

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 REPLY BRIEF

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Plaintiff-Appellant Thomas L. Sluman (Sluman) submits this reply to the Amended Respondents' Brief submitted on behalf of Defendants-Respondents the State of Washington and Bart H. Olson (Olson), a Washington State Patrol (WSP) Trooper at the relevant time.

## I. REPLY

**A. On summary judgment review, Respondents cannot legitimately dispute that Olson “door checked” Sluman as his motorcycle passed Olson’s patrol car.**

In his opening brief, Sluman relied on evidence that Olson “door checked” Sluman, consisting of expert testimony from Marc Boardman, a former Washington State Patrol Trooper with 28 years of experience, and Steve Harbinson, a commissioned police officer with over 24 years of experience, both of whom have expertise in accident reconstruction. *See* App. Br., at 10 (citing Boardman report, CP 714-15, reproduced in App. Br., at A-31 to -34); *id.* at 11 (citing Harbinson report, CP 738, reproduced at A-9 to A-30). Trooper Boardman testified that Olson forcefully opened his door into Sluman’s motorcycle as it passed his patrol car. In particular, Trooper Boardman testified that Sluman’s motorcycle did not run into an already open door, the marks on the door show that “the door was moving laterally simultaneous to the passing of the

motorcycle,” “outward force was still being applied as the motorcycle passed by,” and the motorcycle was forced off the bridge “by a lateral impulse from the driver’s door.” CP 714-15 (emphasis omitted). He also testified that the physical evidence did not match Trooper Olson’s description of events. *See id.* Similarly, Officer Harbinson testified that “Olson opened his door into the travel path of Sluman in an attempt to stop the pursuit,” and “used intentional intervention when he opened his vehicle door into Sluman (door checking Sluman), as Sluman was attempting to drive past” him. CP 738 & 739 (parens. in original).

Respondents do not acknowledge Sluman's evidence regarding Olson's door checking him in their amended brief. Instead, in their counterstatement of the case, Respondents repeat Trooper Olson’s claim that Sluman ran into his already open door, citing their summary judgment memorandum in the superior court, Trooper Olson’s amended police report, and Trooper Olson’s deposition testimony. *See Resp. Amended Br.*, at 8 (stating “Olson started to open his door, in an attempt to exit his patrol vehicle and stop the motorcycle” and “the motorcycle collided with the patrol car door”; citing CP 22, 45 & 153). Elsewhere in their counterstatement of the case and argument, Respondents attempt

to minimize Trooper Olson's conduct by characterizing it as merely "opening" his door, without citation to the record. *See* Resp. Amended Br., at 15, 16, 19, 25, 26, 31, 32 & 35; *see also* RAP 10.3(a)(5) (requiring "[r]eference to the record ... for each factual statement" in the statement of the case; brackets & ellipses added); RAP 10.3(a)(6) (requiring "references to relevant parts of the record" in the argument section of a brief).

Respondents' portrayal of the record does not reflect the standard of review on summary judgment. "[W]here the defense seeks summary judgment on the qualified immunity issue, the court must view the evidence in the light most favorable to the plaintiff." *Triplett v. Washington State Dep't of Soc. & Health Servs.*, 193 Wn. App. 497, 527, 373 P.3d 279, 293 (2016), *rev. denied*, 186 Wn.2d 1023, 383 P.3d 1024 (2016) (brackets added). Accordingly, in reviewing the superior court's dismissal of Sluman's complaint on summary judgment, this Court must assume that Trooper Olson door checked Sluman. *Cf. Gallegos v. Freeman*, 172 Wn. App. 616, 639, 291 P.3d 265, 276, *rev. denied*, 178 Wn. 2d 1002, 308 P.3d 641 (2013) ("taking the facts in the light most favorable to [plaintiff], as we must where qualified immunity is granted at the summary judgment stage, it must be assumed that the vehicle was traveling at

a much slower rate” as contended by plaintiff; brackets added). Respondents pay lip service to the standard of review, but they do not follow it. *See Resp. Amended Br.*, at 13-14.

**B. On summary judgment review, Respondents cannot legitimately dispute that Olson set up a roadblock.**

In his opening brief, Sluman pointed to testimony from Olson’s supervisor, CP 246 & 249, an independent eyewitness, CP 670-71, and Officer Harbinson, CP 730-34, indicating that Olson set up a roadblock to apprehend Sluman. *See App. Br.*, at 8 (citing this testimony). Specifically, WSP Captain Karen DeWitt testified that Olson "definitely" set up a roadblock within the meaning of WSP policy, CP 246, and that Olson "understood that there was a roadblock," CP 249. Witness Kenneth Sewell stated "[i]t appeared to me that the officers involved had set up a roadblock to stop the motorcyclist," and "it appeared that the officers had made sure that the motorcyclist would not get through[.]" CP 671 (brackets added). Officer Harbinson confirmed that Olson set up a roadblock within the meaning of WSP policy, and that the roadblock violated the terms of that policy because it was unwarranted for the suspected crime of eluding. *See CP 730-34.*

Respondents do not address Sluman's evidence regarding Olson's improper roadblock in their amended brief. *See Resp.*

Amended Br., at 4-13 (counterstatement of the case). Instead, they simply claim, without citation to the record, that this case does not involve a roadblock. *See id.* at 33 (attempting to distinguish *Brower v. Inyo*, 489 U.S. 593 (1989), on this basis); *see also* RAP 10.3(a)(6) (requiring "references to relevant parts of the record" in the argument section of a brief). As with Respondents' portrayal of the record regarding Olson's door checking of Sluman, their portrayal of the record regarding Olson's roadblock does not accord with the standard of review on summary judgment. *See Triplett*, 193 Wn. App. at 527.

**C. On summary judgment review, Respondents cannot legitimately dispute that Olson's conduct amounted to lethal force against Sluman.**

In his opening brief, Sluman highlighted testimony that Olson's conduct in door checking Sluman and setting up a roadblock to apprehend him constituted lethal force. *See App. Br.*, at 11 (citing CP 626-27 & 738). With respect to door checking, WSP Lieutenant Timothy Coley, who is responsible for cadet and trooper training at the WSP academy, testified that it is a form of intentional intervention under WSP policy that constitutes lethal force, and that it was improper under the circumstances present in this case. *See CP 626-27*. Officer Harbinson similarly testified that

Trooper Olson's door checking of Sluman amounted to lethal force in violation of WSP policy. *See* CP 738. With respect to the roadblock, WSP Major Accident Investigation Team (MAIT) investigator Greg Wilcoxson testified that it constitutes lethal force. *See* CP 582. Officer Harbinson confirmed that the roadblock constitutes lethal force and added that it was in violation of WSP policy. *See* CP 728 & 730.

Respondents do not address Sluman's evidence regarding Olson's use of lethal force in their amended brief. *See* Resp. Amended Br., at 4-13 (counterstatement of the case). Instead, they state in a footnote that they “do not concede that Sergeant Olson used deadly force in attempting to apprehend Sluman.” Resp. Amended Br., at 19 n.15 (quoting RP 371). There is no page 371 in the Report of Proceedings. A similar, but not identical, quotation appears on page 371 of the Clerk's Papers, but that page is from Respondents' summary judgment memorandum and does not cite or otherwise refer to any evidence in the record. *See* CP 371. Whether or not Respondents "concede" Olson used lethal force, the evidence indicates that he did, in fact, use such force against Sluman.

**D. On summary judgment review, Respondents cannot legitimately contend that Sluman posed an *immediate* threat of serious physical harm or death—as distinguished from a *potential* or *hypothetical* threat of harm—to justify Olson's use of lethal force.**

In his opening brief, Sluman pointed out that only an immediate threat of serious physical harm or death justifies the use of lethal force under the Fourth and Fourteenth Amendments. *See* App. Br., at 17 (citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), for the proposition that "[t]he 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"; brackets added). Sluman also pointed out that, in the superior court, Respondents did not argue that his conduct posed an *immediate* threat of serious physical harm or death, but only a *potential* for harm. *See* App. Br., at 22-23 (quoting CP 20, 30 & 32); *see also* CP 20 (line 3, arguing Sluman was "*potentially* endangering the lives of motorists" without citation to evidence; emphasis added); CP 30 (line 17, arguing that Olson was attempting to avoid *potential* harm to innocent drivers and passengers on the road" without citation to evidence; emphasis added); CP 32 (line 18, arguing Sluman "was *potentially*

dangerous to himself, law enforcement, other drivers and/or their passengers" without citation to evidence; emphasis added).

Notwithstanding their position in the superior court, Respondents contend on appeal that Sluman posed an **immediate** threat of harm, based on his alleged speeding and suspected eluding of law enforcement. *See* Resp. Amended Br., at 25-27 & 35. At every point, this contention is unsupported by citation to the record. *See id.*; *see also* RAP 10.3(a)(6) (requiring "references to relevant parts of the record" in the argument section of a brief). Respondents cannot avoid using conditional phrasing, reflecting the lack of evidence of an immediate threat of harm. *See id.* at 25 (stating Sluman "**could pose** an immediate threat to the safety of all those in the motorcycle's immediate path"; emphasis added); *see also Merriam-Webster Online, s.v. "could"* (noting conditional nature of "could" as an auxiliary verb; viewed Aug. 29, 2017; available at [www.m-w.com](http://www.m-w.com)).

Speeding and attempting to elude law enforcement do not, ipso facto, entail an immediate threat of harm. *See* RCW 46.61.024; *see also State v. Naillieux*, 158 Wn. App. 630, 644, 241 P.3d 1280, 1286 (2010) (noting recklessness required to establish eluding "does not mean a 'willful or wanton disregard for the lives or

property of others"; quotation in original). Furthermore, Respondents distort Olson's deposition testimony regarding the threat of harm, they overstate Sluman's speed at the relevant time and place, and they make additional factual claims without evidentiary support in the record to bolster what is nothing more than an argumentative characterization that Sluman posed an immediate threat of harm. In sum, while Respondents now recognize the need to establish an immediate threat of harm, the evidence in the record reveals nothing more than a potential or hypothetical threat of harm, which is insufficient to justify Olson's use of lethal force against Sluman.

**1. Respondents incorrectly describe Olson's deposition testimony.**

Respondents state that, “[a]s 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.” Resp. Amended Br., at 7 (citing CP 148 & 408). The cited portions of the record are duplicate pages from Olson’s deposition containing part of an extended answer to the question asking for “an overview of this incident.” *See* CP 148 & 408. Respondent’s

characterization of the deposition testimony wrongly suggests that Olson believed *Sluman* posed a risk of harm. In actuality, Olson testified that he set up the *roadblock* in a manner to avoid creating a risk of harm:

I got to the Exit 106 and I basically stopped to block the ramp between the exit ramp and the South Thorp Highway, thinking that whatever motorcycle Trooper Hinchcliff's pursuing right now is gonna probably come shooting out on this road. I am going to make sure that he is uninhibited. He could basically go through this intersection safely, navigate it safely, so no innocent parties are injured, no officers are injured, and the pursuit driver is not injured, so he could safely navigate.

CP 147:21-148:4; *accord* CP 408. Olson's deposition testimony is devoid of evidence that Sluman posed an immediate threat of serious physical harm or death to bystanders, officers, or himself. His contemporaneous police report is likewise devoid of any indication that Sluman posed an immediate threat of harm. *See* CP 45-46.

**2. Respondents overstate Sluman's speed at the relevant time and place.**

Respondents repeat that Sluman was traveling "over 120 miles per hour" on the South Thorp Highway no less than nine times in their brief. *See* Resp. Amended Br., at 3 (twice), 5, 6, 24 & n.16 (twice), 24 & n.16 (twice), 25, 39 nn.20 & 21 (twice) & 40. The only citation to the record for these statements is the report of

airborne WSP Trooper, John Montemayor, who originally determined that Sluman was going between 76 and 89 miles per hour on Interstate 90, before exiting onto the South Thorp Highway. *See* Resp. Amended Br., at 6, 24 & 40 (citing CP 38). As pointed out in Sluman’s opening brief, Trooper Montemayor measured Sluman’s speed on Interstate 90 using Aerial Traffic Surveillance Marks (ATSMs) and a stopwatch. *See* App. Br., at 4 n.1 (discussing CP 38). However, the record does not reflect that there are any ATSMs on the South Thorp Highway, or that Trooper Montemayor timed Sluman as he traveled along that road. *See* CP 38. Trooper Montemayor does not state how he was able to estimate Sluman’s speed on the South Thorp Highway. *See id.* He also does not say where or when Sluman allegedly reached that speed, or whether he momentarily reached that speed or sustained that speed.

Respondents ignore the evidence of Sluman's speed when he reached the roadblock and was door checked by Olson. Before Olson door checked Sluman, another WSP Trooper at the scene, Paul Blume, testified that Sluman was not traveling “at a high rate” of speed. CP 183-84. According to him, Sluman “seemed to be under control of the bike” and “there was [sic] no high speeds

involved at that point.” CP 184 (brackets added). Based on the dashcam video and other methods, WSP MAIT investigator Greg Wilcoxson and MAIT supervisor Gerald Cooper estimated that Sluman was traveling between 28 and 37 miles per hour when Olson door checked him. *See* CP 199 & 284. Sluman's speed at the time and place when Olson used lethal force against him was confirmed by Officer Harbinson. *See* CP 737.<sup>1</sup>

**3. Respondents' insinuations that other people were in harm's way at the relevant time and place lack record support.**

Respondents state that the South Thorp Highway (STH) runs “through a high-density residential farm area.” Resp. Amended Br., at 6 (citing CP 353). The cited portion of the record is a photograph showing the location of Olson’s patrol car when Olson door checked Sluman. *See* CP 353; *see also* CP 350 (Declaration of Patricia Todd, ¶ 4, authenticating the photograph).<sup>2</sup> The photograph does not show any residences or farms, let alone a “high density” of such

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<sup>1</sup> Respondents’ argument that Sluman should have sued Trooper Blume based on testimony at his deposition is disingenuous given Sluman’s admitted lack of memory of the incident, the accident reconstructions by Trooper Boardman, Officer Harbinson, and WSP, and the police report and testimony of Olson himself. *See* Resp. Amended Br. at 42-42.

<sup>2</sup> *See also* Resp. Amended Br., at 9 (referring to "the dense residential farm area on South Thorp Highway," again citing CP 353); *id.* at 25 (referring to "a residential farm road" with no citation to record); *id.* at 27 (referring to "a residential farm road" with no citation to record); *id.* at 35 (referring to "the residential farm road" with no citation to record); *id.* at 40 (referring to "a residential farm community with no citation to record).

residences or farms. *See* CP 353. The phrase “high density,” with and without a hyphen, does not appear in the record. The words “farm” and “farms” do not appear in the record. The words “residence” and “residential” appear several times in the record, but never in connection with STH or the location where Olson door checked Sluman. *See* CP 57-58, 63, 65, 70, 376 & 429-30.

In a similar way, Respondents state that Sluman “rapidly approached both a busy campground and an area of high density traffic as he neared [Olson's location].” *Resp. Amended Br.*, at 24 (citing CP 38, 45 & 147; brackets added).<sup>3</sup> None of the record citations address the busy-ness of the campground or the density of the traffic. As with the phrase “high density,” the word “busy” does not appear in the record.

Lastly, Respondents state that Sluman was traveling toward “a high density population” with no citation to the record. *Resp. Amended Br.*, at 31.<sup>4</sup> As with the phrase “high density,” the word “population” does not appear in the record.

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<sup>3</sup> *See also* *Resp. Amended Br.*, at 25 (referring to a “busy interchange near a campground on a summer day” with no citation to the record); *id.* at 35 (referring to “a busy summer morning, with traffic present” with no citation to record). Respondents also cited “App. B,” but no such appendix was included with the copy of the brief served on Sluman or electronically filed with the Court.

<sup>4</sup> *See also* *Resp. Amended Br.*, at 34 (referring to “a population center” with no citation to record); *id.* at 40 (referring to “a high population center” with no citation to record).

4. **Olson's dashcam video shows that Sluman was in control of his motorcycle, traveling at a moderate speed consistent with WSP estimates of 28-37 miles per hour, and low traffic density at the relevant time and place.**

Respondents rely on Olson's dashcam video throughout their amended brief to show "what happened." *E.g.*, Resp. Amended Br., at 7. While the video only shows Sluman for a few seconds before Olson door checked him, and does not record the door checking incident itself, the video does show that Sluman was in control of his motorcycle at the relevant time and place. He appears to be traveling at a moderate speed consistent with WSP MAIT investigator Greg Wilcoxson's and MAIT supervisor Gerald Cooper's estimates of 28 to 37 miles per hour. The video also shows minimal traffic at the relevant location before, during and after Olson door checked Sluman. In short, the video confirms that Sluman did not pose an immediate threat of harm when Olson used lethal force against him.

- E. **Olson's service record and training are immaterial and do not counter the facts that he violated his supervisor's instructions to "back off" and WSP policies regarding pursuit, roadblocks and the use of lethal force, and that he acted unreasonably in using lethal force against Sluman.**

Respondents point out that Olson was Trooper of the Year in 2010, the same year he used lethal force against Sluman, and that

he has received extensive training. *See* Resp. Amended Br., at 5-6. These facts are immaterial to the present case, and are insufficient to counter Olson's violation of his supervisor's instructions to "back off" of the pursuit of Sluman, CP 648, his violation of WSP's pursuit policy, CP 658, his violation of WSP's roadblock policy, CP 662, and his violation of WSP's policy regarding the use of lethal force, CP 661-62. As noted by Officer Harbinson, "a reasonable law enforcement officer and/or WSP Trooper would have, or should have, known that [Olson's] attempted use of force was inherently dangerous, unreasonable and contrary to existing laws and regulations," CP 734 (brackets added); and Olson's conduct was "clearly unreasonable" under the circumstances, CP 739-40.

**F. In arguing that Olson did not violate the Fourth Amendment, Respondents fail to acknowledge the dispositive U.S. Supreme Court decision in *Tennessee v. Garner*.**

Respondents argue that Olson's use of lethal force against Sluman did not violate the Fourth Amendment, primarily based on the decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Plumhoff v. Rickard*, — U.S. —, 134 S. Ct. 2012 (2014), and the per curiam decisions in *Brosseau v. Haugen*, 543 U.S. 194 (2004), and *Mullenix v. Luna*, — U.S. —, 136 S. Ct. 305 (2015). *See* Resp. Amended Br., at 20-27. However, Respondents never cite, let alone

address, the U.S. Supreme Court's dispositive decision in *Tennessee v. Garner, supra*.

In *Garner*, the Court held that the use of lethal force to apprehend a fleeing suspect violates the Fourth Amendment unless the suspect poses an immediate threat of serious physical harm or death:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the 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.

471 U.S. at 11. This holding is implicitly recognized and re-affirmed in the cases cited by Respondents, all of which cite *Garner* with approval. See, e.g., *Brosseau*, 543 U.S. at 197 (stating "the constitutional question in this case is governed by the principles enunciated in *Tennessee v. Garner*"). Because Respondents cannot establish that Sluman posed an immediate threat of harm, Olson's use of lethal force against him violated the Fourth Amendment.

None of the cases cited by Respondents permit or require a different result. *Graham* clarified that the decision in *Garner* was grounded in the "objective reasonableness" standard of the Fourth Amendment rather than Substantive Due Process:

Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach.

*Graham*, 490 U.S. at 395. *Graham* did not undermine the holding of *Garner* that it is objectively unreasonable to use lethal force on a fleeing suspect in the absence of an immediate threat of harm. *See id.* *Graham* is otherwise unhelpful because the Court remanded the case for reconsideration in light of the proper standard. *See id.* at 399.

In *Plumhoff*, the Court separately treated Fourth Amendment claims challenging the **use** of lethal force from those challenging whether the **amount** of lethal force used was excessive. *See* 134 S. Ct. at 2021-22. The use of lethal force is consistent with the Fourth Amendment only if there is “an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and the officers involved in the chase.” *Id.* at 2021 (quoting *Scott v. Harris*, 550 U.S. 372, 383-84 (2007)). Once the use of lethal force is justified by such an actual and imminent threat of harm, the amount of force permitted

by the Fourth Amendment is that which is reasonably necessary to end the threat. *See id.* at 2022.

On the facts of *Plumhoff*, the Court determined that the use of lethal force did not violate the Fourth Amendment because the fleeing suspect "posed a grave public safety risk," *id.* at 2022. Specifically, he swerved through traffic at high speeds, passed more than two dozen vehicles, rammed two police cars, and then resumed flight when lethal force was used, *id.* at 2017. *Plumhoff* is distinguishable from this case because there is no comparable evidence in this case other than allegedly high speeds, although the alleged speeding in this case occurred at a time and place removed from the use of lethal force by Olson against Sluman.

The per curiam decisions in *Brosseau* and *Mullenix* are unhelpful in determining whether a Fourth Amendment violation occurred because neither case addressed the issue. *See Brosseau*, 543 U.S. at 195 (noting declination of certiorari on the issue of whether a Fourth Amendment violation occurred); *id.* at 198 (stating "[w]e express no view as to the correctness of the Court of Appeals' decision on the constitutional issue itself"; brackets added); *Mullenix*, 136 S. Ct. at 308 (stating "[w]e address only the

qualified immunity question, not whether there was a Fourth Amendment violation in the first place"; brackets added).

In addition, *Brosseau and Mullenix* are unhelpful because the fleeing suspects in both cases posed imminent threats of harm, and the challenges were to the amount of lethal force used rather than the use of lethal force. In *Brosseau*, the suspect was believed to be retrieving a weapon, had been involved in a violent confrontation with an officer, drove across a neighbor's lawn while attempting to flee, and admitted driving with willful or wanton disregard for the lives of others. *See* 543 U.S. at 196-97. In *Mullenix*, the 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. *See* 136 S. Ct. at 306-07, 309-10 & 312. In contrast to *Brosseau* and *Mullenix*, Sluman was nonviolent, unarmed, on the road, in control of his motorcycle, driving only 28-37 miles per hour when Olson used lethal force to apprehend him, and there is no evidence of an immediate threat of harm to anyone in the area. In light of the foregoing, the cases cited by Respondents lend credence to Sluman's argument that Olson violated his Fourth Amendment rights.

**G. Respondents' argument that Olson is entitled to qualified immunity because Sluman's Fourth Amendment rights were not clearly established rests upon the unfounded contention that Sluman posed an immediate threat of serious physical harm or death.**

Respondents argue that Sluman's Fourth Amendment rights were not clearly established, primarily based upon the per curiam decisions in *Mullenix v. Luna*, *supra*, and *White v. Pauly*, — U.S. —, 137 S. Ct. 548 (2017). *See* Resp. Amended Br., at 27-36. However, both cases involve suspects who posed immediate threats of harm. As noted above, the suspect in *Mullenix* 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. *See* 136 S. Ct. at 306-07, 309-10 & 312. Similarly, in *White* the suspects stated "We have guns," "fired two shotgun blasts while screaming loudly," and "pointed a handgun in [an officer's] direction." 137 S. Ct. at 550. As noted in Sluman's opening brief, greater specificity is required for a right to be deemed clearly established and to give fair warning to a law enforcement officer who has to balance the potential harm to a fleeing suspect against an immediate threat of serious physical harm or death to others on an emergency basis. *See* App. Br., at 21 (citing *Triplett*, 193 Wn. App. at 293). In this way, Respondents' qualified immunity defense

hinges upon their unfounded contention that Sluman posed an immediate threat of harm.

Respondents overlook the fact that *Mullenix* specifically distinguishes one of the cases on which Sluman relies on grounds that it did not involve an immediate threat of harm. *See* 136 S. Ct. at 312 (distinguishing *Walker v. Davis*, 649 F.3d 502 (6<sup>th</sup> Cir. 2011)); App. Br., at 20 (discussing & quoting *Walker*); *id.* at 21 (noting that *Mullenix* distinguished *Walker*). In *Walker*, the court denied qualified immunity to an officer who rammed his vehicle into a suspect fleeing on a motorcycle because he "posed no immediate threat to anyone." 649 F.3d at 503. The court held that "[t]his 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.'" *Id.* (quotation omitted); *see also Hawkins v. City of Farmington*, 189 F.3d 695 (8<sup>th</sup> Cir. 1999) (denying qualified immunity to an officer who tried to slow or stop the motorcycle of a fleeing suspect by driving his car on the highway in front of it).

In the context of lethal force used to apprehend a suspect who does not pose an immediate threat of harm, the general rule retains its validity following *Mullenix* and *White*. In *Mullenix*, the

Court stated "[w]e do not require a case directly on point" for a right to be clearly established, 136 S. Ct. at 308 (brackets added); and in *White* the Court quoted *Mullenix* for this proposition, 137 S. Ct. at 551. *Accord Taylor v. Barkes*, — U.S. —, 135 S. Ct. 2042, 2044 (2015); *Stanton v. Sims*, — U.S. —, 134 S. Ct. 3, 5 (2013); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Respondents wrongly suggest that the U.S. Supreme Court changed federal law in *Mullenix* by means of a per curiam opinion, see Resp. Amended Br., at 38 n.19; and they are simply incorrect when they state that "[a]bsent a prohibiting case, Sergeant Olson is entitled to qualified immunity," *id.*, at 36 (brackets added). Nonetheless, even if *Mullenix* did change the law and an on point case were required, *Walker* and *Hawkins* clearly establish that using a patrol car to block or collide with a motorcycle driven by a fleeing suspect who does not pose an immediate threat of harm violates the Fourth Amendment.

**H. Sluman's *Alford* plea does not give rise to collateral estoppel or establish proximate cause of his injuries as required for Respondents' defense under RCW 4.24.420.**

Respondents recognize that Sluman's *Alford* plea to eluding and taking a motor vehicle without permission does not give rise to collateral estoppel, but they go on to argue, without citation to authority, that the terms of the plea, including the term authorizing

the sentencing judge to review police reports to establish a factual basis for the plea, somehow establish their defense to his state law claims under RCW 4.24.420. *See* Resp. Amended Br., at 38-39. This is just collateral estoppel by another name, and it would be improper because "a defendant who enters an *Alford* plea has not had a full and fair opportunity to litigate the issues in a criminal action." *In re Disciplinary Proceeding against King*, 170 Wn. 2d 738, 744, 246 P.3d 1232 (2011). At any rate, the *Alford* plea does not establish the proximate cause of Sluman's injuries. As noted in Sluman's opening brief, a jury is entitled to find that Olson was the sole proximate cause or a superseding cause of his injuries under the circumstances present in this case, and summary judgment is therefore improper. *See* App. Br., at 25-26.

Respectfully submitted this 30th day of August, 2017.

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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:

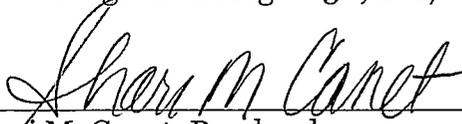
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and upon Appellant's co-counsel, M. Scott Brumback, via email pursuant to prior agreement for electronic service, as follows:

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Signed at Moses Lake, Washington on August 30, 2017.

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

**AHREND LAW FIRM PLLC**

**August 30, 2017 - 2:30 PM**

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