

NO. 344673-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THOMAS L. SLUMAN,

Appellant,

v.

STATE OF WASHINGTON, et. al.,

Respondent.

AMENDED RESPONDENTS' BRIEF

ROBERT W. FERGUSON
Attorney General

Patricia D. Todd
Assistant Attorney General
WSBA 38074
7141 Cleanwater Drive SW
Olympia, WA 98504-0126
360-586-6300
OID #91023

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES.....3

III. COUNTERSTATEMENT OF THE CASE.....4

 A. Facts Relevant to Mr. Sluman’s Federal Civil Rights
 Claims and Sergeant Olson’s Qualified Immunity
 Defense4

 B. Facts Relevant to Mr. Sluman’s State Law Claims and the
 Respondents’ Felony Bar Affirmative Defense.....9

 C. Procedural History of This Case.....11

IV. STANDARD OF REVIEW.....13

V. ARGUMENT14

 A. Mr. Sluman’s Fourth Amendment Excessive Force Claim
 Against Sergeant Olson Fails Because Sergeant Olson is
 Entitled to Qualified Immunity.....15

 1. Sergeant Olson Did Not Violate Sluman’s Fourth
 Amendment Right to Be Free From Excessive Force.....18

 2. Sergeant Olson Is Entitled to Qualified Immunity
 Because in July 2010 Existing Precedent Did Not
 Clearly Establish That Sergeant Olson’s Actions
 Violated The Fourth Amendment’s Prohibition on
 Excessive Force.....27

 B. Sluman’s State Law Claims Are Barred, By the Felony
 Bar Rule RCW 4.24.240, Because, His Injury Was
 Proximately Caused By His Felonious Attempt To Elude
 A Police Vehicle36

C. Sluman’s Deposition Testimony Requires Dismissal of
His Federal and State Claims Against Sergeant Olson
Because He Has Named the Wrong Trooper41

VI. CONCLUSION43

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Creighton</i> , 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).....	passim
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).....	passim
<i>Baker v. McCollan</i> , 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).....	16
<i>Baughn v. Honda Motor Co., Ltd.</i> , 107 Wn.2d 127, 727 P.2d 655 (1986).....	37
<i>Bond v. United States</i> , 529 U.S. 334, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000).....	20
<i>Brosseau v. Haugen</i> , 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).....	21, 26
<i>Brower v. Cty. of Inyo</i> , 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989).....	33
<i>Carey v. Phiphus</i> , 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).....	16
<i>Carroll v. Carman</i> , 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (summary reversal).....	29
<i>City of Indianapolis v. Edmond</i> , 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).....	19
<i>City and Cnty of San Francisco v. Sheehan</i> 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015).....	29
<i>Devenpeck v. Alford</i> , 543 U.S. 146, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004).....	20

<i>Elcon Const., Inc. v. Eastern Wash. Univ.</i> , 174 Wn.2d 157, 273 P.3d 965 (2012).....	13
<i>Estate of Bordon ex rel. Anderson v. State, Dep't. of Corr.</i> , 122 Wn. App. 227, 95 P.3d 764 (2004).....	37
<i>Gomez v. Toledo</i> , 446 U.S. 635, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980).....	17
<i>Graham v. Connor</i> , 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).....	20, 26
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).....	17
<i>Hawkins v. City of Farmington</i> , 189 F.3d 695 (8th Cir. 1999)	34
<i>Hope v. Pelzer</i> , 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).....	28
<i>State v. Hudson</i> , 85 Wn. App. 401, 403, 932 P.2d 714 (1997).....	36
<i>In re Cross</i> , 178 Wn.2d 519, 309 P.3d 1186 (2013).....	39
<i>Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co.</i> , 20 Wn. App. 503, 581 P.2d 167 (1978).....	37
<i>Malley v. Briggs</i> , 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).....	17
<i>Messerschmidt v. Millender</i> , 132 S. Ct. 1235 (2012).....	29
<i>Moran v. State of Washington</i> , 147 F.3d 839 (9th Cir. 1998)	18
<i>Mullenix v. Luna</i> , 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015).....	passim

<i>Pearson v. Callahan</i> , 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).....	16, 18
<i>Plumhoff v. Rickard</i> , 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014).....	24, 29
<i>Reichle v. Howards</i> , 132 S. Ct. 2088 (2012).....	29
<i>Ryburn v. Huff</i> , 132 S. Ct. 987 (2012).....	29
<i>Saucier v. Katz</i> , 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).....	18
<i>Scott v. Harris</i> , 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).....	13
<i>Scott v. United States</i> , 436 U.S. 128, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978).....	20
<i>Stamm v. Miller</i> , 657 Fed. Appx. 492 (6th Cir. 2016).....	34
<i>Stanton v. Sims</i> , 134 S. Ct. 3 (2013).....	29
<i>State v. Tandecki</i> , 153 Wn.2d 842, 109 P.3d 398 (2005).....	36
<i>State v. Treat</i> , 109 Wn. App. 419, 35 P.3d 1192 (2001).....	36
<i>State v. Trowbridge</i> , 49 Wn. App. 360, 742 P.2d 1254 (1987).....	36
<i>Taylor v. Barkes</i> , 135 S. Ct. 2042 (2015).....	29

<i>United States v. Lanier</i> , 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).....	28
<i>Walker v. Davis</i> , 649 F.3d 502 (6th Cir. 2011)	34
<i>Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.</i> , 155 Wn. App. 199, 229 P.3d 871.....	13
<i>Wesby v. D.C.</i> , 816 F.3d 96 (D.C. Cir. 2016).....	29
<i>White v. Pauly</i> , 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017).....	passim
<i>Whren v. United States</i> , 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).....	20
<i>Wood v. Moss</i> , 134 S. Ct. 2056 (2014).....	29

Statutes

42 U.S.C. Sec. 1983	passim
RCW 4.24.420	passim
RCW 43.43.020	5
RCW 46.61.024	36

Rules

CR 56(c).....	15
CrR 4.2(d)	39
ER 201	4

Other Authorities

WPI 15.01 37
WPI 16.0137

I. INTRODUCTION

Sergeant Bart H. Olson¹ is entitled to qualified immunity from Thomas L. Sluman’s claim that Sergeant Olson violated his Fourth Amendment right to be free from excessive force because the trooper’s actions—even the extreme characterization of his actions depicted in Mr. Sluman’s opening brief—do not violate the Fourth Amendment. But, even if this Court were to find Sergeant Olson’s actions to have been unconstitutional, the recent decisions of the U.S. Supreme Court—particularly the torrent of summary reversals the Supreme Court has issued since 2015, beginning with *Mullenix v. Luna*, 136 S. Ct. 305, 312, 193 L. Ed. 2d 255 (2015), and continuing through *White v. Pauly*, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017)—define the well-settled rules this Court must now apply.

The qualified immunity analyses in those recent cases demonstrate that Mr. Sluman’s Fourth Amendment right was not clearly established with sufficient specificity in July 2010 for this Court to deny qualified immunity. The core error in Mr. Sluman’s argument is his assumption that “no particular level of specificity is required” in determining whether the law

¹ Sergeant Bart H. Olson was a Trooper at the time of the incident alleged in the Complaint, and has since been promoted.

was clearly established at the time a law enforcement officer acts. This is not an accurate statement of current qualified immunity standard.

In summarily reversing the Fifth Circuit in *Mullenix*, the Supreme Court made it clear that “existing precedent must have placed the statutory or constitutional question beyond debate” (*Mullenix*, 136 S. Ct. at 308) and, even more recently, summarily reversing the Tenth Circuit in *White*, that unless the clearly established law is “particularized,” a plaintiff is able to convert the rule of qualified immunity into a rule of “virtually unqualified immunity simply by alleging violation of extremely abstract rights. *White*, 137 S. Ct. at 550 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

That is precisely what Mr. Sluman does in this case when he argues—in the most general terms—that a law enforcement officer can effect an unconstitutional seizure with vehicles, not just bullets. That is not the particularized right that is at issue in this case. The facts of this case and Supreme Court precedent require this Court to ask:

Assuming all facts in the light most favorable to Mr. Sluman, was the law clearly established in July 2010 that the Fourth Amendment prohibits a law enforcement officer, making a split-second decision concerning the safety of pedestrians and other motorists imperiled by a suspect fleeing on a motorcycle, from opening the door of his patrol car into the motorcycle's path, even where the suspect had done no more than elude police?

An inquiry particular to the facts of this case reveals that the cases Mr. Sluman relies upon are too general to guide this Court in its analysis of whether the Fourth Amendment right at issue in this case was clearly established in July 2010. Under the law discussed by appellant, denial of qualified immunity to Sergeant Olson would violate the Supreme Court's insistence on particularity and specificity in application of the "clearly established" prong of the qualified immunity test.

As the Supreme Court recently recognized *White*, qualified immunity is important to "society as a whole. *White*, 137 S. Ct. at 550. Sergeant Olson acted, as part of a team, to protect citizens at a well-traveled intersection from a motorcyclist traveling at speeds over 120 miles per hour. He is entitled to immunity from suit by that motorcyclist.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did Sergeant Olson, under the circumstances of this case, violate Sluman's Fourth Amendment right to be free from excessive force?

2. Where Sluman was driving well over 120 miles per hour to elude law enforcement is Sergeant Olson entitled to qualified immunity for initiating a traffic stop to prevent Sluman from entering a high traffic density highway interchange?

3. Assuming, solely for purposes of argument, that Sergeant Olson violated Sluman's Fourth Amendment right to be free from excessive

force, was that right clearly established—with sufficient specificity—in July 2010 to bar Sergeant Olson from receiving qualified immunity?

4. Does Sluman’s admission to committing a felony and his injuries occurring in a direct sequence producing his injuries, which would not have happened if he had just stopped his motorcycle, establish the statutory requirements of the felony bar rule?

5. Are Sluman’s state law claims barred RCW 4.24.420 because, under the undisputed facts of this case, his injuries were proximately caused by his felonious attempt to elude a police vehicle?

6. Does Sluman’s deposition testimony require dismissal of his federal and state claims against Sergeant Olson?

III. COUNTERSTATEMENT OF THE CASE

A. Facts Relevant to Mr. Sluman’s Federal Civil Rights Claims and Sergeant Olson’s Qualified Immunity Defense

The Washington State Patrol (WSP) mission statement specifies that the agency’s goal is to: “Make people safe on Washington roadways.”² WSP’s overarching purpose is to: “prevent the unnecessary loss of life on a daily basis.”³ The troopers’ task was (and is) important to the people of

² WSP Mission Statement: (<http://www.wsp.wa.gov/about/mission.htm>, last visited 3/16/17). State Respondents ask this Court to take judicial notice of this and other facts that may be accurately and readily determined on the WSP’s website. ER 201.

³ Statement of WSP Chief John R. Batiste: (<http://www.wsp.wa.gov/about/about.htm>, last visited 3/16/17).

the state of Washington: In 2010, the year that WSP pursued Thomas L. Sluman as he drove a motorcycle along South Thorp Road at over 120 miles per hour, there were 101,831 collisions on Washington State roads and 2,120 motorcycle-involved collisions.⁴ Sixty-six motorcyclists died.⁵

On July 21, 2010, on a sunny morning day in Ellensburg, Washington, Sergeant Bart Olson operated his WSP patrol vehicle, a Dodge Charger, as part of a five officer team.⁶ The team was “working speed stops,” patrolling Interstate 90 (I-90) eastbound in the area between milepost 102 and milepost 106 in Kittitas County, Washington. CP 38, 145.

Sergeant Olson, the only individually named defendant in this case, is a commissioned Washington State Trooper who earned the WSP Trooper of the Year designation in 2010. CP 461, 764. He logged 1,187 hours of training while at the Washington State Patrol Academy. CP 523; RP 14; RCW 43.43.020. For the past 21 years, he has received regular annual training in law enforcement. CP 523. Sergeant Olson has also served as a

⁴ 2011 Washington State Collision Data Summary (https://www.wsdot.wa.gov/mapsdata/crash/pdf/Washington_State_Collision_Data_Summary_2011.pdf, last accessed on 3/16/17).

⁵ 2011 Washington State Collision Data Summary (https://www.wsdot.wa.gov/mapsdata/crash/pdf/Washington_State_Collision_Data_Summary_2011.pdf, last accessed on 3/16/17).

⁶ Troopers John Montemayor—the pilot of a state patrol aircraft (Smokey 6)—and Troopers David Hinchliff, Steve Houle, Bart Olson, and Paul Blume were “working aircraft and working speed stops.” CP 35-40, 83, 136-42, 144-67, 173-74.

Field Training Officer (FTO) instructing Washington State Patrol Cadets in eight week coaching sessions. CP 525. Sergeant Olson views training cadets as enhancing his situational awareness. CP 526-27.

That July 2010 morning, as Sergeant Olson completed a traffic stop on I-90, he heard Trooper Hinchliff advise radio that he was eastbound in pursuit of a black motorcycle on South Thorp Highway, a road that runs parallel to I-90 between exits 102 (the Thorp Fruit & Antique Mall) and 106 (U.S. 97 and Central Washington University). CP 146. Smokey 6 broadcasted via radio that the black motorcycle, after exiting I-90 at South Thorp Highway, had turned right at the Stop sign, and “accelerated to well over 120 [miles per hour] in an attempt to elude the following trooper [Hinchliff].” CP 38.

Sergeant Olson activated his lights and sirens and prepared to assist in stopping the very high speed motorcyclist. Sergeant Olson traveled eastbound on I-90 towards Exit 106, intending to exit and head toward South Thorp Highway where it intersects with I-90. CP 145, 148. WSP Trooper (Blume), driving a Ford Explorer SUV, followed Sergeant Olson. CP 45.

South Thorp Highway is a two lane road, one lane in each direction, that runs parallel to I-90 through a high-density residential farm area. CP 353. The roadway has no median and is a twisty and curvy road. CP 516;

RP 353. There is a KOA Campground where the South Thorp Highway connects with I-90. CP 788-89; Appendix (App.) B; (Ex. 1 Dashcam Video at 9:37:40).

As Sergeant Olson approached the intersection of South Thorp Highway and I-90, he was reasonably considering the safety of the motoring public of the interchange; the presence of innocent parties at the nearby campground; fellow officers' safety; his own safety; and the speeding motorcyclists' safety. CP 148, 408.

Mere seconds from entering the roadway, Sergeant Olson "observed the black motorcycle round the curve near the State Patrol Office at a high rate of speed."⁷ CP 45, 788-89; (Ex. 1 Dashcam Video at 9:37:50). Sergeant Olson stopped his patrol car straddling the center line of the two-lane road. CP 45, 148-49. Sergeant Olson's patrol car provided sufficient clearance for a semi-tractor trailer to drive on either side of this two lane road. CP 49, 352-53, 788-89; (Ex. 1 Dashcam Video at 9:37:00 to 9:37:53). Sergeant Olson engaged all of his emergency lights and had his siren going. CP 148.

Sergeant Olson observed Sluman approach. The Dashcam Video from Sergeant Olson's patrol car shows what happened next. CP 788-89;

⁷ Sluman later admitted his speed on the curve to be 60 miles per hour. CP 393.

(Ex. 1 Dashcam Video at 9:37:44). Other motorists present (traveling both northbound and southbound) stopped and pulled over to the shoulder of South Thorp Highway. CP 788-89; (Ex. 1 Dashcam Video at 9:37:42). Trooper Houle traveling southbound on South Thorp Highway passes Sluman. CP 788-89; (Ex. 1 Dashcam Video at 9:37:45). Sluman, traveling northbound, rounds the corner, Sluman was “slowing rapidly” and appeared to be stopping. CP 45, 151, 788-89; (Ex. 1 Dashcam Video at 9:37:50). Trooper Houle initiated a U-turn and maneuvered his vehicle northbound.⁸ CP 788-89; (Ex. 1 Dashcam Video at 9:37:51). Sergeant Olson started to open his door, in an attempt to exit his patrol vehicle and stop the motorcycle. CP 45, 153. Sluman then accelerated and steered right, toward the driver’s side of Sergeant Olson’s patrol car. CP 22, 788-89; (Ex. 1 Dashcam Video at 9:37:50-53). As Sluman accelerated the motorcycle, he or the motorcycle collided with the patrol car door. CP 22.

Subsequent events are not captured on the Dashcam Video. After traveling past the patrol car and the SUV behind it, Sluman collided with the bridge railing, slid down the railing for 30 feet, lost contact with the motorcycle, and fell off the bridge into the KOA campground. CP 45.

⁸ At this point, the video shows Trooper Houle south of Sluman and another motorist traveling south stop as Trooper Houle completes the U-turn. CP 788-89; (Ex. 1 Dashcam Video at 9:37:51).

In his deposition, Sergeant Olson testified that his intent in stopping the speeding motorcyclist was to: “end this pursuit, so that they don't end up with serious injuries, kill themselves, kill an innocent party.” CP 149.

B. Facts Relevant to Mr. Sluman’s State Law Claims and the Respondents’ Felony Bar Affirmative Defense

It is undisputed that Mr. Sluman was observed by troopers driving a motorcycle, along South Thorp Highway, at speeds well over 120 miles per hour in a 50 miles per hour zone. Sluman’s path took him through the dense residential farm area on South Thorp Highway which runs parallel to I-90. By Sluman’s own estimated speed, he turned the final corner, prior to encountering Sergeant Olson’s patrol car, traveling at 60 miles per hour. CP 393.

Sluman admits that as he made that final 60 mile per hour turn, he saw a law enforcement vehicle ahead with its lights activated and he started applying the brakes on the motorcycle. CP 393. From the perspective of Sergeant Olson’s dashboard camera (Dashcam Video), Sluman dropped speed rapidly, steered left, then accelerated, and steered right towards the driver’s side of Sergeant Olson’s patrol car. CP 2, 788-89; (Ex. 1 Dashcam Video at 9:37:50). At that point, Sluman travels outside the view of Sergeant Olson’s dashboard camera.

In his Complaint, Sluman asserts that his damages were caused by contact with Sergeant Olson's car door⁹ and Sergeant Olson's actions. CP 4-7. However at his deposition, Sluman claims he was hit by an SUV. CP 391-92. "I - - only remember the SUV . . . [c]ause he was coming right at me in my lane and hit me." CP 391-92. Before this Court, Sluman claims he only saw the white SUV and remembers nothing else. CP 510; Appellant's Opening Brief (Appellant's Br.) at 9. There was an SUV at the scene, the Ford Explorer SUV driven by Trooper Blume, who arrived immediately after Sergeant Olson and stopped behind Sergeant Olson's patrol car. CP 173.

At the scene, Sluman was asked by responding law enforcement why he was running, Sluman admitted he was running from the troopers because "he had warrants." CP 146, 152-53, 345-50, 405, 788-89; (Ex. 1 Audio Statement 2:45 to 3:50). On appeal, Sluman asserts that he did not notice troopers following him. Appellant's Br. at 3.

On July 21, 2010, Sluman was arrested for felony eluding; possession of stolen property (the motorcycle), and reckless driving.¹⁰

⁹ It is undisputed Sergeant Olson drove a Dodge Charger. CP 353. Sergeant Olson's colleague on the scene (Trooper Blume) operated an SUV and arrived immediately after Sergeant Olson stopped his Dodge Charger. CP 45, 173.

¹⁰ On July 21, 2010, Sluman was arrested for felony eluding; possession of stolen property, and reckless driving; on October 28, 2011, he pled guilty to felony eluding and taking a motor vehicle without permission; on July 3, 2013, Sluman filed his complaint.

CP 45. On October 28, 2011, Sluman entered an Alford plea to two felonies: Attempting to Elude and Taking a Motor Vehicle Without Permission. CP 53. With respect to his possession of the motorcycle, in this civil case, Sluman claims he was in the “process of purchasing” the motorcycle and maintains “[i]t was my belief I had full permission to use it.” CP 510, 764.

C. Procedural History of This Case

Sluman filed his complaint against WSP and Sergeant Olson alleging federal civil rights claims pursuant to the Fourth and Fourteenth Amendments (against all defendants in their official capacity and against Sergeant Olson in his individual capacity). He also alleged state law claims for false arrest, false imprisonment, negligence, gross negligence, negligent and intentional infliction of emotional distress, outrage, and negligent training and supervision. CP 7-9.

In response, the WSP asserted various defenses. As to the federal civil rights claims, these included Eleventh Amendment immunity, and with respect to Sergeant Olson in his individual capacity, qualified immunity. RP 17. As to the state law claims, WSP asserted the “felony bar rule, RCW 4.24.420,¹¹ arguing that Sluman’s injury was proximately caused by his felonious flight from marked patrol cars.

¹¹ RCW 4.24.420 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

On summary judgment by WSP, the trial court dismissed Sluman's civil rights claims against WSP and its employees in their "official capacities" because those claims are barred by the Eleventh Amendment. CP 360-63; (Order of October 5, 2015). By agreement of the parties, the trial court also dismissed Sluman's claims for false arrest and false imprisonment, but imposed attorneys' fees on Sluman for pursuing those claims where WSP provided notice, prior to filing, that the statute of limitations for those causes of action had run. CP 361; (Order of October 5, 2015).

After changes in the legal and factual posture of the case, on WSP's second motion for summary judgment, the trial court dismissed all of Sluman's remaining federal and state claims. CP 782-83; (Order of May 5, 2016); RP (04/15/16) at 1-13.

Sluman now appeals the trial court's dismissal of his § 1983 claim for excessive force in violation of the Fourth Amendment against Sergeant Olson, in his individual capacity, as well as his state law claims for negligence, gross negligence, negligent infliction of emotional distress,

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."

intentional infliction of emotional distress, outrage, and negligent training and supervision.¹²

IV. STANDARD OF REVIEW

When reviewing a trial court's decision on summary judgment, the Court of Appeals engages in a de novo review considering the same evidence presented below. *Elcon Const., Inc. v. Eastern Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). If there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should be granted. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 212, 229 P.3d 871, review denied, 169 Wn.2d 1027 (2010). Like the trial court, an appellate court views the facts, and all reasonable inferences to be drawn from them in the light most favorable to the non-moving party. *Id.*

However, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007). In *Scott*, the Supreme Court determined that where the record

¹² It is unclear why Sluman believes he retains the right to appeal dismissal of his negligent training and supervision claims. App. Br. at 15, 28-9. Sluman conceded his negligent training and supervision claims in his memorandum opposing summary judgment. CP 2-4, 495. WSP has affirmed throughout the litigation that Sergeant Olson was acting within the scope of his employment. CP 14, 495. Sluman's concession precludes appeal of these claims.

included a videotape capturing the events in question, the accuracy of which was not challenged, it was appropriate to view the facts in the light depicted by that videotape. *Id.* at 378-81 (ultimately holding that officer's use of force was reasonable and did not violate Fourth Amendment where officer was attempting to terminate car chase, initiated by fleeing motorist, that posed a substantial and immediate risk of serious physical injury to others). Accordingly, because the record here includes an unchallenged WSP Dashcam Video from Sergeant Olson's patrol vehicle, this Court should view the facts "in the light depicted by the videotape." *Id.* at 381.

V. ARGUMENT

This Court should affirm dismissal of all of Sluman's claims on summary judgment. Sluman's federal civil rights claim against Sergeant Olson in his individual capacity should be dismissed because he is entitled to qualified immunity. Sluman cannot satisfy either prong of the qualified immunity test.

First, Sluman has not alleged facts sufficient to establish that Sergeant Olson's actions violated his Fourth Amendment right to be free from excessive force. Second, even if Sergeant Olson's actions were now deemed to have violated that right, Sluman fails to establish that in July 2010 the right was clearly established with sufficient specificity that every reasonable officer would have known it was a Fourth Amendment

violation to attempt to stop a fleeing motorcyclist by positioning a patrol car straddling the center line of a two lane road and opening the vehicle door in the motorcyclist's path.

Sluman's state law claims should be dismissed for two reasons. First, his state law claims are barred because his injuries were the proximate result of his commission of a felony. RCW 4.24.420. Second, the record is devoid of evidence supporting Sluman's claims for negligence, gross negligence, negligent infliction of emotional distress, and outrage.¹³ CR 56(c).

A. Mr. Sluman's Fourth Amendment Excessive Force Claim Against Sergeant Olson Fails Because Sergeant Olson is Entitled to Qualified Immunity

Sluman claims that Sergeant Olson violated his Fourth Amendment right to be free from excessive force pursuant to 42 U.S.C. § 1983. CP 7; Appellant's Br. at 15. Title 42 U.S.C. § 1983 is the cause of action through which Sluman may assert his constitutional claim. It provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" It is the method for pursuing federal rights

¹³ Sluman agreed to dismissal of his false arrest and imprisonment claims. CP 361. He conceded his negligent training and supervision claims in 2015. CP 495.

elsewhere conferred. *Baker v. McCollan*, 443 U.S. 137, 144, 99 S. Ct. 2689, 2694, 61 L. Ed. 2d 433 (1979). Section 1983's purpose is to deter state actors from using their badge of authority to deprive an individual of his federally guaranteed rights and provide remedy if deterrence fails. *Carey v. Phipus*, 435 U.S. 247, 253, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252 (1978).

Federal law applies in determining whether a state actor deprived an individual of constitutional rights. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Accordingly, federal law governs all aspects of Sluman's claims that he was deprived of his federally protected rights when Sergeant Olson stopped his vehicle in the roadway and opened his patrol car door. CP 7.

Sluman claims that Sergeant Olson violated his Fourth Amendment right to be free from the use of excessive force. CP 7; Appellant's Br. at 15. The Fourth Amendment protects, "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." It confers on every citizen the right to be free from the unreasonable use of force by state actors. Sluman is using a federal statute (§ 1983) to pursue federal constitutional claims under the Fourth Amendment, and federal law governs.

Below, the trial court dismissed Sluman's Fourth Amendment claim, ruling that qualified immunity applies to Sergeant Olson, as an individual, to protect him from suit.

Qualified immunity is an affirmative defense that must be pled by the government official. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011); *Gomez v. Toledo*, 446 U.S. 635, 639-40, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980). "Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *White*, 137 S. Ct. at 551 (quoting *Mullenix*, 136 S. Ct. at 308).

Qualified immunity protects government officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). It extends to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). Qualified immunity is immunity from trial. "[Q]ualified immunity is important to society as a whole." *White*, 137 S. Ct. at 552 (internal citations omitted). Its importance stems from the rationale that qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Id.* (internal citations omitted).

Determining whether qualified immunity applies requires answering two questions: (1) whether the facts that a plaintiff alleges constitute 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*, 555 U.S. at 232. Once a defendant pleads the affirmative defense, the plaintiff has the burden of establishing the test is satisfied. *Moran v. State of Washington*, 147 F.3d 839, 844-45 147 F.3d 839 (9th Cir. 1998). If either part of the test cannot be established, then the defendant is entitled to qualified immunity. *Pearson* at 232.

Originally, the test was applied sequentially. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001). However, subsequent case law held that sequence is no longer mandatory given that one of the purposes of qualified immunity is to conserve scarce judicial resources. *Pearson* at 236. At the same time, the *Pearson* Court noted it is often beneficial for a Court to first determine whether the plaintiff has alleged facts sufficient to make out a violation of a constitutional right. *Id.*

1. Sergeant Olson Did Not Violate Sluman's Fourth Amendment Right to Be Free From Excessive Force

The first part of the qualified immunity test requires determining whether the facts Sluman alleges constitute violation of a constitutional

right. Sluman is alleging that he was subjected to excessive force in violation of the Fourth Amendment based on Sergeant Olson's positioning of his parked patrol car and his decision to open the driver's door.

Sluman erroneously states in his opening brief that "Trooper Olson appeared to concede for purposes of summary judgment that Trooper Olson violated Sluman's Fourth Amendment Rights . . ." Appellant's Br. at 16. Sergeant Olson did not concede that the first prong of the test was satisfied. Rather, to conserve scarce resources Sergeant Olson focused his arguments¹⁴ on demonstrating that the second prong of the qualified immunity test failed.¹⁵ CP 371.

Turning to the merits "Fourth Amendment reasonableness "is predominantly an objective inquiry." *City of Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). A court asks whether "the circumstances, viewed objectively, justify [the challenged]

¹⁴ The trial court appears to have understood Sergeant Olson was not conceding that his actions constituted excessive force. Throughout the colloquy, the trial court and Sergeant Olson's counsel compared the actions of the Texas Trooper in *Mullenix* with Sergeant Olson's actions. RP (4/15/16) at 32-33. Such a comparison is stark. If Trooper Mullenix did not violate Israel Leija Jr.'s Fourth Amendment rights when he shot six times into his speeding vehicle from an overpass, Sergeant Olson's actions could not, as a matter of law, constitute such a violation.

¹⁵ "The Defendants do not concede that Sergeant Olson violated Sluman's constitutional rights before, during, or after Sluman caused his motorcycle to collide with Sergeant Olson's car, . . . [t]he Defendants also do not concede that Sergeant Olson used deadly force in attempting to apprehend Sluman. However, even if it were to be determined that Sergeant Olson did violate a constitutional right of Sluman, Sluman cannot establish that such a right was clearly established." RP 371.

action.” *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978). If so, that action was reasonable “whatever the subjective intent” motivating the relevant officials. *Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). “This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, *Bond v. United States*, 529 U.S. 334, 338, n.2, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000); and it promotes evenhanded, uniform enforcement of the law, *Devenpeck v. Alford*, 543 U.S. 146, 153-54, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004).” *Ashcroft* at 736.

Claims of excessive force in the course of making an arrest are properly analyzed under the Fourth Amendment’s “objective reasonableness” standard. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The reasonableness of the particular force used must be judged from the perspective of a reasonable officer on the scene, not 20/20 hindsight. The standard takes into account the moment the officer is forced to make split-second judgments in tense, uncertain, and rapidly evolving circumstances. *Graham*, 490 U.S. at 396. The test of reasonableness considers the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.*; see also *Mullenix*, 136 S. Ct. at 312.

The Supreme Court considered these factors, particularly whether a suspect posed an immediate safety threat, on facts similar to those here in *Brosseau v. Haugen*, 543 U.S. 194, 201, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). In *Brosseau*, the Supreme Court held it is not a violation of the Fourth Amendment's deadly force standards to shoot a suspect in a fleeing vehicle when that vehicle poses a risk to persons in the immediate area. *Brosseau*, 543 U.S. at 201. The Supreme Court found Officer Rochelle Brosseau was entitled to qualified immunity where she was required to determine "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200.

In this case, like in *Brosseau*, a reasonable officer in Sergeant Olson's position would likely have concluded that Sluman's high speed motorcycle flight posed a risk to persons in the immediate area. Officer Brosseau was "'fearful of other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's (the fleeing felon's)] path and for any other citizen who might be in the area.'" *Id.* at 197. As Sergeant Olson stated in his contemporaneous report and testified in his deposition, he was also fearful for the safety of innocent people in the immediate area including the motorists using the South Thorp Highway, the interchange to I-90 (both eastbound and westbound), the

public at the KOA campground, other officers' safety, Sluman's safety, and Sergeant Olson's own safety. All were in Sluman's high speed path as he approached the narrow, dangerous T-intersection at the north end of South Thorp Highway. *See*, App. B. A reasonable officer making the split-second judgments presented to Sergeant Olson could have reasonably determined that stopping Sluman was the only way to protect the public from injury or even death. In that split-second evolving moment, Sergeant Olson was the public's last line of defense.

More recently, in *Mullenix*, 136 S. Ct. at 306, the Supreme Court decided whether or not a Texas Trooper used excessive force when he fired upon a fleeing vehicle in an attempt to end an 85 mile per hour car chase on a public roadway. In *Mullenix*, the Court discussed the two prongs of the test simultaneously, recognizing for example, under the second prong of the qualified immunity test, that it "has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity." *Id.* at 310. But the primary focus of the Supreme Court's decision in *Mullenix* addressed the question of qualified immunity and "not whether there was a Fourth Amendment violation in the first place." *Id.* at 308.

In *Mullenix*, Israel Leija, Jr. sped off in his car after being contacted by law enforcement regarding a warrant for his arrest. *Id.* at 306. Leija fled

at speeds between 85 and 110 miles per hour. *Id.* During the chase, Leija was suspected of being intoxicated and called police claiming he would shoot at the responding police officers. *Id.*

Defendant Chadrin Mullenix, a Texas Trooper, drove to the overpass above the location where Mullenix traveled. *Id.* Mullenix decided he would disable Leija's car by firing at the engine block. *Id.* at 306. Mullenix, armed with his service rifle, took aim from the overpass, twenty feet above the interstate. *Id.* Three minutes later, Mullenix spotted Leija's vehicle, and fired six shots at the vehicle on the roadway below. *Id.* The vehicle continued along the roadway where it engaged a spike strip, hit the median, and rolled two and a half times. *Id.* Leija was killed by Mullenix's shots, with four of the six shots striking Leija. *Id.*

Leija's estate sued Mullenix, alleging that Mullenix violated the Fourth Amendment by using excessive force against Leija. *Id.* The Supreme Court reversed the Fifth Circuit Court's denial of qualified immunity and stated that, "[t]he Court has thus never found the use of excessive force in connection with a dangerous car chase to violate the Fourth Amendment" *Id.* at 310.

The Court considered its prior "excessive force claims in connection with high-speed chases" and noted that officers did not violate the Fourth Amendment "by ramming the car of a fugitive whose reckless driving

‘posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.’” *Mullenix* at 310 (quoting *Scott*, 550 U.S. at 384). The court cited another example where officers did not violate the Fourth Amendment “holding that an officer acted reasonably when he fatally shot a fugitive who was ‘intent on resuming’ a chase that ‘pose[d] a deadly threat for others on the road.’” *Mullenix* at 310, (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022, 188 L. Ed. 2d 1056 (2014)). The Fourth Amendment is not violated when an officer uses deadly force in the context of a high speed chase when there is immediate risk to the public.

The context here mirrors the cases that *Mullenix’s* relied upon including a high speed chase, imminent risk to the public, and a motorist intent on resuming a chase. Regarding the high speed chase and risk to the public, Sergeant Olson knew that Sluman reached speeds of well over 120 miles per hour on a residential farm road, took the turn on the South Thorp Highway at 60 miles per hour, and rapidly approached both a busy campground and an area of high density traffic as he neared the interchange of I-90. CP 38,¹⁶ 45, 147; App. B. A reasonable officer could conclude that

¹⁶ “This motorcycle took the exit at Thorp Road. At the stop sign it turned right and accelerated well over 120 mph in an attempt to elude the following trooper.” CP 38. Pilot Case Report.

Sluman's actions created immediate danger to the public that required an instant decision.

Regarding the intent on resuming the chase, the Dashcam Video demonstrates, Sluman slowed, hesitated, and then *increased* his speed directly in front of Sergeant Olson's marked patrol car. CP 788-89; (Ex. 1 Dashcam Video at 9:37:50). A reasonable officer could also conclude these final acts demonstrated an intent on resuming the chase.

At the moment Sergeant Olson opened his patrol car door, he knew Sluman was driving recklessly, was suspected of felony eluding, and could pose an immediate threat to the safety of all those in the motorcycle's immediate path. In response to two police cars, Sluman accelerated his speed and attempted to evade arrest by flight. Sergeant Olson considered the safety of the innocent motorists using the interchange, the public at the campground (App. B), the law enforcement officers present, and Sluman himself. CP 148, 408.

Even if Sergeant Olson intended to open his door into Sluman's path, Sergeant Olson's use of force was not excessive in context. Sluman led officers on a dangerous high speed chase involving speeds over 120 miles per hour on a residential farm road heading toward a busy interchange near a campground on a summer day. Although Sluman did not claim to have a gun and there was no evidence of intoxication (like the

motorist in *Mullenix*), his actions were still an immediate threat to public safety. Sluman had warrants, knew he had warrants, and ran because he had warrants.

Sergeant Olson's subjective intent in those split seconds as Sluman's motorcycle approached his marked car, including his statement that he wanted to go "hands on with him and take him off the bike,"¹⁷ is irrelevant because Fourth Amendment jurisprudence regulates conduct and not thoughts. The only excessive force conduct supported by the record is: 1) parking the patrol car in the middle of a two lane road with clearance for a semi-truck on each side; and 2) opening the patrol car door. Even if Sergeant Olson were deemed to have door-checked Sluman, this action would not amount to excessive force under *Brosseau*, *Plumhoff*, and *Mullenix*, given Sluman's estimated speed on South Thorp Road, the immediate risk of harm he posed to the public at the moment, and his intent to resume the chase as he accelerated to flee Sergeant Olson's marked patrol car.

The undisputed facts establish, as a matter of law, that the force employed by Sergeant Olson was not excessive. *See Mullenix*, 136 S. Ct. at 305; *Brosseau*, 125 S. Ct. at 201; and *Graham*, 490 U.S. at 388.

¹⁷ CP 47.

Sluman discounts the Supreme Court's holding in *Mullenix* claiming that it "did not change the analysis of qualified immunity." Appellant's Br. at 21. He also dismisses the precedent of this unanimous Supreme Court opinion, arguing: "[g]iven the absence of any immediate threat of serious physical harm or death in this case, *Mullenix* is distinguishable" Appellant's Br. at 23. Sluman's argument is specious. A fleeing felon, on a motorcycle, driving at speeds including 120 miles per hour, on a residential farm road, heading toward a campground early in the morning of a summer day, and approaching the Central Washington University College exit on I-90 amounts to an immediate threat of serious physical harm or death to the public. Sergeant Olson contemplated this as he responded to the incident.

Sluman cannot point to any case law that squarely establishes that Sergeant Olson's actions were prohibited by the Fourth Amendment. The inquiry could end here because Sluman has failed to establish the first prong of the Supreme Court test—Sergeant Olson's actions did not violate Sluman's constitutional rights. Consequently, Sluman's claims against Sergeant Olson should be dismissed.

2. Sergeant Olson Is Entitled to Qualified Immunity Because in July 2010 Existing Precedent Did Not Clearly Establish That Sergeant Olson's Actions Violated The Fourth Amendment's Prohibition on Excessive Force

The second part of the qualified immunity test requires this Court to determine whether the constitutional right at issue was clearly established at the time of the defendant's alleged misconduct. To defeat qualified immunity, Sluman must establish that Sergeant Olson's acts violated a clearly established constitutional right of which every reasonable Trooper would have known. *White*, 137 S. Ct. at 551 (citing *Mullenix*, 136 S. Ct. at 308) ("Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'")

The Supreme Court has emphasized that for purpose of qualified immunity, the constitutional right at issue should not be defined "at a high level of generality." *Ashcroft*, 563 U.S. at 742. Instead, to be clearly established, the law must be "particularized" to the facts of the case. *Anderson* at 640. This requires that "in the light of pre-existing law, the unlawfulness must be apparent." *Id.* at 640 (internal citations omitted).

Sluman erroneously asserts, that "[n]o particular level of specificity is required in every instance." Appellant's Br. at 17 (citing *Hope v. Pelzer*, 536 U.S. 730, 740-41, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 269, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997))).

Yet, the Supreme Court stated recently “it is again necessary to reiterate the longstanding principle that ‘clearly established’ should not be defined ‘at a high level of generality.’” *White* at 600 (internal citations omitted). Specificity is required to determine whether the right at issue was clearly established at the time of the defendant’s alleged misconduct.¹⁸ As the unanimous Supreme Court reaffirmed in *White v. Pauly*, “clearly established law must be ‘particularized’ to the facts of the case.” *Id.* Otherwise, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 640 (1987)) (alterations in original).

White illustrates the level of specificity that the Supreme Court requires. The Court makes it clear that a complex law enforcement action must be addressed with specificity. After receiving a reckless driving

¹⁸ In *Wesby v. D.C.*, 816 F.3d 96, 102, 111-13 (D.C. Cir. 2016) (Kavanaugh, J., with whom Circuit Judges Henderson, Brown, and Griffith joined), the dissent from the denial of rehearing en banc noted: “The Supreme Court ‘often corrects lower courts when they wrongly subject individual officers to liability’ . . . Indeed, in just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, including five strongly worded summary reversals. See *Mullenix* 136 S. Ct. at 305 (summary reversal); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (summary reversal); *City and Cnty of San Francisco v. Sheehan*, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (summary reversal); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Stanton v. Sims*, 134 S. Ct. 3 (2013) (summary reversal); *Reichle v. Howards*, 132 S. Ct. 2088 (2012); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (summary reversal); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).”

complaint, two officers responded to the address of the driver. *Id.* at 550. Officer White arrived after an armed confrontation between his two fellow officers and the two suspects had begun. *Id.* at 549. White heard shouting from a residence where a suspect yelled: “We have guns.” *Id.* at 550. Within seconds, a suspect, screaming loudly, stepped out of a door and fired two shotgun blasts. *Id.* A few seconds later, another suspect opened a window and pointed a gun in Officer’s White’s direction. *Id.* A second officer fired immediately and Officer White fired four to five seconds later. *Id.* Officer White’s shots killed the suspect. *Id.*

The Supreme Court ruled that Officer White did not violate clearly established law in firing without warning after arriving late to the scene of an armed confrontation. *Id.* at 552.

Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here. *Id.*

For the same reasons that *White* was “not a case where it is obvious that there was a violation of clearly established law,” here too Sergeant Olson did not violate clearly established law.

Sluman does not – and could not – point to any case law that squarely established in July 2010 that Sergeant Olson’s actions were clearly prohibited by the Fourth Amendment in the situation with which Sergeant Olson was confronted. Sluman was fleeing from marked patrol vehicles, dangerously speeding toward a high density population. In the final split seconds of his approach, he appeared to be stopping. Sergeant Olson, a commissioned law enforcement officer, stopped his patrol car-lights and siren activated-and opened his car door.

Like White, Sergeant Olson, who acted five years *before* the Supreme Court published its decision in *Mullenix*, is entitled to qualified immunity. In *Mullenix* the relevant inquiry was whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances “beyond debate.” *Id.* at 309. The Supreme Court stated that “far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted.” *Id.* The court reasoned, [i]n any event, none of our precedents “squarely governs” the facts here. *Mullenix* at 310. Accordingly, Mullenix’s use of deadly force was not excessive in connection with a dangerous car chase posing an immediate risk to the public. *Id.* at 310. Mullenix was entitled to qualified immunity. *Id.* If Trooper Mullenix is entitled to qualified immunity for firing six rifle rounds into Leija’s car from an overpass, then Sergeant Olson

is entitled to qualified immunity for stopping his patrol car with enough room for a semi-tractor trailer to pass on each side and opening his car door.

Assuming all facts in the light most favorable to Sluman, the law was not clearly established in July 2010 that a reasonable officer, making a split-second decision concerning the safety of pedestrians and other motorists, could not open the door of his patrol car into the path of a suspect fleeing on a motorcycle, even if opening his door constituted excessive force and the suspect had done no more than elude police. Sergeant Olson's actions were not "beyond debate" in these circumstances and, consequently, were not unreasonable. Sergeant Olson's acts do not violate a clearly established constitutional right which every reasonable Trooper would have known. The required level of specificity is not met.

Sluman has failed to establish that Sergeant Olson's acts in July 2010 violated a clearly established constitutional right which every reasonable Trooper would have known. The second part of the qualified immunity test also fails. Therefore, Sergeant Olson is protected from suit by qualified immunity under both parts of the test.

The cases Sluman relies upon are the very type rejected by the Supreme Court when they reverse denials of qualified immunity because the precedents are too generalized. The law must be "particularized" to the facts of the case and not defined "at a high level of generality." The Supreme

Court has held that if precedents are too general, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Anderson*, 483 U.S. at 639.

Sluman’s reliance on *Brower* is unpersuasive for two reasons. *Brower v. Cty. of Inyo*, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). First, the case lays out excessive-force principles at too general a level. The case is cited for a generality, rather than a particularized principle: “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.” Appellants Br. at 18. Second, the facts of the case are inapposite. *Brower* involved a roadblock. This case does not. In this matter, the photographs and dashboard camera are undisputed, and the factual record they provide is indisputable. CP 352-53, 788-89 (Ex. 1 Dashcam Video at 9:47:06); see discussion of *Scott*. A semi-tractor trailer could fit on either side of Sergeant Olson’s parked patrol car. In this case, where neither Sergeant Olson nor Blume created a roadblock, *Brower* is not specific enough, or applicable enough, to inform them, or any other reasonable law enforcement officer that they were violating the law.

The facts in the federal circuit cases *Sluman* cites are also distinguishable from the facts of this matter. In *Hawkins* and *Walker* the officers rammed their patrol cars into fleeing motorcycles. *Hawkins v. City of Farmington*, 189 F.3d 695 (8th Cir. 1999) (qualified immunity denied to an officer who saw the first motorcyclist pass by and drove his vehicle at the motorcyclist without confirming it was the suspect); *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011) (qualified immunity denied to officer who in an empty field intentionally rammed a motorcycle).

The facts of those cases contrast starkly to the situation Sergeant Olson confronted. In this case, an identified fleeing felon was operating recklessly and about to approach a population center. The denial of qualified immunity to officers who used their vehicles as weapons where there was no risk to the public, is not a basis to deny qualified immunity to Sergeant Olson. It is not clearly established what level of risk of harm a fleeing suspect must present to trigger entitlement to use deadly force.

Sluman also relies upon the unreported *Stamm* case in arguing Sergeant Olson is not entitled to qualified immunity based on general statements of law, and inapposite facts. Appellants Br. at 18-20; *Stamm v. Miller*, 657 Fed. Appx. 492, 493 (6th Cir. 2016) (unpublished). The facts in *Stamm* are distinguishable.

In *Stamm*, on a six lane highway with a median separating oncoming traffic in the wee hours of the morning without any traffic present, an officer maneuvered his slow moving vehicle in front of a motorcyclist speeding at 100 miles per hour in order to force the motorcyclist to slow and stop. *Stamm*, 657 Fed. Appx. at 493. The officer then stopped quickly in front of the motorcyclist who crashed into the rear of the officer's patrol car. *Id.* The court denied qualified immunity reasoning that an officer may not use his police vehicle to intentionally hit a motorcycle unless the motorcycle poses a threat to officers or others. *Id.* at 496.

In Ellensburg, Washington on a two lane highway, without a median separating traffic, on a busy summer morning, with traffic present, Sergeant Olson parked his patrol car and opened the patrol car door. The public was in immediate risk of danger given Sluman's triple digit speed, the summer day, the residential farm road, the presence of a campground, and the proximity to the interstate interchange. Sergeant Olson did not use his patrol car to ram, stop short, or run Sluman off the road. The critical facts are too dissimilar. *Stamm* is not a basis on which to deny Sergeant Olson qualified immunity, nor does an unpublished decision of the Sixth Circuit take precedence over the Supreme Court's recent decisions in *Mullenix* and *White*. See footnote 18, *supra*.

Sluman cannot defeat either prong of Sergeant Olson's qualified immunity through inapposite, general cases. In the past five years, the Supreme Court has summarily reversed eleven cases because they have not applied prong two of the qualified immunity test with sufficient specificity. *See* fn. 18. The message to lower courts is clear. Absent a specific prohibiting case, Sergeant Olson is entitled to qualified immunity.

B. Sluman's State Law Claims Are Barred, By the Felony Bar Rule RCW 4.24.240, Because, His Injury Was Proximately Caused By His Felonious Attempt To Elude A Police Vehicle

Flight from an identifiable law enforcement officer is a felony. RCW 46.61.024; *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398, 400 (2005). Attempting to elude a police vehicle occurs when a driver willfully fails to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing vehicle, after being given a signal to bring the vehicle to a stop is guilty of a felony. RCW 46.61.024. The purpose of the eluding statute is to prevent "unreasonable conduct in resisting law enforcement activities." *State v. Treat*, 109 Wn. App. 419, 426, 35 P.3d 1192, 1196 (2001) (citing *State v. Hudson*, 85 Wn. App. at 403, 932 P.2d 714 (1997) (quoting *State v. Trowbridge*, 49 Wn. App. 360, 362, 742 P.2d 1254 (1987))).

"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.”

RCW 4.24.420. In other words, there shall be no recovery where the injured person was engaged in a felony, if that felony was a proximate cause of the injury. Proximate cause is a cause which in a direct sequence produces the injury complained of and without which such injury would not have happened. When reasonable minds cannot differ proximate cause may be a question of law. WPI 15.01; *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986); *Estate of Bordon ex rel. Anderson v. State, Dep't. of Corr.*, 122 Wn. App. 227, 95 P.3d 764 (2004).

“The applicable quantum of proof to establish the commission of a felony in a civil case is a preponderance of the evidence.” Felony—Defense, 6 Washington Practice: Washington Pattern Jury Instructions: Civil WPI 16.01 (6th ed.) (citing *See Leavy, Taber, Schultz and Bergdahl v. Metropolitan Life Ins. Co.*, 20 Wn. App. 503, 507, 581 P.2d 167 (1978)) (proof of a willful and unlawful killing under the slayer's statute need only be by the preponderance of the evidence).

Here, Sluman's failure to stop and admission to fleeing because he had warrants is inescapable evidence of eluding. Sluman claims that he “did not notice that Trooper Hinchliff was following him . . .” and there are genuine issues of material fact regarding whether Sluman was engaged in a

felony. Appellant's Br. at 3, 24. However, his statements are not credible. At the scene, when asked why he had run, Sluman admitted "he ran because he had warrants." CP 788-89; (Ex.1 Audio Statement of Plaintiff at 3:46); Appellant's Br. at 11. The statement was captured on audiotape by a Kittitas County Sheriff's Deputy CP 788-89 (Ex. 1 Audio Statement of Plaintiff at 2:45-3:50). In his deposition, Sluman identified the voice on the audiotape as his own and confirmed its accuracy. CP 405-06.

Further, Sluman entered an Alford plea to attempting to elude a police vehicle and taking a motor vehicle without permission. CP 62; Appellant's Br. at 11-12. Sluman claims he entered the plea because he "wanted to be done with the matter" and he "had a bill of sale and had been making payments," suggesting that he did little more than plead "no contest" to the charges. Appellant's Br. at 11-12. However, Washington's interpretation of an Alford plea requires more of both the criminal defendant and the court.

The trial judge, the Honorable Judge Scott R. Sparks,¹⁹ with Sluman's permission, reviewed the "police reports and/or a statement of

¹⁹ The Honorable Scott R. Sparks is the same judge who granted both of defendants' motions for summary judgment, finding Sergeant Olson was entitled to qualified immunity, as a matter of law, and dismissing all of Sluman's federal and state law claims. CP 361, 782-83. Judge Sparks determined Sergeant Olson, in his individual capacity, was entitled to qualified immunity on his second motion for summary judgment after changes in federal law made it clear that Sluman could not satisfy either prong of the qualified immunity test. See discussion of *Mullenix v. Luna*, 136 S. Ct. 305, 306, 193 L. Ed. 2d 255 (2015).

probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 60. Judge Sparks found sufficient facts in the information and police report to accept the guilty plea. CP 68. Under CrR 4.2(d), Judge Sparks was required to determine that the evidence was reliable and that it was sufficient for a jury to find Sluman guilty. *In re Cross*, 178 Wn.2d 519, 525-29, 309 P.3d 1186 (2013). Although Sluman’s Alford plea may not have collateral estoppel effect in this proceeding, this Court may rely upon the facts that were, necessarily, established by Sluman’s plea. Sluman errs in suggesting his Alford plea has no significance to this Court’s award of qualified immunity to Sergeant Olson. Appellant’s Br. at 24-25.

The principal source of evidence establishing Sluman eluded are his own words that he ran because he had warrants. Sluman made the statement on July 21, 2010, the statement was audio recorded, and Sluman confirmed the recorded audio statement at his deposition. CP 406.

Sluman willfully failed to immediately bring his vehicle to a stop and drove in a reckless manner.²⁰ He admits to both.²¹ There is undisputed

²⁰ It is immaterial whether the felony eluding began at the South Thorp Highway when Hinchliff turned on his lights and sirens and the motorcycle accelerated well over 120 miles per hour or on the South Thorp Highway where Sergeant Olson positioned his vehicle with lights and sirens operating and Sluman failed to stop. Sluman admits to eluding when he stated on recorded audio he ran because he had warrants.

²¹ Sluman admits he ran because he had warrants, he does not dispute the evidence he drove over 120 miles per hour on the highway, he admits he took the final corner on South Thorp Highway at 60 mph. CP 393, 406.

evidence of both.²² Sluman failed to stop and drove at high speeds on a twisty and curvy road through a residential farm community toward a high population center. Sluman eluded when he took the South Thorp Highway and accelerated to well over 120 miles per hour. CP 38. Sluman eluded when he observed Sergeant Olson's patrol car and chose not to stop. CP 788-89; (Ex.1 Dashcam Video at 9:37:50). Reasonable minds cannot differ—Sluman was engaged in a felony. The felony bar rule is triggered.

Sluman's engagement in felony eluding was a cause, which in direct sequence, produced the injuries complained of and without felony eluding Sluman's injuries would not have happened. If Sluman would have obeyed law enforcement, followed the rules of the road to yield to lights, sirens, and stopped the motorcycle he would not have been injured. Both elements of the felony bar rule are met. Sluman's decision to elude bars his recovery for his state law claims. The trial judge's decision to dismiss the state law claims should be affirmed. The felony bar rule operates to deny Sluman recovery for all of his state law claims.²³

²² CP 788-89 (Ex. 1 Dashcam and Audio). App. B. Sluman's speed documented by WSP. CP 38. Sluman's speed by admission. CP 393.

²³ The four remaining state law claims fail independently as a matter of law. Sluman conceded the negligent training and supervision claim. CP 495. That concession is incurable. Sluman also failed to provide evidence of negligent infliction of emotional distress and outrage. These claims were not supported by evidence. CP 490-92. These claims are *only* supported by argument to this Court. Appellant's Br. at 29. They are not supported by fact or law presented to the trial court. Failing to provide the requisite law and evidence to the trial court (as well as to this Court) is incurable. Sluman failed to allege the required elements of negligence or gross negligence. Sluman focuses on his perception

C. Sluman’s Deposition Testimony Requires Dismissal of His Federal and State Claims Against Sergeant Olson Because He Has Named the Wrong Trooper

In his complaint, Sluman alleged Sergeant Olson proximately caused his injuries and violated his Fourth Amendment right to be free of excessive force, but he testified in his deposition that it was a different Trooper (Blume) that caused his damages. It is axiomatic the correct defendant must be identified in a valid lawsuit.²⁴ CP 8, 15. Sluman in his legal pleadings alleges that Sergeant Olson is the named defendant responsible for his civil rights damages. CP 2-7. It is undisputed that Sergeant Olson drove a Dodge Charger that summer day in July 2010. CP 148. However, Sluman claimed at his deposition it was an SUV that is responsible for his damages. CP 391-92. Sluman testified under oath that he “only remember[ed] the SUV . . . cause he was coming right at me in my lane and hit me.” CP 391-92.²⁵

Trooper Blume drove a Ford Expedition, an SUV. CP 173. Sluman argues that “he saw a large white law enforcement vehicle ‘coming head on

of WSP and Sergeant Olson defeating the claims with the public duty doctrine. Appellant’s Br. at 27. However, he misses the point that that the claims were not supported by evidence or law. Again, this is incurable.

²⁴ The only individual § 1983 claim that survived defendants’ first motion for summary judgment was the claim against Sergeant Olson. CP 362. Trooper Blume is not identified in the complaint. CP 1-11. Sluman did not file an amended complaint.

²⁵ CP 587-58 also contains a portion of Sluman’s testimony but omits the page with the testimony where Sluman states: “A. I - - I only remember the SUV.” Sluman responds to the question “Q: And why do you remember the SUV?” “A: Cause he was coming right at me in my lane and hit me.” CP 391-92.

toward me.’ He does not remember anything else.” Appellant’s Br. at 9 (internal citations omitted). If Sluman testified in accordance with the oath he provided at the beginning of the deposition, then there is no basis for his state or federal law claims against Sergeant Olson. Sluman testified he collided into Trooper Blume’s SUV. CP 391-92. Trooper Blume has not been identified as a party.²⁶

At minimum, Sluman’s sworn deposition testimony contradicts his Complaint for Damages and his sworn statement that the complaint is “true and correct to the best of my knowledge information and belief.” CP 11. Such a contradiction presents thin grounds for appeal. Arguably, Sluman’s case should be dismissed in its entirety because he has failed to name both the correct party and that party’s role in his alleged harm.

If Sluman’s sworn deposition testimony is to be believed, Trooper Blume “hit” him and that “hit” was the proximate cause of the harm he alleges. Sluman’s allegation that he was “hit” by an SUV driven by Trooper Blume does not serve as a factual basis for suing Sergeant Olson for violation of his Fourth Amendment right to be free from excessive force.

²⁶ Trooper Blume was deposed in this matter in April 2015. CP 556.

VI. CONCLUSION

For each of the reasons stated, Sergeant Bart Olson and the WSP request this Court to affirm the trial court's summary judgment order dismissing this action in its entirety.

RESPECTFULLY SUBMITTED this 19th day of June, 2017.

ROBERT W. FERGUSON
Attorney General

/s/ Patricia D. Todd

PATRICIA D. TODD, WSBA No. 38074
Assistant Attorney General
Counsel for State of Washington Respondents
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
Phone: (360) 586-6300
PatriciaT2@atg.wa.gov

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the Amended Respondents' Brief with the Clerk of the Court using the CM/ECF system which will send a copy of such filing to counsel of record for the other parties to this case, including the following:

George M. Ahrend
gahrend@ahrendlaw.com

M. Scott Brumback
scott@brumbacklaw.com

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

George M. Ahrend
Ahrend Law Firm PLLC
100 East Broadway Avenue
Moses Lake, WA 98837

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

DATED this 19th day of June, 2017, at Tumwater, Washington.

/s/ Cynthia A. Meyer
CYNTHIA A. MEYER, Legal Assistant

APPENDIX

Street view of South Thorp Highway at the intersection with I-90.....B

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

June 19, 2017 - 10:09 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34467-3
Appellate Court Case Title: Thomas L. Sluman v State of Washington, et al
Superior Court Case Number: 13-2-00220-8

The following documents have been uploaded:

- 344673_Briefs_20170619100126D3090648_4923.pdf
This File Contains:
Briefs - Respondents - Modifier: Amended
The Original File Name was AmendedRespondentsBrief.pdf

A copy of the uploaded files will be sent to:

- TorSeaEF@atg.wa.gov
- cathh@atg.wa.gov
- cynthiam4@atg.wa.gov
- gahrend@ahrendlaw.com
- scanet@ahrendlaw.com
- scott@brumbacklaw.com
- torolyef@atg.wa.gov

Comments:

Sender Name: Cynthia Meyer - Email: CynthiaM4@atg.wa.gov
Filing on Behalf of: Patricia D Todd - Email: PatriciaT2@atg.wa.gov (Alternate Email:)

Address:
PO Box 40126
Olympia, WA, 98504-0126
Phone: (360) 586-6300

Note: The Filing Id is 20170619100126D3090648