Supreme Court No. 962251
Court of Appeals No. 344673

THE SUPREME COURT OF WASHINGTON

THOMAS L. SLUMAN, a single person,

Plaintiff-Respondent,

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-Petitioners.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

This answer to the Petition for Review is submitted on behalf of Plaintiff-Respondent Thomas L. Sluman ("Sluman").

II. CITATION TO COURT OF APPEALS DECISION

The State of Washington ("State") and Washington State Patrol Trooper Bart H. Olson ("Olson") ask this Court to review a unanimous decision by the Court of Appeals applying settled rules regarding the (lack of) qualified immunity for law enforcement officers using deadly force to apprehend an unarmed and nonviolent suspect who does not pose an immediate threat of serious physical harm or death to officers or bystanders. *See Sluman v. State*, 3 Wn. App. 2d 656, 418 P.3d 125, 670-93 & 704-09 (2018) (Fearing, J., lead op. & appendices); *id.* at 709 (Lawrence-Berrey, C.J., concurring); *id.* at 710 (Korsmo, J., dissenting in part). Qualified immunity involves a fact-dependent analysis of federal common law and does not implicate any of the criteria for review under RAP 13.4(b).

The Court of Appeals also determined, by a 2-1 majority, that there is a question of fact for the jury regarding the "proximate cause" element of the State's and Olson's affirmative defense to Sluman's state law claims based on the felony bar statute, RCW 4.24.420. *See Sluman*, 3 Wn. App. at 693-702 (Fearing, J.); *id.* at 709-10 (Lawrence-Berrey, C.J.); *id.* at 710-15 (Korsmo, J.). This involves application of settled law to the unique

circumstances present in this case, and there is no conflict in the case law or any other grounds that would warrant further review under RAP 13.4(b).

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

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

2. Have the State and Olson satisfied their burden on summary judgment to establish as a matter of law that: (a) Sluman was engaged in a felony when he was injured; (b) any such felony was a proximate cause of Sluman's injuries; and (c) Olson's intentional conduct was not a superseding cause of Sluman's injuries, in order to obtain dismissal of Sluman's state law claims based on the felony bar statute, RCW 4.24.420?

IV. RESTATEMENT OF THE CASE

The Court of Appeals aptly summarized the relevant facts:

> On the sunny morning of Wednesday, July 21, 2010, Thomas Sluman, a Port Angeles denizen, rode his motorcycle eastbound on Interstate 90 in lower Kittitas County ten miles west of Ellensburg. On that same morning, Washington State Patrol Trooper John Montemayor piloted the aircraft "Smokey 6" and patrolled traffic from the craft. An aerial patrol officer employs a series of white stains, known as aerial traffic surveillance marks, painted on the road at half-mile intervals to measure the speed of vehicles. The officer gauges the speed of a vehicle with a stopwatch as the vehicle travels between marks. Trooper Montemayor, by using the surveillance marks, measured Sluman as traveling between seventy-six and eighty-nine miles per hour on the seventy miles per hour interstate. Montemayor radioed Trooper David Hinchliff, who patrolled on the ground, to stop and cite Sluman. Trooper Hinchliff's patrol car parked facing northbound on Thorp Highway near Interstate 90 exit 101, the location of Thorp Fruit and Antique Mall.

Thomas Sluman left Interstate 90 at exit 101. Sluman stopped at the stop sign at the end of the off-ramp, activated his motorcycle's right turn signal, and turned right onto South Thorp Highway. According to Trooper David Hinchliff, Sluman did not turn his head to the left to see Trooper David Hinchliff's patrol car before Sluman turned right. According to Sluman, he looked to the left and saw the patrol car, but the car faced the opposite direction.

South Thorp Highway mainly travels east and west, but south of Interstate 90. Trooper Hinchliff performed a U-turn on Thorp Highway, activated his overhead lights, and radioed dispatch to notify it that he would pursue Sluman. After radioing dispatch, Hinchliff activated his siren and chased Sluman on South Thorp Highway. Sluman never saw Hinchliff reverse directions in order to pursue him.

Trooper David Hinchliff soon lost sight of Thomas Sluman because the two-lane South Thorp Highway frequently curves. From Interstate 90 exit 101, the highway runs five miles before it again crosses the interstate at exit 106, the western exit for Ellensburg. Trooper John Montemayor eyed Sluman from the air while maintaining contact with Hinchliff. From his vantage point, Trooper Montemayor estimated Sluman reached a speed over one hundred and twenty miles per hour. Sluman disputes this speed approximation because South Thorp Highway lacks aerial traffic surveillance marks, but Sluman does not testify as to his speed. While riding on Thorp Highway, Sluman obeyed all traffic laws except the speed limit. Sluman never looked behind him to see Trooper Hinchliff in pursuit. Hinchliff concluded that he did not need to pursue Sluman at a high rate of speed, since the air patrolman followed Sluman.

Washington State Trooper Bart Olson also patrolled, in a Dodge Charger, along Interstate 90 near exit 101 on the morning of July 21, 2010. Trooper Olson had just completed a traffic stop, when he overheard Trooper David Hinchliff notify dispatch about Hinchliff's pursuit of Thomas Sluman. Olson unilaterally joined the pursuit by traveling eastbound on Interstate 90, not on South Thorp Highway.

A Washington State Patrol regulation prohibits a trooper from unilaterally joining a suspect's pursuit. Troopers may join a pursuit only when requested by the first officer in pursuit or when directed

by a supervising officer. The State Patrol adopted this regulation because pursuits pose as one of the riskiest actions that a law enforcement officer undertakes. Trooper Bart Olson denies that he pursued Thomas Sluman since Olson did not chase Sluman on South Thorp Highway. Nevertheless, State Patrol rules consider an officer as pursuing the suspect, even if the trooper does not chase the suspect from behind, if the trooper acts to intercept or stop the pursued driver.

In his haste, Trooper Bart Olson passed another patrol officer, Trooper Paul Blume, on Interstate 90. Blume drove a sports utility vehicle (SUV). Trooper Olson then received instruction to end his pursuit since Trooper John Montemayor followed Thomas Sluman from the air. Olson ignored the instruction and proceeded to Interstate 90 exit 106 where Olson anticipated he could intercept Sluman on South Thorp Highway.

After Olson exited Interstate 90, he turned right on South Thorp Highway and journeyed in the opposite direction of Sluman and Trooper David Hinchliff. Olson then saw Sluman's motorcycle rounding a corner in the oncoming lane. According to Olson, "nobody was in the area." Clerk's Papers (CP) at 535. Trooper Olson drove his patrol car across the centerline of the road, quickly braked, and parked his car, while straddling the center line, on a bridge across the Yakima River, with the car's emergency lights activated. Trooper Olson explained his intent:

> And, anyway, the motorcyclist was coming at me. And I could see the speed of the motorcycle, which was at a high rate, rapidly slowing. ... I'm going to place this person in custody or worst [sic]—you know, I'm going to place him in custody, do a felony-style stop, or they're going to be going slow enough that if it comes down to it I'm going to basically horse collar this person off the motorcycle and end this pursuit, so that they don't end up with serious injuries, kill themselves, kill an innocent party.

CP at 532. After Trooper Olson parked, Trooper Paul Blume pulled behind Trooper Olson's patrol car and blocked more of the road.

The Washington State Patrol does not authorize a state trooper to tackle, horse collar, or otherwise physically remove a driver from a

motorcycle. State Patrol personnel deem such a maneuver to be unwise and unsafe. State Patrol regulations do not permit a trooper to drive patrol cars into the lane of oncoming traffic or to park in the middle of the road. Under a State Patrol regulation, a roadblock occurs when officers position one or more vehicles or other obstructions across a roadway in order to prevent the escape of a fleeing vehicle. The regulation requires any roadblock to afford an "escape route" for the suspect. CP at 246, 662. State Patrol rules allow a roadblock only with supervisory approval and only when law enforcement seeks to apprehend the suspect for homicide, assault with intent to kill, rape, robbery in the first degree, or prison escape. Trooper Olson lacked supervisory approval for blocking the road and law enforcement did not pursue Thomas Sluman for any of the requisite crimes. Olson insists that he allowed space for Sluman to steer around his patrol car.

According to Thomas Sluman, he traveled sixty miles an hour as he rounded a curve on South Thorp Highway into the straightaway across the Yakima River Bridge. Sluman applied his brakes because he saw lights and vehicles on the bridge. He did not know that one or more of the cars were police cars. He intended to stop near the cars. After he rounded the curve, he did not accelerate. Suddenly a sports utility vehicle entered his lane.

As Trooper Bart Olson remained parked in the middle of South Thorp Highway, he observed Thomas Sluman's motorcycle rapidly slow. Sluman probably then traveled between thirty-one and thirty-seven miles per hour. As Sluman slowed, he steered his motorcycle to the right and away from the highway's centerline in order to pass Trooper Olson's vehicle. According to Trooper Paul Blume, Sluman appeared to be stopping his motorcycle. As Sluman attempted to pass, Olson opened his patrol car door into the oncoming lane where Sluman traveled. The parties refer to Olson's maneuver as "door-checking." In his investigation report, Olson did not volunteer that he purposely opened the door to cause the door to strike Sluman. Trooper Olson's open door struck Sluman's motorcycle and propelled Sluman over the Yakima River Bridge to the ground thirty feet below and into a campground. A video captured Sluman crossing the Yakima River Bridge, Olson opening his patrol car door, and Sluman driving by the side of the door.

During a deposition, Thomas Sluman testified that he only remembered encountering a sports utility vehicle. According to Sluman, the SUV drove toward him in his lane and struck him.

Washington State Patrol regulations consider intentional intervention to be the act of ramming or hitting another vehicle with a patrol car in order to damage or force another vehicle off the road. During discovery in this suit, State Patrol personnel confirmed that a trooper driving his car into the oncoming lane of traffic on a two-lane road with a suspect approaching constitutes the use of intentional intervention. The State Patrol equates intentional intervention with lethal force. Intentional intervention should only be used as a last resort to apprehend a suspect. Intentional intervention should also be used only when the officer knows or has reasonable grounds to believe the suspect committed or is attempting to commit a crime that poses a threat of death or serious bodily injury.

A State Patrol regulation declares that intentional intervention "shall not be used to apprehend a traffic offender, misdemeanant, or fleeing felon whose only felony is attempting to elude a pursuing police vehicle." CP at 662. The regulation further reads that an officer "attempting intentional intervention with a vehicle shall be held to the same standards as are applied to any other use of lethal force." CP at 662.

When Thomas Sluman hit the ground, he lost consciousness. After Sluman regained cognizance, but before receiving treatment for his injuries, Trooper Bart Olson asked Sluman why he fled from the police. Sluman answered that he had outstanding arrest warrants. An audio recording captured Sluman's response. Sluman admits he uttered the response, but he denies his statement to be correct. According to Sluman, he had outstanding warrants but he did not flee the police pursuit particularly since he knew not of the pursuit. When responding to Bart Olson's question, Sluman lay on the ground in severe pain.

As a result of the collision with the patrol car door and descent into the campground, Thomas Sluman sustained fractures of the tibia and fibula of his right leg, pubic bone, tailbone, and left elbow. The tibia and fibula breaks required multiple surgeries to implant and replace hardware and to graft skin and muscle. Sluman spent one year in a

> wheelchair while recovering. He suffered permanent physical impairments.
>
> Thomas Sluman later entered an *Alford* plea to charges of attempting to elude a police vehicle. According to Sluman, he entered the plea because he wanted to end the prosecution because he still recovered from injuries.

Sluman, 3 Wn. App. 2d at 664-69.

V. RESPONSE TO THE STATE'S AND OLSON'S STATEMENT OF THE CASE

The Court of Appeals noted that the State and Olson have repeatedly portrayed the facts in the light most favorable to them, rather than Sluman, contrary to the standard of review on summary judgment. *See Sluman*, 3 Wn. App. 2d at 681-82. This tendency persists in the Petition for Review, where the State and Olson describe Sluman's claim as being "for injuries he incurred when he lost control of his motorcycle." Pet. for Rev., at 1. In particular, they claim that Sluman simply "hit the door on Sgt. Olson's vehicle," *id.* at 6, and that he "struck Sgt. Olson's car door and lost control of his motorcycle," *id*. at 17.

On summary judgment review, the State and Olson cannot legitimately dispute that Olson door-checked Sluman. Sluman presented evidence 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* CP 714-15 & 738. 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). This is a form of lethal force that is prohibited by Washington State Patrol policy. CP 626-27 & 738.

The State and Olson urge the Court to watch Olson's dashcam video "to fully understand the injustice of the Court of Appeals decision below." Pet. for Rev., at 5 n.3. 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 and that he was traveling at a

moderate speed consistent with WSP's own estimates of 28 to 37 miles per hour. *See* CP 199, 284 & 737; *accord* CP 183-84 (another officer at the scene indicating Sluman was not traveling "at a high rate" of speed and "seemed to be under control of the bike" and "there was [sic] no high speeds involved at that point"; brackets added). In short, the video confirms that Sluman did not pose an immediate threat of harm when Olson used lethal force against him, leading the Court of Appeals to conclude that "the video supports Sluman's version of the facts, not the State's description of the facts." *Sluman*, 3 Wn. App. 2d at 682.

VI. ARGUMENT IN OPPOSITION TO REVIEW

A. The Court of Appeals determination that Olson is not entitled to summary judgment dismissing Sluman's § 1983 claims based on the federal common law governing qualified immunity is well-grounded in federal precedent and does not justify review under RAP 13.4(b).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, — U.S. —, 136 S. Ct. 305, 308 (2015) (quotation omitted). Qualified immunity is an affirmative defense to § 1983 claims based on federal common law. *See Triplett v. Washington State Dep't of Soc. & Health Servs.*, 193 Wn. App. 497, 509, 373 P.3d 279, 285, *rev. denied*, 186 Wn.2d 1023, 383 P.3d 1024 (2016). On summary judgment,

the facts and all reasonable inferences from the facts must be viewed in the light most favorable to Sluman, as the non-moving party. *See Scott v. Harris*, 550 U.S. 372, 378-380 (2007).

In its exhaustive opinion, including appendices summarizing applicable federal case law, the Court of Appeals unanimously concluded that Olson was not entitled to summary judgment on the issue of qualified immunity. The Fourth Amendment right to be free from unreasonable seizure prohibits the use of lethal force to apprehend a fleeing suspect in the absence of an immediate threat of serious physical harm or death. *See Tennessee v. Garner,* 471 U.S. 1, 11 (1985). This right is clearly established in the context of blocking and/or striking a motorcycle on which an unarmed and nonviolent suspect is attempting to flee. *See Brower v. County of Inyo*, 489 U.S. 593 (1989); *Hawkins v. City of Farmington*, 189 F.3d 695 (8th Cir. 1999); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949-50 (7th Cir. 1994); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003); *Adams v. Speers*, 473 F.3d 989 (9th Cir. 2007); *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011). This conclusion is bolstered by Olson's violations of "many Washington State Patrol rules" implementing the prohibition against the use of lethal force to apprehend a fleeing suspect in the absence of an immediate threat of harm. *Sluman*, 3 Wn. App. 2d at 682 (citing *Gutierrez v. City of San Antonio*, 139

F.3d 441, 449 (5th Cir. 1998); *Scott v. Henrich*, 39 F.3d 912, 915-16 (9th Cir. 1994); and *Tennessee v. Garner*, *supra*).

Olson claims that the Court of Appeals improperly viewed the facts with the benefit of "20/20 hindsight." *See* Pet. for Rev., at 2-3 & 13-15. However, the only example he gives is the court's statement "that under Mr. Sluman's version of the facts no officer knew that Mr. Sluman sought to elude the police." *Id.* at 14; *see also Sluman*, 3 Wn. App. 2d at 677 (stating "[e]ven under the State's version of the facts …. [n]o officer knew that Sluman discerned he was being pursued"; brackets & ellipses added). Inexplicably, Olson provides no citation to the record establishing that he or any other officers knew that Sluman was trying to elude them. *See* Pet. for Rev., at 14. In actuality, the record indicates that, after Sluman was clocked speeding from the air, he exited the freeway, stopped at a stop sign, and used his turn signal before proceeding. *See* CP 390, 510 & 514. The pursuing officer had to make a U-turn before initiating pursuit, and did not attempt to maintain contact with Sluman since he could be observed from the air. He never got closer than half a mile from Sluman. CP 515-16. There is no evidence that Sluman saw him or any other officer before he was door-checked by Olson. Under these circumstances, the Court of Appeals properly applied the summary judgment standard of review when it stated that no officer knew that Sluman discerned he was being pursued. The court

otherwise acknowledged its obligation to "judge the reasonableness of the force exacted by a law enforcement officer from the perspective of a reasonable officer on the scene, rather than with hindsight." *Sluman,* 3 Wn. App. 2d at 674.

Next, Olson suggests that the Court of Appeals decision increases the threat of serious physical harm or death required to justify lethal force, from one that is merely "immediate" or "imminent" to one that "already exists." Pet. for Rev., at 2-3, 15 & 19. This is simply incorrect. In the superior court, Olson argued that the mere "potential" for harm justifies lethal force. *See* 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). Recognizing for the first time on appeal that this is insufficient to justify the use of lethal force, Olson distorted the record in order to support an argumentative characterization that Sluman created an "immediate" threat of harm. *See* Sluman Reply Br., at 7-14. Now, Olson attempts to distinguish immediate or imminent harm from already-existing harm. It is just new

phrasing for the same argument he has made before, and it is completely lacking factual and legal support. The Court of Appeals properly held that "the theoretical possibility that people may be in the area" does not justify the use of lethal force, especially in light of the other circumstances present here. *Sluman,* 3 Wn. App. 2d at 682.

Olson also contends that the Court of Appeals "inverts" the "clearly established" element of qualified immunity by noting the absence of on-point authority cited by Olson to support his argument. Pet. for Rev., at 17-20. In actuality, the Court of Appeals' decision is well-grounded in closely analogous federal case law. *See Brower, supra*; *Hawkins, supra*; *Donovan, supra*; *Vaughan, supra*; *Adams, supra*; *Walker, supra*. Olson does not address any of this authority, except to say that the Eleventh Circuit Court of Appeals decision in *Vaughan* has been questioned by a later U.S. District Court decision. Pet. for Rev., at 20 n.15. The fact that the cases cited by Olson were distinguishable because they involved immediate threats of serious physical harm or death, unlike this case, does not mean that the Court of Appeals erred in conducting its analysis of qualified immunity.

In any event, there is no conflict between the Court of Appeals decision and other decisions from this Court or the Court of Appeals, as required for review under RAP 13.4(b)(1) or (2). An alleged conflict with

federal case law (although there is no such conflict here) is not a basis for review under RAP 13.4(b).

There is no "significant question of law under the Constitution of the State of Washington or of the United States" as required for review under RAP 13.4(b)(3) because the defense of qualified immunity is a matter of federal common law. While the defense involves consideration of whether the complaint alleges violation of a clearly established constitutional right, the constitutional right at issue here is well-settled and not reasonably susceptible to dispute. *See Tennessee v. Garner*, *supra.* The analysis of whether the constitutional right is sufficiently clear to invoke qualified immunity is not itself a constitutional issue. It merely involves application of federal common law to the particular facts of this case.

Finally, there is no "issue of substantial public interest that should be determined by" this Court as required for review under RAP 13.4(b)(4) because the analysis of qualified immunity is fact-dependent—meaning a decision in this case will provide little guidance in future cases; and governed by federal law—meaning that this Court does not have the last word and the precedential effect of a decision will be limited. While every case against state actors can be said to involve an element of public interest, the interest must be “substantial” and the issue must be one that “should be decided by” this Court to warrant review under RAP 13.4(b)(4).

The issue here is not substantial because it involves application of settled law regarding qualified immunity to the particular facts of this case, and it does not need to be decided by this Court because it is a matter of federal law.

B. The Court of Appeals determination that there are questions of fact regarding the State and Olson's affirmative defense based on the felony bar statute, RCW 4.24.420, under the unique circumstances present in this case does not satisfy any of the criteria for review under RAP 13.4(b).

The felony bar statute provides:

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

RCW 4.24.420. By its terms, this statute is inapplicable to Sluman's federal civil rights claims. As to his state law claims, it is an affirmative defense on which the State and Olson bear the burden of proof. *See* CR 8(c) (defining affirmative defenses); *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn. 2d 684, 693, 317 P.3d 987 (2014) (noting defendants have burden of proof on affirmative defenses). Because they have the burden of proof, the State and Olson are obligated to produce evidence on every element of the defense, demonstrate that there are no genuine issues of material fact, and establish that they are entitled to judgment as a matter of law. *See Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 225-26, 770 P.2d 182 (1989). The Court

of Appeals properly held that the State and Olson failed to satisfy this burden because there are genuine issues of material fact whether Sluman's conduct was a proximate cause of his injuries or whether the Olson's conduct was instead a superseding cause.

The felony bar statute incorporates, but does not define, the phrase "proximate cause," as an essential element of the defense. RCW 4.24.420. Where the Legislature uses statutory language that has a well-established common law meaning, it is presumed that the statute should be interpreted in accordance with the common law. *See New York Life Ins. Co. v. Jones,* 86 Wn. 2d 44, 47, 541 P.2d 989 (1975). The common law meaning of proximate cause is "a cause which in a direct sequence [unbroken by any superseding cause,] produces the [*injury*] [*event*] complained of and without which such [*injury*] [*event*] would not have happened." 6A Wash. Prac., Wash. Pattern Jury Instr. WPI 15.01 (6th ed.) (brackets & formatting in original). The question of proximate cause is ordinarily for the jury unless the facts and reasonable inferences from the facts are undisputed. *See id.*, WPI 15.01 cmt.; *N.L. v. Bethel Sch. Dist.*, 186 Wn. 2d 422, 378 P.3d 162, 169 (2016); *cf. Geschwind v. Flanagan,* 121 Wn. 2d 833, 854 P.2d 1061 (1993) (holding it was a question of fact whether a passenger could be more at fault than driver under statute prohibiting recovery if plaintiff is

intoxicated, such intoxication is a proximate cause of his injuries, and the plaintiff was more than 50% at fault, RCW 5.40.060).

The common law definition of "proximate cause" includes the concept of superseding cause. *See* 6A Wash. Prac., *supra* WPI 15.01. A superseding cause is a new independent cause that is deemed to break the chain of causation between a party's negligence and an injury or event. *See id.*, WPI 15.05 & cmt. The touchstone for superseding cause is foreseeability. *See Washburn v. City of Federal Way,* 178 Wn. 2d 732, 761, 310 P.3d 1275 (2013) (noting that "[u]nforeseeable intervening acts break the chain of causation"; brackets added). Intentional tortious or criminal conduct that is not foreseeable is generally deemed to be a superseding cause. *See id*. The question of superseding cause is a question of fact for the jury. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 613, 257 P.3d 532, 545 (2011). As the Court of Appeals held, a jury should be entitled to determine whether Trooper Olson's conduct in setting up the impromptu roadblock and door checking Sluman was a superseding cause of his injuries.

The State and Olson appear to argue that review is warranted simply because the Court of Appeals panel was not unanimous. *See* Pet. for Rev., at 8-9. In particular, the State and Olson rely on Judge Korsmo's partial dissent to argue that there is no "intentional tort" exception to the felony bar

statute. *See* Pet. for Rev., at 9. This argument is not based on a fair portrayal of the Court of Appeals decision or its reasoning, which is grounded in the well-established common-law meaning of the "proximate cause" language of the felony bar statute rather than a form of impermissible judicial legislation. The partial dissent does not acknowledge or address the common law meaning of the phrase proximate cause as used in the felony bar statute. *See Sluman,* 3 Wn. App. 2d at 712-13 & n.4 (Korsmo, J., dissenting in part). In any event, disagreement among a panel of the Court of Appeals in a single case is not one of the criteria for review. *See* RAP 13.4(b)(1)-(4).

The State and Olson also contend that the Court of Appeals decision conflicts with this Court's decision in *Campbell v. ITE Imperial Corp.*, 107 Wn. 2d 807, 812-13, 733 P.2d 969 (1987), and the Court of Appeals decision in *Albertson v. State,* 191 Wn. App. 284, 298, 361 P.3d 808 (2015). Pet. for Rev., at 9-11. While a conflict in the case law would satisfy the criteria for review in RAP 13.4(b)(1) and (2), there is no conflict here.

In *Campbell,* the Court determined that the negligence of an injured person's employer was a superseding cause of the defendant-product manufacturer's liability for its unsafe product. *See* 107 Wn. 2d at 808 ("The principal issue in this case is whether the negligence of appellant's employer in failing to warn of or protect appellant from respondent's allegedly unsafe

product constitutes an intervening act legally sufficient to operate as a superseding cause"). *Campbell* does not involve facts comparable to this case. Nonetheless, the Court relied on provisions of the Restatement (Second) of Torts (1965) that support the Court of Appeals decision that an unforeseeable intentional or criminal act can be a superseding cause of another person's injuries. *See Campbell*, 107 Wn. 2d at 812-13 (discussing Restatement (Second) of Torts § 442(a)-(c)); Restatement § 442(e)-(f) & cmts. (e)-(f) (regarding acts of another as superseding cause; referring to Restatement § 448); Restatement § 448 (regarding intentional acts done under opportunity afforded by actor's negligence as superseding cause).

In *Albertson*, the Court of Appeals held that a third party's abuse of a child was not a superseding cause of injury to the child caused by breach of the State's statutory duty to investigate allegations of child abuse because child abuse is the very harm that the State's duty is designed to prevent. *See* 191 Wn. App. at 298-99. The felony bar statute is not analogous to the statute at issue in *Albertson*. By its terms, the felony bar statute does not preclude recovery for injuries unless those injures were proximately caused by the commission of a felony. *Albertson* relied on *Campbell* and the same Restatement provisions cited in *Campbell* that support the Court of Appeals

decision. *See id.* Because there is no conflict between this case and *Campbell* or *Albertson*, review should be denied.[1]

VII. CONCLUSION

The Court should deny the State's and Olson's Petition for Review.

Respectfully submitted this 29th day of October, 2018.

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[1] The lead opinion also would have found a question of fact whether Sluman was engaged in a felony. Sluman's *Alford* plea to eluding an officer did not have collateral estoppel effect. *See Clark v. Baines*, 150 Wn.2d 905, 917, 84 P.3d 245, 251 (2004). His admission at the scene that he had warrants does not establish that he was driving "in a reckless manner," RCW 46.61.024(1), i.e., "indicating a wanton and willful disregard for the lives or property of others," *State v. Tandecki*, 153 Wn.2d 842, 848, 109 P.3d 398, 400 (2005). "The record lacks facts of such wanton and willful disregard for the lives of others." *Sluman*, 3 Wn. App. 2d at 700 (Fearing, J., lead op.). If the Court were to accept review, this issue would fall within the issues presented for review, and should be addressed in fairness to Sluman.

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:

Michael P. Lynch & Patricia D. Todd
Office of Attorney General of Washington
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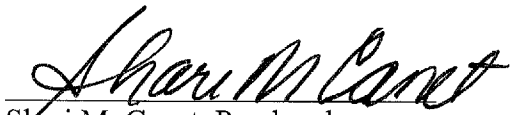
and upon Respondent's co-counsel, M. Scott Brumback, via email pursuant to prior agreement for electronic service, as follows:

M. Scott Brumback at scott@brumbacklaw.com

Signed at Moses Lake, Washington on October 29, 2018.



Shari M. Canet, Paralegal

AHREND LAW FIRM PLLC

October 29, 2018 - 1:02 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96225-1
Appellate Court Case Title:	Thomas L. Sluman v. State of Washington, et al.
Superior Court Case Number:	13-2-00220-8

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