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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID O'DEA,

Plaintiff/Appellant,

v.

CITY OF TACOMA

Defendant/Respondent.

BRIEF OF RESPONDENT CITY OF TACOMA

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I. INTRODUCTION

In this case, a former Tacoma Police lieutenant – on a Saturday afternoon and in a residential parking lot bordering a busy Tacoma street – fired his weapon eleven times *at the tires of a car*. By his own admission, he did so because he wanted to “distract” the driver of that car. After giving the officer the benefit of a full review process, the Tacoma Police Chief decided that the officer’s use of deadly force violated department policy. Moreover, this was not the first time the officer had exhibited dangerously poor judgment, and was unwilling or unable to recognize his mistakes. Consequently, the Chief terminated this officer’s employment. Incredibly, this officer has sued, claiming that his termination violates public policy.

It is unfathomable that in society today, a law enforcement agency cannot terminate a police officer who inappropriately uses deadly force without violating public policy. Having the ability to terminate an officer for violating the well-defined and long established standards governing the use of deadly force—in other words, holding law enforcement officers strictly accountable when they use deadly force that is unreasonable, unnecessary and contrary to prevailing best practices—is critical for any law enforcement agency. That is the public policy that David O’Dea’s termination served.

II. ISSUES ON APPEAL

1. Whether the superior court correctly dismissed plaintiff's claim for wrongful discharge in violation of public policy where plaintiff failed to adduce evidence to establish all essential elements of his *prima facie* case.
2. Whether the superior court's dismissal of plaintiff's remaining claims is supported by the record.

III. STATEMENT OF THE CASE

On August 6, 2016, then-Tacoma Police Lieutenant David O'Dea fired his service weapon eleven (11) times at the tires of a vehicle driven by Jose Mendoza Davalos. CP 147-154. At the time he fired his weapon, no one was in imminent danger, and consequently, Lt. O'Dea's use of deadly force was in violation of both Tacoma Police Department's use of force policy and state law. Id. Lt. O'Dea was subsequently terminated by Tacoma Police Chief Don Ramsdell. Id.

This incident all began when Tacoma Police Officer Ed Huebner responded to a routine call at the El Popo Apartments regarding a traffic collision. CP 147. See also CP 605-630. Mr. Mendoza Davalos was one of the two parties involved. Id. When Officer Huebner arrived at the scene, he learned that there had not been a collision, but rather a "near

miss.” CP 147; CP 607. Accordingly, Officer Huebner informed the parties that he would take an incident report, but would not complete a collision report; Mendoza Davalos was not happy with Officer Huebner’s decision. Id. Mendoza Davalos pulled his car into the driveway of the parking lot, as if he was going to pull onto Union Avenue. CP 608-09. Officer Huebner’s patrol car was directly behind Mendoza Davalos. Id. Instead of pulling out onto the street, however, Mendoza Davalos put his car in reverse and intentionally backed into Officer Huebner’s patrol car. Id. Mendoza Davalos then did a U-turn, pulled back into the El Popo parking lot and parked in a parking stall. Id.

Officer Huebner parked his patrol car behind and in very close proximity to Mendoza Davalos’s vehicle to prevent him from leaving. Id. Mendoza Davalos rolled up his windows, locked his doors, and refused to engage with Officer Huebner. Id. Officer Huebner requested a second patrol unit and a supervisor for assistance. CP 609-10. Ultimately, Tacoma Police Officers Waddell and Koskovich responded to the scene, as well as then-Lt. O’Dea. Id. See also CP 156-175. While Lt. O’Dea was discussing what had occurred with Officer Huebner, Mendoza Davalos put his car in gear and began a series of back and forth movements in an effort to flee. CP 613-15. First, Mendoza Davalos backed into Officer Huebner’s car for a second time. Id. Because of the slow speed and confined space, Officers

Waddell and Koskovich were able to approach the vehicle on each side and break the side windows in an effort to extricate Mendoza Davalos from the vehicle. Id. Then, Mendoza Davalos pulled up onto the C curbing in front of him at a slow speed, becoming high-centered. Id. Next, Mendoza Davalos put the car in reverse and slammed into the truck parked next to him on the driver's side, creating enough space to accelerate forward over the C curbing¹. Id. For a brief moment, Lt. O'Dea was in the path of the Mendoza Davalos vehicle. Id. Mendoza Davalos then turned sharply to his right, and Lt. O'Dea moved to the left. Id. *Suddenly, and without warning, Lt. O'Dea fired eleven (11) rounds in the direction of the front driver's side tire of the Mendoza Davalos vehicle.* CP 119: 18-23; CP 147; CP 156; CP 177. *At the time Lt. O'Dea fired, the car was already*

¹ As Mendoza Davalos accelerated over the C curbing and in the direction of Lt. O'Dea, the speed of the vehicle was slow enough that Officer Waddell was able to run along with the vehicle on the driver's side. CP 161. Once O'Dea began firing, Officer Waddell had to stop as quickly as he could so that he did not run into the line of fire. Id.

moving past him and Lt. O'Dea did not know the location of his fellow officers. CP 130-31; CP 147; CP 168²; CP 617³; CP 619⁴; CP 633⁵.

At no time during this entire event did any of the other officers who were at the scene feel the need to use deadly force to protect Lt. O'Dea, themselves, or the public. CP 148; CP 628. In fact, all of the Officers on the scene were surprised by Lt. O'Dea's decision to shoot. *Id.* Further, the objective evidence showed that O'Dea began firing only after the Mendoza Davalos car was past him, and any imminent threat to O'Dea had ceased.

² From O'Dea's Internal Affairs interview: "Uh, I had no clear idea where Huebner was or Waddell. Uhm, I had saw Koskovich, he had already come out, uhm, while the, the vehicle was making the tight right turn and broke out the passenger window. But he retreated and I wasn't sure where he was."

³From Huebner's Internal Affairs interview: "Huebner: As the vehicle rammed the pickup, took a hard right to get into the parking lot to go northbound, as it was passing Lt. O'Dea, I saw him pull his service pistol, at a low-ready, and then several times. It looked like he was firing at the, at the tires, the front tire of the vehicle."

⁴From Huebner's Internal Affairs interview: "Wade: Was Lieutenant O'Dea in front of the vehicle as he began to fire or was the vehicle, was he just completely to the side of the vehicle when he began firing? Huebner: When he, as I saw it, he would have, the vehicles front quarter panel would have been passing Lieutenant O'Dea, going northbound, as Lieutenant O'Dea started to fire at the tire. ... Wade: So, had Lieutenant O'Dea just stood where he was at ... would the vehicle have struck him? Huebner: No."

⁵ From Koskovich declaration: "Lt. O'Dea, however did not fire his weapon at the moment that the Mendoza Davalos car was driving him. When Lt. O'Dea fired his weapon, he was out of the way of the Mendoza Davalos car and not in imminent danger. From my perspective, in that moment, it was not reasonable for Lt. O'Dea to apply deadly force."

CP 148⁶.

In accordance with Department policy, a Deadly Force Review Board was convened. CP 177-197. After reviewing all of the evidence, four of the six Board members determined that Lt. O’Dea’s use of deadly force was outside of department policy. Id. Chief Ramsdell agreed, finding Lt. O’Dea’s use of deadly force to be outside of Tacoma Police Department policy, and a violation of state law. CP 147-154.

Unfortunately, this was not the first time Lt. O’Dea had committed a serious violation of Tacoma Police Department policy. CP 199-204. In 2015, Lt. O’Dea initialed a pursuit that was found to be in violation of Tacoma Police Department policy. Id. This pursuit, through a residential neighborhood on Halloween night, resulted in injuries to six (6) innocent bystanders, two (2) of which were children and significant property damage. Id.; see specifically CP 206. In light of Lt. O’Dea’s pattern of poor judgment and dangerous behavior, on June 23, 2017, plaintiff was terminated from the Tacoma Police Department. CP 142⁷.

⁶ From Notice of Intent to Terminate: “The forensic evidence gathered and reviewed by the detectives during the investigation clearly showed you began shooting as the car was passing you.”

⁷ From Ramsdell Affidavit: “Despite a clear violation of the pursuit policy and significant discipline, Mr. O’Dea refused to take responsibility for this incident. [referring to 2015 pursuit] Similarly, Mr. O’Dea continues to claim that his use of deadly force was not a violation of the use of force policy. *His decision-making on both situations was dangerous and he is either unable or unwilling to admit it. Because of this, I have no*

Lt. O’Dea sought review of his termination by the Disciplinary Review Board. CP 143-44. This Board is comprised of two management employees and three union appointees. *Id.* After a full review of the facts, this Board voted unanimously to uphold the termination. CP 213.

Following his termination, plaintiff initiated the instant lawsuit, alleging that his termination violated public policy and asserting several other tort claims. As outlined herein, the facts *material* to plaintiff’s claim are not in dispute and the superior court did not err in granting the City summary judgment.

IV. STANDARD ON SUMMARY JUDGMENT

Appellate review of summary judgment determinations is *de novo*. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Thus, “the appellate court engages in the same inquiry as the trial court.” *Id.* (quoting Trimble v. Washington State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000)).

Pursuant to CR 56 (c), summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is

reasonable basis to believe that he will not continue to exercise extremely poor judgment and engage in dangerous behavior, which ultimately puts the public and other officers at risk.” (emphasis added) See also CP 128:15-21 (“Q: You were disciplined for violation of the pursuit policy in 2014 that resulted in a serious motor vehicle accident in which multiple civilians were injured? A: Yes, ma’am. Q: Do you think you were at fault at all for that incident? A: No, ma’am.”)

entitled to judgment as a matter of law. One of the principal purposes of the rule is to dispose of factually and legally unsupported claims or defenses. CR 56; Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990); Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant can meet this burden in one of two ways. First, the defendant can set forth its version of the facts and allege that there is no material issue as to those facts. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757 P.2d 507 (1988). In the alternative, the defendant can meet its burden by showing that there is absence of evidence to support the nonmoving party's case. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

After the defendant makes its required showing, the burden then shifts to the plaintiff:

If, at this point, the plaintiff [as nonmoving party] “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial,” then the trial court should grant the motion. ... “In such a situation, there can be ‘no genuine issue as to any material fact,’ since ***a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.***”

(emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992)(quoting Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 16, 225, 770 P.2d 182 (1989), which, in turn, was quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Consequently, the plaintiff “must do more than express an opinion or make conclusory statements”; *the plaintiff must set forth specific and material facts to support each element of his prima facie case.* Id.

Finally, while “[t]he nonmoving party is entitled to have the evidence viewed in a light most favorable to him,” the standard on summary judgment does not relieve the nonmoving party of his burden to adduce competent, admissible evidence sufficient to support a jury’s verdict. Seiber v. Poulsbo Marine Center, Inc., 136 Wn. App. 731, 736, 150 P.3d 633 (2007). “[I]f the plaintiff, as the nonmoving party, can offer only a “scintilla” of evidence, evidence that is “merely colorable,” or evidence that “is not significantly probative,” the plaintiff will not defeat the motion.” Id. (citing Herron v. Tribune Publishing Co., 108 Wn.2d 162, 170, 736 P.2d 249 (1987)).

V. ANALYSIS

A. **Plaintiff's wrongful discharge in violation of public policy claim fails as a matter of law.**

Generally, the tort of wrongful discharge in violation of public policy has been limited to four scenarios (1) where an employee is fired for refusing to commit an illegal act; (2) where an employee is fired for performing a public duty or obligation such as jury duty; (3) where an employee is fired for exercising a legal right or privilege such as filing a worker's compensation claim; and (4) where an employee is fired in retaliation for reporting employer misconduct, i.e. whistleblowing. Dicomes v. State, 113 Wn.2d 612, 782 P.2d 1002 (1989). When a claim does not fit neatly into one of these four scenarios, the plaintiff must establish the four essential elements adopted by the Supreme Court in Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 913 P.2d 377 (1996). See e.g., Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 277-78, 287, 358 P.3d 1139 (2015).

Plaintiff's claim in the instant case does not fall within one of the four recognized scenarios. Thus, in order to establish his claim of wrongful discharge in violation of public policy (and survive summary judgment), the plaintiff in the instant is required to establish the following: (1) the existence of a clear public policy (the clarity element); (2) that discouraging the

conduct in which the plaintiff engaged would jeopardize the public policy (the jeopardy element); (3) that the policy-linked conduct caused the dismissal (the causation element); and (4) that the defendant cannot offer an overriding justification for the dismissal (the absence of justification element). Gardner, 128 Wn.2d at 936. Further, the plaintiff must not only show the employee's "discharge may have been motivated by reasons that contravene a clear mandate of public policy," but that the public-policy-linked conduct was a significant factor in the decision to discharge the worker. Martin v. Gonzaga Univ., 191 Wn.2d 712, 725-28, 425 P.3d 837 (2018) (citing Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984). *Moreover, the purpose of this tort is "to protect public policy, not the individual employee's rights."* (emphasis added) Rose v. Anderson Hay & Grain, 184 Wn.2d at 280.

If the plaintiff succeeds in presenting a prima facie case on the first three elements, the burden then shifts to the employer to "articulate a legitimate nonpretextual, nonretaliatory reason for the discharge." Wilmot v. Kaiser Alum. & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991). This is a burden of production, not persuasion. Id. ("The employer must produce relevant admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of

persuasion, because the employer does not have that burden.”). If the employer articulates such a reason, the burden shifts back to the plaintiff either to show “that the reason is pretextual, or by showing that although the employer's stated reason is legitimate, the [public-policy-linked conduct] was nevertheless a substantial factor motivating the employer to discharge the worker.” Id. at 73.

As outlined herein, plaintiff has failed to establish these four essential elements of his wrongful discharge in violation of public policy claims and consequently, the superior court did not err in granting the City’s motion for summary judgment.

1. The public policy implicated in this case is the limit that society has placed on a police officer’s use of deadly force.

As to the first element of plaintiff’s claim – the clarity element – plaintiff has the burden of establishing that his termination may have been motivated by reasons that contravene a clear mandate of public policy. Martin v. Gonzaga Univ., 191 Wn.2d at 725 (quoting Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.3d 1081 (1984)). The questions of what constitutes a clear mandate of public policy is one of law, and can be established by prior judicial decisions or constitutional, statutory or regulatory provisions or schemes. Martin, 191 Wn.2d at 725 (internal quotations omitted).

In the instant case, plaintiff contends that the public policy which the City contravened when it terminated him is the sanctity of human life, and that his conduct of shooting at Mr. Mendoza Davalos' car, even if outside Departmental policy regarding the application of deadly force, furthered that public policy. The City does not dispute that society places a high priority of human life. What plaintiff fails to appreciate, however, is that his termination served deeply rooted public policies adopted to protect human life – *the policies that limit how and when a police officer can lawfully use deadly force.*

Plaintiff's argument completely ignores the clear and unambiguous public policy that a law enforcement officer's use of deadly force is constrained by the legal parameters set by society, by the courts and by the legislature. As set forth in the United States Constitution, a wealth decisional case law and RCW 9A.16.040, a police officer's use of deadly force is restricted to only those circumstances where the officer has probable cause to believe that the suspect presents an imminent threat of death or serious bodily harm, to the officer or another. See e.g., Tennessee v. Garner, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (an officer's use of force is measured under an *objective* reasonableness standard, in light of the totality of the circumstances confronting the officer).

These standards, as developed by jurisprudence, are consistent with the Fourth Amendment of the United States Constitution, and with RCW 9A.16.040⁸. As recognized by the trial court, the limitation placed on an officer's use of deadly force *in order to protect public safety* is the public policy actually implicated by this case. See VRP 19:22 - 20:15⁹.

2. Terminating plaintiff's employment for an inappropriate and unnecessary use of deadly force does not jeopardize the relevant public policy.

In order to establish the second element of his claim - the jeopardy element - the plaintiff must show he engaged in particular conduct, and the

⁸ RCW 9A.16.040 states in relevant part: "in considering whether to use deadly force...to arrest or apprehend any person for the omission of a crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others." RCW 9A.16.040 (2). During his deposition, it became clear that plaintiff was shockingly unfamiliar with this standard: "Q: I'm going to make a series of statements and I'm going to ask you to agree or disagree with each statement. Okay? A: Okay. Q: Under prevailing law enforcement practices as you were trained, an officer may use deadly force when there is probable cause to believe that the suspect presents an imminent threat of death or serious bodily harm to the officer or another. Agree or disagree? A: I disagree because of the inclusion of the words 'probable cause.'" CP 112:1-11. See also CP 112-115.

⁹ Court's oral ruling: "You also have to think about the sanctity of human life of the citizens that are adjacent to this shoot-up and the other officers. When you start shooting at vehicles, if there's metal, then you endanger other officers, putting them at risk of picking up a ricochet. Shrapnel can go through these walls and strike a citizen sitting in their living room. I think that's the basis for the public policy that you don't discharge your weapon and use deadly force unless the deadly force is directed at an imminent threat of death or bodily injury to the officer. 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 of these 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."

conduct *directly related* to the public policy or was *necessary* for the effective enforcement of the public policy. Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1139 (2015)¹⁰. Plaintiff claims that his termination violated public policy because he did not shoot Mr. Mendoza Davalos, because he prioritized human life. Plaintiff's argument makes it clear that he has no perspective of the situation and no understanding as to why he was terminated.

Contrary to plaintiff's assertion, he was *not* fired because he did not shoot Mr. Mendoza Davalos. CP 141:17 – CP 142:2. He was fired because ***he did not have probable cause to believe that Mendoza Davalos presented an imminent threat at the moment he pulled the trigger and consequently, he never should have fired his weapon at all.*** Id. And terminating an officer for violating the well-defined and long established standards governing the use of deadly force does *not* jeopardize the public policy of protecting human life. To the contrary, holding officers strictly accountable—and terminating those who use deadly force when it is both unreasonable and unnecessary—upholds the sanctity of human life.

Plaintiff argues that his act of firing his weapon in order to distract

¹⁰ In Rose, the Supreme Court disavowed the former rule that a plaintiff must establish the inadequacy of other remedies in the alternative to a civil suit for damages in order to meet the jeopardy element of the tort for wrongful discharge against public policy. Rose, 184 Wn.2d at 274.

the suspect was not an application of deadly force and therefore, his conduct was furtherance of protecting human life. He further argues that he was free to use any other tools at his disposal, and that the decision to employ deadly force is elective under the Department policy. Plaintiff's misapprehension of the definition of deadly force and the Department's deadly force policy is stunning. Under TPD's policy, deadly force is unequivocally defined as "any force that is likely to cause death or serious bodily injury." CP 593. Further, the policy holds that deadly force is to be used with only life-threatening subjects. CP 593-94. The crux of plaintiff's argument is that he was not using deadly force when he fired his weapon, because he wasn't intending to kill Mr. Mendoza Davalos. Plaintiff's argument strains credulity and flies in the face of not only law enforcement best practices and procedures, but simple common sense.

As made clear by both the Chief of Police and the former Range Sergeant responsible for instructing officers on deadly force issues, outside of an accidental discharge, *when an officer makes the conscious decision to fire his or her weapon, he/she is using deadly force under the Department's policy.* CP 536-37; CP 548-49; CP 550-55. And while plaintiff may be correct that an officer may elect to not use deadly force, *once an officer has made the decision to fire his or her weapon, however, it can only be done*

in accordance with departmental policies and the Constitutional and decisional guidelines that apply. Officers are trained to use their weapon to stop an imminent, deadly threat; if an officer is not firing his/her weapon to stop an imminent, deadly threat, *then they should not be firing their weapon at all.* CP 548-55.

The Supreme Court's analysis of this element in Gardner is instructive in the instant case. In Gardner, after carefully examining the legal bases in Washington law that establish a strong public policy to protect human life¹¹, the court examined whether Gardner's termination would jeopardize the public policy at issue (*saving persons from life-threatening situations*) and concluded that it would:

Gardner's being fired for those actions will discourage similar future conduct in other employees. If employers are allowed to terminate their employees for saving persons from life threatening situations when the employee appears to be the only hope of rescue, then the policy encouraging all citizens to engage in such conduct would be jeopardized.

Gardner, 128 Wn.2d at 946. By his own admission, plaintiff fired his weapon merely to divert Mr. Mendoza Davalos, not to save Davalos from

¹¹ The Gardner court rejected plaintiff's argument that the relevant public policy was "helping law enforcement" or furtherance of the rescue doctrine. Instead, the Gardner court focused on the value placed on human life as evidenced by the waiver of certain constitutional rights under limited exigent circumstances, and criminal statutes which legalize use force to protect oneself or others.

a deadly situation. See Appellant Opening Br., p. 9. *Using deadly force as a diversion tactic is not only inconsistent with TPD's use of force policy, firing such warning shots constitutes a violation of the same.* CP 594¹².

Firing plaintiff for violating TPD's use of force policy - for using deadly force in a way that is inapposite to all prevailing legal standards - will not discourage the public policy at issue here¹³. It furthers that policy.

3. Plaintiff cannot establish that any improper policy-based conduct caused his termination.

Plaintiff's claim also fails because he cannot establish the causation element, which requires evidence that the City's unjustified, improper, public-policy-linked conduct caused his dismissal. Gardner, 128 Wn.2d at 941. Such a showing ultimately involves an inquiry into the reason for the employee's termination. Ellis, 142 Wn.2d at 464. While an employee need not attempt to prove an employer's sole motivation was retaliation, the employee must still produce evidence that the actions in furtherance of public policy were a cause of the firing, and the employee may

¹² From TPD Use of Force Policy: "Warning shots shall not be used. **Deadly force** should not be used against the subject in a moving vehicle unless it is necessary to protect against imminent danger to the life of the Officer or others. ... Self-defense, defense of another, and **imminent danger** of death or serious bodily injury shall be the only policy guideline for the application of **deadly force**."

¹³ Again, the relevant public policy is the protection of the public by limiting the use of deadly force to a very circumscribed set of circumstances.

do so by circumstantial evidence. Wilmot v. Kaiser Aluminum & Chemical Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991); Rickman v. Premera Blue Cross, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015). Proximity in time between the public-policy-linked conduct and the firing, coupled with evidence of satisfactory work performance and supervisory evaluations, may be persuasive in establishing causation. Wilmot, 118 Wn.2d at 69.

In the instant case, plaintiff cannot adduce competent circumstantial evidence to establish the causation element; instead, he offers only his own speculation. Plaintiff appears to think that his termination was motivated by some vague, shadowy desire of the Chief to satisfy his command staff. CP 123-25. Plaintiff offers no credible evidence, whether direct or circumstantial, to support this assertion. Inferences drawn from circumstantial evidence “must be reasonable and cannot be based on speculation.” State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). In this case, plaintiff’s position is unreasonable, speculative and does not even rise to the level of circumstantial evidence. At best, plaintiff disagrees with his fellow officers at the scene that the force was not appropriate. CP 118. He disagrees with the Chief’s findings that his application of deadly force violated Department policy. He disagrees with the Deadly Force Review Board’s determination that the force was outside Department policy.

CP 126-28¹⁴. He disagrees with the Discipline Review Board that termination was appropriate. His disagreement does not create an actionable claim.

As outlined previously, plaintiff was not terminated because he did not kill Mr. Mendoza Davalos¹⁵, *he was terminated because he never should have fired his weapon in the first place*. First, as plaintiff concedes throughout his brief, he had no intention of “using deadly force” when he fired his weapon. This illustrates plaintiff’s deep-rooted misapprehension of the limits of an officer’s authority when he or she fires their weapon, and further underscores why it was necessary for the Department to terminate plaintiff and keep him from having a weapon¹⁶.

The City does not dispute that there may have been a moment at the scene where plaintiff’s use of deadly force could have been reasonable and

¹⁴ Unsurprisingly, as outlined above, plaintiff also disagrees with the Chief’s determination that he had previously violated the Department’s pursuit policy, which resulted in a collision that caused multiple civilian injuries. This pattern of poor judgment, coupled with plaintiff’s disciplinary record, was significant in the Chief’s decision to terminate him in this case.

¹⁵ It is important to keep in mind that the public policy plaintiff has based this claim on is the public policy that protects the sanctity of human life when a police officer fires his weapon but chooses not to shoot at a person, and instead, shoots at the tires of a moving vehicle.

¹⁶ Law enforcement officers are vested with an incredible amount of authority and consequently, they must exercise great responsibility and good judgment. Plaintiff repeatedly did neither and it would have been irresponsible to allow him to continue to exercise the authority given to law enforcement officers.

necessary. As outlined by Officer Koskovich, one of the other officers at the scene, there was a brief moment when the Mendoza Davalos car was driving directly toward plaintiff. See CP 632-35. Had O’Dea fired his weapon at that point, he would have had probable cause to believe that at that moment Mendoza Davalos presented an imminent threat of death or bodily harm and such a belief would have been objectively reasonable. Id. And had plaintiff employed deadly force in that instant, it would have been reasonable and consistent with TPD policy. Id.; see also CP 539-42. But plaintiff did not fire at that moment. Rather, by his own admission, he moved laterally *out of the way* and made a decision to fire his weapon at the tires of the vehicle as it passed by in order to disrupt Mr. Mendoza Davalo’s “OODA loop¹⁷.” CP 246-47; see also CP 617-20. For plaintiff to fire his weapon to disrupt the *subject’s* “OODA loop” was frankly ludicrous; moreover, it is inconsistent with how officers are trained to apply the principle. CP 575¹⁸; CP 584¹⁹; CP 594. Mr. Mendoza Davalos was not presenting an imminent threat to plaintiff or others at the moment plaintiff elected

¹⁷ OODA stands for Observe, Orient, Decide, Act. It is process of decision making that officers receive training in, on how officers can train themselves to respond to uncertain situations. See generally CP 558-561.

¹⁸ From the Deposition of James Barrett, Range Sergeant: “Well, the remainder in this statement not to shoot against moving vehicles to stop it or immobilize it, has been part of the training as far as I’ve been – as long as I’ve been with TPD.”

¹⁹ In questions presented to the Range Master as part of the Internal Affairs investigation

to open fire on the vehicle. Not only did plaintiff's decision-making violate the Department's policy on deadly force, it put his fellow officers and the public at risk.

In light of this undisputed evidence, there is no question that O'Dea was not terminated because he did not shoot Mr. Mendoza Davalos – and again, that is the public policy on which plaintiff has chosen to base this claim. Thus, there is no evidence that plaintiff's termination was caused by wrongful policy-related conduct.

4. Plaintiff's failure to overcome the City's overriding justification for his termination is fatal to his claim.

As outlined above, if a plaintiff succeeds in presenting a prima facie case on the first three elements, the burden then shifts to the employer to “articulate a legitimate nonpretextual nonretaliatory reason for the discharge.” Wilmot, 118 Wn.2d at 70. This is a burden of production, not persuasion. Id. (“The employer must produce relevant admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion, because the employer does

into the O'Dea shooting: “11. In your experience as a Tacoma Police Department firearms instructor/Range Sergeant, has the use of a firearm against a moving vehicle (not the person driving the vehicle) ever been instructed to officers? No. 12. Would the use of a firearm by a Tacoma Police Department member to disable a moving vehicle be an appropriate use of deadly force within the Department's Policy? No. ... In review of Lt. David O'Dea's written statement regarding his actions on August 6, 2016: No. 17. Are his actions consistent with the Tacoma Police Department's firearms training? No. 18. Are his actions consistent with the Tacoma Police Department's Use of Force Policy? No.”

not have that burden.”). If the employer articulates such a reason, the burden shifts back to the plaintiff either to show “that the reason is pretextual, or by showing that although the employer's stated reason is legitimate, the [public-policy-linked conduct] was nevertheless a substantial factor motivating the employer to discharge the worker.” *Id.* at 73.

As outlined herein, plaintiff’s wrongful discharge in violation of public policy claim fails on each and every element. Even if, however, this Court were to find that plaintiff has met his initial burden with regards to the first three elements of his claim, the overriding justification element is fatal to his claim²⁰. The City has adduced overwhelming evidence - competent and credible evidence - to establish legitimate reasons for the plaintiff’s dismissal from the Tacoma Police Department: namely, his violation of the use of force policy when he fired his weapon under circumstances that were not objectively reasonable. CP 140-213²¹. Moreover, plaintiff’s pattern of poor judgment and previous disciplinary history unquestionably warranted termination. CP 142, para. 7.

²⁰ In *Martin, supra*, the Court clarified that an employer need not concede the first three elements before the overriding justification element comes into play. 191 Wn.2d at 727-728.

²¹ Further, plaintiff began firing his weapon at the tires of the Mendoza Davalos’ vehicle without even ensuring the location of his fellow officers at the scene. CP 130-31.

The overriding justification element entails balancing the public policies raised by the plaintiff against the employer's interest. Gardner, 128 Wn.2d at 948-49. If “the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct,” then it cannot be held liable. Id. at 947. In making such a determination, the courts focus on the employer's contemporaneous motive for the discharge. Ellis, 142 Wn.2d at 465.

As outlined herein, the relevant public policy is the protection of the public from an officer's inappropriate use of deadly force, and the record herein unequivocally establishes that the decision to terminate the plaintiff furthered, as opposed to jeopardized, this policy. To the extent that plaintiff argues that he was fired because he did not kill Mr. Mendoza Davalos, his argument is misplaced. Plaintiff's theory is simply not borne out by the competent and credible evidence supporting the justification for the City's decision to terminate. Again, it is well-established that an officer may not use deadly force unless the officer has probable cause to believe the suspect poses a threat of death or serious physical harm to the officers or others. See Tennessee v. Garner, supra; Graham v. Connor, supra. The parameters of the appropriateness of deadly force, which have been defined by decisional case law, have also been laid out in RCW 9A.16.040, as well as TPD's own

policy, all of which states that an officer may use deadly force when confronted with an imminent danger of death or serious bodily injuries to themselves or others. CP 593-94. Plaintiff's fundamental misapprehension of those standards underscores the flimsiness of his claim.

Additionally, there were multiple layers of review of the plaintiff's conduct. CP 537-39. See also CP 140-146; CP 156-175; CP 177-195; CP 213. The Chief's decision did not occur in a vacuum. It was the result of months of investigation. First, the Internal Affairs investigated the allegations that, amongst other policies, plaintiff had violated the use of force policy. Id. Internal Affairs interviewed the other three officers at the scene, all of whom were surprised at plaintiff's use of deadly force under the circumstances. Id.; see also CP 628. Moreover, the other officers either did not believe the force reasonable because the suspect did not present an imminent threat or felt that plaintiff's choice to fire at the tires needlessly endangered the other officers at the scene. Id. Based on the investigation, which included the interviews with the other officers and the forensic evidence showing that plaintiff fired at the side of the vehicle, Assistant Chief Ake determined that the evidence established the plaintiff had violated the use of force policy. CP 156-175. Plaintiff's conduct was also reviewed by the Deadly Force Review Board, consisting of both peer officers and civilian personnel. The majority of the Deadly Force Review Board determined that

plaintiff acted in violation of the use of force policy. CP 177-195. The Chief made his decision based on the findings of the investigation and the Deadly Force Review Board findings. CP 140-154. Finally, after the Chief decided to terminate plaintiff, the Disciplinary Review Board convened and determined the termination should be upheld. Id.; see also CP 213.

As Gardner makes clear, if “the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct,” then it cannot be held liable. Id. at 947. As outlined herein, the City’s justification for terminating plaintiff’s employment trumps all of plaintiff’s arguments. Plaintiff’s disagreement with the Chief’s determination that plaintiff’s use of force violated the policy notwithstanding²², as the appointing authority, the Chief of Police is the official ultimately responsible for determining when a person is unfit to wield the City’s police powers. In the Chief’s view, plaintiff had, on two separate occasions, exhibited extremely poor judgment, *judgment which endangered the public*. CP 140-213. Based on this fact alone, the Chief’s reason for terminating the plaintiff overrides any public policy concerns²³.

²² Plaintiff’s argument is further flawed by his failure to acknowledge that the Chief is the official responsible for implementing best law enforcement practices and policies in the police department. TMC 1.06.030; TMC 1.06.040; TMC 1.06.070.

²³ Moreover, plaintiff has not established that the Chief’s stated reason for terminating plaintiff’s employment is a pretext. See Appellant’s Opening Br., p. 26. As he has

B. The superior court did not err in dismissing plaintiff's remaining tort claims.

As a preliminary matter, plaintiff did not address the superior court's dismissal of his tort claims for negligent infliction of emotional distress and outrage in his appellate brief, and instead, directed this Court to his briefing to the trial court. On this basis alone, this Court should decline to consider whether the superior court erred in dismissing plaintiff's remaining tort claims²⁴. Nelson v. Duvall, 197 Wn. App. 441, 460, 387 P.3d 1158 (2017) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). To the extent, however, this Court wishes to address the superior court's dismissal of these claims, the City addresses them herein, as summary judgment may be affirmed on any basis supported by the record. Ohnemus v. State, 195 Wn. App. 135, 139, 379 P.3d 14 (2016).

First, the trial court did not err in dismissing plaintiff's negligent infliction of emotional distress claim. To recover for negligent infliction of emotional distress, a plaintiff must demonstrate the traditional negligence concepts of duty, breach, causation, and damages. Hunsley v. Giard, 87

throughout this litigation, plaintiff relies only on his dogged insistence that the discharge of his weapon, 11 times while shooting at the tires of a car, was reasonable.

²⁴ At the trial court, plaintiff conceded that his defamation claim should be dismissed. CP 239.

Wn.2d 424, 434, 553 P.2d 1096 (1976). While Washington law does recognize that this cause of action can arise in the employment context, such a claim is not cognizable if it is based on discipline or workplace disputes:

We believe Bishop correctly articulates the law in this state: “Absent a statutory or public policy mandate, employers do not owe employees a duty to reasonable care to avoid the inadvertent infliction of emotional distress when responding to workplace disputes.”

Snyder v. Med. Serv. Corp., 145 Wn.2d 233, 243-244, 35 P.3d 1158 (2001), (citing Bishop v. State, 77 Wn. App. 228, 234-35, 889 P.2d 959 (1995)). See also Chea v. Men’s Warehouse, Inc., 85 Wn. App. 405, 407, 932 P.2d 1261 (1997) (“We recognize that an employer must be accorded latitude in making decisions regarding employee discipline. This does not mean, however, that an employer cannot be held responsible when its negligent acts injure an employee, *and such acts are not in the nature of employee discipline* and do not give rise to a cognizable IIA claim.” (emphasis added)); Calhoun v. Liberty N.W. Ins. Corp., 789 F.Supp. 1540, 1548 (W.D. Wash. 1992) (discharge for poor work performance does not give rise to action for negligent infliction of emotional distress); Johnson v. Dep’t of Soc. & Health Servs., 80 Wn. App. 212, 907 P.2d 1223 (1996) (employers have no duty to avoid infliction of emotional distress on employees when responding to employment disputes). Because plaintiff’s claim for negligent inflic-

tion of emotional distress is premised on his termination, his claim for negligent infliction of emotional distress (brought by an employee based on discipline for poor performance) is simply not cognizable.

Second, the trial court did not err in dismissing plaintiff's intentional infliction of emotion distress (outrage claim). To recover for intentional infliction of emotional distress, plaintiff must prove the basic elements of the tort of outrage: (1) extreme and outrageous conduct; (2) the intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. Keates v. Vancouver, 73 Wn. App. 257, 263, 869 P.2d 88 (1994). Whether conduct is sufficiently extreme is generally a question of fact; however, the court must initially decide as a matter of law whether reasonable minds could differ on whether the conduct was extreme enough to create liability. Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989). Furthermore, the conduct needs to be more than mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

In determining whether conduct is outrageous, it is not enough that the defendant's intent was tortious, criminal, intended to inflict emotional distress or characterized by malice or a degree of aggravation that would entitle a plaintiff to damages for another tort. Birklid v. Boeing Co., 127 Wn.2d 853, 868, 904 P.2d 278 (1995) (citing Grimsby, 85 Wn.2d at 59).

Liability will only be imposed where the conduct is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* Also, “the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties...” *Id.* at 867. Finally, the plaintiff must show that the defendant engaged in the extreme and outrageous conduct *intending to cause* emotional distress to the plaintiff. *Id.* at 868. Given the facts underlying this case, the Chief’s decision to terminate plaintiff due to an inappropriate application of deadly force and a pattern of dangerous behavior can hardly be characterized as conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Further, plaintiff has identified no evidence to suggest that the Chief made his decision to terminate plaintiff’s employment with the intent to cause plaintiff emotional distress. As intent is an essential element of this claim, the absence of evidence to establish intent mandates dismissal of this claim.

Thus, to the extent this Court considers the dismissal of plaintiff’s remaining tort claims, the superior court’s decision is supported by the record and should be affirmed.

VI. CONCLUSION

As outlined herein, plaintiff's claims failed as a matter of law, and the superior court did not err in so holding. Contrary to plaintiff's argument, his wrongful discharge in violation of public policy claim did not implicate the policy at issue in Gardner. In Gardner, the public policy at issue was the policy encouraging people to intervene and save persons from life-threatening situations where there is no other option. In this case, O'Dea was not saving anyone from a life-threatening situation – he created a life-threatening situation when he fired his weapon 11 times at the tire of car in order to distract the driver. His conduct, not the Chief's decision to fire him, threatened the public policy evidenced by the various statutes, constitutional provisions and case law that limit an officer's use of deadly force. The decision to terminate plaintiff, because of the inappropriate use of deadly force and because of a prior violation of the pursuit policy that resulted in significant injury, does not violate public policy. Instead, the Chief's decision protects public safety and furthers the public policies at issue. Moreover, the Chief's decision presents an overriding justification that is fatal to plaintiff's claim. Finally, the record supports the superior court's dismissal of plaintiff's remaining tort claims.

For these reasons, the City respectfully asks this Court to affirm the superior court's order, in its entirety.

DATED this 11th day of May, 2020.

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s/ Jean Homan

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CERTIFICATE OF SERVICE

On May 11, 2020 2020, I hereby certify that I electronically filed the foregoing BRIEF OF RESPONDENT CITY OF TACOMA with the Clerk of the Court, which will send notification of such filing to the following:

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