

Court of Appeals No. 344673  
Kittitas Co. Superior Court Cause No. 13-2-00220-8

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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION III

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THOMAS L. SLUMAN, a single person,

*Plaintiff-Appellant,*

vs.

STATE OF WASHINGTON by and through the WASHINGTON  
STATE PATROL; BART H. OLSON, individually and in his official  
capacity as a TROOPER of the WASHINGTON STATE PATROL;  
and Jane/John Does I-X, individually and as Employees/Agents of  
the WASHINGTON STATE PATROL and/or the STATE OF  
WASHINGTON,

*Defendants-Respondents.*

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APPELLANT'S OPENING BRIEF

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## **I. INTRODUCTION**

This appeal requires the Court to apply well-settled rules regarding the liability of law enforcement officers and agencies using deadly force to apprehend an unarmed and nonviolent suspect who does not pose an immediate threat of serious physical harm or death to officers or bystanders. Because the superior court failed to properly apply these rules, summary judgment dismissing Thomas L. Sluman's federal civil rights and related state law claims against the State of Washington and Washington State Patrol Trooper Bart H. Olson should be reversed, and this case should be remanded for trial.

## **II. ASSIGNMENT OF ERROR**

The superior court erred in dismissing Sluman's claims against the State and Trooper Olson on summary judgment. CP 782-83 (order granting summary judgment).

## **III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Where Sluman was unarmed, nonviolent, and did not pose an imminent threat of serious physical harm or death, is Trooper Olson entitled to qualified immunity for using deadly force to arrest him by setting up a road block and "door-checking" Sluman's motorcycle with his patrol car, in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution?
2. Regarding the State's and Trooper Olson's affirmative defense to state law claims based on RCW 4.24.420,

have they met their burden on summary judgment to establish as a matter of law: (a) that Sluman was engaged in a felony when he was injured; (b) that any such felony was a proximate cause of Sluman's own injuries; and (c) that Trooper Olson's conduct was not a superseding cause of Sluman's injuries?

3. Where there is a discernible standard of care grounded in statutory and common law standards for the lawful use of force, which are reflected in WSP's official policies, and have been recognized by the Washington Supreme Court, are Sluman's state law claims for negligence and gross negligence barred by the public duty doctrine?
4. Is there sufficient evidence to withstand summary judgment regarding Sluman's remaining state law claims for negligent infliction of emotional distress, intentional infliction of emotional distress/outrage, and negligent training and supervision?

#### **IV. STATEMENT OF THE CASE**

**A. An airborne trooper observed Sluman speeding on his motorcycle and radioed another trooper in a patrol car to pull him over.**

On July 21, 2010, around 9:30 a.m., Sluman was driving a motorcycle eastbound on Interstate 90 in Kittitas County, Washington, approaching Exit 101 just outside of Ellensburg. CP 510. At the time, WSP Trooper John M. Montemayor was piloting an aircraft known as "Smokey 6" and conducting an aerial traffic patrol in the area. CP 38 (Pilot Case Report). Trooper Montemayor observed Sluman traveling at speeds between 76 and 89 miles per hour on the interstate, and radioed another trooper,

David Hinchliff, who was driving a patrol car in the area, to pull Sluman over. *Id.*

**B. Sluman was unaware that he had been clocked speeding or that he was being pursued as he exited Interstate 90, stopped at a stop sign, signaled, and then proceeded along the South Thorp Highway.**

Meanwhile, Sluman took Exit 101, following another vehicle off the interstate. He stopped at the stop sign at the end of the exit off-ramp, activated the motorcycle's right turn signal, and turned right onto the South Thorp Highway ("STH") toward Ellensburg. CP 510 (Sluman Decl.); CP 390 (Sluman Depo.); CP 514 (Hinchliff Depo.).

Trooper Hinchliff had to make a U-turn to pursue Sluman. CP 515 (Hinchliff Depo.). Initially, the trooper activated only his overhead lights. *Id.* He radioed dispatch to notify them that he was in pursuit, and then radioed a second time when he did not receive acknowledgment of the pursuit. *Id.* At some point after radioing dispatch, Trooper Hinchliff also activated his siren. *Id.*

After starting the pursuit, Trooper Hinchliff lost sight of Sluman because STH is a curvy road. CP 516. Sluman did not notice that Trooper Hinchliff was following him, and the trooper

apparently never got closer than half a mile away from him. CP 515-16.<sup>1</sup>

**C. Contrary to instructions to "back off" and WSP policy, Trooper Olson unilaterally joined the pursuit of Sluman.**

Trooper Bart Olson was also in the area working on traffic patrol. CP 528-29 (Olson Depo.). When he overheard Trooper Hinchliff notify dispatch about his pursuit of Sluman on the radio, he "took off," joining the pursuit and passing another trooper, Paul Blume, on the way. CP 529-30.

Trooper Olson initially stated, "I was never involved in the pursuit." CP 532 (Olson Depo.). However, he later admitted that he joined the pursuit for the purpose of stopping it. CP 533. His initial denial was contradicted by other WSP personnel. His supervisor testified that Trooper Olson participated in the pursuit of Sluman. CP 647 (DeWitt Depo.). The trooper he passed along the way testified that Trooper Olson became part of the pursuit. CP 562

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<sup>1</sup> As Sluman proceeded along STH, Trooper Montemayor continued to observe him from the air in Smokey 6, and stated that he reached a speed over 120 miles per hour at one point. CP 38. However, the aerial patrol measures speed by timing a vehicle as it passes Aerial Traffic Surveillance Marks ("ASTM") on the road, using a stopwatch. *Id.* The record does not reflect that there are any ASTMs on STH, or that Trooper Montemayor timed Sluman as he traveled along STH. *Id.* Trooper Montemayor does not state how he was able to estimate Sluman's speed. *Id.*

(Blume Depo.). Trooper Olson's actions were also considered to be a pursuit under WSP policy. CP 619-20 (Coley Depo.).

Trooper Olson received instructions to "back off" of the pursuit because Smokey 6 could follow Sluman from the air. CP 648 (DeWitt Depo.). Additionally, under WSP official policy, troopers may not unilaterally join a pursuit as backup units. CP 621-22 (Coley Depo.). The policy states in pertinent part that troopers "*shall not* engage in the pursuit unless requested by the primary unit or directed by a supervising officer." CP 658 (emphasis added). The rationale for this policy is that "pursuits are one of the riskiest actions that an officer can undertake." CP 624. As explained by Steve Harbinson, who has over 24 years of experience as a commissioned law enforcement officer in the State of Washington in addition to years of forensic work, it is difficult to safely coordinate a pursuit and avoid unnecessary injury to WSP personnel or bystanders if officers unilaterally join in. CP 726-27.<sup>2</sup>

Nonetheless, Trooper Olson ignored the instructions he received and WSP policy, and decided to join the pursuit of Sluman on his own. CP 545-46 (Olson Depo.).

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<sup>2</sup> Mr. Harbinson's report is reproduced in the Appendix.

**D. Contrary to WSP policy, Trooper Olson set up an impromptu roadblock on a bridge in Sluman's path, and intended to "horse collar" Sluman.**

Trooper Olson anticipated that he could intercept Sluman near the intersection of Interstate 90 Exit 106 and STH. CP 530 (Olson Depo.). After arriving at the intersection, he started driving south on STH. CP 530-31. He saw a motorcycle rounding a corner ahead of him in the oncoming lane, drove his patrol car across the centerline of the road and quickly stopped, parking in the middle of a bridge across the Yakima River. CP 531-33. He explained his intent as follows:

I'm going to place this person in custody or worst [sic] — you know, I'm going to place him in custody, do a felony-style stop, or they're going to be going slow enough that if it comes down to it I'm going to basically horse collar this person off the motorcycle and end this pursuit[.]

CP 532 (brackets added). About the same time, Trooper Blume pulled up behind Trooper Olson and stopped his vehicle on the bridge as well, blocking more of the road. CP 560 & 567 (Blume Depo.).<sup>3</sup>

Trooper Olson's roadblock and intent to horse collar Sluman were contrary to official WSP policy. There is no "lawful authority

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<sup>3</sup> The extent to which the troopers' vehicles blocked the road is shown in the photographs in the record at CP 594, 596 & 598. Color copies of the photographs are reproduced in the Appendix.

for any Washington State Patrol trooper to go hands on to tackle, horsecollar, or physically remove a driver of a motorcycle operated on the public roads of Washington State." CP 646 (DeWitt Depo.); *accord* CP 632-33 (Coley Depo.). Such a maneuver is "unwise and unsafe," according to WSP personnel. CP 702-03 (Cooper Depo.).

Likewise, WSP policies and training do not allow troopers to drive patrol cars into the lane of oncoming traffic, nor do they allow troopers to park in the middle of a road and partially block both lanes of traffic. CP 642-43 (DeWitt Depo.). The policy governing roadblocks provides:

1. A roadblock is a barricade using vehicles or other obstruction (excluding the Hollow Spike Strip) across a roadway set up to stop or prevent the escape of a fleeing vehicle.
2. Roadblocks may be used to apprehend fleeing felons when necessary, provided:
  - a. A description of the suspect(s) and the suspect vehicle is available (the description must be adequate for proper identification).
  - b. Supervisory approval is obtained.
  - c. An "escape route" is left available.
  - d. The suspect(s) is wanted for any of the following:
    - (1) Homicide
    - (2) Robbery in the first degree

(3) Rape

(4) Assault with intent to kill or felonious assault

(5) Prison escape (involving a felon)

CP 662 (formatting in original). Trooper Olson admits that he did not obtain supervisory approval for the roadblock, and that Sluman was not wanted for any of the crimes necessary to justify a roadblock. CP 550. The record does not reflect whether he had an adequate description of Sluman or his motorcycle.

Presumably recognizing that he lacked the proper basis for setting up a roadblock, Trooper Olson denied that parking his car across the centerline of the bridge was, in fact, a roadblock. CP 549-50 & 708. However, it appeared to an eyewitness that he had set up a roadblock, and his supervisor testified that he set up a roadblock. CP 670-71 (eyewitness declaration); CP 246 & 249 (DeWitt Depo.).

**E. Sluman was surprised by the roadblock as he came around a corner and started over the bridge.**

From Sluman's perspective, as he came around the corner of STH toward the bridge, he saw a large white law enforcement vehicle "coming head on toward me." CP 587-88 (Sluman Depo.);

*accord* CP 510 (Sluman Decl.). He does not remember anything else.<sup>4</sup>

**F. Contrary to WSP policy, Trooper Olson used lethal force by "door checking" Sluman as his motorcycle passed the trooper's car, sending him over the side of the bridge to the ground 25 feet below, and causing him to suffer serious injuries.**

As Sluman passed his vehicle, Trooper Olson opened his door into the motorcycle with enough force to "radically alter" the motorcycle's course, sending Sluman careening over the edge of the bridge to the ground 25 feet below. CP 712 & 715 (accident reconstruction); CP 670 (eyewitness declaration). Sluman sustained fractures of the tibia and fibula of his right leg, requiring multiple surgeries to implant and replace hardware and graft skin and muscle. CP 510 (Sluman Decl.). He also suffered fractures of his pubic bone, tailbone, and left elbow. *Id.* He spent almost a year in a wheelchair while recovering, and he has permanent physical impairments. *Id.*; *see also* CP 607-08 & 610 (photos of the scene & injuries).

Trooper Olson states that his door was already open, and that Sluman's motorcycle simply struck the door. CP 45 (amended report). Specifically, he states that "Sluman actually stopped

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<sup>4</sup> The brakes on the motorcycle were defective, which could have affected his ability to stop. CP 693-94 (Temple Depo.).

himself by running into my car door." CP 537. However, an accident reconstruction performed by Marc Boardman, a former WSP Trooper with 28 years of experience in the WSP and extensive forensic training, confirms that the motorcycle did not collide with a door that was already open, based on the pattern and angle of damage to Trooper Olson's door and the force necessary to alter the path of Sluman's motorcycle. CP 714-15.<sup>5</sup>

Forcefully opening a car door into a passing motorcycle under these circumstances, or "door-checking," is a form of "intentional intervention" that is contrary to WSP policy. CP 738.

The policy governing intentional intervention provides:

1. Intentional intervention (ramming) of a vehicle is the deliberate act of hitting another vehicle with a patrol vehicle(s) for the purpose of functionally damaging or forcing the other vehicle off the road. Intentional intervention is considered use of lethal force.
2. It shall be used to effect an apprehension only as a last resort and only when the officer knows or has reasonable grounds to believe that the occupant(s) has committed or is attempting to commit a crime that poses a threat of death or serious bodily injury. Intentional intervention shall not be used to apprehend a traffic offender, misdemeanor, or fleeing felon whose only felony is attempting to elude a pursuing police vehicle.

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<sup>5</sup> Mr. Boardman's accident reconstruction report is reproduced in the Appendix.

3. Officers attempting intentional intervention with a vehicle shall be held to the same standards as are applied to any other use of lethal force.

CP 661-62 (formatting in original). Sluman was not wanted for any of the crimes necessary to justify intentional intervention, and the use of such lethal force was inappropriate. CP 626-27 (Coley Depo.). Trooper Olson's actions were "a clear and obvious violation of the Washington State Patrol policy manual" that "any properly trained WSP Trooper would know to be illegal and excessive and/or lethal force." CP 738 (Harbinson Report).<sup>6</sup>

**G. While he was still recovering from his injuries, Sluman entered an *Alford* plea to attempting to elude and driving the motorcycle without permission.**

When Sluman first hit the ground after going over the side of the bridge, he appeared to be unconscious. CP 670 (eyewitness decl.). After he regained consciousness, but before receiving any treatment for his injuries, Trooper Olson "asked him why he was running from the police and he stated he had warrants for his arrest." CP 46. The motorcycle he was driving had also been reported stolen, *id.*, although Sluman had a bill of sale and had been making payments, CP 510. He subsequently entered an *Alford* plea

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<sup>6</sup> Inexplicably, Trooper Olson's supervisor wanted to investigate whether he intentionally opened his door into Sluman's motorcycle, but the pertinent questions were never asked. CP 239-40 (DeWitt Depo.); CP 706-10 (investigation documents).

to charges of attempting to elude a police vehicle, *see* RCW 46.61.024, and second degree taking a motor vehicle without permission, *see* RCW 9A.56.075. CP 53-61.<sup>7</sup> He was still recovering from his injuries at the time, and wanted to be done with the matter. CP 591.

**H. Sluman filed suit against the State and Trooper Olson under 42 U.S.C. § 1983 and state law.**

Sluman filed suit against Trooper Olson and the State. CP 1-11 (complaint). He alleged a claim against Trooper Olson individually for violation of his right to be free from unreasonable seizure under the Fourth and Fourteenth Amendments to the U.S. Constitution, brought under 42 U.S.C. § 1983. CP 7-8. He also alleged state law claims, including intentional and negligent infliction of emotional distress, negligence and gross negligence, and negligent training and supervision, among others. CP 7-9.

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<sup>7</sup> In a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), the defendant acknowledges the existence of evidence that would support a conviction, but does not admit guilt. *See State v. MacDonald*, 183 Wn. 2d 1, 6 n.1, 346 P.3d 748 (2015).

**I. The superior court initially denied summary judgment.**

Trooper Olson and the State moved for summary judgment, seeking dismissal of all claims alleged by Sluman. CP 19-34. The superior court initially denied the motion. CP 360-64.<sup>8</sup>

**J. After the U.S. Supreme Court's per curiam decision in *Mullenix v. Luna*, the superior court granted a second summary judgment motion.**

Trooper Olson and the State renewed their motion for summary judgment after the U.S. Supreme Court issued its per curiam opinion in *Mullenix v. Luna*, — U.S. —, 136 S. Ct. 305 (2015). CP 365-85. Although *Mullenix* only relates to qualified immunity from § 1983 claims, the superior court granted the motion as to all claims, including those brought under state law, without explanation. CP 782-83. From this decision, Sluman appeals. CP 784-87 (notice of appeal).

**V. SUMMARY OF ARGUMENT**

***Qualified immunity:*** Trooper Olson is not entitled to qualified immunity from Sluman's federal civil rights claim because he used deadly force to apprehend Sluman in the absence of any immediate threat of serious physical harm or death. Sluman's

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<sup>8</sup> Sluman acquiesced to dismissal of official capacity claims against Trooper Olson under § 1983 as well as state law claims for false arrest and false imprisonment.

constitutional right to be free from this type of unreasonable seizure in the context of blocking and striking a motorcycle on which an unarmed and nonviolent suspect is thought to be fleeing is clearly established by *Tennessee v. Garner*, 471 U.S. 1 (1985); *Brower v. County of Inyo*, 489 U.S. 593 (1989); *Hawkins v. City of Farmington*, 189 F.3d 695 (8<sup>th</sup> Cir. 1999); *Walker v. Davis*, 649 F.3d 502 (6<sup>th</sup> Cir. 2011); and *Stamm v. Miller*, — Fed. Appx. —, 2016 WL 4932025 (6<sup>th</sup> Cir., Sept. 16, 2016).

***Felony defense:*** The State and Trooper Olson are not entitled to judgment as a matter of law based on their affirmative defense under RCW 4.24.420. There are genuine issues of material fact whether Sluman was engaged in the commission of a felony when he was blocked and struck by Trooper Olson, whether any such felony was a proximate cause of his injuries, and whether Trooper Olson's conduct was a superseding cause of his injuries.

***Public duty doctrine:*** The public duty doctrine does not bar Sluman's state law claims for negligence and gross negligence, as the tort duty of the State and Trooper Olson in this context has been recognized by the Washington Supreme Court in *Mason v. Bitton*, 85 Wn. 2d 321, 534 P.2d 1360 (1975).

***Sufficiency of evidence:*** There is sufficient evidence to withstand summary judgment regarding Sluman's state law claims for negligent infliction of emotional distress, intentional infliction of emotional distress/outrage, and negligent training and supervision.

## VI. ARGUMENT

### A. **Trooper Olson is not entitled to qualified immunity from Sluman's federal civil rights claim.**

The Fourth Amendment to the U.S. Constitution provides "[t]he right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated[.]" U.S. Const. Amend. IV (brackets & ellipses added). This provision of the Bill of Rights is incorporated by the Due Process Clause of the Fourteenth Amendment and thereby made applicable to the states. *See* U.S. Const. Amend. XIV, § 1. It prohibits the use of excessive force by law enforcement officers and is actionable under 42 U.S.C. § 1983. Sluman has alleged an excessive force claim under § 1983 in this case.

Trooper Olson raised a defense of qualified immunity to this claim in the superior court. Individual state actors may raise a defense of qualified immunity from § 1983 claims, based on federal common law applicable to such claims. *See Triplett v. Washington*

*State Dep't of Social & Health Servs.*, 193 Wn. App. 497, 509, 373 P.3d 279 (2016), *rev. denied*, — Wn. 2d — (Nov. 2, 2016). "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Mullenix*, 136 S. Ct. at 308 (quotation omitted). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). "When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (quotation omitted). Where qualified immunity is raised on summary judgment, the court must view the facts in the light most favorable to the plaintiff. *See Triplett*, 193 Wn. App. at 527.

Trooper Olson appeared to concede for purposes of summary judgment that Trooper Olson violated Sluman's Fourth Amendment rights by using lethal force in attempting to apprehend him, and argued only that Sluman's rights were not clearly established. *See* CP 371-76. To be considered clearly established, the constitutional rights in question must be sufficiently clear that a reasonable official would have understood that what he or she is doing violates

that right. *Mullenix*, at 308. No particular level of specificity is required in every instance. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* (brackets added); *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope* for the proposition that constitutional "standards can 'clearly establish' the answer, even without a body of relevant case law"); *Mullenix*, at 308 (quoting *al-Kidd*, 563 U.S. at 741, for the proposition that it is not necessary to find "a case directly on point" before a right is deemed to be clearly established).

To the extent it relied on Trooper Olson's defense of qualified immunity in granting summary judgment, the superior court erred. The Fourth Amendment right to be free from unreasonable seizure prohibits the use of lethal force to apprehend a fleeing suspect in the absence of an immediate threat of serious physical harm or death. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This right is clearly established in the context of blocking and/or striking a motorcycle on which an unarmed and nonviolent suspect is attempting to flee, justifying the denial of qualified immunity to Trooper Olson in this case.

- 1. The constitutional right to be free from unreasonable seizures in the context of blocking and/or striking a motorcycle on which an unarmed and nonviolent suspect is attempting to flee is clearly established.**

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the U.S. Supreme Court held that law enforcement officers can effect an unconstitutional seizure with vehicles—not just bullets as in *Garner*—and applied the rule of *Garner* in the context of police roadblocks. The Court reasoned:

Petitioners have alleged the establishment of a roadblock crossing both lanes of the highway. In marked contrast to a police car pursuing with flashing lights, or to a policeman in the road signaling an oncoming car to halt, a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur. It may well be that respondents here preferred, and indeed earnestly hoped, that Brower would stop on his own, without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent. Nor do we think it possible, in determining whether there has been a seizure in a case such as this, to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (*e.g.*, one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (*e.g.*, one located just around a bend). In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant

only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.

489 U.S. at 598-99 (citations omitted).

Following *Brower*, in *Hawkins v. City of Farmington*, 189 F.3d 695 (8<sup>th</sup> Cir. 1999), the Eighth Circuit denied qualified immunity to a police officer who tried to slow or stop the motorcycle of a fleeing suspect by driving his police car onto the highway in front of it, and ended up striking the motorcycle and the suspect. After finding sufficient evidence to create a jury question regarding whether the suspect stated a claim for violation of the Fourth Amendment, the court rejected the officer's qualified immunity defense as follows:

[The officer] finally argues that even if he seized [the suspect] and even if the seizure were unreasonable, he is entitled to qualified immunity because it was not clearly established in September 1994 that his actions in creation of a partial roadblock with means of escape would violate any constitutional right. We disagree. *Brower* was decided in 1989, five years before this incident occurred, and as we have held, that case established the law to be applied here.

189 F.3d at 702-03 (brackets added).

Similarly, in *Walker v. Davis*, 649 F.3d 502 (6<sup>th</sup> Cir. 2011), the Sixth Circuit denied qualified immunity to a police officer who rammed his vehicle into a suspect on a motorcycle who was fleeing across a field. In rejecting the officer's defense of qualified immunity, the court stated:

Nor does it matter that, at the time of [the officer's] actions, there were few, if any, reported cases in which police cruisers intentionally rammed motorcycles. It is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force. This case is thus governed by the rule that “general statements of the law are capable of giving clear and fair warning to officers even where the very action in question has not previously been held unlawful.”

649 F.3d at 503-04 (brackets added; quotation omitted); *accord Stamm v. Miller*, — Fed. Appx. —, 2016 WL 4932025, at \*4 (6<sup>th</sup> Cir., Sept. 16, 2016) (following *Walker* in similar factual circumstances).<sup>9</sup> The foregoing case law is consistent with WSP's policies regarding pursuits and the use of force, as well as the expert testimony indicating that no reasonable officer could have thought that blocking and door-checking Sluman was constitutional under the circumstances.

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<sup>9</sup> *Stamm* is properly cited under GR 14.1(a) because it is may be cited within the Sixth Circuit. See Fed. R. App. P. 32.1(a); 6<sup>th</sup> Cir. R. 32.1(a). A copy of the *Stamm* decision is reproduced in the Appendix.

**2. *Mullenix* does not alter the foregoing analysis, and the facts of *Mullenix* are distinguishable in any event.**

Trooper Olson relied heavily on the per curiam opinion in *Mullenix* in support of his renewed motion for summary judgment. However, *Mullenix* did not change the analysis of qualified immunity. The decision simply noted the degree of specificity required for the constitutional right in question to be deemed clearly established when a law enforcement officer has to balance the potential harm to a fleeing suspect against an immediate threat of serious physical harm or death to other officers or bystanders on an emergency basis. Thus, the Court distinguished cases like *Walker, supra*, that do not involve such immediate threats of harm. *See Mullenix*, at 312; *accord Triplett*, 193 Wn. App. at 293 (recognizing that "Federal law is less likely to be clearly established when it depends on an ad hoc balancing of competing interests between the state and the individual").

Like *Walker*, this case is distinguishable from *Mullenix* because there was no immediate threat of harm when Trooper Olson blocked and door-checked Sluman. As noted above, the nature of the threat must be "immediate" and it must involve "serious physical harm" or death. *Garner*, 471 U.S. at 11. For

example, in *Mullenix*, the fleeing suspect was believed to be armed, had twice threatened to shoot the officers involved in his pursuit, and was seconds away from encountering an officer when deadly force was used to stop him. 136 S. Ct. at 306-07, 309-10 & 312.

No immediate threat of serious physical harm or death was present in this case. None is mentioned in Trooper Olsen's report. CP 45-56. In the first summary judgment motion, counsel for Trooper Olson merely argued, without citation to any evidence, that there was "potential harm." CP 20 (line 3, arguing that Sluman was "*potentially* endangering the lives of motorists"; emphasis added); CP 30 (line 17, arguing that Trooper Olson was attempting "to avoid *potential* harm to innocent drivers and passengers on the road"; emphasis added); CP 32 (line 18, arguing Sluman "was *potentially* dangerous to himself, law enforcement, other drivers and/or their passengers"; emphasis added). In the second summary judgment motion, counsel for Trooper Olson appeared to recognize the need to establish an immediate threat of serious physical harm or death. CP 375. However, counsel cited a portion of Trooper Olson's deposition that does not identify any such threats. CP 375 (citing Olson Depo., at 41:25-42:10); CP 408 (Olson Depo., at 41:25-

42:10).<sup>10</sup> Given the absence of any immediate threat of serious physical harm or death in this case, *Mullenix* is distinguishable and qualified immunity should be unavailable to Trooper Olson.

**B. The State and Trooper Olson are not entitled to judgment as a matter of law on their affirmative defense to state law claims under RCW 4.24.420.**

In the superior court, the State and Trooper Olson raised a defense based on RCW 4.24.420, which provides:

It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

By its terms, this statute is inapplicable to Sluman's federal civil rights claims. As to his state law claims, it is an affirmative defense on which the State and Trooper Olson bear the burden of proof. *See* CR 8(c) (defining affirmative defenses); *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn. 2d 684, 693, 317 P.3d 987 (2014) (noting defendants bear burden of proof on affirmative defenses).

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<sup>10</sup> The cases on which Trooper Olson relied in the superior court are likewise distinguishable because they involve immediate threats of serious physical harm or death. CP 376 (summary judgment memo., citing *Abney v. Coe*, 493 F.3d 412 (4<sup>th</sup> Cir. 2007), and *Coitrone v. Murray*, 2015 WL 2384298 (W.D. Ky., May 19, 2015), *aff'd in part*, 2016 WL 683243 (6<sup>th</sup> Cir. 2016)); *Abney*, 493 F.3d at 416-17 (describing threats to other drivers, including running one driver off the road); *Coitrone*, 2015 WL 2384298, at \*5-6 (following *Abney* because of immediate threat of harm, and distinguishing *Walker* on this basis); *see also Lytle v. Bexar County*, 560 F.3d 404, 415 (5<sup>th</sup> Cir. 2009) (distinguishing *Abney* on the basis of immediate threat of harm).

Because they bear the burden of proof, the State and Trooper Olson are obligated to produce evidence on every element of the defense, demonstrate that there are no genuine issues of material fact, and establish that they are entitled to judgment as a matter of law. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225-26, 770 P.2d 182 (1989). They cannot satisfy this burden because there are genuine issues of material fact whether Sluman was engaged in a felony when he was injured, whether any such felony was a proximate cause of his injuries, and whether the conduct of Trooper Olson was a superseding cause.

There are genuine issues of material fact regarding whether Sluman was engaged in a felony.<sup>11</sup> His *Alford* plea to eluding and taking the motorcycle without permission does not give rise to collateral estoppel or relieve the State and Trooper Olson from satisfying their burden of proof. *See Clark v. Baines*, 150 Wn. 2d

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<sup>11</sup> There is no controlling authority regarding the quantum of proof required to establish that the injured person was engaged in a felony. The official comment to the relevant pattern jury instruction suggests that the preponderance of the evidence applies, by analogy to a case decided under the slayer statute. *See* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 16.01 cmt. (6<sup>th</sup> ed.) (citing *Leavy, Taber, Schultz & Bergdahl v. Metropolitan Life Ins. Co.*, 20 Wn. App. 503, 507, 581 P.2d 167 (1978)). Sluman urges that the standard should be beyond a reasonable doubt, in keeping with the quantum of proof required in felony prosecutions. The issue has not been addressed below, and the court does not need to address it on appeal, although the quantum of proof may influence summary judgment review at the margins. *See, e.g., Herron v. KING Broadcasting Co.*, 112 Wn. 2d 762, 768, 776 P.2d 98 (1989) (discussing relationship between summary judgment and burden of proof).

905, 907, 84 P.3d 245 (2004) (stating "an *Alford* plea cannot be used as the basis for collateral estoppel in a subsequent civil action"). The State and Trooper Olson are unable to point to evidence in the record establishing that he was engaged in eluding, RCW 46.61.024, and taking a motor vehicle without permission, RCW 9A.56.075, at the time of his injuries, with which no reasonable juror could disagree.

There are also genuine issues of material fact whether Sluman proximately caused his own injuries. RCW 4.24.420 incorporates, but does not define, the phrase "proximate cause." Where the Legislature uses statutory language that has a well-defined common law meaning, it is presumed that the statute should be interpreted in accordance with the common law meaning. *See New York Life Ins. Co. v. Jones*, 86 Wn. 2d 44, 47, 541 P.2d 989 (1975). The common law meaning of proximate cause is "a cause which in a direct sequence [unbroken by any superseding cause,] produces the [*injury*] [*event*] complained of and without which such [*injury*] [*event*] would not have happened." 6A Wash. Prac., *supra* WPI 15.01 (brackets & formatting in original). Under this definition, the question of proximate cause is ordinarily for the jury unless the facts and reasonable inferences from the facts are

undisputed. *See id.*, WPI 15.01 cmt.; *N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 378 P.3d 162, 169 (2016); *cf. Geschwind v. Flanagan*, 121 Wn. 2d 833, 854 P.2d 1061 (1993) (holding it was a question of fact whether a passenger could be more at fault than driver under statute prohibiting recovery if plaintiff is intoxicated, such intoxication is a proximate cause of his injuries, and the plaintiff was more than 50% at fault, RCW 5.40.060).

Moreover, there are genuine issues of material fact whether Trooper Olson's conduct was a superseding cause of Sluman's injuries. The common law definition of proximate cause incorporates the concept of superseding cause. *See* 6A Wash. Prac., *supra* WPI 15.01. A superseding cause is a new independent cause that breaks the chain of proximate causation between a party's negligence and an injury or event. *See id.*, WPI 15.05 & cmt.; *Washburn v. City of Federal Way*, 178 Wn. 2d 732, 761, 310 P.3d 1275 (2013) (noting that "[u]nforeseeable intervening acts break the chain of causation"; brackets added). A jury should be entitled to find that Trooper Olson's conduct in setting up the impromptu roadblock and door checking Sluman was a superseding cause of his injuries.

**C. The public duty doctrine does not bar Sluman's state law claims for negligence and gross negligence.**

In the superior court, the State and Trooper Olson argued that Sluman has no viable claim for negligence or gross negligence based on the public duty doctrine. CP 377-78. However, the Washington Supreme Court has previously imposed a duty grounded in tort on law enforcement officers involved in pursuits of fleeing suspects in *Mason v. Bitton*, 85 Wn. 2d 321, 534 P.2d 1360 (1975). See *Bailey v. Town of Forks*, 108 Wn. 2d 262, 266, 737 P.2d 1257 (1987) (noting the Court declined to bar the claim in *Mason* under the public duty doctrine). Under *Mason*, "police officers (and their public employer) may be held liable if their pursuit of a person fleeing in a motor vehicle does not meet the standard of care ... imposed by statute and police policy." *Coffel v. Clallam County*, 58 Wn. App. 517, 522, 794 P.2d 513 (1990) (ellipses added). The State and Trooper Olson do not address *Mason* in their summary judgment motion. CP 377-78. In light of the decision, Sluman's claims for negligence and gross negligence are not barred by the public duty doctrine.<sup>12</sup>

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<sup>12</sup> Following Justice Chambers concurring opinion in *Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn. 2d 871, 885-95, 288 P.3d 328 (2012), joined by majority of the Court, the public duty doctrine is no longer applicable in cases where there is a common law counterpart to a statutory duty imposed upon a governmental actor. "[T]he public duty doctrine applies to governmental duties

**D. There is sufficient evidence to withstand summary judgment regarding Sluman's remaining state law claims.**

In the superior court, the State and Trooper Olson argued that there was insufficient evidence to withstand summary judgment regarding Sluman's state law claims for negligent infliction of emotional distress, intentional infliction of emotional distress/outrage, and negligent training and supervision. They are wrong on all counts.

With respect to the claim for negligent infliction of emotional distress, the State and Trooper Olson argued that there was insufficient medical evidence establishing objective symptomatology consistent with emotional distress. CP 378-79. However, such evidence is required only in the absence of physical injury. *See, e.g., Bylsma v. Burger King Corp.*, 176 Wn. 2d 555, 560-61, 293 P.3d 1168 (2013). In any event, Sluman produced the requisite evidence of objective symptomatology. CP 492 (summarizing evidence in the record).

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mandated by legislative bodies and not common law duties owed by every private and public entity alike." *Id.*, 175 Wn. 2d at 894 (brackets added). The reason is that the Legislature's waiver of sovereign immunity makes the state liable to the same extent as a private person. *See id.* at 887 (citing RCW 4.92.090). The common law counterparts to the statutory duties imposed on law enforcement officers using force, *see* RCW 9A.16.040, or engaging in pursuit of a fleeing suspect, *see* RCW 46.61.035, are the unlawful use of force in defense of self, others or property and the common law privilege for citizen arrest. *See generally* 16 Wash. Prac., Tort Law & Practice §§ 14.20-14.24 (4<sup>th</sup> ed.).

With respect to the claim for intentional infliction of emotional distress or outrage, the State and Trooper Olson argued that Trooper Olson could not have known that his conduct would cause severe emotional distress. CP 379-80. However, this contention is belied by Trooper Olson's use of lethal force in violation of WSP policy.

Lastly, with respect to the claim for negligent training and supervision, the State and Trooper argued that there was no evidence that Trooper Olson acted outside the scope of employment. CP 380-81. However, this argument is also contrary to the evidence that Trooper Olson used lethal force in violation of WSP policy.

None of these remaining claims should have been dismissed on summary judgment.

## **VII. CONCLUSION**

Based on the foregoing, Sluman asks the Court to reverse the superior court's grant of summary judgment in favor of Trooper Olson and the State, and to remand this case for trial.

Respectfully submitted this 23rd day of November, 2016.

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**CERTIFICATE OF SERVICE**

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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Signed at Moses Lake, Washington on November 23, 2016.

  
\_\_\_\_\_  
Shari M. Canet, Paralegal

## **APPENDIX**

<i>Stamm v. Miller</i> , — Fed. Appx. —, 2016 WL 4932025 (6 <sup>th</sup> Cir., Sept. 16, 2016) .....	A-1
Photographs of the road block, CP 594, 596 & 598.....	A-6
Report of Steve Harbinson, CP 721-42 .....	A-9
Accident Reconstruction by Marc E. Boardman, CP 712-15 .....	A-31

2016 WL 4932025

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1. United States Court of Appeals, Sixth Circuit.

Mary Stamm, Personal Representative of the Estate of Carl A. Stamm, IV, Plaintiff–Appellee, v. Frederick Miller, Defendant–Appellant, and Village of Fowlerville, Defendant.

No. 15-1601

FILED September 16, 2016

Synopsis

**Background:** Estate of deceased suspect who died after his motorcycle crashed into police officer's vehicle during a high-speed chase with police brought § 1983 action, alleging that officer intentionally used force to cause collision in violation of the Fourth Amendment. The United States District Court for the Eastern District of Michigan denied officer's motion for summary judgment on basis of qualified immunity. Officer filed interlocutory appeal.

**[Holding:]** The Court of Appeals, Julia Smith Gibbons, Circuit Judge, held that fact issues barred summary judgment on reasonableness of officer's conduct.

Affirmed.

West Headnotes (1)

[1] Federal Civil Procedure

🔑 Civil rights cases in general

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2491.5 Civil rights cases in general

Genuine issues of material fact as to whether police officer intended to use his patrol vehicle to block suspect who was attempting to flee during high-speed chase, and whether suspect's conduct posed an immediate threat to others precluded summary judgment as to the reasonableness of the officer's conduct and whether officer was entitled to qualified immunity, in § 1983 Fourth Amendment action brought by suspect's estate, arising out of suspect's death resulting from his collision with patrol vehicle. U.S. Const. Amend. 4; 42 U.S.C.A. § 1983.

Cases that cite this headnote

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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BEFORE: SILER, GIBBONS, and COOK, Circuit Judges.

Opinion

JULIA SMITH GIBBONS, Circuit Judge.

\*1 Frederick Miller, an officer with the Fowlerville Police Department, challenges the district court's denial of his motion for summary judgment on the ground of qualified immunity. Mary Stamm brought this 28 U.S.C. § 1983 action on behalf of the estate of her son, Carl Stamm, who died after his motorcycle crashed into Miller's vehicle during a high-speed chase with police. The district court's decision to deny Miller qualified immunity relied on material disputed facts with respect to (1) whether Miller intended to block Stamm's motorcycle with his car when their vehicles collided or was attempting to get out of

Stamm's way, and (2) whether Stamm posed an immediate threat to others. Because Miller's actions, viewed in the light most favorable to Mrs. Stamm, indicate a violation of Stamm's clearly established Fourth Amendment rights, and material facts are in dispute, we affirm the district court's denial of summary judgment.

### I.

We adopt the district court's view of the facts in the light most favorable to Mrs. Stamm, *Walker v. Davis*, 649 F.3d 502, 503 (6th Cir. 2011), and the district court described the events in question as follows:

On May 16, 2011, after spending an evening with his grandparents, Carl Stamm went to his friend Erik King's house in Brighton, Michigan. While at this house, Stamm was served alcohol and became intoxicated[, with his blood alcohol level after the accident determined to be .10]. He left King's house at around four in the morning on his motorcycle heading to his home in East Lansing. (Dkt. 16–2.) These facts are not in dispute.

At about 4:20 a.m., on Interstate 96, near the Mason Road overpass in Livingston County, [Michigan] Livingston County Sheriff's Deputy Ray Marino recorded Stamm riding his motorcycle at 104 miles per hour. The speed limit along that stretch of road, which is a three-lane highway, is 70 miles per hour. Deputy Marino activated his overhead lights, but instead of slowing down, Stamm increased his speed. Deputy Marino notified his central dispatch that he was in pursuit of a vehicle that was not stopping. Central dispatch informed Ingham County law enforcement of the chase because the county line was just a few miles ahead of where Deputy Marino was on the highway.

The parties provided a video of the subsequent pursuit[, and the times used below reflect the times as they appear in Deputy Marino's video]. Video taken from Deputy Marino's vehicle shows Stamm maneuvering around several cars and trucks on the highway. About ten seconds into the chase, the highway changes from a six-lane to a four-lane highway. (Dkt. 16–5 at 14:18:37.) At one point during the chase, Deputy Marino was travelling 124 miles per hour, but Stamm was still able to accelerate away from the patrol car. (*See id.*)

After central dispatch contacted Ingham County, audio records reveal that Officer Miller, of the Fowlerville Police Department [ ], responded that he was traveling down a ramp to the highway ahead of the pursuit. (Dkt. 16–8.) Deputy Marino testified that because Stamm was only being pursued for speeding, once he reached the Ingham County line, he would have terminated the pursuit. (Dkt. 18–10 at 14.) On the audio recording, Deputy Marino instructed Officer Miller to “jump on now, get in the right lane, and turn on your overheads.” Officer Miller responded that he was “going to try and stay in front of him.” (Dkt. 16–8 at 00:30–00:44).

\*2 Officer Miller's in-car camera switches on at approximately 4:20:14 a.m. Officer Miller turned his sirens and emergency lights on and travelled on the highway in the right lane at about 36 miles per hour. By 4:20:20, his vehicle reached a peak speed of 43 miles per hour and then began to slow down. At this point, video from Deputy Marino's car confirms that Stamm's motorcycle was also in the right lane and remained there for the next several seconds. At 4:20:24, Officer Miller's car began to move into the left lane just as Stamm began to occupy the left lane. For about the next five seconds, Officer Miller's vehicle straddled the line dividing the two lanes. About half way over into the left lane, at 4:20:30, Officer Miller pressed the brakes, and his vehicle shifted back to the right, at which point Stamm's motorcycle crashed into the back left side of the car. The video from Officer Miller's vehicle shows that he applied his brakes several times in the sixteen seconds he was involved in this incident. (Dkt. 16–6).

The moment of impact cannot be seen from Deputy Marino's video. At approximately 4:20:23, Officer Miller's vehicle's lights appeared ahead. As Deputy Marino approached, he slowed down rapidly, coming to a stop behind skid marks and Stamm's motorcycle on the side of the road.

Upon impact, Stamm was thrown from his motorcycle. His head struck the [metal portion of the patrol car between the rear windshield and the back-seat window] and he fell to the pavement eventually sliding on to the median on the left side of the highway. At the scene of the accident, Stamm appeared to be unconscious and barely breathing. He was declared dead shortly thereafter.

*Stamm v. Miller*, No. 5:14-cv-11951-JEL-MJH, at \*2-\*6 (E.D. Mich. Apr. 27, 2015).

Considering the parties' cross-motions for summary judgment, the district court denied Mrs. Stamm's motion and denied in part and granted in part the defendants' motion. The district court found an issue of material fact as to whether there was a constitutional violation because "[a] reasonable juror could conclude that Officer Miller ... intended to stop plaintiff by use of physical force intentionally causing the collision" and that this use of "deadly force was not necessary under the circumstances." *Id.* at 18-19, 24. Regarding whether Miller's conduct violated a clearly established right of Stamm's, the court concluded that "[i]t has been clearly established that the use of deadly force in a high speed pursuit is unconstitutional where failing to use such force poses little threat to the safety of others." *Id.* at 27.

## II.

We review a district court's denial of a motion for summary judgment on qualified immunity grounds *de novo*. *Stoudemire v. Mich. Dep't. of Corr.*, 705 F.3d 560, 565 (6th Cir. 2013). A court properly grants summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

## III.

Qualified immunity protects government officials from standing trial for civil liability in their performance of discretionary functions unless their actions violate clearly established rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). To determine whether an officer is entitled to qualified immunity, we apply a two-prong test, asking (1) whether the facts, as alleged by the plaintiff, "make out a violation of a constitutional right," and (2) whether "the right at issue was clearly established at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (internal quotation marks and citation omitted). If a district court determines that the plaintiff's evidence would reasonably

support a jury's finding that the defendant violated a clearly established right, it must deny summary judgment. *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015). Here, considering the facts in the light most favorable to Mrs. Stamm, the district court correctly denied Miller summary judgment.

## A.

\*3 "The Fourth Amendment's prohibition against unreasonable seizures protects citizens from excessive use of force by law enforcement officers." *Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015). Claims alleging excessive force are subject to the Fourth Amendment's "objective reasonableness" standard. *Id.* at 464 (quoting *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). This standard requires a court to balance three factors: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (quoting *Martin v. City of Broadview Heights*, 712 F.3d 951, 958 (6th Cir. 2013)). For a seizure under the Fourth Amendment to occur at all, an officer must intend to stop someone. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

The district court correctly determined that there were disputes of material fact regarding whether Miller intended to block Stamm and whether Stamm's conduct posed an immediate threat to others. These disputes concern the reasonableness of Miller's conduct, making them material, and because the evidence is such that a jury could return a verdict in Mrs. Stamm's favor, this material dispute is genuine. *See Stoudemire*, 705 F.3d at 565.

Regarding his intent to block Stamm, Miller argues that he attempted to move out of Stamm's way before the collision. As the district court found, however, the video reasonably supports Mrs. Stamm's version of the facts. The video shows that Miller's police vehicle was traveling, at most, 43 miles per hour on a highway with a 70-mile-per-hour speed limit, when Miller knew Stamm's motorcycle was traveling at a speed of more than 100 miles per hour. The video also demonstrates that Miller's vehicle straddled the dividing line between the two lanes for about five seconds. Finally, the video shows that Miller got in front of Stamm while Stamm was changing lanes

and braked several times while in front of Stamm. The recording of the radio communication between Miller and Marino, the deputy who originally responded, also indicates that Miller's plan was to stay in front of Stamm.

In terms of Stamm's potential danger to others, Miller argues that Stamm's high rate of speed and reckless driving threatened officers and other motorists. The record, however, supports Mrs. Stamm's version of the facts regarding the threat Stamm posed when his motorcycle and Miller's police vehicle collided. As the district court reasoned, "Stamm was being pursued at 4:20 a.m. along a highway six and then four lanes wide, with a large median dividing him from oncoming traffic and no pedestrians or businesses in sight." *Stamm*, No. 5:14-cv-11951-JEL-MJH, at \*22. The district court further observed that "while the motorcycle passed other vehicles while Deputy Marino was pursuing him, at the time and place of the collision with Officer Miller, there are no vehicles to be seen in the immediate vicinity." *Id.* at \*23-24.

The district court correctly found that the record raised genuine issues of material fact as to whether Miller intended to block Stamm and whether Stamm was a threat to others at the time of the collision, inquiries which help determine whether Miller's conduct was reasonable under the Fourth Amendment. A reasonable juror could conclude that Miller deliberately used deadly force against Stamm when he posed no immediate threat to others, and summary judgment to Miller was therefore inappropriate.

## B.

In evaluating whether a constitutional right was clearly established, "[t]he key determination is whether a defendant moving for summary judgment on qualified immunity grounds was on notice that his alleged actions were unconstitutional." *Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009). The Supreme Court has emphasized that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). This does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Rather, it means that "in the light of pre-existing law the

unlawfulness must be apparent." *Id.* at 640, 107 S.Ct. 3034 (collecting cases); see also *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."). The "clearly established" prong must be applied "in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled on other grounds by Pearson*, 555 U.S. at 236, 129 S.Ct. 808.

\*4 We have held that "[i]t has been settled law for a generation that, under the Fourth Amendment, '[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'" *Walker*, 649 F.3d at 503 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). Though *Walker* was decided after the events giving rise to this case, its principle was not new, as we explicitly noted. In that case, which involved a collision similar to the one here, we noted that "[i]t is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force." *Id.* at 503-04. Thus, it is clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others.

The evidence, construed in the light most favorable to Mrs. Stamm, indicates a violation of a clearly established constitutional right. Under Mrs. Stamm's version of the facts, Miller intended to block Stamm's passage with his police cruiser, causing the deadly collision. As the district court observed, the risk to others at the time of Miller's use of force was minimal, as there were no other vehicles in sight, and Stamm's motorcycle posed little threat to Miller, who was inside a much-larger vehicle.

Because the facts as interpreted in the light most favorable to Mrs. Stamm indicate a violation of a clearly established constitutional right, and material facts are in dispute, the district court properly denied summary judgment to Miller.

## IV.

Although Miller's appeal fails, we decline to impose sanctions because the appeal was not entirely frivolous. *See* Fed. R. App. P. 38. Miller's appeal does not concede Mrs. Stamm's version of the facts with regard to Miller's intent or the threat Stamm posed to others when he struck Miller's car. Nonetheless, Miller did raise, albeit inartfully, a non-frivolous issue: whether, considering the facts in the light most favorable to Mrs. Stamm, Miller's conduct "violate[d] clearly established ... rights of which a reasonable person would have known." *Barker v. Goodrich*, 649 F.3d 428, 433 (2011) (quoting *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727).

V.

We affirm the district court's denial of qualified immunity and deny Mrs. Stamm's request for sanctions.

**All Citations**

--- Fed.Appx. ----, 2016 WL 4932025



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September 1, 2015

Scott Brumback  
Brumback Law Group  
1905 Rainier Place  
Union Gap, WA 98903

Re: Sluman v State of Washington

Dear Mr. Brumback:

Thank you for the opportunity to participate in the above-referenced matter. You retained Collision Analysis and Reconstruction, LLC to evaluate and render opinions relevant to the 07/21/2010 motorcycle v Washington State Patrol vehicle collision. This analysis and the preliminary opinions expressed herein are based on information currently available to Collision Analysis and Reconstruction, LLC. These opinions are subject to change based upon new and/or additional information being provided. As discovery is still ongoing, I am open to reviewing new evidence. I have attached my current C.V. as a part of this investigative report.

#### **I. INTRODUCTION**

In reviewing the provided information, I was asked to analyze the collision between Sluman and Trooper Olson's vehicle door and to address the force used to end the pursuit with Sluman. I was also asked to analyze the tactics Trooper Olson used just prior to impacting Sluman's motorcycle with Olson's patrol vehicle door. In formulating my opinions, I have taken into account the following information:

- Washington State Police Traffic Collision Report (Report# E060321, Case # 10-010717) completed by Trooper D. Hinchliff (#815) of the Washington State Patrol.
- Washington State Police Criminal Investigation Division Case File, by Detective David Snyder (#1087) (253 pages).
- Deposition transcript of Trooper Bart Olson.
- Deposition transcript of Captain Karen J. Dewitt.
- Deposition transcript of Sergeant Kiley Conaway.
- Deposition transcript of Lieutenant Timothy D. Coley.
- Deposition transcript of Captain Travis W. Matheson.
- Deposition transcript of David Temple.
- Deposition transcript of Trooper David Hinchliff.
- Deposition transcript of Trooper Eric Seim.
- Deposition transcript of Trooper Paul Blume.
- Deposition transcript of Greg Wilcoxson.
- Radio traffic from Trooper #815 for the pursuit of Sluman.
- Damage comparison photographs with speed analysis based on Trooper Olson's dash video (41 page document).
- 2010 Washington State Patrol Pursuit Policy manual (96 page document).
- Washington State Patrol Pursuit training materials (2366 page document).
- Damage comparison photographs (29 pages).
- District 6's Standard Operating Procedures Manual (145 page document).
- Photographs of Olson Dodge Charger (41 pages).
- Email communications from Washington State Patrol (60 pages).
- Washington State Patrol job descriptions (19 page document).

- Washington State Patrol MAIT correspondence (22 page document).
- Media articles about pursuit (3 pages).
- Trooper Olson's personal file (225 page document).
- Trooper Olson's RMD history (2 page document), from the Office of Professional Standards.
- Trooper Olson's training records (9 page document).
- Photographs of the collision scene on the bridge (83 pages).
- Responding Officers training records (98 page document).
- Revised MAIT Team analysis dated April 9, 2014 (7 page document).
- Office of Professional Standards Internal Incident Report for Trooper Olson's actions (16 page document).
- Washington State Patrol Time and Activity Reports (9 page document).
- Washington State Patrol use of force forms (7 page document).
- Video of the pursuit from Trooper Olson's dash camera.
- Washington State Patrol Damage report to Olson's Dodge Charger (25 page document).
- Washington State Patrol Aviation report (5 page document).
- Photographs of Sluman's Yamaha motorcycle (34 pages).
- Audio tape of pursuit and arrest of Sluman.
- Defendants' answers to Plaintiff's first set of interrogatories and request for production of documents and things.
- Defendants' motion for Summary judgement.
- Scaled diagrams of the collision scene provide as part of the investigation file.
- Declaration of Kenneth Sewell.

## II. BACKGROUND FACTS

The subject collision occurred on 07/21/2010 around 0937 hours, on S. Thorp Highway near I-90 near Ellensburg, WA. The collision involved a 2006 Yamaha YZF-R6 motorcycle operated by Thomas L. Sluman (11/10/1986), and a 2006 Dodge Charger driven by Trooper Bart H. Olson of the Washington State Patrol. Sluman was spotted traveling at high speed eastbound on I-90 by a Washington State Patrol aircraft (Smokey 6). Smokey 6 communicated with ground WSP units that Sluman was driving at a high rate of speed and WSP Trooper Hinchliff responded to the call.

Sluman exited I-90 (Exit 101), stopped behind another vehicle at the intersection with S. Thorp Highway, activated his right turn signal and drove south on S. Thorp Highway (Deposition of Trooper Hinchliff, page 8) in the direction of Ellensburg and the Washington State Patrol office near the intersection of S. Thorp Highway and I-90. Trooper Hinchliff was parked near Exit 101 initially. WSP Trooper Hinchliff testified in his deposition that Sluman was wearing a full face helmet, did not look at Trooper Hinchliff and drove so far ahead of Hinchliff that Hinchliff lost sight of Sluman. No evidence shows that Sluman was aware that a WSP aircraft or Trooper Hinchliff had observed him or were in pursuit.

Trooper Hinchliff testified in his deposition that he was "sure" that Sluman did not look back at Hinchliff when Hinchliff made a U-turn near Exit 101 and activated his overhead lights and sirens to initiate a pursuit of Sluman. Trooper Hinchliff testified that he almost immediately lost sight of Sluman because he had no "visual reference" of Sluman throughout the remainder of the roughly three minute pursuit of Sluman.

After a few minutes had elapsed, Sluman rounded the 90 degree corner of the S. Thorp Highway just prior to approaching the KOA campground. Sluman, southbound on the S. Thorp Highway, approached the relatively narrow two-lane bridge spanning the Yakima River a short distance from the Washington State Patrol office and was forcefully stopped when Sluman made contact with a

roadblock set up by Troopers Olson and Blume who had come from the opposite direction in an effort to intercept and stop Sluman.

The evidence does not show that Sluman was aware that Trooper Hinchliff was pursuing him. The evidence does not show that Sluman was attempting to eluding Trooper Hinchliff. Trooper Hinchliff stated in his deposition that he lost sight of Sluman after his initial view of Sluman at Exit 101 and did not see Sluman again until stopped by Troopers Olson and Blume (Hinchliff deposition, pages 9-11). Sluman exited Exit 101, made a right turn onto the S. Thorp Highway, and drove at high speeds without any showing that Sluman knew Trooper Hinchliff was in pursuit.

Troopers Olson and Blume, each operating marked WSP vehicles eastbound on I-90 (and parallel to Sluman's travel on the S. Thorp Highway), drove ahead at high speeds to Exit 106 and exited I-90 to head off Sluman once they were alerted to Trooper Hinchliff's radio traffic indicating he was attempting to catch up to Sluman.

At this point, Troopers Olson and Blume were absolutely involved in the pursuit of Sluman when they sped up eastbound on I-90 to head off Sluman near Exit 106. A "pursuit" of a suspect vehicle does not require that a trooper be behind and chasing the suspect vehicle.

To be involved in a "pursuit" means that a law enforcement officer be involved in the attempt to stop a suspect vehicle. This means that law enforcement can be involved in a "pursuit" by attempting to "head off" a suspect vehicle. For example, law enforcement setting up a roadblock ahead of a suspect vehicle constitutes being "engaged" in the "pursuit" of a suspect vehicle.

### **III. WASHINGTON STATE PATROL VEHICULAR PURSUIT POLICY**

The WSP Regulation Manual (2010), Chapter 4, section 4.00.010, definition of a "pursuit" shows that "following" or "chasing" a suspect vehicle is not required to be involved in a "pursuit". All that is required is "an attempt ... to stop a moving vehicle", as follows:

#### "A. Vehicular Pursuit

1. **An attempt** by a uniformed WSP officer in an officially marked patrol vehicle to stop a moving vehicle where the officer is signaling the vehicle to stop and the driver is resisting the stop by maintaining or increasing vehicle speed, making evasive maneuvers, or is otherwise ignoring the officer's attempt to stop the vehicle."

Trooper Hinchliff initiated the pursuit of Sluman. Once Trooper Hinchliff initiated the pursuit, a "pursuit" occurred. Trooper Hinchliff alerted WSP personnel to the pursuit, and in response, Troopers Olson and Blume increased speed, drove with lights and sirens activated, and drove to the area in which Sluman was traveling in order to "attempt" to intercept Sluman on the S. Thorp Highway.

Troopers Olson's and Blume's participation in the "pursuit" of Sluman violated the clear mandates of the Washington State Patrol Regulation Manual (2010), **Chapter 4, Vehicular Pursuits**, 4.00.010, Section II, Policy, that require the following:

#### "A. Pursuit Guidelines

1. a. Area patrol units shall monitor the progress of pursuits, but *shall not* engage in a pursuit unless requested by the **primary unit or directed by a supervising officer.**"

Trooper Hinchliff did not request Troopers Olson and Blume to engage in the pursuit. No evidence exists that a supervisor directed Troopers Olson and Blume to engage in the pursuit. Troopers Olson and Blume went beyond monitoring the progress of the pursuit and instead unilaterally increased their speeds, went with lights on, and moved to intercept Sluman.

There are significant safety considerations that factor into this WSP Regulation Manual policy. First, unilateral insertions of troopers without notice in "pursuits" adds variables to the event that fellow law enforcement cannot plan on and/or anticipate. In other words, more moving parts are added to a potentially dangerous and fluid situation with sudden and unplanned insertions into a pursuit. Second, the primary unit and supervisor are in charge of the pursuit once initiated. Other units coming into the pursuit without warning adds to the confusion and creates issues in terms of officer and citizen safety. The WSP Regulation policy provisions are there for a reason, and first and foremost those policy

provisions are there for safety of officers, the public and suspect(s).

Trooper Hinchliff was the "primary unit" in pursuit of Sluman. The WSP Regulation Manual (2010) provides that "primary units" are responsible for advising communications of the reason for the pursuit, direction, description of suspect, location, direction of travel, speed, etc. Since Trooper Hinchliff had lost sight of Sluman, some of this information was incomplete.

Trooper Hinchliff did not request Troopers Olson and Blume "engage" in the pursuit. Yet Trooper Olson stated in his deposition that he and Trooper Blume engaged as "backup units" in the pursuit of Sluman once they learned Trooper Hinchliff had given chase.

Trooper Olson, at page 70 of his deposition, stated that "backup units would have been myself and Trooper Blume." When asked who made the decision to engage as a backup unit, Trooper Olson stated "it was ours".

The WSP Regulation Manual, Chapter 4, establishes the parameters of what a "backup unit" may do in the context of an ongoing "pursuit", as follows:

**"D. Backup Unit's Responsibilities**

1. Other patrols in the pursuit area shall monitor the progress of the pursuit. They *shall not engage in the pursuit unless requested by the primary unit or directed by a supervising officer.* These units should be ready to replace any assigned unit in the event they cannot continue. They should be in position to respond to any collision that may result from the pursuit."

Backup Units are for backup. They are not to be involved in pursuits unless specifically instructed to do so. The parameters are clear. The options are not subject to discretion for safety reasons. The words "shall not" are instructive as to the weight of the mandate to adhere to the policy by WSP Troopers. Yet, once Troopers Olson and Blume drove at speed to head off Sluman near Exit 106, they "engaged" in the pursuit of Sluman. This is a clear violation of the WSP Regulation Manual and, by itself, a potentially dangerous and unsafe act.

There is also no evidence that Troopers Olson and Blume got supervisor approval to engage in the "pursuit" of Sluman. They did not notify Trooper Hinchliff they were entering the pursuit as

"backup units".

Troopers Olson and Blume ultimately terminated the pursuit of Sluman by setting up a roadblock<sup>1</sup> on the S. Thorp Highway bridge over the Yakima River as Sluman approached from the opposite direction. Trooper Olson stated that once he turned on the S. Thorp Highway and drove toward Sluman approaching from the opposite direction, he (Trooper Olson) crossed the centerline and moved into the oncoming (northbound) lane so:

**"Mr. Sluman would know that he is attempting to be stopped. At this point he needs to stop."**

Trooper Olson and Trooper Blume terminated the pursuit with force by setting up a roadblock. Using a roadblock constitutes lethal force. It is also undeniable evidence of Trooper Olson's and Blume's involvement in the "pursuit" of Sluman. As discussed below, the roadblock set up by Troopers Olson and Blume was done in violation of the WSP Regulation Manual and constituted a "seizure" of Sluman.

Troopers Olson's and Blume's unilateral decision to engage in the pursuit of Sluman was directly contrary to WSP Regulations and contributed materially to the serious injury outcome in this matter. In other words, had Troopers Olson and Blume *not unilaterally* engaged in the pursuit in direct violation of the WSP Regulation, Sluman would not have been stopped by Troopers Olson and Blume and would not have likely been injured. The WSP Regulation Manual exists for many reasons, one of which is to have WSP personnel act in a regulated, systematic and safe manner to avoid unnecessary injury to either WSP personnel or citizens.

#### **IV. WSP POLICY ON APPROVED METHODS OF FORCIBLE STOP IN THE CONTEXT OF VEHICULAR PURSUITS**

Just after Troopers Olson and Blume exited at Exit 106 and turned right onto the S. Thorp

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<sup>1</sup> Discussed further below.

Highway (two-lane road) to head off Sluman during the pursuit, they drove southbound on the S. Thorp Highway and drove into the center of the roadway. Troopers Olson and Blume then set up a roadblock on the bridge spanning the Yakima River.

Troopers Olson and Blume positioned their vehicles to block, in a combined and staggered fashion, parts of both the north and southbound lanes of the S. Thorp Highway. Troopers Olson and Blume were admittedly attempting to stop Sluman as he approached from the opposite direction (head-on). At this point, when Troopers Olson and Blume positioned their vehicles in a blocking fashion, they had in fact set up a "Roadblock" versus the oncoming Sluman.

Per the Washington State Patrol Policy Manual (2010), Troopers may only attempt to stop a fleeing vehicle in one of four (4) ways. The only permissible methods of forcible stop authorized by the WSP Regulation Manual (2010) in the course of a vehicular pursuit is found in Chapter 4, **Vehicular Pursuits** are as follows:

#### **4.01.010 METHODS OF FORCIBLE STOP (CALEA<sup>2</sup> 41.2.2, 41.2.3)**

##### **I. POLICY**

###### **A. Four Methods of Forcible Stop**

1. The Washington State Patrol authorizes four (4) methods of forcible stop: intentional intervention, **roadblocks**, hollow spike strip, and the Pursuit Immobilization Technique (PIT). **No other method of forcible stop is authorized or should be used.**

The WSP Regulation Manual is clear that these four methods, and only these four methods, of "forcible stop" during a vehicular pursuit are authorized, and that, according to the WSP Regulation Manual:

**"No other method of forcible stop is authorized or should be used."**

<sup>2</sup> The Commission on Accreditation for Law Enforcement Agencies (CALEA), Inc. In response, the United States Department of Justice provided a grant to the four leading law enforcement executive associations to advance law enforcement professionalism by establishing voluntary standards. The organizations were: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF). The result of this initiative was the creation in 1979 of a private, non-profit corporation: The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA<sup>®</sup>). Source: <http://www.calea.org/content/founding-associations>.

## V. WSP POLICY ON ROADBLOCKS

According to the WSP Regulation Manual (2010), a "Roadblock" is one of the four approved methods of forcible stop in the course of a Vehicular Pursuit, but it may only be used in very limited circumstances. The roadblock set up by Troopers Olson and Blume against Sluman was not authorized, violated the Manual, and constituted "lethal force", a level of force that was completely inappropriate in the context of this incident.

Per WSP Regulation Manual (2010), Chapter 4, Vehicular Pursuits, Section 4.01.010, I C.,

### **Roadblocks:**

"Roadblocks may be used to apprehend fleeing felons when necessary, provided:

- a. A description of the suspect(s) and suspect vehicle is available
- b. **Supervisory approval is obtained.**
- c. An "**escape route**" is left available.
- d. The suspect(s) is wanted for any of the following:
  - (1) Homicide
  - (2) Robbery in the first degree
  - (3) Rape
  - (4) Assault with intent to kill or felonious assault
  - (5) Prison escape"

As referenced, a roadblock is a barricade using vehicle(s) or other obstructions (excluding the Hollow Spike Strip) across a roadway, set up to stop or prevent the escape of a fleeing vehicle. Roadblocks may be used to stop/apprehend a fleeing felon when necessary, provided a description of the suspect and suspect vehicle is available (the description must be adequate enough for a proper identification), there is supervisory approval, an "**escape route**" is left available, and the suspect is wanted for any of the following: Homicide, Robbery 1<sup>st</sup>, Rape, Assault with intent to kill or felonious assault, prison escape (involving a felon).

When Troopers Olson and Blume stopped their vehicles in a blocking fashion to get Sluman to stop, they had set up a roadblock. They were blocking the road with their patrol vehicles. And they did

so to get Sluman to stop.

Troopers Olson and Blume acted in complete disregard for the policy provisions of the WSP Regulation Manual (2010). Sluman was not wanted for any of the crimes listed. No supervisory approval was given or obtained by Troopers Olson and Blume.

WSP Major Accident Investigation Team (MAIT) investigator Greg Wilcoxson stated in his deposition that the use of a roadblock constituted the use of lethal force if used against a motorcycle under similar circumstances as those involved with Sluman.<sup>3</sup> I agree. The use of a roadblock constituted a seizure of Mr. Sluman and was also the use of lethal force against Mr. Sluman.

As Sluman was approaching the bridge portion of the S. Thorp Highway, Troopers Olson and Blume parked and blocked substantial portions of both lanes. Troopers Olson and Blume both state in their depositions and in their post-incident reports that they left an "escape route" for Sluman. This shows that Troopers Olson and Blume intended to set up road block in an attempt to stop Sluman. Nowhere else in the WSP Regulation Manual (2010) does the term "escape route" appear but in the context of a roadblock.

This is particularly compelling evidence as to the intentions of Troopers Olson and Blume to establish a roadblock against Sluman. Trooper Olson also chose to stop on a bridge, which provided a barrier on each side of the roadway, in effect limiting and channeling the "escape route" available for Sluman as he approached the troopers' roadblock. Troopers Olson and Blume state in their reports and respective depositions that they did not set up a roadblock against Sluman.

The WSP Office of Professional Standards (OPS) investigated Trooper Olson related to this incident involving Sluman. The OPS issued an Internal Investigation Report (IIR) that looked into Trooper Olson's conduct during this incident, to include investigating whether Trooper Olson had violated the WSP Regulation Manual (2010) by setting up a roadblock. The commander of the district in which Trooper Olson served was CPT Karen DeWitt. She signed off on the investigation that

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<sup>3</sup> Deposition of Greg Wilcoxson, page 75, lines 19 and 20.

Trooper Olson did not set up a roadblock against Sluman.

CPT DeWitt subsequently changed her opinion later in her deposition and agreed that Troopers Olson and Blume did set up a roadblock. CPT DeWitt was asked in her deposition about whether or not Troopers Olson and Blume had set up a roadblock, as follows:

"Q: After reading that policy manual section on roadblocks, in your opinion did Troopers Olson and Blume set up a roadblock?"

A: Well, yes. Yes, it did. So, yes, **definitely**, I misspoke."

Both Trooper Olson and Blume state in their individual post-incident reports and statements each made in the course of the subsequent WSP Office of Professional Standards (OPS) Internal Incident Report (IIR) that Trooper Olson left an "escape route" for Sluman when they stopped in the middle of the bridge deck over the Yakima River on the S. Thorp Highway.

The term "escape route" has specialized meaning and it is used only in the context of "roadblocks" in the WSP Regulation Manual. Statements by Troopers Olson and Blume that they left an "escape route" show an extremely strong indication that they knew a roadblock was used on Sluman.

CPT Karen DeWitt, in her deposition agreed that a properly executed roadblock includes an "escape route". (Deposition of CPT DeWitt, page 78).

CPT DeWitt testified that even new troopers coming out of the WSP academy should know what a roadblock and an "escape route" is. This position is further supported by the testimony of Lt. Timothy Coley, a WSP instructor at the WSP Academy in Shelton, WA. Lt. Coley testified that new WSP troopers graduating from the WSP academy should know what a roadblock is and that it includes an "escape route" (Deposition of Lt. Coley, page 61).

Lt. Coley testified that troopers should know that a roadblock is not a complete barricade of the roadway with no way out. However, Trooper Olson, in his "Exculpatory Statement" in response to questions during the WSP Office of Professional Standards internal investigation, stated the following when asked "What is a roadblock?":

**"8) Roadway is barricaded across and you can't get through"**

Trooper Blume, in the course of the same internal investigation, and when asked "What do you consider a roadblock?", answered the following:

**"7) A blockade of the roadway with no way out. Police cars completely across the roadway."**

Troopers Olson and Blume, despite knowing what a roadblock is since they graduated from the WSP academy many years prior and after years of experience in the field and training, gave entirely false and erroneous statements about their act of setting up a roadblock against Mr. Sluman. There is simply no way they did not know what a roadblock and an "escape route" were. Their statements appear to be after-the-fact efforts to obscure the true nature of what happened; that Troopers Olson and Blume did set up a roadblock against Mr. Sluman in clear violation of the WSP Regulation Manual (2010) and Washington and federal law.

In CPT Karen DeWitt's deposition, the following questions and answers occurred in the course of discussing Troopers Olson's and Blume's answers during the OPS internal investigation, showing Trooper Olson clearly violated the WSP Regulation Manual when he ended the pursuit of Sluman using a roadblock:

Q: Would you expect that a trooper with the experience that trooper Olson had at the time - - that he would have - - he should have known what a roadblock was?

A: Yes, and he probably does.

Q: What's the - - what's the explanation that you would have for the - - for his answers there?

A: You'd have to ask him.

Q: Okay. It doesn't make sense though, does it?

A: No.

\* \* \*

Q: So the idea that they (Troopers Olson and Blume) said "escape route" means that they understood that there was a roadblock?

A: Yeah."

As stated earlier, Trooper Olson intentionally placed his vehicle blocking a portion of each lane, with a concrete wall on each side of his vehicle. Trooper Blume came up from behind and would have been expected to drive in his proper lane of travel until he placed his vehicle approximately 20 feet behind Trooper Olson (position not documented). Opening Trooper Olson's door fully would further restrict Sluman's travel path/escape route. Trooper Olson's action, in conjunction with Trooper Blume's actions, along with the location where Trooper Olson chose to stop, created a road block, with the required "escape route".

Trooper Olson took a statement from a civilian at the scene named Kenneth Sewell. In Trooper Olson's post-accident report, Mr. Sewell stated:

"I saw the officer in the explorer veer into the opposite lane diagonally as if creating a **road block**. I then heard a crash and saw the man on the motorcycle falling over the rail of the overpass." <sup>4</sup>

#### **VI. TROOPER OLSON'S ATTEMPT TO "HORSECOLLAR" SLUMAN OFF A MOTORCYCLE TRAVELING 28 OR MORE M.P.H.**

Trooper Olson testified in his deposition, and stated in his accident report, that he (Trooper Olson) intended to exit his patrol car to go "hands on" to "horsecollar" Sluman to forcefully remove Sluman from the moving motorcycle and thus end the pursuit. Trooper Olson testified that he had learned this "hands on" technique from fellow WSP Trooper Eric Seim a significant time prior to this incident. When questioned in his deposition, Trooper Olson could not point to any authority in the WSP Regulation Manual or law that would permit or authorize this use of force.

Trooper Olson had no legal authority to seize Sluman by attempting to go "hands on" and/or "horsecollar" Sluman while on a moving motorcycle in the course of a "vehicular pursuit". It was

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<sup>4</sup> Mr. Sewell also reiterates this position in his Declaration, signed August 17, 2015. Mr. Sewell was less than 100 feet away from the crash scene and saw the WSP vehicles set up in a "blocking fashion" on the S. Thorp Highway. Mr. Sewell states that it appeared to him "that the officers involved had set up a roadblock to stop the motorcyclist". Trooper Blume was driving a Ford Expedition, similar in appearance to a Ford Explorer.

unsafe, unreasonable and utterly out of compliance with the WSP Regulation Manual and the standards established by the CALEA as agreed to, and adopted by, the Washington State Patrol.

Trooper Olson's attempt to "horsecollar" or go "hands on" to remove Sluman from the moving motorcycle was an attempt to "seize" Sluman. Given the speeds that Sluman was driving the motorcycle at the time that Trooper Olson attempted to seize Sluman (28 mph to 36 mph), it is my opinion that a reasonable law enforcement officer and/or WSP Trooper would have, or should have, known that this attempted use of force was inherently dangerous, unreasonable and contrary to existing laws and regulations.

In addition, a reasonable officer or trooper would clearly and absolutely know that if he were to knock a motorcyclist off the bike at 28 to 36 miles per hour, there would be a high likelihood of causing serious injury and or death to the rider. In this context, such use of force would equal lethal force. To act in the manner in which Trooper Olson did with respect to opening his patrol car door as Sluman approached at roughly 30 mph created an unreasonable and irresponsible hazard of serious injury or death to Sluman and Trooper Olson.

The attempt to "horsecollar" or go "hands on" against Sluman was a use of force by Trooper Olson that constituted "lethal force" given the speeds involved (over 28 mph). In addition, the WSP Regulation Manual is clear that only four (4) methods of forcible stop are authorized, and a "horsecollar" and/or "hands on" maneuver is not one of the available options. In fact, since "no other methods of forcible stop are authorized or should be used" in the context of a vehicular pursuit according to the WSP Regulation Manual, Trooper Olson was on notice that his chosen use of force on Sluman was unauthorized, contrary to law and regulations, and was extremely hazardous conduct.

WSP CPT Karen Dewitt, Trooper Olson's Commander, testified in her deposition and was asked to review the WSP Regulation Manual (2010) regarding the four methods of forcible stop authorized by the WSP. Captain DeWitt was then asked "are there any other methods of forcible stop that are authorized or should be used?" other than those listed and she stated "No." (Deposition of

Captain Karen DeWitt, page 77).

Captain DeWitt was asked in her deposition if there was "... any lawful authority for any Washington State Patrol trooper to go hands-on to tackle, horsecollar, or physically remove a driver of a motorcycle operated on the public roads in Washington State?", to which she answered, "No". (Deposition of Captain DeWitt, page 45).

## **VII. TROOPER OLSON USED "INTENTIONAL INTERVENTION" TO STOP SLUMAN**

"Intentional Intervention" occurs when a trooper uses a portion of his patrol car to effect a stop of a suspect being pursued. "Intentional Intervention" is defined in the WSP Regulation Manual as follows:

### **4.01.010 METHODS OF FORCIBLE STOP (CALEA 41.2.2, 41.2.3)**

#### **I. POLICY**

##### **A. Four Methods of Forcible Stop**

1. The Washington State Patrol authorizes four (4) methods of forcible stop: **intentional intervention**, roadblocks, hollow spike strip, and the Pursuit Immobilization Technique (PIT). No other method of forcible stop is authorized or should be used.

##### **B. Intentional Intervention**

1. Intentional intervention (ramming) of a vehicle is the deliberate act of hitting another vehicle with a patrol vehicle(s) for the purpose of functionally damaging or forcing the other vehicle off the road. **Intentional intervention is considered use of lethal force.**

Sluman approached two WSP vehicles piloted by Troopers Olson and Blume parked in the middle of the two-lane roadway of the S. Thorp Highway on a bridge. As Sluman was traveling past Trooper Olson's vehicle, Trooper Olson opened his door and hit the front of Sluman's motorcycle. This impact caused Sluman to veer to his right and impact the bridge guardrail. Sluman was then ejected from his motorcycle and fell approximately 25 feet below into a KOA Campground. Sluman suffered serious injuries as a result.

In the video obtained from Trooper Olson's dash camera, Trooper Olson turned onto South Thorp Highway. As Trooper Olson approached the bridge, he drove his patrol vehicle partially into the

oncoming lane of travel and straddles the centerline at approximately 9:37:46 while coming to a stop<sup>5</sup>. Trooper Olson continued forward to approximately the center of the bridge deck and fully stopped his patrol car at approximately 9:37:53<sup>6</sup> as Sluman approached from the opposite direction going about 30 mph.

I analyzed Trooper Olson's COBAN video footage frame by frame multiple times. Trooper Olson stopped his vehicle at approximately 9:37:53.5 (or about ½ second between 9:37:53 and 9:37:54) according to the time counter on the video. Within ¼ of one second or less, Sluman is out of view of the camera and would be, according to my calculations, adjacent to Trooper Olson's vehicle door. These calculations are supported by the testimony of WSP Major Accident Investigation Team investigator Greg Wilcoxson according to his recent deposition testimony<sup>7</sup>. And it is at this point that Trooper Olson opened his door and the motorcycle upon which Sluman was riding was struck by the door.

Even a conservative estimate would be 1 full second for Olson to come to a stop, and then the impact occurs. With this amount of time, Olson cannot place his vehicle into park and exit his vehicle in an attempt to go hands on with a motorcycle which is traveling approximately 31 to 36 miles per hour or 45-52 feet per second. These speeds are based on the speed analysis done by the Washington State Patrol MAIT team, which appear to be accurate.

Based on my analysis, it would take Trooper Olson between 3 to 5 seconds to place his vehicle into park and exit the vehicle where he would be able to go hands on with Sluman. This takes into account placing the vehicle into park, unbuckling the seatbelt, opening the door and exiting fully to be able to grab Sluman. The average time was about 4.5 seconds. If the seatbelt was already off, and Trooper Olson had his left hand on the door handle, with his right hand on the shifter, he would be able to exit the vehicle and possible attempt to grab Sluman as he is going by in about 3.0 seconds.

<sup>5</sup> Analysis of Trooper Olson's onboard, dash-mounted COBAN video camera system recording.

<sup>6</sup> Analysis of Trooper Olson's onboard, dash-mounted COBAN video camera system recording

<sup>7</sup> Deposition of Greg Wilcoxson, pages 86 and 87.

My analysis of the COBAN video and surrounding evidence shows that Trooper Olson did not have sufficient time to exit his vehicle before Sluman would be past Trooper Olson's patrol vehicle. Trooper Olson had approximately .75 seconds (i.e., 3/4 of 1 second) or less from the time he stopped to the time Sluman was at his door. This is not even enough time for Trooper Olson place his vehicle in park. Yet the evidence is clear that when Sluman was at Trooper Olson's door, the door was in the process of being opened.

This is a clear indication that Trooper Olson opened his door into the travel path of Sluman in an attempt to stop the pursuit, not to go hands on with Sluman. This action by Trooper Olson is a clear and obvious violation of the Washington State Patrol policy manual and is an act that any properly trained WSP Trooper would know to be illegal and excessive and/or lethal force. Looking at it from a reasonable standard, a reasonable officer would be able to determine that they could not exit their vehicle with the motorcycle traveling at them at approximately 30 miles per hour and only about 1 second away.

As previously described above, Trooper Olson was not authorized to attempt to stop Sluman by going "hands on" and attempting to "horsecollar" Sluman. This use of force was unlawful, unauthorized and clearly excessive, and as such, this attempted use of force that Trooper Olson claimed was the basis for opening the door is directly linked to him opening his patrol car door and thus striking Sluman. In other words, but for Trooper Olson attempting to do the illegal and unauthorized act of going "hands on", Trooper Olson would not have opened his door and hit Sluman, sending Sluman over the bridge to serious injury.

Worse, Trooper Olson's act of opening his patrol car door into Sluman was an act of "Intentional intervention", that is, the deliberate act of hitting another vehicle with a patrol vehicle(s) for the purpose of functionally damaging for forcing the other vehicle off the road. Trooper Olson testified in his deposition that "Intentional Intervention" is a technique used that "would be using some form, with a vehicle, with some other means to stop a vehicle" (Olson deposition at page 113). Trooper

Olson also agreed in his deposition that "Intentional Intervention" is "considered **lethal force**" as defined in the WSP Regulation Manual (Olson deposition, page 113).

Per the WSP Regulation Manual (2010), "Intentional intervention ... of a vehicle is the deliberate act of hitting another vehicle with a patrol vehicle(s) for the purpose of functionally damaging or forcing the other vehicle off the road. **Intentional intervention is considered use of lethal force**".

Trooper Olson used intentional intervention when he opened his vehicle door into Sluman (door checking Sluman), as Sluman was attempting to drive past Trooper Olson. The use of intentional intervention is considered the use of **lethal force** according to the WSP Regulation Manual (2010). Trooper Olson did not have the authority by policy and or by Washington or federal law to use **lethal force** to apprehend a vehicle that is speeding and attempting to elude the police (only).

Trooper Olson did not know at the time he attempted to stop Sluman that Sluman had warrants for his arrest or that the motorcycle Sluman was riding was reported stolen. This information was only obtained after Trooper Olson used **lethal force** in an attempt to stop a pursuit.

As Trooper Olson drove onto the bridge, which had about a 23 foot drop on both sides, he traveled about 8 seconds before coming to a stop. During this time, Trooper Olson positioned his vehicle in the center of the roadway, blocking a portion of each direction of travel, as Trooper Blume was behind Trooper Olson, in a fully marked SUV, and to Olson's right.

Had Trooper Olson been able to exit his vehicle, he stated that he was going to attempt to "go hands on" and "horsecollar" Sluman take Sluman off his motorcycle. This amount of force is again clearly unreasonable, unauthorized, contrary to state and federal law, and is definitely **excessive**.

With Sluman traveling between 30 to 36 miles per hour as he is passing Trooper Olson, the likelihood of Sluman and Trooper Olson being seriously injured is high. As Trooper Olson tries to take Sluman off the motorcycle from Sluman's left side, Trooper Olson would likely push Sluman toward the right, which is directly toward a 23 foot straight drop off the bridge.

Had Trooper Olson been able to get his arms around Sluman, there is a great chance Sluman could have been seriously injured or even fatally injured when he hits the pavement going 28 to 36 miles per hour. This type of force to remove a motorcycle rider going in excess of 28 miles per hour is clearly **excessive**, not to mention the harm that could have occurred to Trooper Olson in an attempt to grab a body in motion (Sluman) that weights approximately 170 pounds and is traveling between 45 to 52 feet per second.

It is my opinion that the force Trooper Olson used to stop Sluman was clearly unreasonable and **excessive**. I believe, based upon my training and experience as a uniformed and commissioned law enforcement officer for the State of Washington for **over 24 years**, that Trooper Olson used **lethal force** to stop Sluman during this pursuit. The force that Trooper Olson used was of such a nature hat it was entirely foreseeable and likely to cause serious injury or death to Mr. Sluman. Certainly, nothing under Washington law, federal law or any WSP Regulation governing Vehicular Pursuits and the Use of Force in any way authorized or permitted Trooper Olson to stop Mr. Sluman in the manner in which he did.

For the reasons stated above, it is my opinion that Trooper Olson, and to some degree Trooper Blume, acted contrary to federal and state law and in direct violation of the WSP Regulation Manual (2010).

Should you require further analysis of this collision, please let me know.

Sincerely,



Steve Harbinson  
Collision Analysis and Reconstruction, LLC

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#### **EXPERIENCE**

**Basic Collision Investigations** since 1991  
Pullman Police Department 1991 - 1995  
Edmonds Police Department 1995 - present

**Technical Collision Investigator** since 1998  
Major Accident Response Team - Edmonds Police Department

**Accident Reconstructionist** since 2000  
Lead or co-lead investigator- Edmonds Accident Response Team

**Collisions Investigated** since 1991 - approximately 2500

**Civil Cases Investigated** since 2003 – approximately 400

**Serious Injury and Fatality Collisions Investigated** - greater than 100  
Lead investigator on at least 45 major collisions

**Reconstruction Expert** - recognized by Superior Court Judge 2003, testified in excess of 70 times on criminal and civil cases as an expert

#### **ADVANCED TRAINING**

**Advanced Accident Investigation**  
1996 - 80 hours

**Technical Accident Investigation**  
1998 - 120 hours

**Motorcycle Accident Reconstruction**  
1999 - 40 hours

**Collision Investigation Reconstruction**  
2000 - 132 hours

**Pedestrian / Bicycle Crash Investigation**  
2002 - 40 hours

**Damage and Energy Applications for Collision Reconstruction**  
(Crush Analysis) - 2002 - 40 hours

**Total Station Collision and Crime Scene Mapping**  
2006 - 40 hours

**Advanced Motorcycle Accident Reconstruction**  
2008 - 40 hours

**Commercial Vehicle Inspection Course**  
2008 - 120 hours

**Pedestrian Reconstruction**  
2009 - 40 hours

**Crash Data Retrieval (CDR) System Analyst/Operator's Course**  
2011 - 40 hours

**Advanced Collision Reconstruction with CDR Applications**  
2012 - 40 hours

**Collision Reconstruction Update**  
2015 – 40 hours

Revised 02/13/2015

Steve Harbinson

**CONTINUED SPECIALIZED TRAINING**

**Basic Accident Investigations - 1994**  
**Seatbelt and Child Restraint Safety Course - 1998**  
**Train Collision Investigation - 1999**  
**Collision Occupant Kinematics - 2000**  
**Newtonian Law - 2000**  
**Commercial Vehicle Training in Reconstruction - 2000**  
**MapScenes Pro Diagramming Software - 2004**  
**Excel for the Accident Reconstructionist - 2004**  
**Advanced Forensic Mapping and 3-D Animation Programming - 2005**  
**Crash Data Retrieval (CDR) System Operator - 2005**  
**Police Photography Basic Digital - 2006**  
**Crash Data Retrieval (CDR) Technician level 1 - 2011**  
**Crash Data Retrieval (CDR) Technician level 2 - 2011**  
**Aras 360 HD Advanced 3D Computer Diagramming and Animation – 2012**  
**Crash Data Retrieval (CDR) System Operators / Analysis and Application Update Course - 2014**

**ADDITIONAL EXPERIENCE AND TRAINING**

**Police Bicycle Operator Course -1991**  
**Seatbelt Safety Instructor - 1996**  
**DWI Detection and Standardized Field Sobriety Testing Instructor - 1998**  
**Motorcycle Operator Course - 1997**  
**Advanced Motorcycle Course - annually - 1997 - 2000**  
Course Instructor since 2001  
**Motorcycle Operator Instructor - 2001- present**

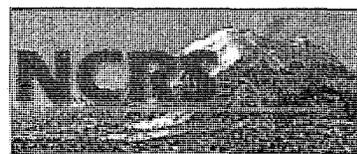
**PROFESSIONAL ASSOCIATIONS**

**Edmonds Police Officers Association (EPOA) - 1995 - present**  
EPOA President - 1996 - 2001  
EPOA President - 2005 - present  
Shop Steward - 1996 - present  
Negotiation Committee - 1996 - present  
**North American Motor Officers Association - 1997 - present**  
Conference Instructor - 2001 - present  
**Washington Association of Technical Accident Investigators - 2001 - present**  
Executive Board Member - 2003 - 2010

**EDUCATION AND EMPLOYMENT**

**Bachelor of Arts Degree - Social Science - 1991**  
Washington State University, Pullman, Washington  
**Pullman Police Department, Pullman, Washington 1991 -1995**  
**Edmonds Police Department, Edmonds, Washington 1995 – present**  
Current Position – Traffic Detective

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SEPTEMBER 2, 2015

#### SUMMARY

On July 21, 2010 at approximately 0935 hours a motor vehicle collision occurred on the South Thorp Hwy on the bridge over the Yakima River just southwest of Ellensburg, Washington. A northbound Yamaha motorcycle collided with the opening driver's door of an unmarked patrol car while in was stopped straddling the centerline facing south with all emergency lights activated. The impact occurred in the northbound lane. The motorcycle and rider subsequently veered into bridge curbing and rail on the northbound side. The rider separated from the motorcycle after approximately 65 feet of drag and rub against the side of the bridge and dropped over the rail, falling 20 - 25 feet to a dirt road below. The motorcycle remained on the bridge deck.

The following is an analysis of the reports presented by the plaintive and supplemented where necessary with additional data from research, scene and vehicle audits, and interviews. Specific questions germane to collision reconstruction are stated by counsel for the motor cycle rider, Thomas Sluman, and addressed in turn below:

1. When did Olson's patrol car come to a full stop on the bridge? (Temple says 9:37:53.5). *Forward motion was arrested at 9:37:53 while suspension rebound concluded a half second later.*
2. Once stopped, how long to place patrol vehicle in park, disengage seatbelt and open door? *Although some of these actions could be underway prior to coming to a complete stop, if none were initiated until coming to a complete stop I estimate 2 - 4 seconds depending on the officer.*
3. Assuming Olson had 3/4 of 1 second (or .75 of 1 second) from time he stopped his patrol car to the time Sluman was abreast of his car door, could Olson have had time to put the patrol car in park, unfasten the seatbelt and open the door? *Not unless the seatbelt, the door latch, and any other duties like signing out on stop or advising he would be out on foot were initiated prior to coming to a complete stop. Just putting a car in park and setting the brake would normally take at least one second.*
4. At what point in the Olson COBAN video did it appear reasonable from Olson's perspective to attempt to go "hands on" and "horsecollar" Sluman operating motorcycle going 30 mph? *At no time was it safe as this scenario unfolded. However an officer anticipates the actions of a motorist and it appeared they initially were slowing in response to the activated emergency equipment.*

*The requested digital measurement files from WSP are pending, but based on the best evidence available at the time of this writing the following calculations were made.*

#### SPEED DETERMINATION

The sight line was measured at 950 feet from Trooper Olson's patrol car at 9:37:46 across the bridge to the last curve warning chevron in the curve south of the bridge, with the motorcycle passing in front of the sign and appearing from behind Trooper Houle's SUV. That places the motorcycle at 830 feet from Trooper Olson's Charger at 9:37:46. From then until 9:37:53 the two vehicles closed the gap, the patrol car covering 205 feet to a complete stop, while the motorcycle covered 560 feet to a low of about 28 mph. I have included a complete breakdown for each second elapsed during this seven second approach time. I have also generated a 3D diagram and animation of the approach, door strike, and slide to stop against the bridge rail.

The results that I extrapolated from Sgt. Cooper's line segment measurements of 10.5 and 29 feet for dash and gap centerline and the COBAN video yield similar results to those of Sgt. Cooper but our markings are slightly different on how we interpret the location of the motorcycle relative to the fixed objects in the video. Sgt. Cooper uses "Power DVD" program to cycle through the video frames and synchronize the motorcycle progression based on frame numbers. I evaluated the video by establishing a site line at 9:37:46 when the motorcycle first cleared the front of Trooper Houle's unmarked SUV and where he subsequently performs a "bootleg" turn before pursuing. This established the only possible location on the highway where the turn could have been made prior to entering shadow and at a point where the northbound shoulder necessitated Houle perform a "bootleg" instead of the quicker "U-turn" maneuver. This fit the timeline and relative locations of the motorcycle sequence. The intermittent shadows cast across the roadway by the foliage on the east side of the highway on the video were replicated both through satellite imagery in ARAS and correlation on video. As the motorcycle proceeds north the rider goes from light to dark three times as it passes through three broad shadows. These intervals are clearly visible on the COBAN video time log and were correlated to the scale forensic map which depicts the shadows captured on satellite image. Though my time and distance analysis starts at 9:37:46 and Sgt. Cooper's actual speed determination starts at 9:37:52, our overall results show similar velocities with the exception of the point we determine the motorcycle begins to accelerate. He shows it continuing to slow until 9:37:53.5 (between RP C and D on his chart) where I see acceleration start just before the foot shifting gears at 9:37:53 (RP C). The approach speeds of Olson and Sluman were nowhere near close. The distances they covered in the same amount of time was nearly 3:1. When the segments are all combined the initial speed of the Yamaha motorcycle at 9:37:46 was 123 fps or 84 mph while the Dodge Charger was 58 fps or 40 mph.

#### TIME AND DISTANCE ANALYSIS

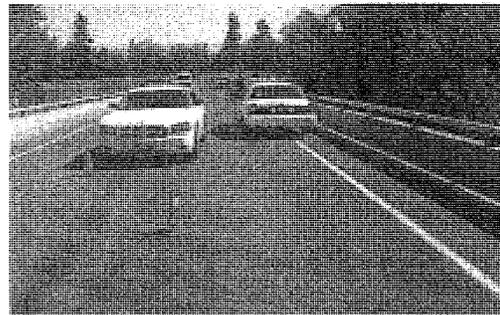
Insert ARAS T & D Chart here.

There are three central questions regarding the collision between the motorcycle and the driver's door of the patrol car that I have been asked to resolve.

#### DID THE MOTORCYCLE RUN INTO AN ALREADY OPEN DRIVER'S DOOR?

The short answer is no. There are several factors to consider in coming to this conclusion:

1. When the motorcycle leaned back to the right and accelerated on a new course it was no longer yielding, but neither was it aimed at an open door. That would be unnecessary and illogical. This was an accomplished rider.
2. The rider had already demonstrated his handling skills and had altered the direction of his motorcycle from a course directed at the front of the patrol car to a course around the side of it in the northbound lane. If the driver's door had been open he could have easily utilized the remaining 10 to 12 feet between the bridge rail and the patrol car door. The measured distance between the driver's side of the car and the bridge curb was 14.5 feet. This implies that there was no door obstructing the path when the motorcycle accelerated onto this new course.



14.5 ft. wide lane to the right of unmarked patrol car

3. By examining the marks on the driver's door it can be shown that the door was moving laterally simultaneous to the passing of the motorcycle.
  - a. There are crisscrossing scuffs and scrapes within the contact patch of the door. The uppermost scuff is parallel with the ground and corresponds to the fractured fairing on the left side of the motorcycle headlamp as shown in comparative photo. The deep sharp gouge penetrating to the metal corresponds to the hard and narrow metal cap on the hand grip that trails immediately behind the contact point on the fairing. Several faint upward angling scuffs on the door correspond to the side fairing rivets on the motorcycle indicating the start of the motorcycle tip to the right.
  - b. The crossing directions of contact damage demonstrate the motorcycle was tipping to the right as it was being pushed laterally by the door.
  - c. The significant and constant lateral force being applied is manifest in the fold in the door sheet metal on its trailing edge. The edge of the door is folded back over the structural hard point behind and yet the contact continues onto this surface. Had the door simply been open at initial contact the door would have been dented and gouge as it glanced away from contact and bounced back. Because the reverse slope of the crease exhibits continuous contact, it is apparent that outward force was still being applied as the motorcycle passed by.



Driver's door damage multi-directional

#### HOW FAR WAS THE DRIVERS DOOR OPEN AT THE TIME OF THE STRIKE?

There was only eight inches of contact on the trailing edge of the door so in order for that limited contact to occur the door angle would have to be at a steep obtuse angle.

1. Had the door been nearly closed, 6 or 8 inches as stated, this would have resulted in a very shallow obtuse angle and the contact damage would not match. The contact would have extended further along the surface of the door.
2. In order for the motorcycle to have made contact with the door when it was only open 6 to 8 inches the path of the motorcycle would have to have been unusually close to the patrol car fender when there was a 14.5 foot corridor to pass by. Again, this is illogical.



*Contact patch on correct MC path*

#### DID THE DRIVERS DOOR OPEN WITH ENOUGH FORCE TO ALTER THE MOTORCYCLE COURSE?

Yes. At 9:37:55 there is a distinct lateral rocking of the car on the COBAN video that is consistent with the impact of the motorcycle with the door. The path of the motorcycle was radically altered at the point of contact with the door. The course change based on the scale diagram of the scene drawn by Sgt. Cooper was approximately 35°. This takes significant force as the gyroscopic force and inertia of a two wheel articulated vehicle tends to want to continue in the same direction it was going prior to contact. There were no tire marks, scrapes, or gouges on the pavement between contact with the door and the curb consistent with the rider laying down the motorcycle to avoid colliding with a door. In other words, the rider did not direct his motorcycle onto a collision course with the bridge rail, his motor cycle was forced onto that course by a lateral impulse from the driver's door.

I declare under penalty of perjury under the laws of the state of Washington that the forgoing statement is true and correct to the best of my ability. (RCW 9A.72.095)

*ME Boardman* 9.2.15

Marc E Boardman

ACCREDITED COLLISION RECONSTRUCTIONIST - ACTAR # 2056