the recovery of damages. Brower v. Ackerly, 88 Wn.App. 87, 98, 943 P.2d 1141 (1997), rev. denied 134 Wn.2d 1021, 958 P.2d 315 (1998) (referring to Rice v. Janovich, 109 Wn.2d 48, 62, 742 P.2d 1230 (1987)). The elements of outrage are: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." Brower, 88 Wn.App. at 98 (citing Rice, 109 Wn.2d at 61). See also Robel v. Roundup Corp., 148 Wn.2d. 35, 59 P.3d 611 (2002).

Robel is instructive. There, the appellate court reversed a trial court's holding that Ms. Robel had established a claim for intentional infliction of emotional distress. The conduct complained of consisted of harassment of Robel in the work setting which caused Robel severe emotional distress. Robel v. Roundup Corp., 103 Wn.App. 75, 80-84, 10 P.3d 1104 (2000). The Supreme Court, in reversing the Court of Appeals, stated as follows:

[R]easonable persons could deem the employers' conduct . . . sufficiently outrageous to trigger liability. In some contexts, perhaps the language directed at Robel could be dismissed as merely 'rough' and 'insulting' as the Court of Appeals characterized it, Robel, 103 Wn.App. at 90, but we believe that reasonable minds (such as the one exercised by the trial judge) could conclude that, in light of the severity and context of the conduct, it was beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community.

Robel, 148 Wn.2d at 35, 51-52, 59 P.3d 611 (2002).

In the employment context, termination is the ultimate sanction. In Lt. O'Dea's case, his termination was outrageous because he spared Mr. Mendoza Davalos' life.

Importantly, on the record before this Court, the TPD terminated Lt. O'Dea because he chose Mr. Mendoza Davalos' life over death, yet he was terminated for this decision. As such, Lt.

O'Dea sets forth an appropriate claim of outrage against the City of Tacoma. Accordingly, this Court should reverse the trial court's decision and remand to trial.

III. CONCLUSION

We live in a time when police conduct, appropriately, is being scrutinized. The days are gone when police officers could shoot to kill a suspect, succeed in doing so, and not be questioned. Here, Lt. O'Dea made a conscious decision not to "shoot to kill" Mr. Mendoza Davalos or make him a statistic despite what Chief Ramsdell states. Lt. O'Dea is a hero, not a person who should have been terminated. Although the trial court made comments regarding the concerns it had, the court clearly erred when it ignored that material issues of fact exist:

Whether or not the vehicle was headed for Mr. O'Dea or whether it had turned off before the discharge of the weapon or whether both things were true, the use of deadly force and firing off eleven rounds in an urban setting under these circumstances -- to discharge an officer on that basis does not, in my view, violate some kind of public policy. It advances public safety. That is the basis for my ruling.

RP 20:8-15.

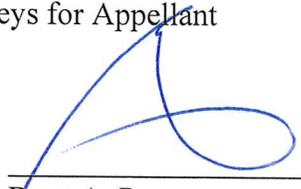
Respectfully, Lt. O'Dea's termination violated public policy as he chose life over death. The court, in its ruling, recognized that material issues of fact existed because it accepted that the vehicle was headed for Lt. O'Dea. The court made its ruling based upon the City's argument that shooting at the vehicle is clearly prohibited when the factual and expert evidence presented supports a finding that such actions are permissible. Accordingly, and based upon the summary judgment standards that material facts are to be viewed in the light most favorable to

the nonmoving party, the trial court erred in granting the City's motion. Accordingly, Lt. O'Dea respectfully urges this Court to reverse the trial court's order and remand this matter for trial.

RESPECTFULLY SUBMITTED this 10th day of June, 2020.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this reply brief to be served on the following in the manner indicated below:

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