No. 99656-3

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 79696-8-I)

ROSE DAVIS, as the Personal Representative of the Estate of Renee L. Davis, deceased,

Plaintiff/Appellant,

v.

KING COUNTY, et al.,

Defendants/Appellees.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

This appeal arises from the tragic death of Respondent Renee Davis, who during a police welfare check brandished a firearm at deputies with the admitted "intent to provoke law enforcement to kill her …." The trial court dismissed the case under the Felony Bar Statute, Wash. Rev. Code § 4.24.420, concluding that Ms. Davis committed the felony of Second- or Third-Degree Assault. The appellate court originally affirmed the trial court, but on reconsideration reversed itself; in doing so it discarded plaintiff's admission and other key evidence and authority regarding the operation of the statute.

Review is warranted on two alternative grounds—the opinion conflicts with other decisions of the Court of Appeals in multiple respects, and it involves an issue of substantial public importance. The decision conflicts both with Division Three's opinion in *Estate of Lee ex. Rel. Lee. v. City of Spokane*, 101 Wn. App. 158, 2. P.3d 979 (2000) (and related appellate court opinions) and with its own opinion in *Watness v. City of Seattle*, 16 Wn. App. 2d 297, 2021 *Wash. App. LEXIS* 321 (Wash. Ct. App. 2021),[1] a case decided just two weeks after this one. Further, the opinion addresses the application of a statute for which sparse authority exists, and trial courts would benefit significantly from this Court's guidance. Petitioners respectfully request this Court grant review, reverse the Court of Appeals, and affirm the trial court's dismissal.

[1] A copy of the slip opinion is attached as Appendix B.

II. IDENTITY OF PETITIONERS

Petitioners are Defendants King County along with Deputy Nicholas Pritchett, Deputy Timothy Lewis, and former King County Sheriff John Urquhart (collectively absent the County, "Individual Officers").

III. COURT OF APPEALS DECISION

Petitioners respectfully seek review of the Court of Appeal's published decision ("Decision"), *Davis v. King Cty., et al.*, 16 Wn. App. 2d 64, 479 P.3d 1181 (2021)[2].

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the Decision conflicts with the *Estate of Lee ex. Rel. Lee. v. City of Spokane*, 101 Wn. App. 158, 2. P.3d 979 (2000) by permitting a plaintiff to defeat the felony bar statute at summary judgment by holding that a court may not infer intent to commit a crime even where a plaintiff points a gun at law enforcement officers and her estate fully admits that her intent was to provoke a deadly response?

2. Whether the Decision conflicts with *Watness v. City of Seattle*, *et al*., by permitting a plaintiff to defeat the felony bar statute at summary judgment by claiming diminished capacity without any evidence or experts to show that plaintiff's alleged mental condition resulted in her having the inability to form the mental state required for felony assault?

3. Whether a defendant is barred from employing the felony defense pursuant to RCW 4.24.420 at summary judgment where material facts are

[2] A copy of the Decision is attached as Appendix A.

not in dispute and plaintiff is either deceased or unavailable to testify based on privilege (e.g., 5th Amendment)?

V. STATEMENT OF THE CASE

A. RELEVANT FACTS.

On October 21, 2016, at approximately 6:30 p.m., King County Sheriff Deputy Nicholas Pritchett was parked in his patrol car at the Muckleshoot Reservation Powwow Grounds. CP 115; 247. Ms. Davis' boyfriend, TJ Molina, approached Deputy Pritchett; Molina appeared upset and said something along the lines of, "I can't deal with her when she's like this. She's going crazy again." CP 116-118. Deputy Pritchett was familiar with Mr. Molina and learned that Molina was talking about Renee Davis. CP 112-114; 246. Deputy Pritchett was also familiar with Ms. Davis as he had responded to incidents at her home in which she was a victim of domestic violence. CP 112.

Molina showed Deputy Pritchett a series of text messages from Ms. Davis. CP 118. The text messages were sent between 5:10 p.m. and 6:28 p.m. that day and read as follows: "Bring your bike over your rifle will be on the porch"; "Answer the phone"; "Well come get the girls or call 911 I'm about to shoot myself"; "I'm put that on my mom"; "This is to show you I'm not lying." CP 223-35. The final text message was accompanied by a photograph of what appeared to be a "red gash on human skin." CP 119; CP 225. Deputy Pritchett was very concerned by the text messages and the photograph as it evidenced someone was potentially seriously injured. CP

119. Deputy Pritchett asked Mr. Molina if Ms. Davis had access to firearms, and Mr. Molina said she had a 30-30 rifle. CP 120.

Deputy Pritchett advised dispatch of the information received from Mr. Molina and that he was heading to Ms. Davis' residence to do a welfare check. CP 125-28. The following information was logged in the computer-aided dispatch (CAD): "suicidal female, possibly armed with a rifle and has her two children with her," "she's texting pics of fresh injuries, unsure who is injured," and "female is Davis, Renee possibly born in 1993." CP 161; 311. Deputy Pritchett requested backup to assist and learned that backup was approximately 20 minutes away. CP 127. He then asked dispatch to check with the Auburn Police Department to see if they had any units available to respond. *CP 128*. Deputy Pritchett was concerned about a delay in investigating the circumstance, given that Ms. Davis or someone else at the residence could be bleeding out because of the wound he had been shown or other related injuries. CP 141-42; 145. He was also concerned that Ms. Davis might shoot herself. *Id.* .

Deputy Timothy Lewis, who was off-duty and on his way home from the firing range, heard Deputy Pritchett's request and advised dispatch that he could respond and back Deputy Pritchett. CP 169-171. While waiting for backup, Deputy Pritchett drove to Ms. Davis' neighborhood. He parked near her house and approached on foot to investigate signs of distress or concerning sounds. CP 128-130. After reviewing the scene, Deputy Pritchett returned to his patrol car and waited for backup. CP 130-32.

Deputy Lewis arrived and met Deputy Pritchett at his patrol car. CP 175. Deputy Pritchett informed Deputy Lewis about what he learned from Mr. Molina, that he had surveyed the outside of the home, and the two discussed how they would try to contact Ms. Davis and the kids at the residence. CP 132; 176; 178. Both recognized the exigencies involved, specifically that Ms. Davis may have harmed herself and they needed to act quickly to make sure she was okay. CP 134; 181. Deputy Pritchard was in uniform: Deputy Lewis wore a vest that identified him as "POLICE." CP 176. The deputies approached the home on foot. CP 133-34; 180-81.

Outside the residence neither deputy could hear any sounds coming from the home. CP 134; 182. Deputy Pritchett knocked on the front door, announced himself as police, and received no response. CP 144. Deputy Lewis knocked on the side of the house, calling for Ms. Davis by using her first name, and announced that he was a police officer. CP 187. The deputies knocked for several minutes and received no response. CP 139; 187-88. Both deputies were very concerned that Ms. Davis may have harmed herself and was so injured that she was incapable of responding. CP 140-42; 201.

While looking through a crack in the blinds of a front window, Deputy Lewis saw a young child. CP 194. A child then moved the blinds and looked at Deputy Lewis. CP 195. He asked the child if she could come to the door and she nodded and opened the front door. CP 139-40; 195. The deputies entered and found two small children alone, each appeared to be under the age of five. CP 142-43; 196-97. Deputy Lewis moved the children

to the front porch area of the residence, and Deputy Pritchett began searching the common areas of the home. CP 145-47; 198-200. As Deputy Lewis moved the children towards the porch, he asked one of the children where "mommy's room" was; the child pointed to a door in the hallway. CP 200. Deputy Lewis then returned and provided cover to Deputy Pritchett; both called out for Ms. Davis and announced themselves as police. CP 147; 200. They received no response. Needing to confirm Ms. Davis' welfare, the deputies moved to the bedroom.

While Deputy Lewis covered the hallway, Deputy Pritchett knocked on the bedroom door and again announced himself as a police officer. CP 148. He received no response. *Id.* . The doorknob to the bedroom was covered by a child safety device that Deputy Pritchett, who was wearing gloves, could not manipulate. He knocked the device off the doorknob with his foot and then opened the bedroom door with his hand. *Id.* . Once the door was open, Deputy Pritchett saw Ms. Davis and summoned Deputy Lewis. CP 147-48; 202; 205. Both deputies entered with Deputy Lewis to Deputy Pritchett's left. CP 149; 203. Ms. Davis was lying in bed with a blanket pulled up to her neck. CP 149-150; 204.

Deputy Pritchett then asked Ms. Davis to show her hands and remove the blanket. CP 150. She responded "no." *Id.* . Concerned she was injured or possibly armed, Deputy Pritchett pulled the blanket off Ms. Davis. CP 150-52. Both deputies immediately saw that Davis was holding a handgun in her right hand and a magazine in her left hand. CP 153; 207.

Neither knew whether the gun held a second magazine or a bullet in the gun's chamber. Plaintiff's police practices expert testified the deputies should have assumed the weapon was loaded. CP 215. Deputy Lewis yelled "gun," and both deputies retreated toward the doorway. CP 154; 206-08. Ms. Davis sat up in bed, raised her right arm and pointed the gun at the deputies in the doorway. CP 154-56; 206-08. Deputy Lewis ordered her to drop the gun, but she did not comply; the deputies fired upon Ms. Davis. *Id.*

Ms. Davis slumped down to her right side and fell off the bed between the wall and the bed. CP 156-57; 207. Deputy Pritchett announced "shots fired" over the air. CP 162. Deputy Lewis thereafter moved out of the room to go check on the children. CP 207. An Auburn police officer arrived within seconds and took control of the children, placing them in his patrol car. CP 210. Deputy Pritchett secured Ms. Davis' handgun, called for aid, and moved Ms. Davis to a location where aid could be provided. CP 157-58. Fire department medics who had been alerted to the circumstance earlier and were pre-positioned at the scene moved in and undertook unsuccessful lifesaving measures. CP 159.

The estate filed a wrongful death action. CP 1-19.

B. PROCEDURAL HISTORY.

1. TRIAL COURT SUMMARY JUDGMENT DISMISSAL.

Petitioners filed separate summary judgment motions on the estate's claims, based in part on the Felony Bar Statute. CP 70-104. In response, plaintiff admitted that "Renee was indeed armed, suicidal, and 'engaged in

behavior with the intent to provoke law enforcement to kill her' by brandishing a firearm." Supp. CP 526-27. Plaintiff followed that admission with the following definition of "suicide by cop":

> [W]here a suicidal individual intentionally engages in life-threatening and criminal behavior with a lethal weapon or what appears to be a lethal weapon toward law enforcement officers or civilians specifically to provoke officers to shoot the suicidal individual in self-defense[.]

Id. at 527 (emphasis added). Plaintiff argued King County "had no de-escalation or suicide by cop policies, and implemented little to no training on the topics." *Id*. at 527-28. To further support her suicide-by-cop theory, plaintiff relied upon the expert report of Dr. Jennifer Piel. Dr. Piel opined that based on Ms. Davis' mental health history and two prior suicide attempts, Ms. Davis intended to commit suicide by cop:

> **Based on the sources of information reviewed, the evidence leads me to conclude that Ms. Davis engaged in behavior with the intent to provoke law enforcement to kill her (suicide by cop).**

CP 373. Plaintiff then inaccurately argued that the only felony at issue was First Degree Assault, which requires "intent to inflict great bodily harm"; she argued that element could not be met when a subject's intent is "to commit suicide by provoking police into shooting h[er]." Supp. CP 535-56.

In short, plaintiff admitted and argued to the trial court that her specific intent was to create an apprehension of harm to provoke the deputies into shooting her by pointing a gun at them and presented expert testimony to bolster that claim. There was no evidence, either through expert or lay witnesses, that Ms. Davis did not have the capacity to form the

intent to commit the felonies; the trial court found the elements of Assault in the Second or Third Degree were met and dismissed plaintiff's claims under the felony bar statute.

2. PLAINTIFF APPEALS TO DIVISION ONE.

Plaintiff appealed the dismissal before Division One of the Court of Appeals. For the first time on appeal, plaintiff argued "diminished capacity," an argument not raised at the trial court and one that contradicted her admissions to the trial court along with the expert report submitted by plaintiff. Defendants moved to strike plaintiff's argument as it was raised for the first time on appeal and relied on materials never presented to the trial court. Division One denied the motion without explanation.

3. DIVISION ONE AFFIRMS THE TRIAL COURT.

On August 31, 2020, the panel issued an unpublished opinion[3] affirming the trial court's dismissal under the felony bar statute:

> But, even viewing these facts in the light most favorable to Davis, there is no dispute that both officers testified that Davis raised and pointed the gun directly at them before they shot. The act of pointing a gun at someone supports a determination that there was an intent to create apprehension of bodily injury. The trial court did not err when it concluded that there was not a dispute of material fact about whether Davis formed the requisite intent to find that she was engaged in the commission of a felony at the time of her death.
> …
>
> Without facts demonstrating the possibility that Davis did not point her gun at deputies, the estate cannot create a dispute of material fact sufficient to overcome the felony bar statute.[4]

[3] A copy of the unpublished opinion is attached as Appendix C.
[4] Appendix C, Slip. Op. at *8-19, 14 (emphasis added).

On September 21, 2020, plaintiff moved for reconsideration and to publish. Petitioners filed an answer on December 7, 2020.

4. DIVISION ONE REVERSES ITSELF.

On February 5, 2021, Division One granted reconsideration and published a new opinion reversing the trial court's summary judgment dismissal. *Davis v. King Cty*., 16 Wn. App. 2d 64, 479 P.3d 1181 (2021) ("Davis"). The opinion held in relevant part:

> In granting summary judgment, the trial court relied on the testimony of Deputies Pritchett and Lewis, that Davis pointed a weapon at them, to infer her intent to commit felony assault. This was error. As the estate argues, the evidence in the record before us raises numerous questions of fact over whether Davis intended to commit an assault. This evidence includes Davis's history of mental illness and attempted suicide, the deputies' conflicting testimony about where the gun and clip were located, their testimony that she pointed the gun at each of them—apparently at the same time, Davis's dying statement that "It's not even loaded," and the conflicting testimony whether the gun was found in Davis's hand on the floor, or still on the bed. While a jury might find the officers' testimony credible and Davis's act of pointing the gun demonstrates her intent to commit an assault, it might also conclude to the contrary. The trial court erred in concluding Davis had the requisite specific intent to commit assault.

Id. at 74.[5] Not only does the *Davis* opinion fail to reference plaintiff's admissions to the trial court regarding her intent to commit suicide by cop or Dr. Piel's expert opinion supporting the admission, but its reversal of summary judgment relies almost entirely on plaintiff's "diminished capacity" defense raised for the first time on appeal. The new opinion makes no reference to the fact this was a new argument or that petitioners moved to strike this new argument.

[5] Appendix A, Slip Op. at *9-10.

5. *WATNESS V. CITY OF SEATTLE, ET AL.*

On February 16, 2021, Division One issued its ruling in *Watness*. There, Seattle police officers shot Charleena Lyles after she threatened them with a knife.[6] The defendants sought summary judgment under the felony bar statute. In response plaintiffs presented expert opinion that Lyles did not have the requisite *mens rea* to commit first degree assault.[7] The trial court excluded plaintiff's expert opinion and granted summary judgment pursuant to the felony bar defense, RCW 4.24.420.[8]

The *Watness* court reversed the trial court's dismissal, relying on its February 1, 2021 opinion in *Davis*. In addressing the *Davis* facts, the *Watness* court stated "the [Davis] trial court granted summary judgment for the deputies, ruling that Davis was engaged in the commission of first degree assault when the deputies killed her[.]"[9] The *Watness* court claimed it reversed Davis "concluding that specific intent is an essential element of first degree assault" and that plaintiff "raised a genuine issue of material fact as to whether Davis had formed the requisite intent to commit assault."[10] The *Watness* recitation of the history of this case was plainly erroneous – the *Davis* trial court did not grant summary judgment based on a ruling that Davis was engaged in *first degree* assault.

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[6] 16 Wn. App. 2d at 303; App. B., Slip Op. at 1.
[7] *Id*. at 304; App. B., Slip Op. at 5.
[8] *Id*. at 304-05; App. B., Slip Op. at 5-6.
[9] *Id*. at 309; App. B., Slip Op. at 10-11.
[10] *Id*. (emphasis added).

6. PETITIONERS' REQUEST FOR RECONSIDERATION.

As the *Davis* holding made no reference to plaintiff's admissions, conflicted with its holding two-weeks later in *Watness*, and the *Watness* ruling suggested Division One may have confused the facts between the two cases, petitioners sought reconsideration. The motion was denied.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court should accept review under both RAP 13.4(b)(2) and (4). First, the Decision "is in conflict with a published decision of the Court of Appeals." *Id.* Indeed, the *Davis* decision conflicts with multiple appellate decisions. In *Estate of Lee ex. Rel. Lee. v. City of Spokane*, a case that is virtually identical factually regarding the felony threat presented to officers, Division Three applied RCW 4.24.420 at the summary judgment level to dismiss the plaintiff's claims. The *Davis* holding conflicts with *Lee*.

Second, the *Davis* court's holding that "Davis's history of mental illness and attempted suicide" creates a genuine issue of fact as to whether "Davis had the requisite specific intent to commit assault" conflicts with its opinion in *Watness*. The *Watness* court held that to support a diminished capacity defense a party "must present evidence of a mental disorder and expert testimony must logically and reasonably connect the [party's] alleged mental condition with the asserted inability to form the mental state required for the crime charged[.]" 16 Wn. App. 2d at 310. *Davis* conflicts with *Watness* because Davis never produced any evidence that she suffered from a mental condition that diminished her capacity. Indeed, Davis

presented evidence through an expert that her intent was very clear – to intentionally provoke law enforcement officers into shooting her. The holdings in *Watness* and *Davis* directly conflict.

The Court should further accept review as this matter "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Very few cases have addressed the statutory felony defense, and review will help trial and appellate courts better understand how to apply the defense. This is most important where the plaintiff is either deceased or elects not to testify. The *Davis* holding suggests that under that scenario the felony defense is effectively never available at the summary judgment stage. Such an application is erroneous and would defeat a key purpose behind the defense.

A. THE DECISION CONFLICTS WITH *ESTATE OF LEE EX. REL. LEE V. CITY OF SPOKANE* ALONG WITH RELATED APPELLATE DECISIONS REGARDING INTENT.

The *Davis* court's holding that the trial court erred when it "relied on the testimony of Deputies Pritchett and Lewis, that Davis pointed a weapon at them, to infer her intent commit felony assault"[11] conflicts with numerous Washington appellate opinions holding such evidence is sufficient to infer intent. Most notably, the Decision conflicts with *Lee*, which is a virtually identical case that upheld the application of the Felony Bar Statute. 101 Wn. App. at 177. In a footnote, the Decision acknowledged *Lee*, but failed to distinguish it.[12]

[11] 16 Wn. App. 2d at 74; App. A., Slip. Op. at 9.
[12] *Id*. at 73, fn. 3; App. A., Slip. Op. at 9, fn. 3.

In *Lee*, the defendant officers had probable cause to arrest the decedent for domestic violence. The officers and Lee's wife went to the door of the Lee's residence. Lee's wife attempted to unlock the door to the residence, but he held the lock in a locked position. Lee's wife asked him several times to let her in and he responded, "get the f*** out of here … or two people are going to die tonight." 101 Wn. App. at 164. Shortly thereafter Lee opened the front door holding a rifle pointed down. *Id*. When officers ordered him to drop the gun, he refused; instead he raised it and pointing it at one of the officers. *Id*. One officer fired a single shot killing Lee. The appellate court reversed the trial court's denial of summary judgment, holding RCW 4.24.420 barred plaintiff's state law claims because he was committing a felony when he pointed a gun at the officers and his wife. *Id*. at 177.

As in *Lee*, there is no dispute here that Ms. Davis pointed a gun at the deputies. As a result of and during Ms. Davis's commission of this felony, she was shot and died from her injuries, an outcome she argued she specifically intended in support of her claims against the county.

Reviewing the undisputed evidence, the trial court properly found:

> Given the undisputed facts in this case, Ms. Davis pointed a firearm at Deputy Pritchett and Deputy [Lewis] … which prompted them to open fire on her and cause her death. Any contrary information is purely speculation. There isn't any evidence to support it.

RP (54:1-7). The *Davis* holding reversing summary judgment clearly conflicts with *Lee*.

The Decision also conflicts with other cases consistent with *Lee*. These cases generally permit a court to infer intent from objective evidence and plaintiff's own admissions and evidence and to grant summary judgment on the felony bar statute when no evidence contradicts the circumstantial evidence of intent. For example, *State v. Bea*, 162 Wn. App. 570, 579, 254 P.3d 948 (2011) reads:

> Where there is no direct evidence of the actor's intended objective or purpose, intent may be inferred from circumstantial evidence. A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability. This includes inferring or permissively presuming that a defendant intends the natural and probable consequences of his or her acts.

(citations omitted). *See also State v. Gallo*, 20 Wn. App. 717, 729, 582 P.2d 558 (1978) ("Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event."). A court may infer the requisite intent to cause reasonable fear of harm where a defendant wields a deadly weapon in a menacing or threatening manner towards a particular person. *See, e.g., State v. Hupe*, 50 Wn. App. 277, 748 P.2d 263 (1988) (upholding conviction of assault with unloaded rifle), disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Krup*, 36 Wn. App. 454, 676 P.2d 507 (1984) (upholding second degree assault conviction where defendant pointed knife at victim, threatened to kill her, and stabbed knife into countertop before exiting victim's store); RCW 9A.04.110(6) (definition of deadly weapon includes "loaded or unloaded firearm").

Intent may and often does present a factual question for a jury if material disputed facts exist. Here, however, plaintiff has never presented any facts disputing that Ms. Davis pointed a firearm at the deputies. Instead, she admitted that fact and produced expert evidence to support it. *Davis* does not refute this fact, instead it holds a jury must decide whether Ms. Davis intended to assault the officers when she pointed the gun at them. That holding ignores the absence of a disputed fact, ignores plaintiff's admissions, and ignores the only evidence before the trial court – Dr. Piel's expert's opinion that she *did* have the requisite intent. Indeed, a jury could only reach a different conclusion through speculation. The trial court noted that it may rely on objective circumstantial evidence where no facts exist to support a different conclusion. RP (29:17-30:8) ("But where are there any facts that would allow a jury to draw any other conclusion?").

A reviewing court may not ignore plaintiff's admissions, arguments, and undisputed evidence before the trial court showing there was no dispute as to Ms. Davis' intent. Nor can it ignore the fact the trial court relied upon those admissions and arguments in reaching its determination. Our process does not allow litigants to assert a position/theory, have their case dismissed on the theory they proposed, and then rest their appeal on an entirely different and contradictory premise.[13] *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5. Doing so here was invited error, which the Court of Appeals should not have allowed.

[13] The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.

Review is necessary to address the *Davis*'s conflict with other appellate opinions and the obvious error of ignoring the record on *de novo* review.

B. *DAVIS* ALSO CONFLICTS WITH THE EVIDENTIARY REQUIREMENT REAFFIRMED IN *WATNESS*.

In *Watness*, the appellate court held summary judgment was improper because the plaintiff presented evidence through an expert that Ms. Lyles could not form the requisite intent to commit assault with a deadly weapon or attempted murder. Addressing whether this evidence was sufficient to create an issue of fact for summary judgment, the *Watness* court held:

> Generally, a criminally charged defendant must present evidence of a mental disorder and expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged when the defendant seeks a diminished capacity jury instruction. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). **When a defendant presents such evidence**, a court may instruct the jury that "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form (fill in requisite mental state)." WPIC 18.20.
> …
>
> If a jury were to find, as the Estate contends, that Lyles suffered from a mental disorder that rendered her unable to form the mens rea of a felony, then the jury could conclude the Officers failed to prove she was engaged in the "commission of a felony" and they would not be entitled to statutory immunity under RCW 4.24.420.[14]

Although decided only two weeks prior to *Watness*, the *Davis* holding completely ignores the evidentiary requirement set forth in *Watness*,

[14] 16 Wn. App. 2d at 310-11 (emphasis added); App. B., Slip. Op. at 11-12.

resulting in a conflict between the two holdings. Like the summary judgment reversal in *Watness*, the *Davis* court reversed summary judgment on the basis that "Davis's history of mental illness and attempted suicide" created an issue of fact regarding her requisite intent to commit assault. However, in conflict with *Watness*, the *Davis* court reached its conclusion without any evidence that "[Davis] suffered from a mental illness that diminished her capacity" and ignored the admission and evidence presented by plaintiff of specific intent weighed by the trial court. *Davis* ignores the burden to produce evidence requirement outlined in *Watness*.

Plaintiff here never argued diminished capacity in opposition to summary judgment; the term exists in neither plaintiff's trial court pleadings nor the summary judgment hearing transcript. Indeed, plaintiff presented the antithesis of diminished capacity to the trial court. Not only did she admit in her briefing that she was "armed, suicidal, and engaged in behavior with the intent to provoke law enforcement to kill her by brandishing a firearm," but she backed it up with an expert opinion that she possessed the exact intent necessary to support a charge of Assault in the Third Degree – "Based on the sources of information reviewed, the evidence leads me to conclude that Ms. Davis engaged in behavior with the intent to provoke law enforcement to kill her (suicide by cop)." *Davis*, consequently, lacks the diminished capacity evidence required by *Watness*, creating a significant conflict between the two rulings.

Based on this obvious conflict review is necessary to confirm the evidentiary standard for defeating summary judgment and/or creating an issue of fact under a diminished capacity defense. Otherwise, any plaintiff that commits a felonious act could avoid summary judgment by the mere argument she did not have the requisite intent, even when intent is admitted.

C. THE COURT SHOULD ACCEPT REVIEW TO DETERMINE HOW TO APPLY THE FELONY DEFENSE DOCTRINE WHERE THE PLAINITFF IS UNAVAILABLE.

Review should also be granted because the Decision raises issues of substantial public interest that this Court should determine. RAP 13.4(b)(4). Very few Washington cases have addressed the felony defense statute, RCW 4.24.420. More importantly, significant questions remain surrounding the use of the defense and required evidence when the plaintiff is either deceased or unavailable to testify based on privilege. As noted, *Davis* conflicts with the foremost case on the issue, *Estate of Lee ex. Rel. Lee. v. City of Spokane*. This case demonstrates the need for further guidance as *Davis* suggests the felony defense will never be available at summary judgment if the plaintiff is deceased or unavailable to testify so long as he or she claims diminished capacity. In fact, *Davis* was recently cited for the proposition that whether a decedent was committing a felony and whether such felony was a proximate cause of the decedent's death constitutes a question of fact that precludes summary judgment. See *Bao Xuyen Le v. King Cty*., 2021 U.S. Dist. LEXIS 53573 (W.D. Wash. Mar. 22, 2021) (citing *Watness* and *Davis*).

Supreme Court review is necessary to provide guidance on the felony defense statute as *Davis* effectively obliterates the defense.

VII. CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court grant this petition for review.

RESPECTFULLY SUBMITTED this 12th day of April, 2021.

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Certificate of Service

The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled PETITION FOR REVIEW on the following individuals:

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Dated this 12th day of April, 2021, at Seattle, Washington.

/s/ Lisa Smith
Lisa Smith

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROSE DAVIS as Personal Representative of the Estate of RENEE L. DAVIS, deceased, Appellant, v. KING COUNTY, a political subdivision of the State of Washington, TIMOTHY LEWIS, Deputy, King County Sheriff's Office, individually and in his official capacity acting under the color of state law; NICHOLAS PRITCHETT, Deputy, King County Sheriff's Office, individually and in his official capacity acting under the color of state law; JOHN URQUHART, in his individual capacity; MITZI JOHANKNECHT, Sheriff, King County Sheriff's Office, in her official capacity; JOHN DOES 1-10, individually and in their official capacities acting under the color of state law, Respondents.	No. 79696-8-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — Washington's felony bar statute, RCW 4.24.420, creates a complete defense to any action for damages for personal injury or wrongful death if the person injured or killed was engaged in the commission of a felony at the time of the

injury or death and the felony was a proximate cause of the injury or death. On its face, the statute applies even if the defendant was negligent or unreasonable.

The estate of Renee Davis appeals the trial court's summary judgment order dismissing its wrongful death action. Davis was fatally shot by law enforcement during a mental health crisis where she was suicidal. On appeal, the estate contends that the trial court erred in granting the defendants' summary judgment motions because the court improperly inferred Davis's specific intent to assault the deputies, made credibility determinations about the deputies' version of events, and because issues of material fact exist as to whether the defendants' negligence was the proximate cause of Davis's death. The estate also contends that the trial court erred because the felony bar statute requires a criminal conviction or admission to felonious conduct before it can bar a wrongful death action. We reverse.

I. FACTS

On October 21, 2016, T.J. Molina approached King County Sheriff's Office Deputy Nicholas Pritchett on the powwow grounds at the Muckleshoot Indian Reservation during his patrol shift.[1] Molina was worried about his girlfriend, Davis, who had been sending him concerning text messages. Davis had a history of psychiatric treatment for mental illness and history of attempted suicide.

At 6:21 p.m., Davis sent Molina a text message saying "[w]ell come and get the girls or call 911 I'm going to shoot myself." Another text message followed at 6:28 p.m.

[1] Davis was a member of the Muckleshoot Indian Tribe. It is common for residents of the Reservation to seek out law enforcement officers for help rather than call 911.

that said "[t]his is to show you I'm not lying," with a blurry photo that appeared to be an injury. It was unclear from the photo the severity and location of the potential injury.

Molina sought out Pritchett's help because Davis had two of her three children with her and was also pregnant with a fourth child. Pritchett was familiar with both Davis and Molina because he had responded to domestic violence incidents at Davis's home concerning Davis's ex-boyfriend. Molina showed Pritchett the text messages from Davis. Pritchett thought the picture could have been an injury or a "photo off the internet," but because the image was blurry, he could not be sure. Molina told Pritchett that Davis had access to a rifle and a handgun.

Pritchett advised dispatch of a "suicidal female, possibly armed with a rifle and who has her two children with her," texting "pictures of fresh injuries, unsure who is injured," and "female is Davis, Renee possibly born in 1993" at 6:37 p.m. Pritchett indicated that he would conduct a welfare check. Dispatch advised Pritchett that backup was approximately 26 minutes away. Pritchett asked dispatch to check if any units from the Auburn Police Department were available to respond. At the same time, Deputy Lewis was commuting home when he overheard Pritchett's radio transmissions and responded. Lewis had been attending a firearms training at the King County Sheriff's Office range.

Pritchett parked a few blocks away from Davis's home at 6:44 p.m. Pritchett approached the home on foot to survey the area and look for signs of distress. Pritchett returned to his vehicle to wait for backup. Lewis arrived at approximately 6:45 p.m. Pritchett quickly told Lewis about a tree he observed outside Davis's residence where

they could shelter if there was gunfire. Lewis knew only what he heard over the radio and did not know that Davis was pregnant or that Pritchett had prior contacts with Davis.

Together, the deputies approached Davis's house on foot at approximately 6:52 p.m. Neither heard any noise from the house or indication that the occupants were in distress. Both deputies loudly knocked on the front door, siding, and windows of the house. They repeatedly yelled "Sheriff's Office!" "It's the police!" and "Come to the door!" to get Davis's attention. Lewis tried to remove the screen from the window when he saw Davis's two children in the living room and asked them to open the front door; Davis's three-year-old child complied. Both children appeared to be under the age of five.

The deputies entered the home, Lewis had his weapon drawn. After quickly assessing the children's well-being, Lewis moved the children to the front door foyer while Pritchett checked the living room and kitchen area. Lewis asked the children "Where's mommy's room?" and one of the children pointed to a door down the hallway. Lewis covered the hallway and the two bedrooms at the back of the hallway while Pritchett approached the first bedroom. The doorknob had a child safety device on it, and Pritchett was unable to maneuver the device because he had on gloves. Pritchett kicked the child safety device off the doorknob.

The deputies entered Davis's bedroom and observed her lying in her bed, covered in a blanket up to her neck, staring blankly at the door. The deputies instructed Davis to show her hands; Lewis recalled that Davis did not respond, while Pritchett recalled that Davis said "no." Lewis pointed his weapon at Davis while Pritchett pulled the blanket off Davis. Both deputies testified that they saw a gun. Lewis recalled that

Davis's right hand was over the top of or below the gun, with the muzzle facing the foot of the bed, while Pritchett recalled that the gun was in Davis's right hand resting on her legs. Both deputies observed a magazine in Davis's left hand, but could not tell whether the gun was loaded or unloaded.

Lewis ordered Davis to "drop the gun," while Pritchett yelled "gun." Pritchett attempted to move back toward the door. Both officers testified that she raised the gun and pointed it directly at them—apparently at the same time. Both Lewis and Pritchett fired their weapons. Three bullets hit Davis. Pritchett announced "shots fired" over the air. Davis slumped over, fell off the bed, and stated "Its not even loaded."

Lewis heard the children screaming and left Pritchett alone in the bedroom with Davis. Lewis encountered Auburn Police Officer, Derek Pederson, as he took the children outside. After removing the children from the home, Pederson and Lewis went back to Davis's bedroom. According to Pederson he saw the gun in Davis's hand while she was lying on the floor and one of the deputies took it out of her hand. Pritchett testified that he told Lewis that they needed to make the scene safe and asked Lewis to cover him while he got the gun. Pritchett claimed he recovered the gun from the bed, checked it, and confirmed that it did not have a magazine nor round in the chamber. He then put the gun in his belt. Lewis testified that he was watching Davis and did not see Pritchett remove the gun from the bed.

Pederson moved the bed away from Davis so that medical personnel could provide treatment. Pritchett called for aid and moved Davis to a location where aid could be provided. Fire department medics, who had been waiting outside entered and performed lifesaving measures. Medics were unable to revive Davis.

On January 3, 2018, the estate filed a wrongful death action against King County, Pritchett, Lewis, former King County Sheriff Urquhart and Sheriff Johanknecht[2] (collectively King County) for negligence, battery, negligent use of excessive force, and outrage. King County moved for summary judgment to dismiss all of the estate's claims based on the felony bar statute, that the deputies had no legal duty to Davis, that Washington does not permit a negligent investigation against police, the deputies' actions were intentional, justified, and reasonable, the facts do not support a claim for battery because the deputies were justified in using deadly force when confronted with a deadly threat, and the elements of outrage could not be met. The estate responded that RCW 4.24.40 required a felony conviction or admission by the plaintiff and that Davis was accused of committing assault in the first degree, which requires specific intent to cause bodily harm or an apprehension of bodily harm. At oral argument, the estate argued that the jury could infer that Davis didn't have the necessary specific intent.

The trial court granted summary judgment in favor of the defendants, concluding that, while there may be disputes of material fact related to the reasonableness of the deputies' conduct, RCW 4.24.420 barred Davis's action. The estate appeals.

II. ANALYSIS

A. Intent to Commit Assault

The estate first contends that the trial court erred in granting summary judgment based on the felony bar statute, RCW 4.24.420. It avers that there are questions of material fact over whether Davis had the necessary specific intent to commit a felony assault. We agree.

[2] Davis's estate voluntarily dismissed Johanknecht as a defendant.

"We review summary judgment motions de novo, engaging in the same inquiry as the trial court." Vargas v. Inland Washington, LLC, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019). "When reviewing summary judgment motions, we consider all disputed facts in the light most favorable to the nonmoving party." Vargas, 194 Wn.2d at 728 (internal quotes omitted). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." CR 56. Estate of Lee v. City of Spokane, 101 Wn. App. 158, 166, 2 P.3d 979 (2000).

The trial court based its order granting summary judgment on the affirmative defense provided by the felony bar statute. RCW 4.24.420 provides that

> [i]t 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.

In order to prevail on the defense provided by RCW 4.24.420, King County bears the burden of demonstrating: (1) that Davis was engaged in the commission of a felony at the time of her death and (2) that the felony was the proximate cause of her death. Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014) (the party raising affirmative defense bears the burden of proof).

King County asserts that Davis was engaged in either second or third degree assault at the time she was killed. RCW 9A.36.021(1) defines second degree assault, in pertinent part: "[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . (c) [a]ssaults another with a deadly weapon." RCW 9A.36.031(1)(g) defines third degree assault, in pertinent part:

"[a] person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . . (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault."

Because "assault" is not defined in the criminal code, we resort to common law definitions. State v. Abuan, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). Washington recognizes three common law definitions of 'assault': (1) an intentional touching (actual battery); (2) an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it; and (3) an act done with intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS; CRIMINAL 35.01 (4th ed. 2016) (WPIC); Abuan, 161 Wn. App. at 154 (citing State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). Importantly here, specific intent to cause bodily harm or to create apprehension bodily harm is a necessary element of assault. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

"'Intent' to commit a criminal act means more than merely 'knowledge' that a consequence will result." State v. Bea, 162 Wn. App. 570, 579, 254 P.3d 948 (2011). The known or expected result must also be the person's objective or purpose. Bea, 162 Wn. App. at 579. Where there is no direct evidence, intent can be inferred from circumstantial evidence. "A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability." Bea, 162 Wn. App. at 579 (citing State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)).

> While the trier of fact is permitted to draw an inference or presumption that a defendant intends the natural and probable consequences of [their] acts, however, the defendant is entitled to have the jury give equal consideration to the possibility that [they] did not act intentionally, including any theory of nonintentional conduct that [they] might offer.

Bea, 162 Wn. App. at 579-80.

Intent is a question of fact, normally reserved for the jury. "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." Morissette v. U.S., 342 U.S. 246, 274, 72 S. Ct. 240, 96 L. Ed. 288 (1952) (it is error for the trial court to instruct jury to presume intent). See also Bea, 162 Wn. App. at 579; Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 849, 50 P.3d 256 (2002) ("the statute's requirement that the [person] act willfully and with intent presents a question of fact.").[3]

In granting summary judgment, the trial court relied on the testimony of Deputies Pritchett and Lewis, that Davis pointed a weapon at them, to infer her intent to commit felony assault. This was error. As the estate argues, the evidence in the record before us raises numerous questions of fact over whether Davis intended to commit an assault. This evidence includes Davis's history of mental illness and attempted suicide,[4] the deputies' conflicting testimony about where the gun and clip were located, their

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[3] King County cites Lee for the proposition that "a judge on summary judgment is fully authorized to infer said intent." Lee involved an appeal of a trial court decision dismissing a survivorship action brought under 42 U.S.C. § 1983 against the City of Spokane after a police involved shooting. After concluding dismissal was appropriate, the court went on to address several additional immunity defenses raised by the City. In a short, two sentence discussion at the end of the opinion, the court concluded that RCW 4.24.420 provided the City a defense because "[b]y the plaintiff's own account, Mr. Lee pointed a gun at Officer Langford and Ms. Lee after threatening to shoot them. This is first degree assault, a felony." The court did not discuss intent, much less, conclude that intent could be inferred by the trial court on summary judgment.

[4] Evidence of diminished capacity is admissible to prove or disprove that a defendant was capable of forming the requisite specific intent to commit a crime. State v. Poulsen, 45 Wn. App. 706, 708, 726 P.2d 1036 (1986).

testimony that she pointed the gun at each of them—apparently at the same time, Davis's dying statement that "Its not even loaded," and the conflicting testimony whether the gun was found in Davis's hand on the floor, or still on the bed. While a jury might find the officers' testimony credible and Davis's act of pointing the gun demonstrates her intent to commit an assault, it might also conclude to the contrary. The trial court erred in concluding Davis had the requisite specific intent to commit assault.[5]

B. Conviction or Admission

While we reverse and remand for trial, we also address the estate's alternative argument that the trial court erred in granting summary judgment under RCW 4.24.420 because there must be a felony conviction or admission to felonious conduct before the court can bar a wrongful death action under RCW 4.24.420. We disagree.

We review statutory interpretation de novo. Tesoro Ref. & Mktg. Co. v. State, Dep't of Revenue, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). "The primary objective of any statutory construction inquiry is to ascertain and carry out the intent of the Legislature." Tesoro, 173 Wn.2d at 556. First, we look to the statute's plain language and if the language is unambiguous, our inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "The statute is to be enforced in accordance with its plain meaning." Armendariz, 160 Wn.2d at 110. "Where the plain language of the statute is subject to more than one reasonable interpretation, it is ambiguous." When a statute's language is ambiguous, we may resort to legislative history to discern legislative intent. Armendariz, 160 Wn.2d at 110-11.

[5] Because we reverse and remand for trial, we do not address the estate's argument that there was a question of fact over whether Davis's actions were the proximate cause of her death.

Here, the statute's language is unambiguous. The plain language of the statute does not require that a person be convicted of a felony or admit to felonious conduct before RCW 4.24.420 is a complete defense to a civil action. Instead, the language states "[i]t 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." RCW 4.24.420 (emphasis added). A wrongful death action will likely never involve a conviction or admission to felonious conduct because the death would proceed any possible trial or admission. When possible, we "give effect to every word, clause and sentence of a statute." Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). The argument advanced by the estate reads the language "wrongful death" out of the statute by making the defense unavailable in almost all wrongful death actions. We read the statute to specifically contemplate its applicability in wrongful death actions.

We reverse the trial court's order granting summary judgment based on RCW 4.24.420.

Mann, C.J.

WE CONCUR:

Chun, J.

Appelwick, J.

APPENDIX B

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

COMMISSIONER ERIC WATNESS, as Personal Representative of the Estate of Charleena Lyles; KAREN CLARK, as Guardian Ad Litem on behalf of the decedent's four minor children, Appellant, v. THE CITY OF SEATTLE, a municipality; JASON M. ANDERSON, an individual; STEVEN A. MCNEW, an individual, Respondent.	No. 79480-9-I DIVISION ONE PUBLISHED OPINION

ANDRUS, A.C.J. — On June 18, 2017, Seattle Police Officers Jason Anderson and Steven McNew (the Officers) shot and killed Charleena Lyles after, as the Officers contend, she threatened them with a knife. Retired Commissioner Eric Watness, personal representative of Lyles's estate, and Karen Clark, guardian ad litem for Lyles' four minor children (referred here jointly as the Estate), sued the City of Seattle (the City) and the Officers alleging negligence and assault. The trial court granted the Officers' motion for summary judgment, denied the Estate's motion for partial summary judgment on certain affirmative defenses, and struck the Estate's three

expert declarations. Because there remain genuine issues of material fact, we reverse and remand for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

In the six months prior to her death, Charleena Lyles called the Seattle Police Department (SPD) twenty-three times. On June 5, 2017, SPD responded to one of Lyles's calls in which she reported she had been the victim of domestic violence at her apartment in an affordable housing complex owned by Solid Ground. Police reports indicate that while officers were in her apartment, Lyles—who was present with her young daughter—"armed herself with a pair of extra long metal shears and was threatening [responding] officers." Lyles reportedly told officers, "Ain't none of y'all leaving here today." Both officers present drew their firearms and commanded her to drop the scissors to the floor. Lyles reportedly yelled, "[A]re you going to shoot me in front of my daughter?" The police reported that Lyles refused to put down the shears even after being repeatedly asked to do so. They told Lyles they were there to help her, not to shoot her.

Additional police officers responded to the scene and reported that during this incident, Lyles made several unusual comments, including wanting to "morph into a wolf" and talking about "cloning her daughter." The police described Lyles making several "unusual religious comments" and accusing the officers of being "devils" and members of the Ku Klux Klan. Officers were ultimately able to convince Lyles to take a seat on her sofa and to drop the scissors.

The police reports further indicate the officers separated Lyles and her young child from the scissors and obtained a phone number for a nearby family member who

arrived at Lyles's apartment shortly thereafter. They then took Lyles into custody. The police learned from Lyles's sister that Lyles had experienced "a recent sudden and rapid decline in her mental health." The police report described Lyles as exhibiting "[d]isorientation/confusion," "[d]isorganized speech/communication," "[d]isorderly/disruptive behavior," and "[b]izarre, unusual behavior." They described her as "[b]elligerent/uncooperative, angry," "[o]ut of touch with reality," and experiencing "[h]allucinations/delusions." The incident led the officers to flag Lyles and her address with an "officer safety caution." The police booked Lyles into jail for harassment but recommended her case be transferred to mental health court.

On the morning of June 18, 2017, Lyles called 911 to report a residential burglary. Lyles informed police that three hours earlier, she had discovered her apartment door open and an Xbox missing. Seattle Police Officer Jason Anderson, on routine patrol, responded to the call and conducted a routine record check on the address. After Officer Anderson noted the officer safety caution associated with Lyles and reviewed the police report of the June 5 incident, he requested back up from another unit. When Officer McNew arrived, the two officers briefly discussed the prior incident. Officer McNew commented they should not let Lyles get behind them or get between the officers and her apartment door.

When the Officers contacted Lyles in her apartment, she was calm and cooperative. Lyles told the Officers she had left her apartment unlocked while she went to the store and returned to find her Xbox or PlayStation taken. She led the Officers down a hall to a back bedroom from which she reported items had been stolen. After returning to the kitchen, the officers noticed two young children playing

in the living room. As Officer Anderson asked Lyles to clarify some information for his report, he glanced up and saw Lyles lunge at him with a knife.[1] Officer Anderson testified that had he not jumped back, Lyles would have stabbed him. He drew his firearm and told Lyles to get back. Officer Anderson testified Lyles was yelling at them but he could not make out what she was saying.

Officer Anderson testified Lyles then turned her attention toward Officer McNew, who was then cornered in her kitchen. Officer McNew asked Officer Anderson to use his stun gun.[2] Officer Anderson responded that he did not have his stun gun.[3] The Officers both testified that Lyles continued to approach them, knife in hand, ignoring their commands to get back. Believing Lyles intended to stab one of them, both Officers repeatedly fired their service firearms at Lyles, killing her.

SPD's investigation into the police shooting revealed that Lyles had a black-handled knife with a four and one-half inch blade in her left jacket pocket and a knife sheath in her right jacket pocket. Police recovered a second knife, with a four-inch blade, near Lyles's apartment door. This knife matched the size and shape of the sheath in Lyles's pocket.

[1] Although the Estate refuses to stipulate to the facts as presented by the Officers, it has not presented any evidence to dispute their account of Lyles's actions in her apartment immediately before the shooting. We therefore accept this account as undisputed.

[2] The witnesses use the word "Taser," but we refer to the device generically as a "stun gun." We intend to use the two words interchangeably here.

[3] Officer Anderson was certified to carry and deploy a stun gun. Under Seattle Police Department policy, once certified, a police officer is required to carry his stun gun. Following the shooting, Officer Anderson received a two-day suspension for his failure to carry his stun gun device with him on patrol that day.

The Estate brought this lawsuit alleging common law negligence and assault.[4] The City and the Officers asserted a number of affirmative defenses, including immunity under RCW 4.24.420, qualified immunity, assumption of risk, and discretionary immunity.

The City and Officers moved for summary judgment, principally arguing the Officers owed no legal duty to Lyles under the public duty doctrine and that they were immune from suit under Washington's felony defense statute, RCW 4.24.420. The Estate opposed this motion and moved to dismiss the affirmative defenses of qualified immunity and assumption of risk and the City's discretionary immunity defense, and submitted declarations from three expert witnesses, two in police conduct and practices and one in forensic psychology.

The admissibility of the experts' testimony is a key issue in this appeal. Criminologist Thomas Mauriello opined that the Officers' use of their firearms was unreasonable in light of the circumstances and contrary to SPD policies on de-escalation. Police practices expert D.P. Van Blaricom opined that Lyles's death could have been avoided had Officer Anderson been carrying his SPD-mandated stun gun and used it, rather than his firearm, to subdue Lyles. Criminal psychologist, Dr. Mark Whitehill, opined that Lyles was in a psychotic state during the shooting and did not have the capacity to form the intent to assault the Officers. The Officers moved to strike these declarations as inadmissible under ER 702 and Frye v. U.S., 293 F. 1013 (D.C. Cir 1923). The trial court granted the Officers' motion to strike the expert

[4] The suit also alleged a violation of the Washington Law against Discrimination (WLAD) and violation of article I section three of the State Constitution. The trial court granted the Officers' CR 12(b)(6) motion to dismiss the WLAD and constitutional claims and the Estate has not appealed that order.

declarations and granted their summary judgment motion. It denied the Estate's partial summary judgment motion. The Estate appeals all three orders.[5]

ANALYSIS

Appellate courts review a summary judgment order de novo and perform the same inquiry as the trial court. Borton & Sons, Inc. v. Burbank Properties, LLC, 196 Wn.2d 199, 205, 471 P.3d 871 (2020). A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." CR 56(c). We view all facts and reasonable inferences in the light most favorable to the non-moving party. Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005).

Although appellate courts generally review a decision to exclude expert witness testimony at trial under an abuse of discretion standard, State v. Arndt, 194 Wn.2d 784, 798, 453 P.3d 696 (2019), the de novo standard of review applies when reviewing trial court evidentiary rulings made in conjunction with a summary judgment motion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). We review a trial court's Frye ruling de novo. Advanced Health Care, Inc. v. Guscott, 173 Wn. App. 857, 871, 295 P.3d 816 (2013).

A. Public Duty Doctrine

The Estate first argues its claims are not barred by the public duty doctrine. The Estate alleges the Officers acted unreasonably and violated SPD policy during

[5] The City has a separate summary judgment motion on file but the trial court has stayed further proceedings pending this appeal.

their encounter with Lyles by failing to use nonlethal force. It contends the police officers could have used nonlethal methods, such as a stun gun or a police baton, to disarm Lyles or to subdue her without having to shoot her. The core of its case is that the Officers unreasonably failed to follow police practices on the use of nonlethal weapons calculated to avoid the use of deadly force. We agree that this claim is not barred by the public duty doctrine.

"When the defendant in a negligence action is a governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general." Munich v. Skagit Emergency Comm'n Ctr., 175 Wn. 2d 871, 878, 288 P.3d 328 (2012). The recent Supreme Court decision in Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 549, 442 P.3d 608 (2019), is dispositive on the inapplicability of the public duty doctrine in this case. In Beltran-Serrano, a Tacoma Police Department officer shot a mentally ill homeless man after the officer approached him about panhandling in the city. Id. at 540-41. When the man, who did not understand English, ran from the officer, she shot him multiple times. Id. Beltran-Serrano brought an action for assault, battery, and negligence, arguing that the officer unreasonably escalated the situation, resulting in Beltran-Serrano's death. Id. at 542.

The City of Tacoma argued the officer owed no duty to Beltran-Serrano under the public duty doctrine. Id. at 542. The Supreme Court disagreed, reasoning that "every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others. . . . This duty applies in the context of law enforcement and encompasses the duty to refrain from directly causing harm to another through

affirmative acts of misfeasance." Id. at 550. The court held that "Beltran-Serrano's negligence claims arise out of Officer Volk's direct interaction with him, not the breach of a generalized public duty." Id. at 551.

As in Beltran-Serrano, the Estate's claims arise out of the Officers' direct interaction with Lyles and not the breach of a generalized public duty. The Officers argue Beltran-Serrano is factually distinguishable because the police officer in that case approached Beltran-Serrano unsolicited, whereas here, Officers Anderson and McNew responded to Lyles's request for police assistance. The Officers suggest the holding in Beltran-Serrano was premised on the fact that Beltran-Serrano had enlisted no help from Officer Volk. But Beltran-Serrano cannot be read so narrowly. The Supreme Court unequivocally held that when a police officer has a direct interaction with a plaintiff, that officer has a duty to act with reasonable care. Id. There is nothing in the case to suggest that this duty only exists when the direct interaction is the result of an unsolicited social contact.

The Officers further argue that they did not owe Lyles a legal duty of care because when they responded to her report of a burglary, she was able to converse with them coherently, she suddenly and without provocation attacked them, and the Officers had the right under RCW 4.24.420 to respond with force. But this argument conflates the concept of whether officers owe a legal duty to exercise reasonable care in interacting with others and whether officers are statutorily immune from civil liability for using lethal force when defending themselves from an assault.

While there are factual differences between this case and Beltran-Serrano, these differences do not negate the holding of that case: an officer owes a legal duty

to exercise reasonable care when engaging in affirmative conduct toward others, whether they be crime victims or individuals suspected of committing crimes. As the Supreme Court indicated in Beltran-Serrano, when "harm result[s] from the officer's direct contact with [a] plaintiff[], [and] not the performance of a general public duty of policing" the public duty doctrine does not apply. Id. at 551. If the officers act, they have a duty to act with reasonable care. Id.

Here, whether the use of lethal force breached a duty of reasonable care is a question for the trier of fact. The Officers may ultimately convince a jury that lethal force was the only viable option. But Beltran-Serrano establishes that the public duty doctrine does not bar the Estate's negligence claim.

B. Felony Defense Statutory Immunity

The Officers next contend they have complete statutory immunity under Washington's felony defense statute, RCW 4.24.420. Because genuine issues of material fact exist regarding the applicability of that statutory immunity, we conclude summary judgment was inappropriate.

RCW 4.24.420 provides:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.

RCW 4.24.420 requires proof that the person killed was engaged in the commission of a felony at the time of her death. The Officers allege that Lyles was engaged in the commission of a felony because her conduct constituted first degree assault with a

deadly weapon under RCW 9A.36.011(1) and attempted murder under RCW 9A.28.020(1) and (3), and RCW 9A.32.[6]

Assault with a deadly weapon requires proof that a person, with the intent to inflict great bodily harm, assaulted another with a deadly weapon. RCW 9A.36.011(1); 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.01, at 480 (4th ed. 2016) (WPIC). As the Estate correctly notes, the mens rea for first degree assault is the specific intent to inflict great bodily harm. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Attempted murder requires proof of the specific intent to cause the death of another person. State v. Boswell, 185 Wn. App. 321, 335, 340 P.3d 971 (2014); WPIC 26.01.

To benefit from complete immunity under RCW 4.24.420, the Officers must prove that Lyles formed the specific intent either to inflict great bodily harm or to cause death. The Officers argue they have no burden of proving any specific mens rea. We disagree. In Davis v. King County, No. 79696-8-I, slip op. at 9-10 (Wash. Ct. App. Feb 1, 2021), this court concluded that a defendant asserting immunity under RCW 4.24.420 must prove the party killed formed the intent to commit a felony. In Davis, two King County Sheriff's deputies shot and killed a woman in her home after she allegedly pointed an unloaded gun at them. Id. at 4-5. After Davis's estate brought a wrongful death action, the trial court granted summary judgment for the deputies, ruling that Davis was engaged in the commission of first degree assault when the

[6] The Officers do not identify the provision of our homicide statute on which they rely to substantiate this assertion. Chapter 9A.32 RCW includes premeditated murder, murder in the first and second degree, and manslaughter in the first and second degree. All are felonies but each contains a different mens rea, from premeditation and intent, to recklessness and negligence. Because the Officers repeatedly use the word "murder," we assume the Officers are relying on RCW 9A.32.030 (murder in the first degree) or RCW 9A.32.050 (murder in the second degree).

deputies killed her and that RCW 4.24.420 barred the Davis's claims. Id. at 6. This court reversed, concluding that specific intent is an essential element of first degree assault and Davis's history of mental illness, the deputies' conflicting testimonies about the placement of the gun, and Davis's dying statement that the gun was not loaded raised a genuine issue of material fact as to whether Davis had formed the requisite intent to commit assault. Id. at 9-10.[7]

As in Davis, there is a genuine issue of material fact as to Lyles' specific intent to commit assault with a deadly weapon or attempted murder. A person's diminished capacity, due to a mental illness, may impair her ability to form the specific intent to commit a crime. State v. Nuss, 52 Wn. App. 735, 738, 763 P.2d 1249 (1988). Contrary to the Officers' contention, diminished capacity is not an affirmative defense for which a criminally charged defendant bears the burden of proof, but is merely evidence that negates specific intent. Id. at 739. See also WPIC 18.20 (Diminished Capacity – Defense).[8] Generally, a criminally charged defendant must present evidence of a mental disorder and expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged when the defendant seeks a

[7] The Officers argue Lyles's intent is immaterial under RCW 4.24.420, citing Estate of Lee v. City of Spokane, 101 Wn. App. 158, 177, 2 P.3d 979 (2000). But Lee simply states "[i]t is a complete defense to any action for damages for wrongful death that the person killed was engaged at the time in the commission of a felony and that the felony was a proximate cause of death." Id. Lee contains no discussion of whether the aggressor's mens rea should be considered when adjudicating a defendant's immunity under RCW 4.24.420. Generally, in cases where a legal issue is not discussed in an opinion, the case is not controlling on a future case where the legal issue is properly raised. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Lee does not discuss mens rea under RCW 4.24.420 and is not controlling here.

[8] Diminished capacity is treated as an affirmative defense only to the extent that the defendant carries the burden of producing sufficient evidence of diminished capacity to put the defense in issue. State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982).

diminished capacity jury instruction. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). When a defendant presents such evidence, a court may instruct the jury that "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form (fill in requisite mental state)." WPIC 18.20. Thus, while the Estate may have the burden to produce evidence that Lyles suffered from a mental illness that diminished her capacity to form the requisite specific intent, the ultimate burden of proving each element of the alleged felonies remains with the Officers.

If a jury were to find, as the Estate contends, that Lyles suffered from a mental disorder that rendered her unable to form the mens rea of a felony, then the jury could conclude the Officers failed to prove she was engaged in the "commission of a felony" and they would not be entitled to statutory immunity under RCW 4.24.420.

Here, the Officers presented prima facie evidence that Lyles committed at least felony assault. They both testified she lunged at them with a knife while making threatening statements. Although the Officers may have no direct evidence of Lyles's intent, a jury may infer it from this circumstantial evidence. "A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability. This includes inferring or permissively presuming that a defendant intends the natural and probable consequences of his or her acts." State v. Bea, 162 Wn. App. 570, 579, 254 P.3d 948 (2011) (citations omitted).

The Estate, however, presented evidence that Lyles was suffering from a psychosis at the time of the shooting that impaired her ability to form this mens rea. The police reports of the June 5, 2017 incident describe Lyles as disoriented,

delusional, experiencing hallucinations, and exhibiting impaired judgment. The Officers testified that Lyles's conduct swung rapidly from coherent to aggressive without warning on June 18. Dr. Whitehill testified that Lyles had a history of depression, post-traumatic stress disorder, adjustment disorder and an anxiety disorder, as well as a history of decompensation and emerging psychosis. Dr. Whitehill concluded from his review of the records that "she was in a psychotic state and did not have the capacity to intend to assault [the Officers] when she encountered police on June 18, 2017."

The Estate contends the trial court erred in excluding Dr. Whitehill's declaration. We agree. First, evidence of Lyles's mens rea is relevant under RCW 4.24.420. The Officers must prove each element of the alleged felony, including intent, and evidence of Lyles's incapacity to form intent to commit felonious assault or attempted murder at the time of her shooting relates directly to an element of proof under RCW 4.24.420.

Second, the testimony is admissible under Frye. The Officers contend Dr. Whitehill's methodology, termed a "psychological autopsy," is not generally accepted in Washington. But there is nothing in the record to establish that Dr. Whitehill's "psychological autopsy" methodology is unsound. Dr. Whitehill testified that a psychological autopsy "is an established practice within the field of forensic psychology to determine the mental state of someone who is already deceased." The Officers presented no evidence to contradict this testimony.[9]

[9] Other state courts have also approved of the methodology, finding no distinction between psychological autopsies and psychiatric opinion evidence in general. See Jackson v. State, 553 So.2d 719 (Fla. Dist. Ct. App. 1989).

Finally, the Officers argue Dr. Whitehill's testimony is inadmissible because he did not treat, evaluate, or test Lyles, citing to State v. Johnson, 150 Wn. App. 663, 208 P.3d 1265 (2009). But Johnson does not support this argument. In that case, a defendant argued fetal alcohol spectrum disorder (FASD) impaired his ability to tell right from wrong. The trial court allowed a defense expert to testify in general as to how FASD generally impairs a sufferer's cognitive functioning but would not permit the expert to testify that Johnson's FASD precluded him from being able to tell right from wrong. The Supreme Court affirmed because the expert testified he had no knowledge as to how the defendant was affected by FASD and trial counsel told the court the expert would not offer such opinions. Id. at 676-77. The Supreme Court did not hold that an expert cannot opine on an individual's mental state unless he has personally examined that individual.

Fundamentally, the Officers' arguments about Dr. Whitehill's opinions go to the weight, and not the admissibility, of his testimony. Such considerations are not dispositive on admissibility under ER 702 or Frye.[10] See Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc., 8 Wn. App. 2d 418, 446, 438 P.3d 1212 (2019) (the credibility of expert witness testimony is best determined by the trier of fact). The trial court thus improperly excluded Dr. Whitehill's declaration.

The evidence of Lyles's psychological condition on the day of her death creates a genuine issue of material fact as to whether she had the capacity to form the

[10] At oral argument, the Officers further argued that the trial court appropriately excluded Dr. Whitehill's testimony because, as a Ph.D. and not an M.D., he was not qualified to give such an opinion. Dr. Whitehill's testimony, however, was not a medical opinion, but a psychological one. Furthermore, an attack on the academic degree held by a testifying expert assails the weight afforded the testimony, not its admissibility. State v. Weaville, 162 Wn. App. 801, 824-25, 256 P.3d 426 (2011).

requisite intent to commit felony assault or attempted murder, and the trial court erred in granting summary judgment on this issue.

C. Qualified Immunity

The Estate next argues it was entitled to summary judgment on the Officers' affirmative defense of qualified immunity. We disagree.

In a negligence action, an officer is entitled to qualified immunity when he or she (1) was carrying out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acted reasonably. Staats v. Brown, 139 Wn.2d 757, 778, 991 P.2d 615 (2000). The first Brown factor presents a question of law, while the second and third factors necessarily introduce a factual inquiry into the qualified immunity analysis under state law. See Lesley v. Dept. of Soc. & Health Servs., 83 Wn. App. 263, 275, 921 P.2d 1066 (1996) (summary judgment on qualified immunity reversed because questions of fact existed as to whether caseworker followed proper procedures in removing child from parental custody).

We conclude there are genuine questions of material fact as to whether Officer Anderson followed the proper procedures in responding to Lyles's actions and whether both officers acted reasonably in using lethal force against her.

The Estate first contends neither officer was carrying out a statutory duty when they responded to Lyle's report of a burglary. This is legally incorrect. Under RCW 10.93.070, police officers have the statutory authority to enforce state criminal laws. Responding to a 911 report of a possible crime is the execution of a police officer's statutory duties. The officers were in Lyles's apartment at her invitation and with her

consent. As a matter of law, they were carrying out a statutory duty when they interacted with her.

Next, the Estate argues that Officer Anderson violated SPD's stun gun policy by failing to carry his stun gun on patrol. This fact is undisputed. SPD policies mandate that any officer who has been trained and certified to carry a stun gun must do so during their shift. But that policy does not mandate that an officer use a stun gun when attacked by a knife-wielding subject, only that the stun gun be carried with them when on duty. If Officer Anderson had been carrying his stun gun at the time of the shooting, there remains a question of fact as to whether its use would have been appropriate under the circumstances. The Estate expert, D.B. Van Blaricom, testified a stun gun would have been appropriate as a nonlethal device to subdue Lyles. Jeff Noble, the Officers' police practices expert, testified that Lyles was such a short distance away from Officer Anderson that even had he deployed the stun gun, it would have been ineffective and would have put Anderson at risk of death or serious bodily injury. Noble testified that "a reasonable officer under the circumstances would not have drawn or attempted to use the Taser," because the stun gun has a low effectiveness rate, Lyles was wearing a heavy coat, and Officer Anderson was too close to her to ensure its efficacy

The Estate also maintains that both officers violated SPD use of force policies by not choosing less lethal methods of subduing Lyles, a small woman at 5' 3" and weighing just 100 pounds. SPD's use of force policies require that officers use only the degree of force that is objectively reasonable, necessary, and proportional to the threat of a subject and officers must use de-escalation tactics when circumstances

permit. Under Seattle Municipal Code § 3.28.115, a police officer is authorized to discharge a firearm at another person "when necessary to . . . [d]efend himself or another person from death or serious bodily injury." Under that same provision of the city code, "[a] police officer may not use a firearm unless all other reasonable alternatives have been exhausted or would appear to a reasonable police officer to be ineffective under the particular circumstances."

But there are genuine issues of material fact as to whether the Officers followed SPD use of force policies or Seattle code provisions regarding the discharge of a firearm. Noble opined that the Officers' use of deadly force was objectively reasonable, necessary, and proportional to Lyles' lethal threats. The Estate's experts, Maureillo and Van Blaircom, opined that the Officers did not act reasonably in using lethal force against Lyles, and the Officers had non-lethal options available to them, including stun guns or batons. Mauriello further testified using a firearm was also unreasonable due to the risk of hitting Lyles' children who were in close proximity.

The Estate contends the trial court erred in striking the declarations of Mauriello and Van Blaricom. We agree. First, the testimony of these experts addresses the reasonability of the Officers' conduct in their interaction with Lyles, an issue relevant to the application of the Officers' qualified immunity defense.

Second, the expert opinions are admissible under both ER 702 and Frye. The Officers argue that the Estate's experts did not properly account for the factors defining the reasonability of a law enforcement officer's use of force, as laid out in

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).[11] But neither Mauriello nor Van Blaricom relied on an incorrect legal standard. Mauriello based his opinions on the following standard:

> The reasonableness of a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

As the Officers concede on appeal, "Mauriello's declaration relies upon the Graham standard." They argue, however, that despite laying out this correct standard, he then "expresses an opinion that does not account for the Graham factors and violates the prohibition against assessing the reasonableness of force with the 20/20 vision of hindsight." This argument, however, does not challenge the legal standard Mauriello applied. It is instead an attack on the credibility of his conclusions. A mere disagreement with an expert's conclusions, based on methods generally accepted in the relevant community, does not render expert witness evidence inadmissible under ER 702. Reese v. Stroh, 74 Wn. App. 550, 560, 874 P.2d 200 (1994).

As for Van Blaricom's testimony, the Officers contend he incorrectly relied on the standard applicable to claims of professional negligence, rather than Graham. But Van Blaricom, like Mauriello, set out the same Graham standard for determining the reasonableness of a police officer's use of force. Van Blaricom, like Mauriello, concluded that the actions of the Officers "were unreasonable." Van Blaricom also

[11] The Graham standard relates to the reasonableness of a police officer's use of force under the Fourth Amendment in cases arising under 42 U.S.C. § 1983. Under federal constitutional jurisprudence, the reasonableness of an officer's use of force is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Graham, 490 U.S. at 397.

opined that the Officers "failed to exercise the degree of skill, care, diligence and learning that would be expected of a reasonable police officer in the State of Washington under the same or similar circumstances." But this opinion was in addition to his Graham analysis and was appropriate under the negligence standard set out in Beltran-Serrano, 193 Wn.2d at 550. Thus, the trial court erred in striking the Mauiello and Van Blaricom declarations.

The expert testimony here creates genuine issues of material fact as to whether the Officers are entitled to qualified immunity and the trial court did not err in denying the Estate's summary judgment motion on this issue.

D. Assumption of Risk

The Estate also argues the Officers' assumption of risk affirmative defense should have been dismissed because there is no evidence that Lyles assumed the risk of being killed by Officers Anderson and McNew and the trial court erred in denying summary judgment on the issue. We disagree.

Washington courts recognize four categories of assumption of risk: express, implied primary, implied unreasonable, and implied reasonable assumption of risk. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Only the first two serve as an absolute defense; the latter two only serve as damage-reducing factors. Id. The parties agree that only implied primary assumption of risk applies to this case. To establish this affirmative defense, the Officers must prove that Lyles "(1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." Id.

The Officers presented evidence that Lyles had extensive history with the police, having called for their assistance some 23 times in the recent past. There is evidence she had previously threatened police officers in her apartment and had acknowledged, when they drew their firearms, that she might be shot for doing so. There is evidence she appeared to have intentionally armed herself with not one but two knives the day the Officers responded to her 911 call and she intentionally lunged at them, knowing the officers had their weapons drawn. A reasonable jury could find from this evidence that Lyles subjectively understood attempting to stab armed police officers with a knife carried a significant risk of being shot and voluntarily chose to encounter that risk.

But the Estate has presented evidence that Lyles was in a psychotic state and incapable of fully understanding the presence and nature of the risk posed by threatening Officer Anderson and McNew with a knife. Lyles's delusional statements and bizarre behavior may indicate that she did not fully appreciate the threat posed by the officers during that encounter. Dr. Whitehill testified Lyles's mental illness precluded her from voluntarily assuming the risk of her conduct.

Given this evidence, there are genuine issues of material fact and the trial court did not err in denying summary judgment on the issue of assumption of risk.

E. Discretionary Immunity

The Estate contends the trial court erred in refusing to dismiss the City's affirmative defense of discretionary immunity because it does not challenge any discretionary policy decision made by a high-level executive within the City. The City argues the Estate's position on appeal is new and was not the argument it advanced

before the trial court. We conclude the Estate did raise this argument below and the trial court erred in refusing to dismiss the City's affirmative defense.[12]

In its answer to the third amended complaint, the City pleaded the following affirmative defense: "Plaintiffs' claims may be barred in whole, or in part, by governmental immunity for discretionary, policy making, and/or judgmental functions and decisions." A governmental entity is entitled to immunity for "discretionary acts at a basic policy level." Chambers-Castanes v. King County, 100 Wn.2d 275, 282, 669 P.2d 451 (1983). "To fall within this exception, however, the discretionary act must not only involve a basic policy determination, but must also be the product of a considered policy decision." Id.

The Estate moved to dismiss this defense because "Defendant has failed to provide any evidence in support of this claim." In response, the City argued the Estate made various allegations about City policies and basic policy decisions and when it tried to determine which policies the Estate was challenging, the Estate would not identify them. In fact, the Estate represented during a discovery conference that it was not challenging any policies or procedures. The Estate argued in reply that "[the] City offers no evidence of high-level officials making considered policy decisions relevant here. There is no evidence in the record to support an Evangelical/King analysis," citing Evangelical United Brethren Church of Adna v. State, 67 Wn.2d 246, 407 P. 2d 440 (1965) and Chambers-Castanes, 100 Wn.2d at 275. The Estate's briefing before the trial court and the evidence the City presented—that the Estate

[12] The City indicated below that the Officers have not separately asserted a discretionary immunity defense.

was not challenging any City policy decision—demonstrates that the Estate's argument on appeal is not new. It is indeed the same argument advanced below.

Given that the Estate has disavowed any challenge to City policies, the discretionary immunity defense is inapplicable and should have been dismissed.[13]

CONCLUSION

We reverse the summary judgment dismissal of the Estate's claims against the Officers because there are genuine issues of material fact on the Officers' affirmative defense under RCW 4.24.420. We affirm the trial court's denial of summary judgment as to the Officers' qualified immunity and assumption of risks defenses. We reverse the order denying the Estate's motion to dismiss the City's discretionary immunity defense. We remand for further proceedings consistent with this opinion.

Andrus, A.C.J.

WE CONCUR:

Mann, C.J.

Verellen J

[13] This conclusion is further supported by our Supreme Court's recent decision in Mancini v. City of Tacoma, No. 97583, slip op. at 23 (Wash. Jan. 28, 2021), holding that the doctrine of discretionary immunity has no bearing on cases that do not involve policy decisions made by a coordinate branch of government.

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROSE DAVIS as Personal Representative of the Estate of RENEE L. DAVIS, deceased, Appellant, v. KING COUNTY, a political subdivision of the State of Washington, TIMOTHY LEWIS, Deputy, King County Sheriff's Office, individually and in his official capacity acting under the color of state law; NICHOLAS PRITCHETT, Deputy, King County Sheriff's Office, individually and in his official capacity acting under the color of state law; JOHN URQUHART, in his individual capacity; MITZI JOHANKNECHT, Sheriff, King County Sheriff's Office, in her official capacity; JOHN DOES 1-10, individually and in their official capacities acting under the color of state law, Respondents.	No. 79696-8-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Washington's felony bar statute, RCW 4.24.420, creates a complete defense to any action for damages for personal injury or wrongful death if the person injured or killed was engaged in the commission of a felony at the time of the

injury or death and the felony was a proximate cause of the injury or death. On its face, the statute applies even if the defendant was negligent or unreasonable.

The estate of Renee Davis appeals the trial court's summary judgment order dismissing its wrongful death action. Davis was fatally shot by law enforcement during a mental health crisis where she was suicidal. On appeal, the estate contends that the trial court erred in granting the defendants' summary judgment motions because the court improperly inferred Davis's specific intent to assault the deputies, made credibility determinations about the deputies' version of events, and because issues of material fact exist as to whether the defendants' negligence was the proximate cause of Davis's death. The estate also contends that the trial court erred because the felony bar statute requires a criminal conviction or admission to felonious conduct before it can bar a wrongful death action. We affirm.

I.

On October 21, 2016, T.J. Molina approached King County Sheriff's Office Deputy Nicholas Pritchett on the powwow grounds at the Muckleshoot Indian Reservation during his patrol shift.[1] Molina was worried about his girlfriend, Davis, who had been sending him concerning text messages.

At 6:21 p.m., Davis sent Molina a text message saying "[w]ell come and get the girls or call 911 I'm going to shoot myself." Another text message followed at 6:28 p.m. that said "[t]his is to show you I'm not lying," with a blurry photo that appeared to be an injury. It was unclear from the photo the severity and location of the potential injury.

[1] Davis was a member of the Muckleshoot Indian Tribe. It is common for residents of the Reservation to seek out law enforcement officers for help rather than call 911.

Molina sought out Pritchett's help because Davis had two of her three children with her and was also pregnant with a fourth child. Pritchett was familiar with both Davis and Molina because he had responded to domestic violence incidents at Davis's home concerning Davis's ex-boyfriend. Molina showed Pritchett the text messages from Davis. Pritchett thought the picture could have been an injury or a "photo off the internet," but because the image was blurry, he could not be sure. Molina told Pritchett that Davis had access to a rifle and a handgun.

Pritchett advised dispatch of a "suicidal female, possibly armed with a rifle and who has her two children with her," texting "pictures of fresh injuries, unsure who is injured," and "female is Davis, Renee possibly born in 1993" at 6:37 p.m. Pritchett indicated that he would conduct a welfare check. Dispatch advised Pritchett that backup was approximately 26 minutes away. Pritchett asked dispatch to check if any units from the Auburn Police Department were available to respond. At the same time, Deputy Lewis was commuting home when he overheard Pritchett's radio transmissions and responded. Lewis had been attending a firearms training at the King County Sheriff's Office range.

Pritchett parked a few blocks away from Davis's home at 6:44 p.m. Pritchett approached the home on foot to survey the area and look for signs of distress. Pritchett returned to his vehicle to wait for backup. Lewis arrived at approximately 6:45 p.m. Pritchett quickly told Lewis about a tree he observed outside Davis's residence where they could shelter if there was gunfire. Lewis knew only what he heard over the radio and did not know that Davis was pregnant or that Pritchett had prior contacts with Davis.

Together, the deputies approached Davis's house on foot at approximately 6:52 p.m. Neither heard any noise from the house or indication that the occupants were in distress. Both deputies loudly knocked on the front door, siding, and windows of the house. They repeatedly yelled "Sheriff's Office!" "It's the police!" and "Come to the door!" to get Davis's attention. Lewis tried to remove the screen from the window when he saw Davis's two children in the living room and asked them to open the front door; Davis's three-year-old child complied. Both children appeared to be under the age of five.

The deputies entered the home, Lewis had his weapon drawn. After quickly assessing the children's well-being, Lewis moved the children to the front door foyer while Pritchett checked the living room and kitchen area. Lewis asked the children "Where's mommy's room?" and one of the children pointed to a door down the hallway. Lewis covered the hallway and the two bedrooms at the back of the hallway while Pritchett approached the first bedroom. The doorknob had a child safety device on it, and Pritchett was unable to maneuver the device because he had on gloves. Pritchett kicked the child safety device off the doorknob.

The deputies entered Davis's bedroom and observed her lying in her bed, covered in a blanket up to her neck, staring blankly at the door. The deputies instructed Davis to show her hands; Lewis recalled that Davis did not respond, while Pritchett recalled that Davis said "no." Lewis pointed his weapon at Davis while Pritchett pulled the blanket off Davis. Both deputies saw a gun, Lewis recalled that Davis's right hand was over the top of or below the gun, with the muzzle facing the foot of the bed, while Pritchett recalled that the gun was in Davis's right hand resting on her legs. Both

deputies observed a magazine in Davis's left hand, but could not tell whether the gun was loaded or unloaded.

Lewis ordered Davis to "drop the gun," while Pritchett yelled "gun." Pritchett attempted to move back toward the door. Both officers testified that she raised the gun and pointed it directly at them. Both Lewis and Pritchett fired their weapons. Three bullets hit Davis. Pritchett announced "shots fired" over the air. Davis slumped over, fell off the bed, and stated that the gun was not loaded.

Lewis heard the children screaming and left Pritchett alone in the bedroom with Davis. Lewis encountered Auburn Police Officer, Derek Pederson, as he took the children outside. After removing the children from the home, Pederson and Lewis went back to Davis's bedroom. Pederson recalled seeing Davis's gun in her hand while she was on the floor, while Pritchett recalled putting the gun in his utility belt as Lewis reentered the bedroom. Pedersen moved the bed away from Davis so that medical personnel could provide treatment. Pritchett called for aid and moved Davis to a location where aid could be provided. Fire department medics, who had been waiting outside entered and performed lifesaving measures. Medics were unable to revive Davis.

On January 3, 2018, the estate filed a wrongful death action against King County, Pritchett, Lewis, former King County Sheriff Urquhart and Sheriff Johanknecht[2] for negligence, battery, negligent use of excessive force, and outrage. King County moved for summary judgment to dismiss all of the estate's claims based on the felony bar statute, that the deputies had no legal duty to Davis, that Washington does not permit a

[2] Davis's estate voluntarily dismissed Johanknecht as a defendant.

negligent investigation against police, the deputies' actions were intentional, justified, and reasonable, the facts do not support a claim for battery because the deputies were justified in using deadly force when confronted with a deadly threat, and the elements of outrage could not be met. The estate responded that RCW 4.24.40 required a felony conviction or admission by the plaintiff and that Davis was accused of committing assault in the first degree, which requires specific intent to cause bodily harm or an apprehension of bodily harm. At oral argument, the estate argued that "the jury could infer that [Davis] didn't intend to create this apprehension—the specific intent to create an apprehension of bodily harm" but did not present facts creating an issue of fact that Davis pointed her gun at the deputies.

The trial court granted summary judgment in favor of the defendants, concluding that, while there may be disputes of material fact related to the reasonableness of the deputies' conduct, RCW 4.24.420 barred Davis's action. The estate appeals.

II.

"We review summary judgment motions de novo, engaging in the same inquiry as the trial court." Vargas v. Inland Washington, LLC, 194 Wn.2d 720, 728, 452 P.3d 1205 (2019). "When reviewing summary judgment motions, we consider all disputed facts in the light most favorable to the nonmoving party." Vargas, 194 Wn.2d at 728 (internal quotes omitted). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." CR 56. Estate of Lee ex rel. Lee v. City of Spokane, 101 Wn. App. 158, 166, 2 P.3d 979 (2000).

At issue in this appeal is whether the felony bar statute, RCW 4.24.420, bars the estate's action. RCW 4.24.420 provides that

> [i]t 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.

Before addressing each of the estate's arguments, we acknowledge that Davis's death is tragic and echo the trial court's sentiment that the application of RCW 4.24.420 here is problematic because it precludes claims where law enforcement officers' actions and training may have been unreasonable, given their knowledge that the individual they were confronting was suicidal and armed. RCW 4.24.420 prevents courts and juries from reaching the issue of whether law enforcement's negligence resulted in the loss of life. The statute is clear and precludes our evaluation of these policy questions.

A.

The estate contends that only a jury may infer, from circumstantial evidence, the requisite specific intent that the decedent was "engaged in the commission of a felony" and therefore, the trial court erred in granting summary judgment because it infringed upon the jury's province. We disagree.

RCW 9A.36.021(1)(c) provides that "[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another with a deadly weapon." RCW 9A.36.031 provides "[a] person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: (g) Assaults a law

enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault."

The statute does not define "assault;" thus, we look to the common law definition. State v. Abuan, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). "Washington recognizes three common law definitions of 'assault': '(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.'" Abuan, 161 Wn. App. at 154 (citing State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). Finally, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 369 (1995).

The estate identifies the following factors for why there is a dispute about whether Davis formed the requisite intent for assault in the second or third degree: "her mental state, history of depression and abuse, pre-shooting statements and conduct, suicidal ideation, the unloaded gun, personal history and characteristics, as well as the Deputies' own negligent conduct, pre-shooting tactical errors, and completely unnecessary and rushed confrontation of [Davis] at gunpoint in her bedroom less than a minute after entering her home."

But, even viewing these facts in the light most favorable to Davis, there is no dispute that both officers testified that Davis raised and pointed the gun directly at them before they shot. The act of pointing a gun at someone supports a determination that there was an intent to create apprehension of bodily injury. The trial court did not err when it concluded that there was not a dispute of material fact about whether Davis

formed the requisite intent to find that she was engaged in the commission of a felony at the time of her death.

B.

The estate next contends that only a jury can weigh evidence and make credibility determinations and that the trial court erred by invading the jury's exclusive province by inferring specific intent from the circumstantial evidence. We disagree.

"It is true that a court should not resolve a genuine issue of credibility at a summary judgment hearing." Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991). "An issue of credibility is present only if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue." Howell, 117 Wn.2d at 626. "A party may not preclude summary judgment by merely raising argument and inference on collateral matters." Howell, 117 Wn.2d at 626-27.

> The party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.

Amend v. Bell, 89 Wn.2d 124, 127, 570 P.2d 138 (1977).

There is no evidence suggesting that Davis did not point her gun at the deputies. Instead, the estate contends "[b]ecause a reasonable juror could conclude that because the involved officers lied about circumstances surrounding the shooting, and that therefore 'the officers also lied about the facts that would support their claim that [Davis] posed an imminent threat of harm,' summary judgment was inappropriate." The estate cites an unpublished decision from the United States District Court for the Central

District of California, J.J.D. v. City of Torrence, No. CV 14-07463-BRO, 2016 WL 6674996, at *5 (C.D. Cal. Mar. 22, 2016) (court order), to support its argument. In that case, however, the officers had not provided an account of the shooting that matched the physical evidence. This created a dispute of material fact, from which a reasonable juror could conclude the officers had lied. Here, there is no physical evidence to suggest that Davis did not raise her gun or that the deputies lied. The estate points to small inconsistencies in the deputies' version of events, including how Davis was holding the gun, and how the gun was handled after the shooting. These inconsistencies are insufficient to create a dispute of material fact on the issue of whether Davis raised her gun. There is no evidence that the gun was planted or not in Davis's immediate possession at the time of the shooting. Thus, the trial court did not err when it granted summary judgment because there was no genuine issue of material fact.

C.

The estate next contends that the trial court erred when it granted summary judgment under RCW 4.24.420 because there must be a felony conviction or admission to felonious conduct before the court can bar a wrongful death action under RCW 4.24.420. We disagree.

We review statutory interpretation de novo. Tesoro Ref. & Mktg. Co. v. State, Dep't of Revenue, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012). "The primary objective of any statutory construction inquiry is to ascertain and carry out the intent of the Legislature." Tesoro, 173 Wn.2d at 556. First, we look to the statute's plain language and if the language is unambiguous, our inquiry ends. State v. Armendariz, 160 Wn.2d

106, 110, 156 P.3d 201 (2007). "The statute is to be enforced in accordance with its plain meaning." Armendariz, 160 Wn.2d at 110. "Where the plain language of the statute is subject to more than one reasonable interpretation, it is ambiguous." When a statute's language is ambiguous, we may resort to legislative history to discern legislative intent. Armendariz, 160 Wn.2d at 110-11.

Here, the statute's language is unambiguous. The plain language of the statute does not require that a person be convicted of a felony or admit to felonious conduct before RCW 4.24.420 is a complete defense to a civil action. Instead, the language states "[i]t 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." RCW 4.24.420 (emphasis added). A wrongful death action will likely never involve a conviction or admission to felonious conduct because the death would proceed any possible trial or admission. When possible, we "give effect to every word, clause and sentence of a statute." Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). The argument advanced by the estate reads the language "wrongful death" out of the statute by making the defense unavailable in almost all wrongful death actions. We read the statute to specifically contemplate its applicability in wrongful death actions.

The trial court did not err by applying RCW 4.24.420 on summary judgment when there was no criminal conviction or admission to felonious conduct.

D.

Finally, the estate contends that the trial court erred in granting summary judgment because there is a dispute of material fact on the issue of causation. We disagree.

Proximate cause is generally a question for the jury, but it is a question of law "when the facts are undisputed and the influences therefrom are plain and incapable of reasonable doubt or difference of opinion." Graham v. Public Emps. Mut. Ins. Co., 98 Wn.2d 533, 539, 656 P.3d 1077 (1983). Proximate cause consists of two elements: cause in fact and legal causation. Sluman v. State, 3 Wn. App. 2d 656, 701, 418 P.3d 125 (2018). Cause in fact concerns the "but for" consequences of an act: those events that the act produced in a direct, unbroken sequence, and that would not have resulted had the act not occurred. Sluman, 3 Wn. App.2d at 701. "Legal causation rests on considerations of logic, common sense, policy, justice, and precedent as to how far the defendant's responsibility for the consequences of its actions should extend." Sluman, 3 Wn. App. 2d at 701. "The inquiry is whether a reasonable person could conclude that there is a greater probability that the conduct in question was the proximate cause of the plaintiff's injury than there is that it was not." Mehlert v. Baseball of Seattle, 1 Wn. App. 2d 115, 118-19, 404 P.3d 97 (2017).

Even if the estate is correct, and the deputies' response was not appropriate given the circumstances and what they knew about Davis during the encounter, that is not the issue before us. Instead, we are asked whether Davis's commission of a felony was a proximate cause of her death. For proximate cause, we look at the unbroken sequence of events, from the felonious conduct to the injury. The statute does not take

into account the deputies' conduct prior to the felonious conduct. The statute states it is a complete defense when "the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death." RCW 4.24.420. Thus, our inquiry concerns Davis's conduct and whether it was a proximate cause of her death. Viewing the facts in the light most favorable to Davis, there are no facts to support that she did not point her gun at the deputies. But for her conduct, the deputies would not have shot Davis. There is no dispute of material fact on the issue of causation because there are no facts to support that Davis did not raise her gun. The trial court did not err.

The opinion of the estate's law enforcement expert, Leo Poort does not create a dispute of material fact on the issue of causation. Poort concluded that the deputies

> acted without proper cause or justification in fatally shooting [Davis] who was known by the deputies to be suicidal. Lewis and Pritchett far fell below the applicable standard of care here, and did not act as reasonable Sheriff's Deputies. Indeed, it would have been obvious to any Sheriff Deputy exercising his or her professional judgment that the acts taken by Lewis and Pritchett would put [Davis] at an unnecessary risk of serious harm and/or death.
>
> I have also concluded, to a reasonable degree of professional certainty, that the KCSO through its failure to adequately train and supervise its deputies, created an environment where the conduct of these deputies on October 21, 2016 was excessive. The deputies loudly entered [Davis's] home and forcibly entered her bedroom, thereby precipitating a fatal confrontation with the suicidal [Davis]. The KCSO far fell below the applicable standard of care here. Indeed, it would have been obvious to any Chief or Sheriff exercising his or professional judgment that KCSO's failure to train and supervise would result in suicidal persons, such as [Davis], at additional and unnecessary risk of serious harm and/or death.

Rather than opine on Davis's actions, Poort's opinion focuses on the negligent conduct of the deputies. The issue of the deputies' negligence, however, is a separate

issue from whether the felony bar statute acts as a complete defense to any negligence claim, regardless of whether the elements of negligence are met. It is not enough to show that the deputies were independently negligent, the estate must show that facts exist to establish a dispute of material fact as to whether Davis pointed her gun at the deputies.

Additionally, the estate cannot show that, had the deputies acted differently, that Davis would not have still pointed her gun at them upon entering the room. When the estate's police practice's expert, D.P. Van Blaricom, was deposed, he was asked if he agreed that the deputies acted appropriately once Davis pointed a gun at them. Van Blaricom responded that "if someone points a gun at you, you may shoot them" and there would be no way to safely know whether a gun was loaded. Without facts demonstrating the possibility that Davis did not point her gun at deputies, the estate cannot create a dispute of material fact sufficient to overcome the felony bar statute.

Finally, the language of RCW 4.24.420 indicates that it applies if "the felony was a proximate cause of the injury or death." (Emphasis added). Washington courts have long recognized that there can be more than one proximate cause of an injury and that the plaintiff should not be forced to prove that the defendant's negligence was the sole cause of the injury. Mehlert, 1 Wn. App. 2d at 118; N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 378 P.3d 162 (2016). The statute only requires a defendant show that the felony was a proximate cause of the injury or death, not the only proximate cause. Thus, while there may be multiple causes of a plaintiff's injury, a defendant need only show that the felony was a cause for the felony bar statute to apply as a complete defense. Since the estate was unable to present any evidence to create a dispute of material fact as to

whether Davis pointed her gun at the deputies, there is no dispute of material fact on the issue of causation under RCW 4.24.420.

We affirm.

Mann, C.J.

WE CONCUR:

Chun, J.

Appelwick, J.

FREY BUCK, P.S.

April 12, 2021 - 4:22 PM

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