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Division III  
State of Washington  
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CASE NO. 371492

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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**GILBERTO CANTU, a single person,**  
**Appellant,**

v.

**ADAMS COUNTY,**  
**ADAMS COUNTY SHERIFF'S DEPARTMENT,**  
**SHERIFF DALE J. WAGNER,**  
**and DEPUTY DARRYL BARNES,**

**Respondents.**

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**BRIEF OF RESPONDENTS**

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JONATHAN R. HAMMOND  
BOHRNSEN STOCKER SMITH LUCIANI ADAMSON PLLC  
312 West Sprague Avenue  
Spokane, WA 99201  
Phone: (509) 327-2500  
Fax: (509) 327-3504  
*Attorney for Respondents, Adams County, et al.*

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## I. INTRODUCTION

In the afternoon of April 4, 2015, Adams County Sheriff's Deputy Darryl Barnes ("Deputy Barnes") was on patrol in the City of Othello, Washington. As he approached the intersection of East Main Street and 14<sup>th</sup> Avenue, Deputy Barnes saw a man riding a BMX-style bicycle. From prior law enforcement encounters, Deputy Barnes recognized the bicyclist as Gilberto Cantu. Deputy Barnes also knew that probable cause existed for Mr. Cantu's arrest as a result of an alleged felony domestic violence assault and harassment incident that had occurred the previous day.

Deputy Barnes activated his patrol unit lights and siren and called out Mr. Cantu by name using his public address system, asking Mr. Cantu to stop several times. Instead of complying with Deputy Barnes' commands, Mr. Cantu attempted to flee on his bicycle. Deputy Barnes then pursued Mr. Cantu at low speeds as his suspect zigged and zagged across parking lots, over sidewalks, and through unpaved areas. The pursuit lasted about 90 seconds and was concluded when Mr. Cantu's bicycle was struck after he veered into the path of the approaching police cruiser.

Mr. Cantu ("Plaintiff"<sup>1</sup>) filed suit against Adams County ("the County"), the Adams County Sheriff's Department ("the Sheriff's

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<sup>1</sup> For clarity purposes, this brief will utilize the lower court designations of "Plaintiff" and "Defendants" (or the parties' names) in lieu of the appellate case designations.

Department”), Sheriff Dale J. Wagner (“Sheriff Wagner”), and Deputy Barnes (collectively, the County, Sheriff’s Department, Sheriff Wagner and Deputy Barnes are referred to herein as “Defendants”), to recover for personal injuries and other damages resulting from the collision. Specifically, Plaintiff has asserted claims for: (1) Negligent Driving (against Deputy Barnes); (2) Negligent Training (against the County, Sheriff’s Department and Sheriff Wagner); (3) Agency Theory (against the County); and (4) a claim based on the doctrine of Respondeat Superior (against the County and Sheriff’s Department).<sup>2</sup> See CP 1-5.

After the parties exchanged written discovery and after the depositions of Plaintiff and Deputy Barnes were taken, Defendants moved for summary judgment. Adams County Superior Court Judge Steven Dixon granted Defendants’ motion and dismissed Plaintiff’s complaint with prejudice. On appeal, Plaintiff contends there are genuine issues of material fact in dispute which preclude summary judgment, and that the lower court applied an incorrect legal standard when ruling upon Defendants’ summary judgment motion. As shown below, Plaintiff’s underlying claims and his arguments on appeal are wholly lacking in merit and the Court should affirm Judge Dixon’s order granting Defendants summary judgment of dismissal.

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<sup>2</sup> Plaintiff has not asserted a use of force claim under 42 U.S.C. § 1983; instead, this case involves only personal injury claims based upon common law tort theories. CP 1-5; see also Transcript of Proceedings from Summary Judgment Hearing at 10:22-25.

## II. ASSIGNMENT OF ERRORS

Defendants do not assign error to the lower court's order of summary judgment. Defendants submit that applying a *de novo* review of the record reveals that summary judgment was properly granted.

## III. STATEMENT OF THE CASE

### A. April 3, 2015 Felony Domestic Violence Incident

On April 3, 2015, an unidentified caller alerted the Sheriff's Department dispatch that a man was beating up a woman near a burned building located at 2125 W. Cunningham Road in Othello, Washington. CP 62 and 65. Sheriff's deputies responded to the scene of the reported assault; not finding anyone in the immediate area, they began searching some tents that had been erected on the property. *Id.* After announcing their presence, a woman named Melissa Fife came out of a tent and spoke with the deputies. *Id.* According to the sworn statement of Deputy Garcia (one of the deputies who responded to the reported assault), Ms. Fife reported that Mr. Cantu had punched and slapped her at least eight times (including on her head). *Id.* at 62. During the assault, Mr. Cantu also reportedly pushed Ms. Fife down, then dragged her back to the tent by her hair. *Id.* Deputy Garcia observed dried blood on the side of Ms. Fife's nose, redness on her neck, and hair missing from her scalp. *Id.* Ms. Fife also reported that Mr. Cantu threatened to kill her if she said anything to the

police, and that she believed he would actually do it. *Id.* By the time the deputies arrived, Mr. Cantu had already fled the scene and the deputies were unable to immediately locate him. *Id.*

Based on Ms. Fife's report, Deputy Garcia found probable cause existed to arrest Mr. Cantu for Felony Harassment (RCW 9A.46.020) and 4<sup>th</sup> Degree Felony Assault - Domestic Violence (RCW 9A.36.041), which he memorialized in a sworn incident report and affidavit of probable cause. CP 62-64. Plaintiff at no time has disputed the basis of finding probable cause. CP 133-137; see also Plaintiff's Brief.

**B. Pursuit of Plaintiff by Deputy Barnes and Subject Collision**

The following day, Deputy Barnes was on patrol in the City of Othello in his department-issued, fully marked black-and-white Ford Crown Victoria. CP 106. While on patrol, Deputy Barnes observed Mr. Cantu riding a bicycle near the Cimarron Motel in Othello. CP 73. Deputy Barnes was able to recognize Plaintiff, as he had had at least two prior law enforcement encounters involving Mr. Cantu; however, Deputy Barnes did not know where Mr. Cantu resided within Adams County. CP 55, 105-106. In addition, before he left on patrol that day, Deputy Barnes was informed and had reviewed documentation in the Sheriff's Department offices establishing that probable cause existed to arrest Mr. Cantu for the assault against Ms. Fife the prior day. CP 55-56, 107-108.

As soon as he recognized Plaintiff, Deputy Barnes began pursuing Mr. Cantu in his patrol vehicle. CP 73, 111; see also CP 69 (video of pursuit). A dashcam video (part of which includes audio) captured the pursuit and was presented to the Superior Court as part of the Defendants' summary judgment motion.<sup>3</sup> The pursuit lasted about 90 seconds, and occurred at low speeds of approximately fifteen miles per hour. CP 49, 113, and 118-19.

As shown in the pursuit video and set forth in the sworn police reports, declaration of Deputy Barnes, and the depositions of both the Plaintiff and Deputy Barnes, the pursuit took place as follows: Deputy Barnes turned on his patrol vehicle lights and ordered Mr. Cantu to stop by repeatedly announcing his name over the police cruiser's public address (or "PA") system. CP 73, 111. Plaintiff disobeyed this command and continued west into a parking lot. *Id.* Deputy Barnes followed at a rate of a few miles per hour. CP 73, 111, 113. When Plaintiff proceeded north

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<sup>3</sup> A true and correct copy of the dash-cam video capturing the low-speed pursuit was included in Defendants' summary judgment motion and reviewed and discussed on the record at the hearing on Defendants' summary judgment motion. However, the lower court did not initially transmit the video as part of the Clerk's Papers on appeal; Defendants understand the record has since been supplemented by the Adams County Clerk to include the video. See CP 56, 69; see also January 23, 2020 letter from Adams County Superior Court transmitting flash drive containing subject video.

Both Plaintiff and Defendants relied upon the video in support of their arguments on summary judgment and on appeal, and the video has been properly authenticated. See CP 56 and 69. *This Court is respectfully requested to view the video in connection with rendering its decision in this matter, as it is highly relevant to the issues to be determined on appeal.*

and west back onto Main Street, Deputy Barnes engaged his audible siren, and again commanded Mr. Cantu to stop using the PA system. CP 73, 111; CP 69 (video at 0:40-0:48 and at 1:00). Deputy Barnes also reported his location to dispatch and requested backup. CP 69 (video at 0:55); CP 73.

Despite Deputy Barnes' repeated commands to stop accompanied by a siren and flashing emergency lights, Plaintiff continued his attempts to evade capture by accelerating away from Deputy Barnes; plaintiff proceeded south onto 14<sup>th</sup> Avenue, turned into a parking lot near a dental building, and then doubled back north into a gravel parking lot. CP 73, 111-112; CP 69 (video from 0:48-1:20) Just before reaching a berm separating the gravel lot from an adjacent parking lot, Plaintiff veered into the path of Deputy Barnes' cruiser and was struck and knocked to the ground. CP 49, 56, 112, 119; see also CP 69 (video at 1:25).<sup>4</sup> When Plaintiff complained of a hurt foot, Deputy Barnes called an ambulance to provide medical assistance. CP 74, 114. Mr. Cantu sustained a hairline fracture of his ankle as a result of the impact with Deputy Barnes' vehicle. CP 74. After being medically cleared by hospital staff, Mr. Cantu was booked and jailed on charges of obstructing a law enforcement officer (RCW 9A.76.020) and

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<sup>4</sup> Notably, Plaintiff at no time in the summary judgment materials nor in his appellate brief has disputed that the impact occurred just after his bicycle veered in front of the approaching police cruiser.

violation of the Uniform Controlled Substance Act (RCW 69.50.401).<sup>5</sup>  
CP 74 and 75.

At deposition, **Plaintiff admitted he knew Deputy Barnes was trying to detain him and stated that his goal was to get away by fleeing on his bicycle.** CP 124-126. In particular, Mr. Cantu acknowledged that he intentionally pedaled fast, changed directions several times, and rode through parking lots and landscaped areas in order to get away from the pursuing Deputy. CP 126.

At the time of the pursuit and subject collision between Plaintiff and Deputy Barnes, Plaintiff was homeless and living on the streets in Othello, Washington. CP 122; see also CP 80.<sup>6</sup>

### **C. Expert Testimony by Earl Howerton**

Defendants retained police practices expert Earl Howerton to provide opinions related to the conduct of Deputy Barnes during his pursuit and arrest of Plaintiff. See CP 40-51. Mr. Howerton's declaration and accompanying report were submitted to the Superior Court in connection with Defendants' summary judgment motion. *Id.* Based on his review of the pursuit video, incident reports and photographs, deposition testimony of

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<sup>5</sup> White crystalized residue on a glass pipe found during a search of Mr. Cantu's person presumptively tested positive for Methamphetamine. CP 74.

<sup>6</sup> The Police Report at CP 80 indicates Mr. Cantu's address was 2125 W. Cunningham Road, the location of the burned out building and homeless encampment where the domestic violence incident involving Ms. Fife allegedly took place. See CP 62 (Deputy Garcia report of domestic violence incident).

Plaintiff, and other case files, and based on his years of training and work as a peace officer, Mr. Howerton concluded that Deputy Barnes acted reasonably in his pursuit and arrest of Plaintiff in accordance with accepted police practice. CP 49-51. Mr. Howerton specifically noted that Deputy Barnes had probable cause to arrest Plaintiff for the commission of a violent felony; if Plaintiff had gotten away, it may have been difficult to find him, and an immediate arrest would promote public safety and prevent further felony domestic violence by Plaintiff; Deputy Barnes drove reasonably when pursuing Plaintiff by maintaining an appropriate distance and speed, clearly identifying himself, ordering Mr. Cantu to stop using the PA system, and activating his lights and siren; and Plaintiff was riding his bike in a manner to evade pursuit and arrest by Deputy Barnes. See *Id.* (providing additional details supporting Mr. Howerton's conclusions that Deputy Barnes had no duty to disengage from his attempted contact with Mr. Cantu).

**Plaintiff did not retain a liability expert to respond to Mr. Howerton's opinions, nor has Plaintiff objected to or provided any evidence to undermine Mr. Howerton's conclusions.** See Plaintiff's Appellate Brief on file herein; see also CP 129-130 (Plaintiff's interrogatory answer indicating no liability experts were retained), and CP 133-166 (Plaintiff's summary judgment opposition brief and declaration, and

Defendants' reply thereto, showing that Mr. Howerton's opinions remain unchallenged by Plaintiff).

#### IV. ARGUMENT

Plaintiff argues that there is a basis to find liability on the part of Defendants because Deputy Barnes traveled too fast for conditions, failed to reduce his speed to avoid a collision, failed to maintain control of his vehicle, and failed to yield to a bicyclist. Plaintiff also claims the evidentiary record contains factual inconsistencies which require the matter to proceed to trial. The Court should not be persuaded by any of Plaintiff's arguments, which are based upon cherry-picked and misleading citations to the record, and which are rooted in a set of "alternative facts," in which a law-abiding bicyclist was struck by an inattentive motorist (as opposed to a measured, and legally mandated pursuit of a suspected violent felon who was struck only after attempting to evade capture).

The Court should affirm the Superior Court's order of summary judgment because the Legislature and the common law have immunized law enforcement personnel from liability for frivolous personal injury claims like this one. Further, Plaintiff's claims are barred by the doctrine of assumption of the risk. Plaintiff is also unable to show that the collision and his ensuing injuries were proximately caused by Deputy Barnes, as Plaintiff clearly could have avoided the collision by simply stopping his bicycle at

any point in the 90-second pursuit. Notably, neither on summary judgment nor on appeal has Plaintiff disputed the application of any of these dispositive defenses to his case.

Further, because Plaintiff's claims for negligence against Deputy Barnes fail as a matter of law, so too do his claims based upon vicarious liability and agency law against Sheriff Wagner, the Sheriff's Department, and the County. Plaintiff has also set forth no evidence to establish a genuine issue of material fact to support his claims for negligent training.

Because none of Plaintiff's legal contentions has any merit, this Court should affirm the lower court.

**A. Standard of Review**

An appellate court reviews a ruling granting a motion for summary judgment on a *de novo* basis, engaging in the same analysis as the trial court. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987); *Highline School Dist. No. 401, King County v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). On review of an order granting summary judgment, the appellate court conducts the same inquiry as the trial court by viewing all facts and their reasonable inferences in the light most favorable to the nonmoving party. *Estate of Carter v. Carden*, 455 P.3d 197, 201 (Wash. Ct. App. 2019). However, when engaging in *de novo* review, the appellate court considers only the evidence and arguments that were presented and

asserted before the trial court. *Riojas v. Grant County Public Utility Dist.*, 117 Wn. App. 694, 696, n. 1, 72 P.3d 1093 (2003); *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996). In addition, appellate courts “may affirm the trial court on “any theory established in the pleadings and supported by proof,” even where the trial court did not rely on the theory. *Meyers v. Ferndale Sch. Dist.*, 457 P.3d 483, 489 (Wash. Ct. App. 2020); *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 630, 334 P.3d 1154, 1164 (2014) (“We can affirm the trial court on any grounds established by the pleadings and supported by the record”).

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). In a summary judgment proceeding, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989); *Celotext Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the moving party is a defendant and makes this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at that time, the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the

burden of proof at trial,” then the trial court should grant the motion. *Celotext*, at 322. *Young* expressly adopted the *Celotext* reasoning and procedure. *Young*, at 225-26. “Bare assertions of ultimate facts and conclusions of fact are alone insufficient to defeat summary judgment.” *Saluteen–Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 852, 22 P.3d 804 (2001).

**B. Elements of Claim for Negligence**

Plaintiff has pled a cause of action against Deputy Barnes for common law negligence arising from Deputy Barnes’ alleged negligent operation of a motor vehicle. It is well established that a plaintiff must establish four elements to support a prima facie case for negligence: (1) the existence of a duty owed; (2) a breach of that duty; (3) a resulting injury; and (4) a proximate cause between the breach and the injury. *Ticani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 875 P.2d 621 (1994). While breach and proximate are usually questions of fact for the jury, they may be resolved at the summary judgment stage if reasonable persons could reach only one conclusion from all the evidence, together with all reasonable inferences therefrom, viewed most favorably toward the non-moving party. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77, 81 (1985); *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835, 837 (2001).

**C. Deputy Barnes Had a Privilege to Arrest the Plaintiff for Suspected Domestic Violence Without a Warrant**

A police officer is privileged to arrest a suspect without a warrant for offenses committed outside of the officer's presence if he or she has reasonable grounds to believe that the offense committed is a felony and that the person apprehended committed felony. See RCW 10.31.100<sup>7</sup>; *Kellogg v. State*, 94 Wn.2d 851, 621 P.2d 133 (1980). In *Kellogg*, a suspect was arrested after he shot his victim. The police were able to locate the suspect based on the name given by the victim. *Id.* at 852-53. The court emphasized that a police officer "is privileged to arrest without a warrant for offenses committed outside his presence if he has reasonable grounds to believe (1) that the offense committed is a felony, and (2) that the person apprehended committed the felony." *Id.* at 854. The court found that the officers were privileged to arrest the suspect because they "knew the victim had been shot with a shotgun and that the victim had identified [the suspect] as the assailant." *Id.*

As documented above, when Deputy Barnes pursued Mr. Cantu on April 4, 2015, there was probable cause for Mr. Cantu's arrest for a felony domestic violence offense. Deputy Barnes had reasonable grounds that Plaintiff was the suspected offender, because Mr. Cantu had been identified

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<sup>7</sup> Effective January 20, 2020, the Legislature has amended this statute with respect to "intimate partners" protected by the statute, without altering the underlying authority to arrest a suspected felon without a warrant, based upon probable cause.

by name by the purported victim (Ms. Fife) and Deputy Barnes had seen the domestic violence incident reports documenting probable cause existed for Mr. Cantu's arrest, prior to going out on patrol on April 4<sup>th</sup>. In addition, based upon his prior law enforcement encounters with the Plaintiff, Deputy Barnes was able to visually recognize Mr. Cantu as the suspected perpetrator when encountering him on patrol. Based on the undisputed record before the Court, Deputy Barnes was authorized by statute and common law to arrest Mr. Cantu without a warrant.

Notably, Plaintiff has submitted no evidence or argument to the contrary.

#### **D. Deputy Barnes Is Immune from Suit**

As argued below on summary judgment, Deputy Barnes is protected from liability by virtue of two immunity defenses.

##### **1. Deputy Barnes Enjoys Statutory Immunity**

The Legislature has by statute shielded law enforcement officers from liability in civil actions arising out of an arrest or other good faith conduct related to an alleged incident of domestic violence. In that regard, RCW 10.99.070 provides as follows:

**A peace officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged**

**incident of domestic violence brought by any party to the incident.** (Emphasis added.)

In *Feis v. King Cty. Sheriff's Dep't*, 165 Wn. App. 525, 551, 267 P.3d 1022, 1036 (2011), a lawsuit was filed against the King County Sheriff's Department and four officers by a plaintiff who had been arrested for fourth degree domestic violence assault. Plaintiff claimed that an entry into his home to seize his firearms was unlawful. Finding that the officers were immune from suit, the trial court dismissed all of plaintiff's claims on summary judgment. *Id.* at 531. Prior to the seizure of the plaintiff's firearms, various members of his family had been interviewed about the alleged domestic violence. *Id.* at 533-34. Additionally, one victim responded indicated that he would like the deputies to remove firearms from the home based on prior threats by the plaintiff. *Id.* Pursuant to that request, a search was conducted and several of the plaintiff's firearms were removed. *Id.* at 536.

On appeal, the court affirmed the lower court's ruling that the Sheriff's department and officers were immune from suit under RCW 10.99.070, because the alleged unreasonable search and seizure took place in the course of responding in good faith to a domestic violence incident. *Id.* at 551; see also *Estate of Lee ex rel. Lee v. City of Spokane*, 101 Wn. App. 158, 177, 2 P.3d 979 (2000) (officers enjoyed statutory

immunity because the alleged tort took place during the course of arrest arising from a domestic violence incident).<sup>8</sup>

In the present case, Deputy Barnes was pursuing Plaintiff with probable cause to arrest him for a domestic violence offense. Plaintiff's immediate apprehension after the assault was not possible because he fled the scene of the incident, according to the sworn statement of his victim, Ms. Fife. Deputy Barnes attempted the arrest at the very earliest opportunity upon learning of Mr. Cantu's whereabouts, which is consistent with the domestic violence statute and the public policy of our state. Moreover, the very claims being asserted by the Plaintiff (personal injuries resulting from a collision) arise from Deputy Barnes' lawful pursuit, conducted in direct response to the reported domestic violence incident.

Further, Deputy Barnes' conduct readily meets the "good faith" standard of RCW 10.99.070. Plaintiff himself acknowledges the collision was not intentional, and the record plainly illustrates that the impact occurred only after Deputy Barnes issued repeated commands to stop and activated his lights and sirens. In any event, Plaintiff has provided no evidence that Deputy Barnes acted with anything other than good faith. And, speculation alone cannot be relied upon to overcome a motion for summary judgment. *See Seven Gables Corp. v. MGM/UA Entm't Co.*, 106

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<sup>8</sup> The court also stated that the area of qualified immunity can be decided as a matter of law. *Id.*

Wn.2d 1, 13, 721 P.2d 1, 7 (1986) (“A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain...[but] must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.”)

Accordingly, because the Legislature has by statute insulated Deputy Barnes from liability arising out of the arrest, this Court should affirm the lower court's order granting summary judgment.

## **2. Deputy Barnes Also Has Common Law Immunity**

Deputy Barnes is also protected from liability pursuant to common law immunity. Police officers have common law qualified immunity from state tort claims if “(1) they are carrying out a statutory duty, (2) according to the procedures dictated by statute and superiors, and (3) they acted reasonably.” *Lee*, 101 Wn. App. at 176; *Staats v. Brown*, 139 Wn.2d 757, 778, 991 P.2d 615 (2000).

In *Lee*, a husband assaulted his wife at a bowling alley, then went home. After responding to the wife's domestic violence call, the officers attempted to make contact and arrest the husband at his home; when he opened the door, made threatening statements and pointed his rifle at the officers, the husband was shot and killed. *Id.* at 163-64. The husband's family sued the police officers and the City of Spokane for wrongful death,

violations of 42 U.S.C. § 1983, and other claims. *Id.* at 164. The trial court granted the defendants' summary judgment motion and the appellate court affirmed, holding, *inter alia*, that the officers enjoyed qualified common law immunity under the above-cited three-part test:

Here, the domestic violence statute, RCW 10.99, **required the officers to arrest Mr. Lee**. RCW 10.99.030(6) (former RCW 10.99.030(3) (1993)). RCW 10.31.100 authorizes them to do so without a warrant. *Roy v. Everett*, 118 Wn.2d 352, 360, 823 P.2d 1084 (1992). By the Lees' own admission, City policy gives the officers the discretion to carry out the arrest as they see fit. Because they acted reasonably here, they are immune under common law.

*Id.* at 176–77 (emphasis added).

Here, as in *Lee*, Deputy Barnes had statutory mandate to arrest the Plaintiff without a warrant based on probable cause that Plaintiff had committed felony domestic violence, pursuant to RCW 10.99.030. Deputy Barnes also acted pursuant to the authority provided by RCW 10.31.100 by arresting Plaintiff without a warrant, as the suspected crime was a felony.

Further, as analyzed in detail by Defendants' expert Earl Howerton, Deputy Barnes acted reasonably and followed correct procedures when pursuing and arresting the Plaintiff. Plaintiff has put forth no opinion from a qualified expert to the contrary.

In addition, Deputy Barnes' conduct was consistent with the Sheriff's Department's published policies applicable to vehicle pursuits, because the suspect was attempting to evade arrest or detention; Deputy

Barnes activated his lights and siren; and Deputy Barnes' conduct was in line with the criteria in the Department's vehicle pursuit policy with respect to the initiation and continuation of a pursuit. The policy requires deputies to weigh such factors as: the seriousness of the suspected crime and its relationship to community safety; the need for immediate capture in comparison to the risk to deputies and third parties; the nature of the scene of the pursuit (whether there is a lot of traffic, what the weather and roadway conditions are, and other considerations); vehicle speeds; whether there are other persons in the pursued vehicle or in the sheriff's unit whose safety should be considered; and whether, in the case of a known suspect, the suspect can be safely apprehended at a later time, when balanced against the need for immediate capture to protect public safety. See CP 87-88.<sup>9</sup>

Here, it was reasonable to attempt to immediately pursue a suspected violent felon who had threatened the life of his girlfriend the prior day. The pursuit was carried out with a very low likelihood of danger to third parties when balanced against the need for public safety; as shown in the video, the pursuit was conducted at low speeds, vehicle and pedestrian traffic was very light, neither Barnes nor Cantu had anyone else with them, and Deputy Barnes' cruiser was never in a position to injure a third party.

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<sup>9</sup> Defendants will address Plaintiff's arguments that the vehicle pursuit policy is inapplicable to the pursuit of a bicycle in a later section of this brief.

Further, and not disputed here, Plaintiff was a homeless person with no fixed address, meaning law enforcement may not have been able to locate him at a later date for detention and arrest purposes. Certainly, Plaintiff's steadfast efforts to evade capture underscore his unwillingness to cooperate with law enforcement in their efforts to investigate Ms. Fife's domestic violence complaint.

The Court should also note that Plaintiff at no time in the summary judgment proceedings, nor in his opening brief, presented any evidence or legal argument to contest the fact that Defendants enjoy common law and statutory police officer immunity pursuant to the above cited authority.<sup>10</sup> Plaintiff has not even objected to or disputed any of the underlying evidence related to the alleged domestic violence incident which provides the foundation for the pursuit. It is well established that arguments not raised below are deemed waived and cannot be raised for the first time on appeal.

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<sup>10</sup> It is also worth noting that common law police officer immunity is available even as to *intentional tort* claims, such as assault, battery, and false imprisonment. See, e.g., *Gallegos v. Freeman*, 172 Wn. App. 616, 291 P.3d 265 (Div. I 2013) (trial court properly dismissed claim against deputy sheriff whose use of deadly force was reasonable under the circumstances); *McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (Div. I 2000) (trial court properly dismissed claims for assault, battery, and false arrest against police officers who were acting in good faith). In this case, in which no intentional tort is alleged, Defendants' defense based upon common law immunity defense is even stronger.

For this reason, Plaintiff's contention at page 10 of his brief that the trial court applied the "use of force standard for an arrest rather than the common law negligence as alleged in the Plaintiffs (sic) complaint" is nonsensical. If Deputy Barnes were immune from suit even for intentionally striking Plaintiff (which he did not do), then of course he would also be immune if his conduct was unintentional.

See, RAP 2.5(a); see also *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012).

Based on the foregoing, Deputy Barnes enjoys both statutory and common law immunity from Plaintiff's claims.

**E. Plaintiff's Claims Are Also Barred by the Doctrine of Assumption of Risk**

In addition to the defense of immunity, Plaintiff's claims fail based upon the doctrine of assumption of risk.

**1. Plaintiff Had an Obligation to Stop**

As set forth above, Deputy Barnes acted with full legal authority when he pursued and arrested Plaintiff. Plaintiff had no such authority and was legally required to stop upon hearing Deputy Barnes' request. See RCW 46.61.022 (providing that a person who willfully fails to stop when requested or signaled by a person reasonably identifiable as a law enforcement officer is guilty of a misdemeanor); see also RCW 46.61.024 (defining as a class-C felony willfully failing to immediately stop and driving in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle).<sup>11</sup>

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<sup>11</sup> In addition, as set forth in *Borromeo v. Shea*, 138 Wn. App. 290, 156 P.3d 946 (2007), a bicycle is considered a vehicle under the RCW for the purposes of traffic laws. Further, WPI 70.09 emphasizes that "a person riding a bicycle upon a roadway has all the rights of a driver of a motor vehicle **and must obey all statutes governing the operation of vehicles except for those statutes that, by their nature, can have no application.**" (Emphasis added).

As documented above, Deputy Barnes was driving his marked patrol unit when he saw Plaintiff. Even after Deputy Barnes activated his lights and sirens, and made repeated requests for Plaintiff to stop, Plaintiff refused to abide by these lawful commands. **Plaintiff has admitted he knew he was being pursued and that his goal was to get away from Deputy Barnes to avoid arrest.** Plaintiff was also not obeying traffic laws as he rode his bicycle between dirt lots and their surrounding areas. Accordingly, it is beyond debate that Plaintiff violated his clear duty to comply with the lawful command of Deputy Barnes to stop his bicycle.

**2. Plaintiff Assumed the Risks of Injury Associated with Erratic and Illegal Bicycle Riding While Being Pursued by Law Enforcement**

The doctrine of assumption of risk means that a plaintiff, prior to the incident complained of, gave his consent to relieve the defendant of an obligation of conduct toward him, and agreed to assume a chance of injury from a known risk arising from the obligation for which the defendant has been relieved. See 16 Wash. Prac., Tort Law And Practice § 9:11 (4th ed.) (citing to Prosser & Keeton on the Law of Torts, 5th ed., § 68). The Washington Supreme Court has identified four separate classes of assumption of risk: (1) express, (2) implied primary, (3) implied reasonable, and (4) implied unreasonable. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Depending on the type of

assumption of risk and the circumstances of the case, assumption of risk may operate as a partial defense to a tort action (reducing the damages recoverable by the plaintiff), or as a complete defense. *Id.*

Where a plaintiff has full subjective understanding of the presence and nature of a specific risk to be encountered, and voluntarily chooses to encounter the risk, the defendant may establish the defense of implied primary assumption of the risk, which operates as a complete bar to recovery. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). Implied primary assumption of risk means that the plaintiff has impliedly consented (often in advance of any negligence by defendant) **to relieve defendant of a duty** to plaintiff regarding specific known and appreciated risks. *Scott By & Through Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496-97, 834 P.2d 6, 13-14 (1992); *Egan v. Cauble*, 92 Wn. App. 372, 376, 966 P.2d 362 (1998) (plaintiff's consent to relieve the defendant of any duty is implied based on the plaintiff's decision to engage in an activity that involves those known risks). Implied primary assumption of risk follows from the plaintiff engaging in risky conduct, from which the law implies consent. *Id.* The defendant must also show that the plaintiff

was injured by an inherent risk of an activity. *Pellham v. Let's Go Tubing, Inc.*, 199 Wn. App. 399, 411, 398 P.3d 1205, 1213 (2017).<sup>12</sup>

If reasonable minds could not differ on the issues of knowledge and voluntariness, there is implied primary assumption of the risk as a matter of law. *Id.*; *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 523, 984 P.2d 448 (1999); *Prosser & Keeton, et al., supra*, § 68, at 489 (where it is clear that any person in plaintiff's position must have understood the danger, the issue may be decided by the court).

Here, it is manifest that Plaintiff's claims are barred by the doctrine of implied primary assumption of risk. Reasonable minds could not differ in concluding that Plaintiff must have known that riding a bicycle in an evasive manner with full knowledge that law enforcement was in hot pursuit was a risky venture. The risk of injury to the Plaintiff—whether from falling from the bicycle after trying to “jump” a dirt berm, being struck by an oncoming vehicle while riding against the flow of traffic, or from impact with Deputy Barnes' cruiser—were all easily foreseeable and likely outcomes. The harm that ultimately occurred is inherent in, and encompassed by, the risk that Plaintiff chose to encounter. Moreover, it is beyond debate that Plaintiff's conduct was at all times voluntary; indeed,

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<sup>12</sup> In *Pellham*, Division III suggested the term “inherent peril assumption of risk” instead of “implied primary,” as a more fitting description of the plaintiff's decision to encounter a dangerous condition or situation that is inherent in the activity.

Plaintiff testified he knew he was being chased and was trying to get away by riding in an evasive manner.

Because Plaintiff voluntarily chose to engage in a dangerous activity that was likely to result in his own injuries, and because he was injured by the very type of risk inherent in the activity, his claims are barred as a matter of law under the doctrine of implied primary assumption of risk.

**F. Plaintiff's Refusal to Stop During the Pursuit Proximately Caused the Collision**

As documented above, Deputy Barnes was privileged to pursue and detain Mr. Cantu whose decision to continue evading the lawful pursuit violates applicable law. As a result, the undisputed evidence in this case makes plain that the subject collision was proximately caused not by Deputy Barnes' negligent driving when he carried out his lawful duties, but by Mr. Cantu's illegal acts in attempting to evade capture.

Proximate cause has two elements: cause in fact and legal cause. *Hartley*, 103 Wn.2d at 777. "Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." *Id.* at 778, 698 P.2d 77. Legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend" and is based upon "mixed considerations of logic, common sense, justice, policy, and precedent." *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422,

436–37, 378 P.3d 162, 169–70 (2016). Where the facts are undisputed and do not admit of reasonable differences of opinion, the question of proximate cause is one of law subject to review by this court. *LaPlante v. State*, 85 Wn.2d 154, 159–60, 531 P.2d 299, 302 (1975).

The *LaPlante* case illustrates why Plaintiff’s claim here fails for lack of proximate causation. In *LaPlante*, one passenger was killed and another injured when a taxicab attempted to make a U-turn on Highway 97 and was struck by a car approaching from the opposite direction. *Id.* at 155. The taxi driver misjudged the speed and/or distance of the approaching vehicle before initiating the U-turn. *Id.* At the time of the accident, the taxi driver had a valid Washington State driver’s license which had been renewed two years prior with no restrictions. In discovery, it was learned that the driver had glaucoma and early evidence of cataracts. The plaintiffs contended the State was negligent in renewing the taxi driver’s license and in failing to re-examine the driver in relation to a prior request from the local police chief regarding the taxi driver’s driving record. *Id.*<sup>13</sup>

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<sup>13</sup> Prior to the accident, a local police department sent a ‘Recommendation for Driver Re-Examination’ form to the Department of Motor Vehicles, asking the Department to check accident reports for the number of accidents in which the taxi driver had been involved. *Id.* at 156-57. The Department made the requested check and reported that her record disclosed only two accidents, neither of which were chargeable. *Id.* at 157. The Chief of Police was informed by letter that there was not a sufficient basis for requiring a re-examination. *Id.* The Department also advised that if the police chief could provide specific examples of hazardous driving, a re-examination could be scheduled. The Department received no further communication from the police chief. *Id.*

The trial court granted summary judgment in favor of the State of Washington and the appellate court affirmed. On appeal the court explained that, as a matter of law, the plaintiff could not establish but-for causation, reasoning as follows:

The undisputed evidence is that [the taxi driver] **stopped and in fact saw the Buckley automobile approaching the intersection for quite some distance.** From a place of safety, she concluded that she had a sufficient margin of safety to enter the oncoming lane of traffic and did so. Unfortunately, her judgment was faulty and the collision followed. Appellants have furnished no specific facts showing that there is a genuine issue for trial on this point. **Under these circumstances we can say as a matter of law that the negligence of the State, if there was any, was not a proximate cause of the accident. The State's actions were totally unrelated to [the taxi driver's] decision to enter the lane of traffic after seeing the approaching automobile.** The only proof is that the proximate cause of the accident was a judgmental error by [the taxi driver]—not a failure to see or an inability to see.

*Id.* at 160.

Just as the *LaPlante* court found the Department of Motor Vehicle's renewal of a driver's license was not the cause-in-fact of the collision (which occurred because the taxi driver misjudged the speed and distance of the approaching car), so too should this Court find that Deputy Barnes' measured pursuit of Mr. Cantu at low speeds was not the cause-in-fact of the impact. Here, Mr. Cantu made a decision to break the law by fleeing from a lawful pursuit. He erratically rode his bicycle through unpaved areas with the express goal of getting away. Critically, Plaintiff **does not dispute**

that his bicycle in fact veered across the path of the travel of the approaching cruiser. The Plaintiff's voluntary actions and erratic and illegal bicycle riding is what proximately caused the collision, as opposed to any negligent driving on the part of Deputy Barnes.

**G. Plaintiff's Reliance Upon RCW 46.61.400 is Misplaced**

Plaintiff asserts that Deputy Barnes is liable for causing the collision based upon the provisions of RCW 46.61.400(1), which prohibits driving at a speed that is greater than reasonable under existing conditions. Plaintiff again misses the mark.

First, as indicated above, it was not the speed of the cruiser that proximately caused the collision. *See Sadler v. Wagner*, 5 Wn. App. 77, 82, 486 P.2d 330, 334 (1971) ("in order to predicate liability upon the violation of a statute it must be established that the violation was the proximate cause of the injury"); *Burlie v. Stephens* 113 Wash. 182, 193 P. 684 (1920) (violation of speed ordinance or statute is not in itself sufficient to make the driver of automobile liable for damages in event of collision, but it must appear that the violation was the proximate cause of injury). Further, courts have held that driving in excess of the speed limit is not the proximate cause of a collision when the vehicle is where it is entitled to be and the driver would not have had sufficient time to avoid the collision even if driving at the lawful speed. *Theonnes v. Hazen*, 37 Wn. App. 644, 646, P.2d 1284

(1984). Here, it is beyond debate that Deputy Barnes had a right to be where he was at the moment of impact: in direct pursuit of a fleeing felon. Moreover, Defendants' retained expert has testified that insufficient time existed for Deputy Barnes to avoid Mr. Cantu's bicycle when it swerved in front of his cruiser. See CP 51. Other than the speculative assertions of Plaintiff's counsel, there is no evidence in the record to support the contention that Deputy Barnes was negligent by failing to react quickly enough to the swerving bicycle.

Plaintiff's arguments regarding RCW 46.61.400(1) are also incorrect because Plaintiff fails to consider all of the language in the statute. The second sentence of subdivision (1) says that speed must be so controlled as "to avoid colliding with any person, vehicle or other conveyance *on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*" (Emphasis added.) Here, no one disagrees that Plaintiff was not in compliance with legal requirements when he tried to get away from Deputy Barnes, nor was he using due care in so acting.

Further, Plaintiff ignores that this was a *police pursuit* where maintaining close proximity to the Plaintiff was necessary. Attempting to find liability based upon a statute governing the flow of everyday traffic is entirely misplaced.

Accordingly, the Court should disregard Plaintiff's theory of liability based upon alleged violation of RCW 46.61.400.

**H. Plaintiff's Arguments Related to the Department's Vehicle Pursuit Policy Are Illogical**

At summary judgment, and on appeal, Plaintiff has taken the position that Defendants are liable for his injuries because Deputy Barnes pursued Mr. Cantu without the benefit of a published Department policy governing the pursuit of bicycles. *See* Pltf. Brief at p. 9 ("Defendant has provided no policy regarding pursuit of bicyclist (sic) which suggests the pursuit of a bicyclist is improper under department policy.")

First, Plaintiff's arguments regarding the vehicle pursuit policy are (once again) based upon cherry-picked citations to the relevant document. While Plaintiff contends that "high speed" is a required element, the policy in fact says a high-speed pursuit is only one of multiple types of covered incidents, defining a "vehicle pursuit" at section 314.1 as:

An event involving one or more officers attempting to apprehend a suspect who is attempting to avoid apprehension while operating a motor vehicle by using high speed driving **or other evasive tactics** such as driving off a highway, turning suddenly, **or driving in a legal manner but willfully failing to yield** to a deputy's signal to stop.

Clearly, not all vehicle pursuits must take place at high speed under the plain language of the policy, contrary to Plaintiff's contentions.

Second, as argued by the Defendants below, the Legislature and case law have made clear that bicycles are treated as vehicles with respect to their operation on public roadways. *Borromeo*, 138 Wn. App. at 296; WPI 70.09; RCW 46.04.670 (a vehicle “includes every device capable of being moved upon a public highway ... including bicycles”). A fair reading of the policy makes plain that Deputy Barnes’ pursuit of Mr. Cantu falls within the purview of the Department’s policy.

Furthermore, even if the Court were to determine that the vehicle pursuit policy is not applicable to fleeing bicyclists, this does not imply that Deputy Barnes violated any procedures, much less that he has tort liability. Nor does any legal authority exist to support the contention that the Sheriff’s Department has a duty to draft a unique policy for every conceivable type of pursuit (e.g., to capture fleeing roller skaters or moped riders), or that simply because the word “bicycle” is not used in the subject policy, somehow Deputy Barnes’ pursuit was not authorized or compliant with procedure. That would be an absurd and ill-conceived conclusion to reach. Further, as noted previously, Plaintiff is still required to prove a breach of duty and proximate causation of his damages, which he cannot do.

Moreover, Defendants have put forth evidence from their expert witness Mr. Howerton establishing that Deputy Barnes complied with accepted police practices (which testimony remains uncontradicted).

Therefore, Plaintiff's efforts to find liability based upon an incorrect and illogical reading of the Department's vehicle pursuit policy are unavailing.

**I. Plaintiff's Efforts to Demonstrate There Are Factual Issues for Trial Are Misguided and Misleading**

Plaintiff argues that disputed or inconsistent evidence in the record requires the matter to proceed to trial, based on various statements made by Deputy Barnes in the pursuit video and incident report. Pltf. Brief at pp. 7-8. Plaintiff's contentions are incorrect and are based on an incomplete and/or incorrect reading of the record. First of all, Deputy Barnes' statement that he first accelerated to get over the berm, and then that he braked once he saw Plaintiff coming into his path of travel, is not a contradictory statement. Cars can increase, then decrease their speed, and that is what happened here, as shown on the video.

Second, Plaintiff's allegation that Deputy Barnes was not in control of his vehicle is not supported by the record. Troublingly, Plaintiff cites to CP 146 for this proposition; however, in that portion of Deputy Barnes' deposition, the testimony was that he was in control of his vehicle as the pursuit took place. Likewise, Plaintiff bizarrely claims that Deputy Barnes stated his brakes failed (by citing to a full six-minute segment of the video – apparently, the Court and counsel are supposed to just watch carefully to

see when this comment crops up?). See Pltf. Brief at p. 4. Leaving aside the professional discourtesy associated with failing to make a specific reference to the minute/second mark, upon review, Deputy Barnes makes no such statement.

Further, it should be recalled that Plaintiff below did not dispute the testimony by Deputy Barnes that Plaintiff's bicycle veered in front of him just before the impact. This key point renders meaningless any minor discrepancies in the incident reports.

**J. Since Deputy Barnes Was Not Negligent, Adams County, the Sheriff's Department, and Sheriff Wagner Are Not Liable Under the Theories of Agency and Respondeat Superior**

Adams County, Adams County Sheriff's Department, and Sheriff Dale J. Wagner ("the Employers") are not liable for the actions of Deputy Barnes under the theories of agency and respondeat superior. Under both theories, an employer can be liable for the tortious actions of their employees if the employee was acting within the scope and course of employment when the act is done. *See Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993). It is axiomatic that Plaintiff is first required to prove a tort by the employee/agent in order to prevail on a claim against his employer under agency law principles.

As shown above, the actions of Deputy Barnes were reasonable and not negligent, a conclusion that is undisputed by Plaintiff's lack of evidence

to show otherwise. Deputy Barnes is also shielded from liability pursuant to immunity and the defenses of lack of proximate causation and assumption of the risk. Since Deputy Barnes did not act negligently and has multiple dispositive defenses from Plaintiff's claims, Sheriff Wagner, the Sheriff's Department, and the County cannot be held liable as a matter of law, under principles of agency and the doctrine of *respondeat superior*.

**K. The County, the Sheriff's Department, and Sheriff Wagner Are Not Liable Under the Theory of Negligent Training**

Plaintiff also asserted a claim based upon negligent training against the Employers. This claim too lacks merit.

It is established law in Washington that theories of agency only apply when the employee is acting within their scope of work, and in that case, employers can be vicariously liable for their employee's actions. *LaPlant v. Snohomish County*, 162 Wn. App. 476, 271 P.3d 254 (2011). When employees are acting **outside** of their scope of work, then a claim of negligent training and supervision becomes relevant. *LaPlant*, 162 Wn. App. at 479. An allegation of negligent training, supervision, and hiring is generally improper when the employee was acting within the scope of work. *Id.* at 480. Raising both claims is superfluous since both causes of actions depend on an employee's actions being negligent and that negligence causing injury to a third party. *Id.* Negligent training and supervision arise from an employer's independent, limited duty to control an employee acting

outside the scope of employment to protect third parties. *Id.* at 479. A claim of negligent training can also be proper when a claim of negligence against an employee giving rise to employer vicarious liability is not raised. *Id.* at 483.

Here, the negligent training claim does not fit either scenario. It is undisputed that Deputy Barnes was acting within the scope of his employment. CP 55 and 56. Plaintiff has not contended otherwise. Since Deputy Barnes was acting within the scope of his employment, a claim for negligent training is superfluous and not permitted, pursuant to *LaPlant*.

Further, even if a negligent training claim were allowed, the claim would fail on its own merits. To establish negligent training, Plaintiff must set forth a prima facie case of negligence: duty, breach, proximate causation, and resulting injury. *Gurno v. Town of LaConner*, 65 Wn. App. 218, 228-29, 828 P.2d 49 (1992). As shown above, Plaintiff cannot meet that burden.

In *Gurno*, a woman alleged that police officers were negligently trained based on events that occurred during her arrest, in which she was allegedly injured and falsely arrested. *Id.* at 221. The court held that the woman failed to produce evidence showing any of the elements of the negligence claim, and therefore dismissal of the negligent training claim was proper. *Id.* at 228. In addition, no evidence was produced to show that

a deficiency in training caused her to be falsely arrested. *Id.* The woman also produced no evidence showing that the police department's policy or customs caused her injury. *Id.*

*Gurno* is analogous to the present case. Here, the record is clear that Deputy Barnes attended Basic Law Enforcement Academy, Corrections Officer Academy, and Reserve Police Officer Academy. CP 102-103. Deputy Barnes has also done field officer training, and is himself an EVOC instructor, meaning he teaches emergency driving courses to new deputies. CP 104. Plaintiff has not identified in what manner Deputy Barnes' training was allegedly deficient, nor has Plaintiff established proximate causation between any purported deficiencies in the training and Plaintiff's resulting injury. As such, Plaintiff has failed to establish a prima facie case of negligent training and the Employers are not liable as a matter of law.

## V. CONCLUSION

The lower court properly granted summary judgment. The Defendants are protected by common law and statutory immunity and did not proximately cause the collision, which was instead caused by Plaintiff's decision to encounter a known risk. Plaintiff has also not proven any of his claims against the County, Sheriff's Department, or Sheriff Wagner, whether based upon vicarious liability or negligent training. Moreover, Plaintiff has failed to dispute multiple dispositive issues of fact and law

related to the basis for the pursuit (felony domestic violence), the mechanics of the impact (bicycle veers in front of cruiser), and the legal duties and responsibilities of each party (duty to stop vs. authority to pursue).

This is a case in which reasonable minds could reach but one conclusion: that Defendants are not liable for Plaintiff's injuries. See *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355, 367 (1995). To echo Judge Dixon below, the case was properly disposed of because no Adams County jury is going to find for Plaintiff.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of May, 2020.

BOHRNSEN STOCKER SMITH LUCIANI  
ADAMSON PLLC



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JONATHAN R. HAMMOND, WSBA #50499  
Attorneys for Respondents

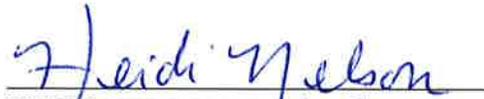
**DECLARATION OF SERVICE**

On said day below, I electronically served a true and accurate copy of the foregoing in Court of Appeals, Division III, Cause No. 371492, to the following:

Douglas D. Phelps  
Phelps & Associates, P.S.  
2903 N. Stout Road  
Spokane, WA 99206

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 13 day of May, 2020, at Spokane, Washington.



HEIDI NELSON, Paralegal  
Bohrnsen Stocker Smith Luciani  
Adamson PLLC  
312 W. Sprague Avenue  
Spokane, WA 99201  
(509) 327-2500  
[hnelson@bssslawfirm.com](mailto:hnelson@bssslawfirm.com)

**BOHRNSEN STOCKER SMITH LUCIANI PLLC**

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