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FEB 10 2012

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

Court of Appeals No. 298124

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COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

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Daniel B. Strange

Appellant/Plaintiff

v.

SPOKANE COUNTY, et al.

Respondent/Defendants

---

RESPONDENTS' BRIEF

---

**Heather Yakely**

Attorney for Respondent/Defendants, Spokane County and Jeffrey Welton  
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## **I. INTRODUCTION**

Plaintiff filed a lawsuit against Defendants, Spokane County and Detective (then Deputy) Jeffrey Welton out of an incident arising on January 22, 2006. On that date Mr. Strange was a passenger in his own vehicle that his wife was driving. He became belligerent when asked for his identification and eventually exited the vehicle. After failing to follow Detective 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, Detective Welton tased him one time. Mr. Strange was then immediately compliant and was arrested for resisting and obstruction. This lawsuit followed and it was finally tried on January 3, 2011.

## **II. STATEMENT OF THE CASE**

Mr. Strange filed his Complaint for damages on December 5, 2006. (CP 5-20) He filed an Amended Complaint on April 25, 2008. (CP 38-57) On January 2, 2008, the undersigned substituted in as counsel for Spokane County Prosecutor. Discovery was completed at that time and the matter was set for trial on February 11, 2008. Given the recent substitution, the Trial Court granted a brief continuance until May, 2008. On May 19, 2008, the parties argued Motions in Limine and objections to trial exhibits and witnesses. Mr. Strange also filed a Motion to Amend his

Complaint (a third time); striking witnesses and a written trial continuance request. (CP 698-702) The Trial Court granted his request. (CP 703-704)

The trial date was re-set for December 1, 2008. It was then continued again to January 12, 2009. (CP 708) After numerous other continuances, as a result of Mr. Strange's Motion for Discretionary Review to this Court, (CP 726-737; 770-778) trial was finally set for January 3, 2011. A second pre-trial was held January 3, 2011. Mr. Strange submitted supplemental trial briefs, Motions in Limine and Jury Instructions.

Trial commenced on January 3, 2011 and continued through January 24, 2011. Mr. Strange's Motion for New Trial was heard on March 4, 2011.

### **III. ARGUMENT**

Mr. Strange offers five assignments of error. However, many sub issues are included in each subsection. Defendants have attempted to address the issues as raised by Mr. Strange. Mr. Strange's issues are all subject to abuse of discretion. Defendants' set forth *infra* that he does not meet that heavy burden and this Court should deny Mr. Strange's appeal in its entirety.

**A. The Trial Court Did Not Err In Denying Mr. Strange's Motion For Directed Verdict Against Deputy Welton<sup>1</sup>**

Mr. Strange argues that he was entitled to a directed verdict against Detective Welton and Spokane County. (Defendants) (*Strange Brief*, p. 8) Spokane County had previously been dismissed on January 20, 2011. (RP 1483-1491) At the close of Mr. Strange's case in chief, Mr. Strange brought a Motion for Judgment as a Matter of Law in favor of Mr. Strange on, "Deputy Welton's use of excessive force and the lawfulness of his arrests."<sup>2</sup> (CP 1392-1398; RP 1610-1622) After argument by both parties,

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<sup>1</sup> Mr. Strange did not seek a directed verdict against Spokane County. However, pages 17 – 20 of his brief appeals a directed verdict against Spokane County. That section ends with, "The matter should be reversed, and judgment entered on municipal liability." Mr. Strange did bring a Motion for New Trial and Motion for Judgment Notwithstanding the Verdict." (CP 1525 – 1562) Spokane County and Welton "Defendants" will address any arguments in response to a directed verdict against Spokane County in its response to Mr. Strange's argument on denial of the motion for new trial at section E in this Response.

<sup>2</sup> Mr. Strange's brief does not address his request for a directed verdict on the obstruction or resisting arrest claims. Therefore, it is presumed that

the Trial Court denied Mr. Strange's Motion holding that..." the state law issues [are] all matters of determination for the jury as a matter of fact to determine...[and] *MacPherson* can't apply as the law governing this case because it came four years after the fact, and therefore, represents a ruling that can only be applied to other cases prospectively and not retroactively." (RP 1633, l. 3-5 & 1634, l. 5-11, see generally 1630-1635) The Trial Court's ruling was proper and thus was not an abuse of discretion.

**1. *Bryan v. MacPherson* Was Properly Limited By The Trial Court.**

The bulk of Mr. Strange's argument relies on the 2010 Federal Case, *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010). He argues that it should have been applied, by the trial court in this case thereby establishing excessive force by Detective Welton. This argument fails for three reasons. First, *Bryan v. MacPherson* was not controlling law. Second, Mr. Strange has interpreted *MacPherson* incorrectly; the Ninth Circuit did not hold that the use of a Taser was "excessive force," in fact, it specifically ruled that the deputy would be entitled to qualified

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those issues are not part of this appeal and only excessive force is properly before this Court. (*compare Appeal brief, p. 8-16 and CP 1395-1397*)

immunity. Third, Mr. Strange continues to miscomprehend law enforcement's statutory authority to use force to effectuate an arrest. This miscomprehension was evident during Mr. Strange's argument and the Court's ruling at trial (*see e.g.*, RP 1610-1622)

**a) *Bryan v. MacPherson* Was Not Controlling Law.**

"'When reviewing a trial court's decision to deny a motion for judgment as a matter of law the appellate court applies the same standard as the trial court.' *John L. Scott, Inc. v. Sing*, 134 Wn.2d 24, 29; 948 P.2d 816 (1997); *Caulfield v. Kitsap County* 108 Wash.App. 242, 250, 29 P.3d 738, 742 (2001)(internal citations omitted); *Wright v. Engum*, 124 Wash.2d 343, 356, 878 P.2s 1198 (1994); *Lilly v. Lynch*, 88 Wn.App. 306, 321, 945 P.2d 727 (1997). The appeals court will not overturn a verdict as long as the record contains enough evidence to persuade a rational, fair-minded person of the truth of the matter in question. *Wlasiuk v. Whirlpool Corp.*, 81 Wash.App. 163, 170, 914 P.2d 102 (1996), 932 P.2d 1266 (1997.)

*Bryan* was decided by the Ninth Circuit in 2010. *Bryan v. MacPherson*, 630 F.3d at 805. Mr. Strange relies on *Lunsford v. Saberhagen* 139 Wn.App. 334, to argue that because the Ninth Circuit applied *Bryan* retroactively, the Trial Court should have as well. Mr.

Strange misapplies *Lunsford*. Rather, the *Lunsford* Court dealt with an analysis (without going into the analysis which is not applicable here) of retroactive application regarding strict liability. It held that because strict liability was applied in previous asbestos cases, it must apply to all subsequent litigants. *Lunsford*, 139 Wn.App. at 336, 160 P.3d 1090.

Further, the *Bryan* Court was very clear in its ruling that while it is now holding that tasers in the "dart mode," are an intermediate use of force not, as Mr. Strange argues, that it was excessive force, *Byran*, 630 F. 3d. at 810 (court concluded that the X26 is an intermediate, significant level of force that must be justified.) The officer was also still entitled to qualified immunity because the officer did not know in 2005 when he made the traffic stop that using the Taser may have been a violation of MacPherson's rights.

based on these recent statements regarding the use of Tasers...we must conclude that a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July, 2005.

*Bryan*, 630 F.3d at 809.

Mr. Strange repeatedly argued *Bryan* was controlling law *and* that it found the use of the Taser was excessive force. (emphasis added) Here, the Trial Court properly refused to apply *Bryan* prospectively. The arrest of Mr. Strange occurred on January 22, 2006. Four years prior to the Ninth Circuit's decision in *MacPherson*. The Ninth Circuit recognized that it could not hold the officer liable because it had not yet ruled that a taser was an intermediate use of force. 630 F.3d at 809.

Here, as the officer in *MacPherson* was entitled to qualified immunity, so also would Detective Welton be entitled to qualified immunity. In this case, any error by the Trial Court in failing to apply the facts of the case to establish a Fourth Amendment violation was a harmless error as qualified immunity would apply anyway as Detective Welton could not have known a taser was an "intermediate use of force." The Ninth Circuit made it clear that because officers could have been mistaken in 2005, qualified immunity would apply. Not until after 2010 could law enforcement in the Ninth Circuit know the Court viewed a taser as an intermediate use of force.

Mr. Strange further cites *Bryan* incorrectly when he states that the Ninth Circuit held that the use of a Taser in "dart mode" is excessive force. The Ninth Circuit made no such ruling and *Bryan* does not change the analysis required under *Graham v. Connor*. (emphasis added) *Bryan*

actually held: "we remain cognizant of the Supreme Court's command to evaluate an officer's action 'from the perspective of a reasonable officer on the scene...'" (Id. quoting *Graham v. Connor*, 490 US at 396) The proper analysis remains a review under the totality of the circumstances and tasers are not an automatic use of force. The *Bryan* Court specifically held, "[t]he most important factor under *Graham* [which] is whether the suspect posed an "immediate threat of safety of the officers or others...we ask 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." (Id.)

**b) Washington Statutes Set Parameter's For Use Of Force**

Mr. Strange next argues that Deputy Welton's use of force was not permitted, and he had no authority to do so, under state law. At trial, he argued that an officer may only use force in a felony arrest. (CP 1393; *e.g.* RP 1611) Although, apparently no longer making this argument, Mr. Strange continues to craft an argument that force is not "necessarily" used in the performance of a legal duty for a misdemeanor. (*Strange Brief*, p. 14) The distinction by Mr. Strange is that the arrest was not necessary for a misdemeanor thus not a "legal duty."

The Plain language of R.C.W. 9A.16.020 states:

The 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 ....

RCW 9A.16.020(1)

Mr. Strange attempts to argue a nexus between "necessarily" (in the statute) and the fact that a custodial arrest is "only a legal duty in domestic violence and restraining order violations." (Ostensibly for misdemeanor arrests)(*Strange Brief*, p. 14) This argument is without merit and there is no legal connection established by Mr. Strange. He also failed to rebut the overwhelming evidence that a taser may be used by a Spokane County Sheriff's Deputy during the course of a legal duty, which includes a misdemeanor arrest. (*see e.g.*, RP 1414, l. 19 – p. 1415, l. 12; p. 1418, l. 22 – p. 1419; 1437, l. 7 – p. 1438, l.6)

Finally, Mr. Strange argues that Spokane County trains its deputies that they need not provide functional or actual notice.

Again, Mr. Strange interprets the plain language of the statute conveniently, but without any legal support. There is no "functional notice," requirement. *Responsible Urban Growth Group v. City of Kent* is wholly distinguishable. There, the issue dealt with notice regarding due

process notice requirements for rezones *Responsible Urban Growth Group v. City of Kent*, 123 Wn. 2d 376, 386, 868 P.2d. 861 (1994). This is not remotely applicable here. Nonetheless, there is absolutely nothing in the record to support Mr. Strange's argument that Detective Welton was trained that he did not have to give "functional" or "actual" notice. Rather, the testimony was that an officer does not have to guarantee that a suspect heard a command before acting on it. (emphasis added)(RP 680, l. 14 – p.681, l. 2; p. 905, l.24 – p. 906, l.12; p. 1403, l.18 – p. 1404, l.8)

Mr. Strange next attempts to define "flight" and "flee" in a manner not supported by any argument of law. The cases he relies on are criminal cases and none even define "flight" or "flee." Regardless, the only evidence in the record (not argument from counsel) made clear that Detective Welton and other Spokane County witnesses considered an attempt to return to a vehicle as "flight," or "fleeing." (RP 686, l. 3-14; 905-907, 1416-1420) There was no rebutting testimony that this training was incorrect or insufficient.

Thus, there was, as the Trial Court properly noted no grounds for a directed verdict. The evidence was clear or at least sufficient to create an issue, that Detective Welton was in the performance of legal duty and it was properly left to the jury to decide if the force was reasonable. (RP 1630-1635)

**B. The Trial Court Did Not Abuse Its Discretion**

Mr. Strange has lumped a number of issues in summary fashion into this section of his Opening Memorandum. However, each issue will be addressed independently.

**1. Spokane County's Motion For Judgment As A Matter Of Law Was Properly Granted.**

Spokane County sought Judgment As A Matter Of Law (pursuant to CR 50) following the close of Mr. Strange's case in chief on January 20, 2011. (CP 1377-1391) The Court, after hearing oral argument by both parties granted Spokane County's request. (RP 1483-1491, 1.1)

The Standard of review is the same as set forth Supra (*See Sec. A*) Mr. Strange fails to understand the burden of proof required under *Monell* and 42 U.S.C. § 1983 claims. The threshold issue, contrary to Mr. Strange's argument, is not whether "deliberate indifference" has been established or whether Spokane County failed to follow its policies regarding the use of a taser (and its reporting guidelines.) (Strange Brief, p. 20-22) The issue for a 42 U.S.C. § 1983 claim is whether the conduct was the result of an official policy or a custom so pervasive as to be "policy." *Miguel v. Guess*, 112 Wash. App. 536, 546, 51 P.3d 89 (2002); *citing, Fuller v. City of Oakland*, 47 F.3d 1522, 1533-34 (9th Cir.

1995)(emphasis added). It is not enough to simply argue that the Department failed to enforce its policies as Mr. Strange attempts to argue. (*Strange Brief*, p. 22) Even assuming that this Court reaches the same conclusion offered by Mr. Strange that "Spokane County witnesses ultimately testified that conformance to written policies was optional," that argument is not relevant under the *Monell* Standard. (*See e.g., Strange Brief*, p. 23 – 27)<sup>3</sup>

Plaintiff has the burden of proof in establishing a *Monell* claim and there are only three circumstances in which a governmental entity may be sued under 42 U.S.C. § 1983. *Miguel*, supra. While Mr. Strange has set forth purported examples of failures of the Department to follow its own policies, he failed to link these alleged failures to the relevant legal standards that must be established. (*Strange Brief*, p. 22-27)

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<sup>3</sup> Plaintiff also argues that Spokane County failed to follow its policies and procedures regarding investigations when Complaints are filed. However, testimony from all Spokane County witnesses clearly defines "complaints" which trigger an internal investigation under the policies and procedures are written complaints made with the Spokane County Sheriff's Department – not a legal complaint. (Infra)

First, the deprivation was as a result of the governmental entity's official policy or custom so pervasive as to constitute policy. *Id.*; *Miguel v. Guess*, 112 Wash. App. at 546; 51 P.3d. 89; *citing Monell v. Dep't of Soc. & Health Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) Second, a plaintiff can establish that the challenged conduct was the result of a deliberate choice...made from among various alternatives by the official or officials responsible for establishing final policy. *Id.*, *citing, Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). Finally, a plaintiff can demonstrate that the policy maker's either delegated policymaking authority to a subordinate or ratified a subordinate's decision. *Id.* In addition, a "[m]unicipality cannot be held liable simply because it employs (*sic*) tortfeasor." *Davis v. City of Ellensburg*, 869 F.2d 1230, 1234 (9th Cir. 1989) The policy behind that is to prevent "...unduly threatening a municipality with respondeat superior liability." *Id.*, *citing City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 2436-37, 85 L.Ed.2d 791 (1985)

"[I]n failure to train, supervise or investigate contexts, the causal link must connect the deficient training, supervisory or investigatory programs and the constitutional injury, otherwise it would 'open municipalities to unprecedented liability under § 1983...." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 391, 392, 109 S.Ct. 1197, 103 L.Ed.2d 412

(1989)(emphasis added). In *Alexander v. City and County of San Francisco*, the Ninth Circuit held, "in order to give the case to a jury there must be evidence of a 'program wide' inadequacy of training." *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994); *Davis v. Ellensburg*, supra ("In this case, however, Davis has failed to present any evidence of other acts by Ellensburg police officers to prove that the use of excessive force is a widespread practice or custom in the city. Thus, we can infer neither that the authority to make policy regarding the use of force in misdemeanor arrests had been delegated to individual field officers, nor that the use of excessive force is sufficiently pervasive to rise to the level of a custom of the City.") There must also be more than an isolated incident. *Id.*

Here, there was absolutely no evidence of any training deficiencies whatsoever presented by Mr. Strange. In fact, the only evidence was that Detective Welton had gone through training and was following his training. (RP 635, 645-652; 1576-1578) Despite this, Mr. Strange presented no evidence that any of that training was deficient. (*see generally* Partial Report of Proceedings, Testimony of Nault, January 3 and 4, 2011)<sup>4</sup> There was no evidence of a department wide training

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<sup>4</sup> Plaintiff's expert, who may have been able to offer testimony regarding

deficiency (there was no evidence at all except by Spokane County that Detective Welton followed his training.

## **2. There Was No Ratification**

Mr. Strange also vaguely argues, albeit without any legal support, that Spokane County actually has no policies and that, "...a policy of 'optional policies' is sufficient to support a verdict under all three prongs of municipal liability – deliberate indifference, failure to train and ratification." (*Strange Brief*, p. 27)

Initially, there is no distinct § 1983 claim for "deliberate indifference." Rather that is a part of the burden of proof necessary under the three ways to establish a § 1983 violation. *See e.g., Canton*, 489 U.S. at 391-392 ("the deliberate indifference standard was specifically adopted by the Supreme Court in order to ensure that civil rights claims against municipalities attain a certain level of gravity before they are compelled to defend themselves at trial.") *Canton* goes on to state that if a plaintiff must only show the adequacy of training of one officer it does not establish deliberate indifference of a municipality (*Id.* at 1367-1368)

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training, did not do so.

Mr. Strange cites to no law in support of his argument of "deliberate indifference," or "ratification." (emphasis added) However, his argument can fairly be summarized as that "Spokane County somehow ratified Deputy Welton's alleged (and denied) use of excessive force by allegedly failing to properly document the use of force as required by the policies and procedures and thereafter have that use of force reviewed by higher ranking officers up the chain of command." (CP 1381-1382)

Ratification requires something more than simply one alleged ratifying act. "In order for there to be ratification, there must be 'something more' than a single failure to discipline or the fact that a policy maker concluded that the defendant officer's actions were in keeping with the applicable policies and procedures." *Kanae v. Hodson*, 294 F.Supp.2d 1179, 1191 (D.Hawaii 2003), *See also*, CP 1382-1383 for additional law). In a recent Ninth Circuit case arising out of Bremerton, Washington, the Ninth Circuit held: "Thus, this single decision not to pursue an additional investigation into the specific arrest claims cannot be fairly characterized as an affirmative choice to ratify the alleged conduct, since he believed they had not engaged in such conduct." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1055 (9th Cir. 2009) In *Lassiter*, plaintiffs brought an appeal because the City of Bremerton had been dismissed on summary judgment, "the Lassiters contend that the district court erred in dismissing the

excessive force and unlawful arrest claims against [the chief] and the City, on the grounds that the Chief condoned such behavior or ratified an official custom or policy of allowing it. As evidence of this ratification, the Lassiters cite his failure to adequately investigate their claims...."

*Lassiter*, 556 F.3d at 1055

"A plaintiff cannot establish a § 1983 claim against a municipality by simply alleging that the municipality failed to investigate an incident or to take punitive action against the alleged wrongdoer...Plaintiff also argues that by not requiring officers to file reports after employing the sensory overload tactic, the City implicitly ratified every use of sensory overload by its officers. However, the City's failure to require formal reports be filed after every use is not the same as affirmative approval of every use."

*Lassiter*, 556 F.3d at 1055(internal citations omitted)<sup>5</sup>; *see also*, *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993)("deliberate or reckless indifference to complaints must be proved in order to establish that an abusive practice has actually been condoned and therefore can be said to

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<sup>5</sup> Mr. Strange did not distinguish *Lassiter* at the time of trial, and does not do so in this Appeal. (RP 1467, l. 3-6)

have been adopted by those responsible for making municipal policy; the mere failure to eliminate a practice does not constitute an approval of the practice); *Morrison v. Board of Trustees of Green Twp.*, 529 F.Supp.2d 807, 825 (S.D. Ohio, 2007)(internal citations omitted)(although a failure to conduct an investigation into a claim of excessive force may permit an inference that the entity has an official policy or custom of tolerating unconstitutional conduct, standing alone, it is not enough to establish liability.)

Finally, the Supreme Court has very explicitly defined the body of proof required to establish § 1983 liability:

proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incidents includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker...but where the policy relied upon is not itself unconstitutional, considerable more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the policy and the constitutional deprivation.

*City of Oklahoma v. Tuttle*, 471 U.S. 808, 824, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985)

There was no evidence of ratification by Mr. Strange under *Lassiter* or *Tuttle*. Thus, even if this Court determined on review there was a failure by the County to follow its policies in this particular instance that remains insufficient to establish a claim of ratification. If Mr. Strange wanted to rely on one isolated incident, he would have had to prove the policies and procedures were unconstitutional. He did not. Thus, Mr. Strange failed to present evidence that would establish the necessary causal connection as required by the U.S. Supreme Court in *Tuttle, et al.*

Finally, *Harris v. Groth*, 31 Wn.App. 876, 645 P.2d 1104 (1982) is the sole case Mr. Strange has offered to this Court, is distinguishable. In *Harris*, there is no issue of § 1983 liability; rather it is a medical malpractice case – which has a distinct burden of proof. As clearly set forth supra, municipal liability is a unique and specific burden of proof that was not met here.

The trial court did not abuse its discretion and properly granted Spokane County's Motion for Judgment As a Matter of Law. (RP 1483-1491, 1.1) Mr. Strange could not prove his burden of proof at the time of trial. (RP 1478-79) Plaintiff's own expert said that the policies were appropriate. (CP 1391, RP 1485) He could not establish any failure to

train; he could not establish any causal link. (RP 1481, Partial Verbatim Report of Proceedings Nault, January 3 and 4, 2011, p. 127 – 128, 1.12) Mr. Strange's expert, Mr. Nault did not even review any of Spokane County's policies. (*Id.*, p. 128) He did not establish any "wide spread" custom or practice. He did not establish any ratification (for failure to follow policies and procedures).

**3. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence**

**a) The Trial Court Did Not Err in Excluding Evidence of Prior Complaints<sup>6</sup>**

A trial court's decision to exclude evidence is reviewed for abuse of discretion. *Kappelman v. Lutz*, 141 Wash.App. 580, 584, 170 P.3d 1189, 1191 (Wash.App. Div. 3,2007); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wash.App. 34, 58, 52 P.3d 522 (2002); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Braut v. Tarabochia*, 104 Wash.App. 728, 733, 17 P.3d 1248 (2001); *Powell*, 126 Wn.2d at 258. "[I]n order to obtain

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<sup>6</sup> See CP 197-213; 642-650; 709-713; 716-725; 726-737; 769; 770-778; 785-792.

appellate review of a trial court action excluding evidence, there must be an offer of proof made.” *State v. Vargas*, 25 Wn.App. 809, 816-17, 610 P.2d 1(1980).

Mr. Strange argues that one of his theories was that “[the deputy] was improperly trained and escalated the traffic stop and that Spokane County knew of Detective Welton's propensity to escalate situations to this level of force but did nothing about it.” (*Strange Brief*, p. 27-28) Mr. Strange's expert was going to testify that the volume and frequency should have “mandated” discipline and retraining. (*Id.*) Mr. Strange then offers to this Court evidence that had been previously excluded by the prior trial court. This Court has previously addressed Mr. Strange's argument on exclusion of these documents. (RP 1494, CP 716-725; CP 785-792)

The Trial Court properly excluded the evidence of prior existing acts. (CP 197-212) However, assuming *arguendo* if this Court could find that the trial court erred in excluding evidence of Detective Welton's prior citizen complaints, any error would be harmless. As argued *supra*, Plaintiff had a very specific burden of proof to successfully establish a § 1983 claim. A need for “retraining” is not one of the required elements – rather a plaintiff must establish unconstitutional policies in three particular methods. Even assuming this testimony by Mr. Nault was evidence of a failure to train, § 1983 requires more than a single isolated incident.

Rather, it must be a widespread pattern and/or practice (Supra) Thus, the Court's continued exclusion of Mr. Nault's testimony on this issue and the underlying documents (infra) dismissal of Spokane County was appropriate. As noted supra, Mr. Strange's expert did not offer any testimony regarding inadequate policies or a lack of training. (supra) The only evidence was that Detective Welton was trained, and adequately at that. As a result, there is simply nothing that Mr. Strange's expert; Mr. Nault's testimony would have added to Mr. Strange's § 1983 burden of proof. (See *Strange Brief*, p. 28 for summary of Mr. Nault's testimony) Mr. Nault's testimony would also not affect Mr. Strange's allegation of "excessive force," which also has a specific burden of proof (infra). Thus, even if this "evidence," was not properly excluded, its exclusion did not rise to the level of an abuse of discretion. Any improper exclusion was harmless error.

Mr. Strange's argument regarding 404b is without merit. He relies on *Larez v. City of Los Angeles* in support of his proposition that the prior complaints should be admissible despite the fact that the rules of evidence clearly mandate exclusion of prior complaints. (See *Strange Brief*, p. 31) Mr. Strange's reliance is misplaced.

In *Larez*, the facts are wholly distinguishable. There, plaintiff filed a complaint against the officers, following a finding that the department

could not sustain the complaint, a lawsuit was filed. More importantly, the trial court allowed admissibility of an expert's two year study of past complaints. *Larez v. City of Los Angeles*, 946 F.2d 630, 647 (1991). The study included a detailed investigation into each of the complaints that were part of that study. *Id.* The *Larez* Court held that report admissible because it was a comprehensive study. *Id.*

Here, Mr. Strange did not offer any "comprehensive review" of citizen complaints. He simply wished to offer prior complaints against Detective Welton. There was absolutely no evidence regarding the circumstances of the prior complaints, other than that they occurred. As argued in Motions in Limine, the Complaints could not be admitted alone. (CP 197-213; 642-650) Any admission of them would require extensive further evidence and testimony and Defendants requested an additional two to three weeks of trial. *Id.* That was far different than the evidence presented by plaintiff in *Larez*, whose expert had specifically completed a study into the entire department's history of complaints.

Further, Mr. Strange's expert, Mr. Nault, was offering no opinions that the Department had a policy and procedure of inadequate investigations. (*supra*) Mr. Strange's only reason for admissibility then, because there was no foundation for any argument that Spokane County

had a policy of inadequate investigations, was to attempt to discredit Detective Welton – and the prior complaints were properly excluded.

ER 404 is designed to protect against just that type of evidence, particularly as it was offered by Mr. Strange. ER 404(a) excludes evidence of character. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b); *see also, Gates v. Rivera*, 993 F.2d 697, 700 (9th Cir. 1993)("character evidence is normally not admissible in a civil rights case.") In *Gates* the court held, "[t]he question to be resolved was whether, objectively, his use of force had been excessive." *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). "His past conduct did not bear on that issue." *Gates v. Rivera*, 993 F.2d at 700. *Gates* exclusion of prior bad acts clarifies another important ground to exclude the prior complaints against Detective Welton which refers back to the *Graham v. Connor* standard, that is based upon the totality of the circumstances what would a reasonable officer have done at the time. *Graham*, 490 US at 395. That analysis also requires that 20-20 hindsight may not be considered. *Id.* In other words, a jury may only consider the facts and circumstances known at that particular point in time. This is not in any way dependent upon Detective Welton's past complaints.

In addition, the Washington Supreme Court has also afforded even greater protection to those individuals involved in allegations that were found to be false. *Bellevue John Does 1-11 v. Bellevue School Dist.* 405, 129 Wash. App. 832, 120 P.3d 616 (2005); *aff'd in part and reversed on other grounds*, 164 Wash.2d 199, 189 P.3d 139 (2008)(en banc).<sup>7</sup>

Finally, contrary to Mr. Strange's assertion that he was "required to show that circumstances called for retraining," (and thus needed this evidence) as set forth supra there is no such requirement in establishing § 1983 liability. (*See Strange Brief*, p. 30) Regardless, Mr. Strange offered no expert to establish the sufficiency, or insufficiency of, the investigation into the underlying complaints. (*supra*, Nault, 127-128) Mr. Nault may have reviewed the prior complaints, but did no investigation, nor did Mr. Strange, into the underlying facts and circumstances of the prior complaints. Thus, if Mr. Nault offered opinions other than that this was a large number of complaints, his opinions are *ipse dixit*. That evidence is not relevant, could not possibly assist or enlighten the jury on any of the issues, and would have only unfairly prejudiced Defendants. He had no further testimony to contribute similar to *Larez*.

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<sup>7</sup> These prior complaints were each found to be unsubstantiated (could not find witnesses, etc.) or unfounded.

The exclusion of the prior complaints and testimony by Mr. Nault on the same was appropriate.

**b) The Sheriff Was Properly Excluded From Testifying.**

Mr. Strange next argues that Sheriff Knezovich was improperly excluded as a witness at the time of trial. Sheriff Knezovich was excluded after a long and repeated effort at attempting to gain his testimony by Plaintiff. Pursuant to the rules of civil procedure, the trial court properly excluded Sheriff Knezovich from testifying at trial.

Mr. Strange's arguments fail for two reasons. Sheriff Knezovich was not the Sheriff at the time that any alleged wrongdoing occurred by Detective Welton. (RP 71, Pre Trial Motions, January 3, 2011) Yet despite having three plus years to correctly name the right Sheriff, Mr. Strange failed to properly list Sheriff Sterk, take his perpetuation testimony, or otherwise attempt to secure his appearance at the time of trial. (RP 71 – 79)

It is true that one theory of municipal liability pursuant to 42 U.S.C. § 1983 requires proof of the decision maker's approval. (See supra, section B2) However, Mr. Strange also argues that the exclusion of Sheriff Knezovich was prejudicial error because part of his theory of his

case was that Spokane County was engaging in ongoing ratification of Detective Welton's alleged (and denied) wrongdoing even currently. Again, Mr. Strange has offered absolutely no evidence whatsoever to support his argument that there is such an issue of law of an "ongoing ratification," some five years past the event. (There is none.)

Further, this theory of Mr. Strange is based upon incomprehension of the trial testimony regarding complaints (filed litigation) The testimony was clear that "litigation," does not equal a complaint that triggers an investigation by internal affairs. (emphasis added) That investigation is triggered only when an actual written complaint is made by a citizen, this specifically does not include litigation complaints. (RP 630; 636; 714-715; 741-742; 751-752; 759-760; 765-768) Nor did Mr. Strange establish any case law supporting a theory of "continuing violations" because a Department does not complete and internal investigation when litigation is filed.

Thus, the Sheriff at the time of the incident was the only proper witness to establish any alleged claim of ratification. (See e.g., RP 27-37, 59-60, 62-63, 71, 79) Mr. Strange never made any attempt to amend his witness list, depose or compel (former) Sheriff Sterk to testify. (RP 74)

The exclusion or limitation of a witness's testimony may be an appropriate sanction for the late disclosure of the witness or for other

discovery violations. See, e.g., *In re Marriage of Gillespie*, 89 Wash. App. 390, 948 P.2d 1338 (1997) (court properly excluded medical expert witnesses disclosed after two scheduled trial dates passed); see also *Miller v. Peterson*, 42 Wash. App. 822, 714 P.2d 695 (1986) (court properly excluded testimony of experts disclosed less than a week before trial).

In *Barci v. Intalco Aluminum Corp.*, 11 Wash. App. 342, 522 P.2d 1159 (1974), the Court of Appeals set forth eleven factors that are material to a trial court's decision to exclude or allow testimony from a witness who was undisclosed until just before the commencement of trial or during the course of a trial. *Barci*, 11 Wash. App. at 349-50. "In determining whether trial courts have abused their discretion in allowing or excluding the testimony of an undisclosed witness, Washington appellate courts have focused primarily on two factors: (1) whether there was a willful violation of a court discovery order and (2) whether the other party would be prejudiced by the testimony or by a continuance to allow for preparation and rebuttal." See, e.g., *Dempere v. Nelson*, 76 Wash. App. 403, 886 P.2d 219 (1994) (willful violation was adequate grounds for exclusion of evidence); see also *Hampson v. Ramer*, 47 Wash. App. 806, 737 P.2d 298 (1987) (exclusion of evidence proper where noncompliance caused irreparable prejudice to opponent).

Further, "[t]o establish municipal liability under § 1983, it must be shown that the decision maker possesses final authority to establish municipal policy with respect to the action ordered." *Davis v. Mason County* 927 F.2d 1473, 1480 (9th Cir. 1991), citing, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986) (plurality opinion). "Because 'municipalities often spread policymaking authority among various officers,' a particular officer may have authority to establish binding policy with respect to particular matters, but not others." *Id.* at 483, 106 S.Ct. at 1300. Under Washington law, "[t]he sheriff is the chief executive officer and conservator of the peace of the county." Wash. Rev. Code § 36.28.010 (1990). As chief executive officers, sheriffs possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject.

Mr. Strange presented no evidence to indicate or argue that the Sheriff of Spokane County was not the ultimate decision maker. Just the opposite testimony by Spokane County witnesses established the Sheriff was the decision maker. Sheriff Knezovich was not the Sheriff at the time this incident occurred. The appropriate Sheriff would have been Sheriff Sterk.

Sheriff Knezovich was properly excluded because his involvement was too remote. (RP 55) Even if Sheriff Knezovich's exclusion was error, it was harmless as his testimony, as a matter of law, would not have assisted Mr. Strange's ratification theory as he was not the Sheriff at the time of the incident.

**c) There Was No Need For Detective Welton's Weapons In The Courtroom**

“A trial court's order granting or denying a motion to quash a subpoena is reviewed for abuse of discretion.” *Eugster v. City of Spokane*, 121 Wn.App. 799, 807, 91 P.3d 117 (2004). A trial court abuses its discretion when it bases a decision on untenable grounds. *Luckett v. Boeing Co.*, 98 Wn.App. 307, 309-10, 989 P.2d 1144 (1999). Washington has relatively little case law on the use of a subpoena duces tecum solely for purposes of trial. 14A WAPRAC § 28:15 (West 2011) An immaterial subpoena may not be enforced. 14 WAPRAC § 28:16 (West 2011). "Untenable" is described as "unable to be defended." (Webster's Ninth New Collegiate Dictionary)(Webster 1983) The trial court's grounds were not untenable here. (RP 51-53)

Mr. Strange served a subpoena requiring Detective Welton to appear at trial with his service weapon, his back-up weapon and a knife

that he carried around his neck. (CP 884-885; 885-892, RP 48) Defendants Motion to Quash was granted. The trial court did not abuse its discretion in excluding the evidence. Any improper exclusion would still be harmless error.

Mr. Strange argues that this evidence would have shown the "real" balance of power and thus, it should have been admitted. (*Strange Brief*, p. 35) However, this argument is not based on any evidence and would not have changed the outcome on the claims against Detective Welton. Relevant evidence is evidence that has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Also, contrary to Mr. Strange's argument that the Defendants failed to show unfair prejudice (*Strange Brief*, p. 34) that argument was properly presented to the trial court. (CP 890-891, RP 49-50)

The facts clearly establish that the weapons carried by Detective Welton had no bearing on any of Mr. Strange's claims. The facts also establish that Mr. Strange did not even know that Detective Welton initially had his service weapon out. (RP 50); He did not know Detective Welton carried a back-up weapon, he could not see the back-up weapon (RP 50); he could not see the knife. (RP 50, CP 886-891) Thus, Mr.

Strange's subpoena was designed to do no more than attempt to create an issue out of unsupported facts. Mr. Strange did not even know about the existence of the gun or the knife. He did not observe Detective Welton draw his firearm; only the taser. (RP 1162) To somehow attempt to now argue that these unseen items would play into any "balance of power," is unsupported by the record.

Regardless, any alleged improper exclusion was harmless error. Mr. Strange was permitted, and did, inquire as to the existence of what weapons Detective Welton carried. The trial court permitted him to question Detective Welton about his weapons and show them pictures of the guns and knife that he carried.<sup>8</sup> Given that Mr. Strange did not know about these extra weapons on the night in question, it is without merit to argue that physically showing them to a jury could alter its finding of "no unreasonable force." (RP 1867-) Showing them to the jury would have added nothing to Detective Welton's testimony that he carried them on his person if the jury actually saw them.

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<sup>8</sup> One may also safely assume, or even take judicial notice, that jurors are aware that law enforcement carry guns, and that many of them carry more than one, although there was no case specifically on point to affirm this.

Exclusion was appropriate, and at the very least, harmless error, thus there could be no abuse of discretion.

**d) The Trial Court Did Not Err In Limiting Mr.Nault's Testimony**

Contrary to Mr. Strange's inference, Mr. Nault was not precluded from testifying altogether, he was permitted to testify within the bounds of the rules of evidence regarding expert opinions and relevance. "The trial court has considerable discretion when admitting or excluding evidence." *State v. Hayward* 152 Wash.App. 632, 649, 217 P.3d 354, 363 (2009), *citing, State v. Demery*, 144 Wash.2d 753, 758, 30 P.3d 1278 (2001). Witness opinion testimony is typically limited because it invades the jury's exclusive province. *Demery*, 144 Wash.2d at 759, 30 P.3d 1278. "We consider a trial court's admission or rejection of testimony, including expert testimony, for an abuse of discretion." *Hayward*, 152 Wash. App. at 649, *citing, State v. Ortiz*, 119 Wash.2d 294, 308, 831 P.2d 1060 (1992); *State v. Swan*, 114 Wash.2d 613, 655, 790 P.2d 610 (1990).

Testimony by an expert regarding the ultimate issue is allowed, but the trial court has discretion to reject the expert testimony in whole or in part. *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wash.2d 391, 399, 722 P.2d 787 (1986); *Burtch, In re Disciplinary*

*Proceeding Against* 162 Wash.2d 873, 891, 175 P.3d 1070, 1077 (Wash.,2008)("The hearing officer did not err by omitting some portions of expert testimony and was not required to give any weight to the testimony that was admitted. This was not an abuse of discretion.")

Mr. Strange argues that his expert, Mr. Nault, was not permitted to testify to his opinions in this case. However, Mr. Nault was permitted to testify, within the limitations of the Courts rulings on evidence and pursuant to ER 702 in prior motions. (CP 709-713; CP 785-792; *See generally* Partial Report of Proceedings Testimony of Nault, January 3 and 4, p. 1-171) Mr. Strange next argues that the trial court continually interfered with Mr. Strange's counsel's questioning of Mr. Nault. (*Strange Brief*, p. 35-36) He provided no citations to the record to support this statement. However, Mr. Nault's testimony is provided at the Report of Proceedings, Nault, p. 1-171. A review of these pages makes it clear that the trial court's interruptions were appropriate. These limitations were based upon the trial court's ruling on prior motions. (RP 31-32, *Supra*)

Mr. Strange's argument is nothing more than an attempt to ignore the clearly defined rules of evidence for expert testimony. In reality, Mr. Nault was permitted to testify far outside the limits previously ruled on by the trial court. (*See e.g.*, Nault 97-104; 117-118) In fact, Mr. Nault was excluded only to the extent that he was not qualified as an expert in the

use of a taser. (CP 709) And to the extent he was offering opinions on ultimate issues of fact. (*see e.g.*, Nault, 114-116)

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

That Rule governs the admissibility of expert testimony and involves the dual inquiry of whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact. *State v. Cauthron*, 120 Wn.2d 879, 890, 846 p.2d 502 (1993). This testimony must be offered by a qualified individual, based on legally appropriate information, and must be helpful to the trier of fact before it can be admitted. *Cauthron*, 120 Wn.2d at 890; *Queen City Farms, Inc. v Cent. Nat'l. Ins. Co. of Omaha*, 126 Wn.2d 50, 102, 882 p.2d 703, 891 P.2d 718 (1994). An expert's testimony must also be offered within the confines of the other rules of evidence. He may not offer testimony on "character," (*see e.g.*, CP 86-88); a predisposition of a party or witness, (*see e.g.*, 88-94); nor offer testimony on the ultimate legal issues of deliberate indifference and ratification. (*see e.g.*, CP 94-97); or that Detective

Welton violated any law (*see e.g.*, 98-100); or opinions on any credibility (*see e.g.*, CP 100-103), among others. Experts are not permitted to offer opinions on ultimate conclusions of law if it will not assist the trier of fact to understand the evidence or to determine a fact in issue. *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995)(internal citations omitted)

Here, it does not appear that Mr. Strange takes issue with every ground upon which Mr. Nault's testimony was limited. (CP 81-108; 709-713) In fact, Mr. Strange's appeal to this Court appears to be limited to the fact that Mr. Nault was not permitted to testify on the ultimate issues of fact (to be determined by the jury) (*Strange Brief*, p. 37) Mr. Nault offered his opinion on two inadmissible legal conclusions. First, whether or not Detective Welton and/or Spokane County were deliberately indifferent to Plaintiff's Rights. (CP 157). Second, he concludes that the Sheriff's Department "condoned," Welton's conduct in this case based on past behavior.

Whether Detective Welton acted with deliberate indifference was a jury question. *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), *cert denied*, 513 U.S. 1111, 115 S.Ct. 902, 130 L.Ed.2d 786 (1995), a § 1983 municipal liability case, the plaintiff's expert witness testified that the Detroit Police Department was "gross[ly] negligent" in its training of its officers and that this gross negligence was comparable to "deliberate

indifference." *Id.* at 1353. The witness then defined deliberate indifference as "conscious knowledge of something and not doing anything about it." *Id.* at n.12. Overturning a jury verdict for the plaintiff, the 6th Circuit held that the district court erred by admitting this testimony. The court explained that "deliberate indifference" is a legal term and that "[i]t is the responsibility of the court, not testifying witnesses to define legal terms." *Berry*, 25 F.3d at 1353; *see also*, *Woods v. Lecrureux*, 110 F.3d 1215, 1219-20 (6th Cir. 1997)(holding an expert could not testify that the defendant acted with deliberate indifference because that mental state was an element of the alleged statutory violation.) "[E]xperts' opinions on the ultimate issue of deliberate indifference are expression of a legal conclusion and are outside the scope of admissible expert testimony." *Soles v. Ingham County*, 316 F.Supp.2d 536, 542 (W.D.Mich. 2004); *Taylor v. Watters*, 55 F.Supp. 801, 805 (E.D. Mich. 1987)(holding hostage situation expert's testimony that officials' conduct was reckless and conscience-shocking inadmissible.)

Similarly, assuming Mr. Strange's case had not been dismissed, whether or not Spokane County ratified Detective Welton's actions is a question of fact for the jury; it did not require expert testimony to define or explain the actual facts. *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995)(finding that allowing policy practices expert to opine

regarding the reasonableness of officers' actions and that the officers did not violate the Fourth Amendment was an abuse of the district court's discretion); *Soderbeck v. Burnett County*, 752 F.2d 285, 293-94 (7th Cir.)(holding inter alia, whether law enforcement committee (final policymaker) exposed county to § 1983 liability by participating in or ratifying sheriff's firing of subordinate was question for jury), cert denied, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 261 (1985) While *Davis v. Mason County*, correctly notes that experts may offer opinions on ultimate issues, it is distinguishable from the facts here and the analysis must include the reasoning behind the trial court's exclusion of his testimony initially. That initial hurdle has not been addressed in Mr. Strange's appeal and his argument does not address the actual grounds for exclusion.

Significantly, Mr. Nault's deposition testimony further affirmed the necessity of excluding his opinions. In his deposition, Mr. Nault testified to his understanding of the terms "deliberate indifference," and "ratification." As a matter of law, these were wholly incorrect. (*see* CP 96 – 97; 133)

In reality, while Mr. Strange has revised his phraseology in this appeal, he simply refers to the testimony generally, as "police practice experts who may opine on practices." Yet, if the Court refers to Mr. Nault's expert report – which is what his testimony must necessarily, arise

from - he offers opinions on deliberate indifference and ratification – not police practices. (CP 155-173)

During trial, objections to Mr. Nault's testimony were sustained because Mr. Strange was simply trying to run around rulings previously made regarding Mr. Nault's testimony on the previous complaints against Detective Welton. Further, a review of the record clearly indicates that Mr. Nault was permitted to offer his opinions on an ultimate issue –within the confines of the trial court's previous rulings on his testimony (and which do not appear to be at issue in Mr. Strange's current appeal). (*Supra*) The trial court did not abuse its discretion.

**e) The Trial Court Properly Excluded Any Any Examination Regarding Insurance**

Mr. Strange phrases this section of his brief as an error by the trial court in limiting cross examination of the County's expert, Kirk Wiper. However, the subject matter of the limitation is limited to only a fraction of Mr. Wiper's extensive cross-examination of him. (RP 1325-1393, 1440-1448; specifically RP 1425-1428) While Mr. Strange attempts to call his attempt to solicit references to insurance impeachment and credibility issues, it is nothing less than an attempt to offer evidence of insurance to the jury.

"The scope of cross examination is within the broad discretion of the trial court and will not be overturned on appeal absent an abuse of discretion." *Miller v. Peterson* 42 Wash.App. 822, 827, 714 P.2d 695, 699 (1986)(Peterson next alleges that the trial court had no discretion to limit cross examination of plaintiff's expert who testified concerning the reasonableness of the hospital charges. Peterson is mistaken.); *citing State v. Young*, 89 Wash.2d 613, 574 P.2d 1171, *cert. den'd*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).

"As always, the trial court has the discretion to curtail cross-examination that is irrelevant, unduly repetitive, unduly prejudicial, baseless, or a waste of time. The cross-examiner should not be allowed to use cross-examination as a vehicle for the introduction of hearsay or other inadmissible evidence to strengthen the cross-examiner's own case under the guise of probing the expert's underlying facts and data."

5B WAPRAC § 705.7 (West 2011)(internal citations omitted)

Mr. Strange however, argues that his Counsel's ability to question Defendant's expert Kirk Wiper on his "alignment with, use by, profit from, and thus bias toward, his defending municipalities," was improperly interfered with. (*Strange Brief*, p. 40) He then goes on for several pages

in his memorandum to argue that testimony on Mr. Wiper's unintentional reference to the "risk pool," somehow had a logical connection to the litigation. (*Strange Brief*, p. 40-42) It does not. Any testimony regarding a common insurer between the City of Kelso and Spokane County has absolutely no relevance to the issues of § 1983 liability and/or excessive force.

As clearly explained Mr. Wiper referred to the Risk Pool because the county that he works in is part of the same risk pool – or insurance pool. (RP 1425) Indeed, the phrase itself was solicited by Mr. Strange's counsel, when Mr. Wiper was asked to read his answer from his deposition. (RP 1425) There was no "offering," of the term by Mr. Wiper. In other words no open door by Mr. Wiper. (RP 1425-1426)

Mr. Strange could easily have explored any potential bias or credibility issues with Mr. Wiper by simply questioning him about his work in law enforcement, or who had retained him. (RP 1427) He chose not to. The trial court went so far as to give Mr. Strange other avenues which he could achieve the same purported bias and not cross into insurance. *Id.*

The trial court did not abuse its discretion in precluding cross examination regarding the "risk pool." (RP 1425-1428) It would not lead to any relevant evidence and nothing more than a reference to "insurance."

Mr. Wiper's bias could easily have been explored, particularly by a seasoned trial attorney, in any manner of other lines. In particular, the trial court did not abuse its discretion because the point, such as it was, was not germane to the issues to be presented to the Jury.

### **C. The Trial Court Did Not Err In Limiting Jury Instructions**

The appeals court reviews a trial court's rejection of a jury instruction for abuse of discretion. *State v. Pesta*, 87 Wash.App. 515, 524, 942 P.2d 1013 (1997). Jury instructions are sufficient if (1) they are not misleading, (2) they permit the parties to argue their cases, and (3) when read as a whole, they properly inform the jury of the applicable law. *Id.* The court must instruct on a party's theory of the case if evidence supports the theory. *State v. Theroff*, 95 Wash.2d 385, 389, 622 P.2d 1240 (1980). "Our review of jury instructions is guided by the familiar principle jury instructions are sufficient if 'they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.'" *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995)(internal citations omitted). On appeal, jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Cox v. Spangler* 141 Wash.2d 431, 442, 5 P.3d

1265, 1271 (2000); citing, *State v. Wanrow*, 88 Wash.2d 221, 559 P.2d 548 (1977).

"In determining whether the instructions allow a party to argue his theory of the case, the instructions must be read and understood as a whole." *State v. Lane*, 4 Wash.App. 745, 748, 484 P.2d 432, review denied, 79 Wn.2d 1007 (1971); *State v. Dana*, 73 Wash.2d 533, 536, 439 P.2d 403 (1968).

The standard of review depends on whether the trial court's refusal to give a jury instruction was based on a matter of law or of fact. Mr. Strange has not specified if he seeks review on issues of law or fact. This Court uses differing standards based on a factual or legal dispute. "We review a trial court's refusal to give instructions to a jury based on a factual dispute for an abuse of discretion." *State v. Walker*, 136 Wash. 2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wash. 2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wash. 2d 541, 544, 947 P.2d 700 (1997)). On the other hand, we review a trial court's refusal to give an instruction based upon a ruling of law de novo. *Walker*, 136 Wash. 2d at 772.

Mr. Strange again attempts to compartmentalize each alleged error without consideration for the pre-existing underlying facts or decisions. Thus, without repeating the arguments that have already been made, Mr.

Strange's instructions were rejected because they almost exclusively relied on *Bryan v. MacPherson*, and further continued to misinterpret the plain language of the statutes as well as the evidence (testimony and documents) regarding Detective Welton's statutory authority to arrest.

Mr. Strange also complains that "nothing here limits the use of force." For the same reasons regarding the testimony surrounding the statutes, this argument has no weight. There are no "limiting" factors except those noted by statute, and case law's "totality of the circumstances." (CP 1252-1263; 1271-1281; 1635-1646) In addition, Mr. Strange's proposed instructions are not even accurate statements of *Bryan v. MacPherson*. (A12-A16) Instead, Mr. Strange's proposed instructions were self-serving statements well beyond even the language of *Bryan v. MacPherson* and in no way objective statements of the law. See e.g., A12-A16. A16 is a complete misstatement of the law in *Bryan v. MacPherson*.

Further, the instructions that were given very clearly defined the elements of excessive force. (CP 1410-1438; RP 1635; 1641-1644) It added instructions at Mr. Strange's objections and request (RP 1643-1645; see also generally 1635-1665; CP 1423) The Trial Court carefully utilized the WPIs regarding excessive force claims. (RP 1635-1666) The given instructions also included an instruction on the "totality of the

circumstances." (CP 1425) In reviewing the exceptions and objections report of the proceedings the trial court revised many instructions as requested by Mr. Strange. The end result was instructions that were given together as a whole were sufficient and not misleading. Under either standard abuse of discretion or de novo, the trial court did not commit reversible error. Any error was harmless.

**D. Spokane County Did Not Engage In Misconduct And The Court Did Not Abuse Its Discretion**

Mr. Strange next argues "new" evidence was introduced at the time of trial that "went directly" to the case. *Strange Brief*, p. 48. He goes on to argue that the trial court then refused to remedy the situation, presumably that means that it refused to grant Mr. Strange's request for a new trial.

The trial court did not err in failing to grant a mistrial based upon this new evidence. First, the evidence was harmless. Second, while there was evidence produced, Mr. Strange was permitted to question all Spokane County witnesses (ad nauseum) about the evidence. (RP 247, l. 20-254; see also *infra* 237-274; 298 l. 17- 299 l.63) In fact, Mr. Strange went far afield of any relevant testimony or further evidence but nonetheless, the Court permitted Mr. Strange to inquire fully into the

issue. Second, Mr. Strange does not, understand the evidence that was offered by Sgt. Golman. While the evidence has no bearing on Mr. Strange's claims, his incorrect understanding of the evidence has even less bearing on them.

**1. The Jan. 22, 2006 Report Was A Use Of Force Report (P 145)**

Mr. Strange misunderstood the evidence presented at the time of trial, which was a data entry report completed by a secretary. Based on this Mr. Strange continually asserts that there was no "use of force" report done and that this somehow violated Spokane County's policies and procedures. (*Strange Brief*, p. 48) Mr. Strange failed to establish to the trial court, and now this Court, how he suffered any harm or prejudice as a result of this "new" evidence.

The "report," (P-145) is not remotely related to Spokane County's "Use of Force" reporting requirements. (RP 399-407; 573-577; 586-591; 635-636) The evidence clearly established that a use of force report had been properly completed by Spokane County. (Id.; RP 630; 636; 714-715) That Mr. Strange wanted to represent to the jury that a secretarial database input was a use of force was simply not relevant.

At best, had Spokane County remained a party, this report's existence would have gone to the weight of the evidence in that there was "another report." However, the testimony was clear that this report was not recognized as a "use of force report," by any one at Spokane County. (emphasis added) The trial court did not abuse its discretion in refusing a mistrial. It appropriately permitted Mr. Strange to cross-examine witnesses and fully explore the exhibits through examination on the stand. There was nothing prejudicial about its admission, in fact, the document is nothing more than a summary of the reports that were previously completed, admitted and examined by Mr. Strange. (generally RP, 566-598; 635-636; 586-591)

## **2. The Taser Download Report Was Harmless**

Supplemental exhibits 146 and 146A were produced as a result of Sgt. Dale Golman bringing a copy of the document to trial with him. (A34 – 44; RP 247-248) He looked up the record because Mr. Strange, for the first time in prior questioning raised an inference that the taser had been cycled more than once.<sup>9</sup> (*Id.*) Mr. Strange then used this "new" document

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<sup>9</sup> At the time of trial, the trial court noted that the issue was potentially a discovery issue, but not a trial issue. ( *see e.g.*, RP 1594)

to continue to follow down the theory that the taser had been cycled more than once, or for 127 seconds. (RP 252, - 253, l.2; 231, 232-233; 1512; 1514) However, the exhibit clearly showed the taser event in question was shown on the document and the document showed that it had been cycled only one time. (RP 1513 – 1516) Deputy Eric Johnson, Spokane County's Master Taser Instructor testified that:

if I held it down for 127 continuous seconds, every five seconds you are going to get a new date and time stamp that is going to be five seconds different than the previous five-second date/time stamp. So every five seconds, it is going to record another triggering event. So 120 divided by five...however many cycles that is. But they will be consecutive every five seconds.

(RP 1515, l. 24 – 1516, l. 7; *see also*, RP 1568-1570)

Mr. Strange never alleged he was tased more than one time despite a complaint, an amended complaint, and numerous continuances, until his counsel inferred it during direct examination. This was a new argument. While the timing was unfortunate, Sgt. Golman's presentation of P146 (and the subsequent P146A) was absolutely harmless in its admissibility. It had no relevance to the issue of "excessive force." Further, Mr. Strange was permitted to fully explore the issue. The testimony offered regarding

exhibits 146/146a from Spokane County only confirmed what was already in evidence (and never before questioned) – that the Taser was fired once. (RP 321, 1.5-10) Further, despite Mr. Strange's continuing allegations to the contrary the exhibit is complete. (RP 1573, - 1575, 1.8; 1580-1581, 1.6; 316) Mr. Strange simply does not understand the document, or what it represents. (RP 1562 1.19 -1565; 1566; 1567, 1.21- 1570, 1.16; 1583-1586; 1588-1596) That inability to understand the information caused him to question over and over again Spokane County witnesses regarding the download.<sup>10</sup> (*see also* e.g. RP 1512-1514; 1515-1516, 1.21)

At best, the testimony solicited regarding the document only prevented 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. (*Supra*) The trial court did not abuse its

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<sup>10</sup> Spokane County disputes the characterization that the trial court ever ruled on any discovery issues. The trial court noted that it should have been produced during discovery, but Spokane County maintained that it was never requested in its response to Mr. Strange's objections to the failure to produce the document. However, any discovery issues are not raised by Mr. Strange on appeal and any discovery issues are not before this court.

discretion in admitting exhibits P 146 - P 146A and permitting Mr. Strange's Counsel to fully explore these exhibits with County witnesses. Mr. Strange's requested and received the "complete" record. (RP 343-145, 1.6; 368-384) Mr. Strange simply did not like the response.<sup>11</sup> This does not rise to the level of an abuse of discretion and any error was harmless as it failed to affect any of Mr. Strange's burden of proof. Further, the trial court permitted Mr. Strange every opportunity to explore these new (albeit no relevant) exhibits.

**E. The Trial Court Did Not Err In Failing To Grant A New Trial**

The "new evidence" that Mr. Strange alleged was grounds for a new trial is the "use of force" report and the taser download as set forth supra below. He alleges that a failure to grant a new trial as a result of these two pieces of evidence was an abuse of discretion. (*Strange Brief*, p. 55-56) However, nowhere does Mr. Strange reference what his grounds

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<sup>11</sup> It is also an interesting point that Mr. Strange presented new evidence in the form of two Affidavits from individuals located in Florida. While not relevant to the issues at trial, it does establish that Mr. Strange was given significant opportunity to fully explore any merit of these allegedly "new" documents.

for appeal are based upon. Pursuant to RAP 10.3(5), the Court will not consider claims insufficiently argued by the parties. *See also* RAP 10.3(5); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990) It is inferred by Mr. Strange's brief that he is seeks a new trial because of "new evidence" discussed is § D noted above. However, he has failed to set forth what rule his request is based upon. (*See e.g., Strange Brief*, p. 55-56) Thus, it is presumed that Mr. Strange's motion for a new trial is based upon CR 59(a). The alleged grounds for the new trial were exhibits 145 and 146/146A addressed supra. This section focuses exclusively on the specific request for a new trial.

Under CR 59(a)(2), misconduct of a prevailing party is a ground for a new trial if the misconduct materially affects the substantial rights of the moving party. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000). The moving party must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. In addition, the moving party must object to the misconduct at trial, and the misconduct must not have been cured by court instructions. *Aluminum Co. of Am.*, 140 Wn.2d at 539-40 (citing 12 James Wm. Moore, *Federal Practice* sec. 59.13(2)(c)(I)(A), at 59-48 to 58-49 (3d ed.1999)).

A trial court may grant a new trial where an adverse party prevents the movant from having a fair trial. CR 59(a)(1). And under CR 59(a)(9), the trial court also has the power to grant a new trial if it determines, in the exercise of its discretion, that substantial justice was not done. *Olpinski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968). The court must state its reasons for finding a lack of substantial justice. *Olpinski*, 73 Wn.2d at 951. In *Olpinski*, the court noted that '[t]he basic question posed by an order granting a new trial upon this ground ... is whether the losing party received a fair trial.' 73 Wn.2d at 951 (quoting *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 440, 397 P.2d 857 (1964)). "As a general rule, the trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal absent a showing of a clear abuse of discretion." *Cox v. General Motors Corp.* 64 Wash.App. 823, 826, 827 P.2d 1052, 1054 (1992), *Kramer v. J.I. Case Mfg. Co.*, 62 Wash.App. 544, 561, 815 P.2d 798 (1991).

"A new trial will not be granted on the basis of an error or irregularity that is harmless. Inconsequential errors or irregularities, not likely to affect the outcome of the case, will not support a motion for new trial. RCWA 4.36.240 provides as follows: 'The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no

judgment shall be reversed or affected by reason of such error or defect.”

4 WAPRAC CR 59.

Similarly, errors during trial will not support a motion for new trial if the ultimate outcome of the trial is the only outcome that could be sustained by the evidence. 4 WAPRAC CR 59 *See, e.g., Grass v. Seattle*, 100 Wash. 542, 171 P. 533 (1918). Similarly, an error during trial will not support a motion for new trial if the prejudicial effect of the error was neutralized during trial, by a cautionary instruction or otherwise. *Id.*, *See, e.g., Rettinger v. Bresnahan*, 42 Wn.2d 631, 257 P.2d 633 (1953).

Case law boils down to essentially five requirements that must be satisfied before a new trial will be granted on the basis of newly discovered evidence:

(1) The evidence must truly be newly discovered, and not simply evidence that was available but not presented at trial.

(2) It must be shown that all due diligence was used to discover and present at the trial all the evidence that was of value in establishing counsel's case; and that notwithstanding such diligence, this newly discovered evidence was not discovered until too late to use it at the trial.

(3) The evidence must be material to the merits of the case and must be evidence that would be admissible under the usual rules of evidence. Inconsequential new evidence will not justify a new trial. The evidence must be more than merely cumulative or impeaching evidence.

(4) The evidence must be described in sufficient detail so that the court can determine its materiality, and whether it would be available in evidence if a new trial were granted.

(5) The evidence must be of such strength as evidence that there is a probability that it might change the result of the trial.

#### 4 WAPRAC CR 59

Here, as set forth in section D supra, there is simply no indication that P145 and P146/146A would have changed the outcome of the trial. Mr. Strange simply failed to understand the documents.<sup>12</sup> Spokane

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<sup>12</sup> Mr. Strange raised numerous arguments at the time of trial to attempt to make something out of P145 and P146 but without success. However, none of these arguments are raised in this appeal brief and thus are not addressed in response. *See e.g.*, CP 1558-1560. Again, these references are pointed out to this Court to establish that Mr. Strange had plenty of

County was previously dismissed as a matter of law, but even had it not been, the outcome would not have been any different. The documents simply did not affect the elements required as a matter of law of 42 USC § 1983 claims or on excessive force. Rather, the exhibits only precluded Mr. Strange from arguing (for the first time) that the Taser was used more than once (for the first time.)

**1. No Denial Of Fair Trial Against All The Evidence**

The test is whether trial irregularities, if any, when viewed against the backdrop of all the evidence, denies a party his right to a fair trial. *See State v. Avendano-Lopez*, 79 Wn.App. 706, 721, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007 (1996) (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)).

Here, this trial went on for three weeks. Mr. Strange took the majority of that time on direct and cross. He was permitted to fully explore exhibits 145 and 146/146A. (*Supra*) While he never understood the testimony, it was clear that the documents had no bearing on Mr. Strange's allegations. (*Supra*) It was also clear that there was nothing

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opportunity to examine witnesses and documents. Despite these efforts, there was simply no relevance or merit to the exhibits that affected the outcome of this trial.

further to be gained by the documents. (*Supra*) Thus, even assuming this Court wants to find "cumulative" irregularities, the proper test is still to determine whether those irregularities would have affected the outcome. The answer to that is "no."

The trial court did not err in failing to grant Mr. Strange's Motion for new trial. The trial court did not abuse its discretion, or commit reversible error by failing to grant Mr. Strange a new trial based on new evidence and/or "misconduct" of Spokane County.

**F. Mr. Strange Is Not Entitled To Attorney Fees**

Mr. Strange alleges that if he "prevails on appeal, he is entitled to an interim award of his full fees and costs." (*Strange Brief*, p. 57) A review of the case cited by Mr. Strange clearly establishes that this is incorrect. The *Larez* Court states:

The *Larez*es request attorney's fees and costs on appeal. As parties who have succeeded on significant issues in this appeal, they are entitled to attorney's fees under 42 U.S.C. § 1988. *See Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791-92, 109 S.Ct. 1486, 1492-93, 103 L.Ed.2d 866 (1989). When a party meets with partial success on appeal, we have deemed it proper to award fees only for those claims successfully defended on the merits. *See, e.g., Connor v. City of Santa Ana*, 897 F.2d 1487, 1494 (9th Cir.), *cert. denied*, 498 U.S. 816, 111

S.Ct. 59, 112 L.Ed.2d 34 (1990); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1464 (1988). Therefore, we award fees to the Larezes for time spent on appeal defending the jury verdicts against the individual officers. Because the claims against Gates and the City have been remanded for a new trial, however, we deem it inappropriate to award fees for defending the verdicts against them at this time. Further fees would be proper if the Larezes prevail on retrial."

*Larez*, 946 F.2d at 649. The plain language of the Court states that if Mr. Strange prevails on the appeal, he is entitled to fees incurred in defending on the appeal. NOT "full fees." Plaintiff is further incorrect because the fees were awarded because the Larezes had to defend on appeal, they did not file the appeal. There is no other support offered for this argument and thus as a matter of law, Mr. Strange's request must be denied as a matter of law.

Additionally, a party must have obtained some of the relief it sought in bringing the suit in order to justify a fee award pursuant to 42 U.S.C. § 1988. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980); *LSO, Ltd. V. Stroh*, 205 F.3d 1146, 1160 (9th Cir.2000); *See Am. Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir.1981). That

clearly has not happened in this case as Mr. Strange did not prevail on any part of his claim. To award fees and costs in the manner that Mr. Strange's (counsel) requests would result in the absurd result that Defendants would pay an award that has not yet been proved. Assuming arguendo that even if this Court were to remand (there are no grounds to do so), simply because there was a remand does not ensure that Mr. Strange would prevail the second time. Defendants would then be placed in the untenable position of attempting to collect attorney fees and costs that have been reimbursed and not "earned." As indicated by the lack of cases offered by Mr. Strange, there is simply no law to support this unusual request.

RESPECTFULLY SUBMITTED this 10th day of February, 2012.

EVANS, CRAVEN & LACKIE, P.S.

A large, stylized handwritten signature in black ink, appearing to be 'H. Yakely', written over a horizontal line.

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Attorneys for Respondents

