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MAR 13 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA No. 298124

**IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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DANIEL BRIAN STRANGE

Appellant,

v.

SPOKANE COUNTY, and SPOKANE COUNTY SHERIFF'S DEPUTY  
JEFFREY WELTON, in his official and individual capacity,

Respondents.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT.

### A. *Bryan v. McPherson* is Dispositive.

On appeal, the collective County defendants frame the evidence this way: “[A]fter failing to follow Deputy Welton’s commands to return to the vehicle he was told he was under arrest at which point he tried to return to the car. Following this, Deputy Welton tased him one time.” *Response Brief, Introduction*. The County thus argues that a Taser in dart mode was to enforce a single contradictory command for a misdemeanor arrest. The outcome is predetermined. Such use of a Taser violates federal fourth amendment law. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9<sup>th</sup> Cir. 2010), citing *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 186, 104 L.Ed.2d 443 (1989). A Taser may not be used to effect a misdemeanor arrest absent flight or physical resistance to arrest, absent imminent fear of harm, self-defense or felony arrest. *Bryan*, 630 F.3d at 826, 832; RCW 10.31.050; RCW 9A.16.020. <sup>1</sup>

The County does not meaningfully argue “resistance” or even “flight” on appeal. At its core, the County argues only that Mr. Strange “misunderstands arrest authority,” that a misdemeanor arrest is a legal duty, and that a taser can therefore be used in the performance of the

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legal duty. The County argues that RCW 9A.16.020(1) is the only limitation on the use of force for a misdemeanor arrest, but that statute is no limitation at all. The County fails to appreciate that both the Constitution and statute *limit* a deputy's use of force. *State v Walker*, 157 Wn.2d 307, 314-315, 138 P.3d 113 (2006). Law enforcement officers are not allowed to define their own terms in justifying force. The meaning of *limiting* statutory terms are the role of the legislature and the courts.

The County's construction of RCW 9A.16.020(1) would violate federal law, and thereby, state law. As federal law, the *Bryan* decision establishes the minimum standard for the United States Constitution's Fourth Amendment, consistent with *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 186, 104 L.Ed.2d 443 (1989). It thus sets the minimum threshold for the use of a taser on a misdemeanor arrest even under Washington statute, as this state's constitution affords *greater* protection to privacy interests than does the Fourth Amendment. *State v. Griffith*, 61 Wn. App. 35, 40-41, 808 P.2d 1171, 1174 (1991). As a result, *Bryan* is applicable not just to the evidence; but to the construction of any relevant Washington statute related to the event. This state's statutes must necessarily result in protections which are

also greater than these federal minimum protections. *Wash. Const. Art. I, § 2; State v. Griffith*, 61 Wn.App. 35, 40-41, 808 P.2d 1171, 1174 (1991). And under *Bryan*, the use of intermediate force, i.e. a Taser in dart mode, to arrest for misdemeanor offenses of resisting a police officer and failure to comply with a lawful order, is unlawful, absent qualifying criteria. These misdemeanors are not inherently dangerous offenses, and do not warrant use of a taser in dart mode where the suspect is also nonviolent and posed no threat to the safety of the officers or others. *Bryan*, 630 F.3d at 828-829.

The County thus offers only two other arguments against the application of *Bryan*. First, it argues that the *Bryan* decision is not controlling because it cannot be applied retroactively; second, it argues that its deputy had qualified immunity under *Bryan*. Neither is valid here.<sup>2</sup>

As to the first, i.e., that *Bryan* should not apply retroactively, while the County tries to distinguish *Lunsford v. Saberhagen*, 139 Wn.App. 334, 160 P.3d 1089, *aff'd*, 166 Wn.2d 34 (1992), it offers no affirmative support for its own proposition—i.e., that judicial precedent

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<sup>2</sup> The County also argues that a taser is not per se excessive force; this wildly misstates the argument made. No one is arguing that *any* use of a Taser excessive force as a matter of law. *Response Brief* at p. 7. Mr. Strange argues that use of a Taser *under these circumstances* is excessive force as a matter of law, as *Bryan* is dispositive.

does *not* apply to all cases pending at the time of the holding. Most recently, in *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011), this state's Supreme Court reiterated Mr. Strange's argument—pending litigants receive the retroactive benefit of newer holdings, including litigants on appeal.

The County argues that *Lunsford* involved strict liability. *Response Brief* at p. 6. The facts of *Lunsford* are not limited to strict liability product cases. Retroactivity of precedent is well established in both the civil and the criminal law.

As to the second response, the County argues that any error in applying *Bryan* is harmless, because even if *Bryan* was used, it would result in qualified immunity for Deputy Welton. Qualified immunity was waived when trial started. Qualified immunity is an immunity from suit rather than a mere defense to liability. It is lost if a case is erroneously permitted to go to trial. *Pearson v. Callahan*, 555 U.S. 223, 231-32, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009), citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); see also *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151, 2155-56, 150 L. Ed. 2d 272 (2001); and see *Babcock v. State*, 116 Wn.2d 596, 636, 809 P.2d 143 (1991)(dissent on other grounds, noting

that such immunity is an entitlement not to stand trial). In all Taser cases dealing with qualified immunity, the officer's qualified immunity was resolved on summary judgment. *Ciampi v. City of Palo Alto*, 790 F. Supp. 2d 1077 (N.D. Cal. 2011); *Bryan*, 630 F.3d at 833; *Mattos v. Agarano*, 661 F.3d 433, 436 (9th Cir. 2011), which also reviewed *Brooks v. City of Seattle*, 623 F.3d 911 (9th Cir. 2010) (see *Mattos*, 661 F.3d at 436).

Qualified immunity cannot apply here, as once trial commenced, Deputy Welton waived his immunity.

Moreover, even if Deputy Welton had not waived qualified immunity, he could not have made a "reasonable mistake of law" regarding his use of his Taser in this event. The constitutional right allegedly violated was clearly established at the time of the act. *Staats v. Brown*, 139 Wn. 2d at 763-64. Claims of qualified immunity are reviewed based on the assumption that all facts alleged in *plaintiff's* complaint are true. *Id.* A summary judgment standard is applied, requiring that all facts and inferences be construed most favorably to the nonmoving party. *Id.*, citing CR 56. Here, the facts and inferences from Brian Strange, Kelly Strange and Matthew Keetch's testimony are that Brian Strange got out of his car to chastise Deputy Welton for

slamming his car door, Deputy Welton was a distance away, Brian Strange stood in one place, heard the deputy order him back into the car, saw a laser light on his chest and realized he had a weapon pointed at him, attempted to immediately comply and return to the car, heard no arrest command or command to stop, and was almost reseated at the time of discharge of the Taser into his back. *See e.g. RP 1158-1163 (Brian Strange); RP 968 (Kelly Strange); RP 507, 515-516 (Matthew Keetch, and see Ftntes 3 and 4 of opening brief.*

Construing these facts most favorably to Brian Strange, qualified immunity is not available to Deputy Welton. Properly construed, RCW 10.31.050 allows the use of force for a misdemeanor arrest only in circumstances of flight or forcible resistance. Neither statutory requisite existed here.<sup>3</sup>

Finally, Spokane County cannot avail itself of qualified immunity. Local government entities are not entitled to the qualified immunity available to their officials. *Owen v. Independence, Mo.*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Babcock v. State*, 116 Wn.2d at 620-21; *Robinson v. City of Seattle*, 119 Wn.2d at 64.

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<sup>3</sup> Officers are deemed to possess actual knowledge of the law, and are not entitled to qualified immunity if the law is violated. *See Robinson v. City of Seattle*, 119 Wn. 2d 34, 67-68, 830 P.2d 318 (1992).

The trial court's failure to apply the *Bryan* holding is reversible error.

**B. Washington Law is Dispositive.**

On the issue of arrest authority under state law, the County argues that Mr. Strange is now “changing his position” – because he first allegedly argued that an officer may only use force in a felony arrest. *See Response Brief at p. 8, citing “CP 1393, RP 1611.”* The citations referenced prove the opposite. Mr. Strange has always argued that a deputy's right to use force on a misdemeanor arrest is limited by two statutes—RCW 9A.16.020 and RCW 10.31.050. At “RP 1611,” Mr. Strange argues the same. At “CP 1393,” Mr. Strange argues for a directed verdict asserting the same. The claim is without merit.

The County then argues that Washington law permits the use of taser force for a misdemeanor arrest because a misdemeanor arrest is a legal duty under RCW 9A.16.020(1).<sup>4</sup> Its authority is law enforcement testifying that a misdemeanor arrest is a legal duty. But again, this

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<sup>4</sup> RCW 9A.16.020 states that “[T]he use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction; (2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody.

reading is a reading without limitation. Construed as these officers would have it, then under RCW 9A.16.020, once a decision is made to effect a custodial arrest for a misdemeanor, a legal duty is now in progress allowing force without limitation, except as they themselves deem “necessary.” Under the County’s theory, RCW 9A.16.020(1) is a broad grant of authority to use force as long as the officer is in uniform and deems force necessary. But were this valid, there would then be no reason for the remainder of RCW 9A.16.020, *or* for the second provision of that statute specifically authorizing force for a felony arrest, or for any of the language of RCW 10.31.050. The statute is thus a limitation on the use of force. See *Walker*, 157 Wn.2d at 314-315. Because it specifically mentions felony arrest, it *as* specifically does *not* mention misdemeanor arrests. If the legislature meant to include misdemeanor arrests, it would have done so.

As noted in opening, the only other statute specific to the use of force with arrests is RCW 10.31.050. And that statute *limits* the use of force by specifying criteria:

**“10.31.050. Officer may use force.** If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest.”

RCW 10.31.050's language is *limiting* language. *Walker*, 157 Wn.2d at 314-315. The statute would not include specific criteria for such use—flight or forcible resistance—if such were not required. RCW 10.31.050's specifics can thus only be construed as limitations on misdemeanor arrests.

Going outside these statutory limitations would also violate the federal law. *Bryan*, 630 F.3d at 826, citing *Graham*, 490 U.S. at 396. And in fact, read as its limitations are intended, *Bryan* does no more than restate RCW 10.31.050. With a misdemeanor arrest, force may not be used absent 1) notice, followed by 2) flight or forcible resistance. The statute has always been consistent with, and in fact preceded, the federal law now articulated in *Bryan*, 630 F.3d at 826, 832.

As to the statutory terms of “flight” and “forcible resistance,” the County argues that the definitions of these terms are limited only by the deputy’s imagination in testifying. *Response Brief at 10* (arguing that “...the only evidence in the record...made clear that (deputy) Welton and other Spokane County witnesses considered an attempt to return to a vehicle as ‘flight’ or ‘fleeing.’ ”).

But the ordinary meaning of “resist...describes an opposition by

direct action and *quasi* forcible means.” *Staats v. Brown*, 139 Wn. 2d 757, 765, 991 P.2d 615 (2000). And nowhere can the County find precedent for defining “flight” as a passenger returning to his passenger seat after being ordered to do so, in a stopped vehicle, with the engine off, with the deputy holding all of the occupants’ licenses and registrations, with the car commandeered by a fully cooperative driver, and the passenger in the process of reseating himself. “Flight” is defined very differently throughout the law. *See Opening Brief, citing at p. 15*. A “fleeing suspect” is someone who is, e.g., jumping *out* of a car and running toward a residence to get away from an officer. *State v. Griffith*, 61 Wn.App. 35, 37, 808 P.2d 1171, 1172 (1991), and see *Tennessee v. Garner*, 471 U.S. 1, 23, 105 S. Ct. 1694, 1702, 85 L. Ed. 2d 1 (1985). As an example of flight being someone jumping *into* a car, in *Terrell v. Smith*, 668 F.3d 1244 (11th Cir. 2012), the Eleventh Circuit found flight where two police officers directed one Zylstra to exit the car, kneel down on the ground, and raise their hands. Zylstra exited the vehicle, first acting as if he were going to get on the ground, but then turned around, ran back to the vehicle, and jumped into the *driver’s* seat. Had Brian Strange gone to the driver’s seat, the scenario would be different. But Zylstra then further started the car, began

driving it, attempted to make a U-turn in the officer's direction, and failed to stop even when the officer gave chase. *That* is flight. The circumstances here are not remotely similar. It is improper for a trial court to allow law enforcement to hijack statutory terms. A plain failure to follow a contradictory command is not "flight." *See County Introduction at page 1*. "Flight" is a statutory limitation on a deputy's use of force, and must be properly construed to effect that limitation. *Id.*; RCW 10.31.050; and see *Bryan*, 630 F.3d at 826, citing *Graham*, 490 U.S. at 396.

While not determinative here as to excessive force, but relevant as to probable cause for resisting arrest or obstructing, the County similarly argues that their deputies have no obligation to ensure that proper or "functional" notice of arrest is given before its deputies taser someone for violating their command, or charge them with "resisting" their arrest. But again, "notice" necessarily implies receipt—some form of proper effort to inform. Otherwise, the statutory language is again superfluous.

The County argues that its officers testified only that they do not have to "guarantee" that a suspect heard such a command. *P. 10*. That is not true. The very testimony cited by the County is that of deputies

testifying that they have no “obligation” to ensure that an arrest command is heard prior to using force. “RP 1403-1404,” cited by the County, is Deputy Welton’s expert, Kirk Wiper, testifying thusly: “It is not the obligation of the officer to ensure that an individual knows that they are under arrest to resist the arrest.” “RP 680” cites Deputy Welton, who testifies: “I would automatically assume he heard me; he was looking right at me.” “RP 905-906” cites Deputy Welton, who testifies: “I don’t have to ensure that they heard it, no.”

If a deputy feels no duty or obligation to ensure someone has heard a contradictory command before tasing them in the back for violating the command, or “resisting” the arrest, then there is no notice requirement. The statute must be held to obligate deputies to a meaningful effort to provide proper notice.

Again, the scenario summarized by the County in its statement of case is that of a deputy discharging a taser into the back of a car passenger trying to sit back down in his seat. This was done purely because that passenger did not immediately respond to a contradictory order—not because of “flight” or “active resistance.” As in *Bryan*, Mr. Strange complied with every command issued by the deputy “except the one he asserts he did not hear—to remain in the car.” *Bryan*, 630

F.3d at 829-30. In *Bryan*, a failure to comply with a command does not constitute “active resistance” supporting a substantial use of force.” *Id.* Mr. Strange as entitled to a directed verdict on the issue of excessive force.

**C. Jury Instructions Failed to Limit the Use of Force.**

The County agrees that jury instructions must *properly* inform the jury of the applicable law. *See Response Brief at p. 42.* These instructions did not do so. They are permissive only, and, like the County’s position, place no limitations on the use of force. Law enforcement personnel told this jury that failure to follow a single arrest command properly allowed the deputy to apply a Taser in dart mode. This misstates and exceeds a deputy’s authority to use force. Only a directed verdict or proper instructions on *limitations* of the use of force could bring about a jury properly informed to determine the totality of circumstances.

The County argues that the law allows for a jury’s unguided determination of the “totality of the circumstances” as to whether force was necessary. *Response Brief at p. 8: 44-45.* “Totality of the circumstances” and necessary force are not concepts whimsically controlled by law enforcement’s specious definitions of legal terms.

Any decision regarding the totality of the circumstances must necessarily be preceded by and determined under the proper definition of existing law from a court. “Totality of circumstances” can only be made in accord with an understanding of the limitations of the law.

The County argues that the instructions proposed by Mr. Strange were not consistent with *Bryan v. MacPherson*. The point is moot. Assuming *arguendo* that proposed instructions *had* been accurate, they would still not have been given. The trial court declined to apply or instruct on *Bryan v. MacPherson*.

**D. The Dismissal of Spokane County Was Improper.**

Spokane County argues that it was properly dismissed, as no evidence was presented of any training deficiency presented by Mr. Strange. *See Response Brief at p. 14.* This is contrary to the record. Substantial testimony was presented that department-wide training of deputies included training to use a taser to prevent an individual under misdemeanor arrest from returning to a vehicle, regardless of that individual’s apparent motive or intent. This is a direct violation of state statutory and federal law. This training was still being given by the time of trial, long after the *Bryan* decision.

The County argues that no causal connection exists between the

County training and this incident. Deputy Welton testified that he tased Mr. Strange in the back because of this training. *RP 843:2-5*. The connection is established. Deputy Welton's supervisors testified that they ratified Deputy Welton's use of Taser force because this was indeed his training. *See, e.g., RP 612:23-613: 24*.

The County argues that ratification did not occur because only a single act was ratified. *See Response Brief at pp. 15-20*. It argues that any improper training would have only been with one officer. *Id.* This ignores the evidence. Deputies and supervisors all testified to a County-wide training and policy whereby deputies were told they could taser citizens in the back to prevent individuals from returning to a vehicle once placed under arrest.

This evidence alone was sufficient to avoid dismissal of the County following the conclusion of Mr. Strange's case. This evidence is sufficient for a directed liability *against* the County.

The County then argues by footnote that Mr. Strange is requesting a directed verdict on appeal against the County, but did not do so at the time of trial. *See Response brief, fnote. 1*. This is incorrect. Mr. Strange moved for a directed verdict in the trial court on the use of excessive force as a matter of law. *CP 1392-1395*. Had the court

directed that verdict, the next step was a directed verdict against the County. Absent a directed verdict on unlawful force, moving for a directed verdict against the County was not feasible. Where *Bryan v. MacPherson* would have led to the proper result, a directed verdict against the County was inevitable.

**E. Obstructing and Resisting.**

The County argues that Mr. Strange's request for a directed verdict against Deputy Welton for lack of probable cause as to obstruction and resisting charges is not before this court. *See CP 1396-1398*. It is. This entire trial was tainted from the outset by the failure to apply federal or state law, and the continued exclusion of Plaintiff's evidence. Without a proper legal definition of "flight," a directed verdict on excessive force—without even available evidence of exactly how many times Deputy Welton supposedly fired his Taser at Mr. Strange (which is subject to an adverse inference against the County, as discussed below)—then no proper assessment of this deputy's credibility as to his "probable cause" determinations could occur.

**F. Exclusion of Prior Complaints Against Deputy Welton.**

The County concedes that the only authority for exclusion of prior complaints is ER 404(b)'s authority to exclude evidence against

an individual to show that individual's conformity therewith. *See Response brief at 20-24.* No support is provided for the trial court's extension of the plain language of ER 404(b) to prevent admission of such evidence against the County.

Secondly, the County fails to address the fact that this trial court's ER 404(b) ruling excluded *not just the complaints*, but the notice given by the sheer volume of complaints. Whether the underlying complaints were sustained or not is irrelevant. This is a volume issue leading to obligation. *See Nault, CP 360-364.* The County had no protocol for even identifying such repetitive complaints. *Nault, at 388.* But these complaints also consistently identified this deputy's propensity to escalate situations to the point of then using force—whether justified or not. It was this escalation of this traffic stop which again led to his use of force here. Absent escalation by the deputy, Mr. Strange would never have been out of the car.

Mr. Strange was entitled to use this evidence to show that the County had notice of some sort of a problem meriting attention—the very problem arising here—and refused to intervene or train. Exclusion of the evidence of this theory is unjustified.

**G. Restriction, Exclusion, and Quashing Trial Subpoenas.**

The County fails to address the cumulative effect of the trial court's ongoing exclusions of, and restrictions on, Mr. Strange's own proposed evidence, and even his ability to respond to evidence presented against him. In support of the trial court's ruling excluding Sheriff Knezovich, the County offers only law related to undisclosed witnesses. *See Response Brief at p. 28*, citing *Barci v. IntelCo Aluminum Corp.*, 11 Wn. App. 342, 522 P.2d 1159 (1974). The Sheriff was not excluded because he was not disclosed prior to trial. The law is inapplicable.

The County argues that Sheriff Knezovich was properly excluded because his involvement was "too remote," and because he allegedly could not have assisted the ratification theory. Under ER 403, the relevance of the evidence sought to be admitted is assumed. *Carson v. Fine*, 123 Wn. 2d 206, 222, 867 P.2d 610, 620 (1994). The only question is whether its probative value is outweighed by its prejudicial effect. *Id.* Neither theory is any theory of unfair prejudice to the County. *Id.*

The County argues that excluding Sheriff Knezovich was harmless. Yet the County acknowledges that the sheriff is the ultimate

decision maker for purposes of ratification. *Response Brief at p. 27, 29.* The County argues that a Sheriff who takes office after a taser event cannot ratify conduct after the fact. This one certainly did. *See e.g. Opening Brief Ftnte 2, citing Volume I RR, 49:21-24, RP 52: 3-16.* No prejudice to the County is shown.

The County argues that the court's prohibiting Mr. Strange from showing the jury the actual weapons in the possession of Deputy Welton on the evening in question because there was "no need" for such, and such "had no bearing on any of Mr. Strange's claims." Deputy Welton used Mr. Strange's size against Mr. Strange, while making claims of officer safety. Mr. Strange had the right to respond by pointing out the safety level Deputy Welton himself carried. Again, relevance is presumed. *Carson*, 123 Wn. 2d at 222. The County's response fails to show unfair prejudice. It also fails to respond to the court's exclusion of this evidence on grounds of "judicial notice."

The County argues that the trial court's restricting plaintiff's expert Michael Nault from testifying as to ultimate issues was correct, yet it can find no law from this jurisdiction rejecting testimony as to police practices. ER 702 specifically permits this testimony. Courts are to "interpret possible helpfulness to the trier of fact broadly and will

favor admissibility in doubtful cases.” *Moore v. Hagge*, 158 Wn.App. 137, 155, 241 P.3d 787 (2010). Police practices testimony is routine in such cases. *See Opening brief at pgs. 37-38.*

Mr. Nault’s opinions were used within the confines of police practices and supervision processes—not as ultimate conclusions of law. Such evidence helps a jury understand the terms as they are viewed by a supervising law enforcement officer. *Id.*, and see *In re Detention of Coe*, 160 Wn.App. 809, 824-826, 250 P.3d 1056, 1063-64, *review granted*, 172 Wn. 2d 1001 (2011). Ultimately, objections to such police opinions go to weight and cross-examination of expert opinion, not admissibility. *Id.*

The County has no authority supporting the court’s exclusion of expert testimony on grounds of hearsay. There is none.

Allowing jurors to hear only the County’s set of ultimate opinions was unfairly prejudicial to Mr. Strange.

As to the county’s expert being allowed to testify as to what “our” pool was, without inquiry as to his alignment language—the County remains unable to support the trial court’s restrictive theory of cross-examination, whereby once a lawyer strays outside a “traditional script,” no further questioning is allowed. There is no such proper

restriction.

**H. Misconduct is Established and Continuing.**

The County not only fails to justify its misconduct, it *continues* its misconduct. The County does not dispute that it has the ability to produce the complete dataport recording for Deputy Welton's Taser. Instead, it argues that its refusal to produce this evidence in its possession is harmless. Had the County ever submitted the evidence to the record for review, then "harmless error" claims might be proper. But the County has never produced the evidence sought. Its probative value remains unrevealed. Harmless error is not available as a defense.

Likewise, an argument that a party may withhold evidence because they have decided the other party won't understand it is specious. No support is offered for such a concept. There is none.

Here, *no* legitimate reason exists as to why the trial court refused to order production of complete evidence after Mr. Strange was ambushed at trial with incomplete new evidence. No legitimate reason exists as to why the Taser download was not immediately produced in its entirety *if it supported what the County argued*. If the Taser was only triggered once, then a complete printout would end that question with finality. The County's active refusal to produce the evidence

suggests a serious problem with the County's and the Deputy's version of events.

Moreover, the County's failure to produce this document prior to trial to allow for analysis remains unexplained. If not for Sgt. Golman's "unfortunate" timing, the existence of this document would have been successfully concealed in its entirety. This is plain misconduct, any trial court allowing such misconduct should be reversed.

The County also concedes that it then used *incomplete* surprise evidence to defend itself—it used the evidence to “prevent (ed) Mr. Strange from misleading the jury in closings by continuing with an improper inference that the Taser was fired on more than one occasion on January 22, 2006.” *See Response Brief p. 49.* This error is not harmless.

**I. The January 22, 2006 Use-of-Force Report.**

The County's suggesting that no obligation existed to produce the use-of-force document in discovery is contrary to the record. The trial court itself decided that this use-of-force document should be have been produced in advance of trial and was not. *RP 406-408.* The court simply provided Mr. Strange no remedy for the violation. This is

continuing improper trial court accommodation of a County defendant at the expense of a private litigant.

**J. Failure to Grant a New Trial on Misconduct.**

The County argues that a new trial is not warranted for its refusal to produce the complete version of its new dataport evidence. It argues that: “Mr. Strange simply failed to understand the documents,” *see Response Brief at p. 54*, and there is “simply no indication that [this new evidence] would have changed the outcome of the trial.” *Id.* Again, no court can determine if a failure to produce evidence is harmless or not until it sees the evidence.

**K. Fees.**

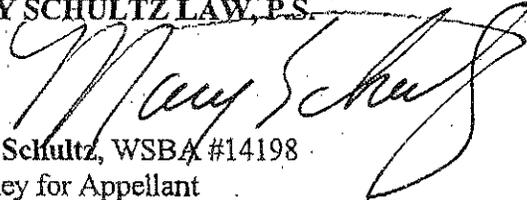
The County argues that *Larez v. Los Angeles*'s interim fee awards are limited to awarding fees to a prevailing party at trial who successfully defends on appeal. *Larez v. City of Los Angeles*, 946 F.2d 630 (9<sup>th</sup> Cir. 1991) This is the exact opposite of the holding. *Id.*, citing *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791-92, 109 S.Ct. 1486 (1989).

**II. CONCLUSION.**

Compounding error of significant magnitude requires reversal, directed verdicts ordered, fees ordered, and retrial ordered on damages.

DATED this 12 day of March, 2012.

MARY SCHULTZ LAW, P.S.



Mary Schultz, WSBA #14198  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

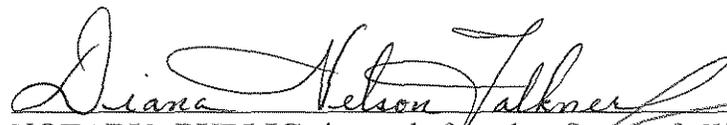
The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers, and that on Mar. 12<sup>th</sup>, 2012, the foregoing was delivered to the following persons in the manner indicated:

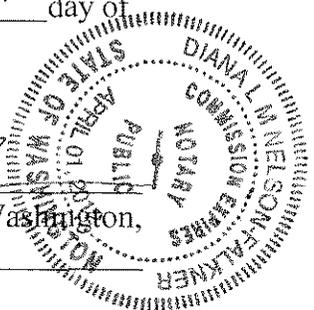
<b>Ms. Heather Yakely</b> Evans, Craven & Lackie, P.S. 818 W. Riverside Ave., Ste. 250 Spokane, WA 99201	<input checked="" type="checkbox"/> <b>E-Mail:</b> <u>hyakely@ecl-law.com</u> <input checked="" type="checkbox"/> <b>U.S. Regular Mail</b> , <i>postage prepaid</i>
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Dated this 12<sup>th</sup> day of March, 2011.

  
\_\_\_\_\_  
**KIM SIZEMORE**

**SUBSCRIBED and SWORN** to before me this 12<sup>th</sup> day of March, 2012.

  
\_\_\_\_\_  
**NOTARY PUBLIC** in and for the State of Washington,  
residing in Spokane. Commission Expires: 04/01/12



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**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

**DANIEL BRIAN STRANGE,**

Appellant,

v.

**SPOKANE COUNTY, and  
SPOKANE COUNTY  
SHERIFF'S DEPUTY JEFFREY  
WELTON, in his official and  
individual capacity,**

Respondents.

COA No. 298124

GR 17

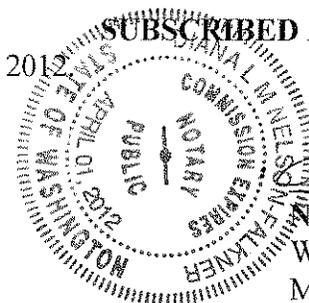
**Tina Ingram**, herein first duly sworn upon oath, hereby deposes and states:

I received the attached signature pages from Mary Schultz to **Appellant's Reply Brief** via facsimile, have examined this document, consisting of thirty-three (33) pages, including these two affidavit pages, and verify that it is complete and legible.

*Tina Ingram*

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SUBSCRIBED AND SWORN to before me this 12<sup>th</sup> day of March,  
2012



*Diana Nelson Falkner*  
**NOTARY PUBLIC** in and for the State of  
Washington, residing in Spokane, Washington.  
My Commission Expires: **04/01/12.**