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No. 95062-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person,
individually, and BIANCA BELTRAN as guardian ad litem of the
person and estate of CESAR BELTRAN-SERRANO,

Petitioners,

v.

CITY OF TACOMA, a political subdivision of the State of
Washington,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE SUSAN K. SERKO

BRIEF OF RESPONDENT

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I. INTRODUCTION

Michel Volk, a police officer employed by Defendant City of Tacoma, intentionally shot petitioner Cesar Beltran-Serrano after a confrontation on a City street. The parties dispute whether, and why, Officer Volk reasonably feared for her safety when she fired four shots at plaintiff, seriously injuring him. However, the dispute over whether Officer Volk's intentional act was justified does not transform plaintiff's claim for battery, an intentional tort, into a negligence claim. Plaintiff's assertion that defendant City could be liable for negligence for its employee's intentional act because defendant's employee is a police officer would impose a "special set of rules" on government tort defendants that is inconsistent with both the Legislature's abolishment of sovereign immunity and with the public duty doctrine, which continues to properly focus this Court's analysis of the duties of a governmental defendant in tort. This Court should affirm the trial court's partial summary judgment dismissing plaintiff's negligence claims and his claims for negligent supervision and training, which are not available to a plaintiff when, as here, defendant's employee was acting within the scope of employment.

II. RESTATEMENT OF THE CASE

A. Restatement of Facts.

This Court is presented with a question of law. Although the appellate court views conflicting evidence in the light most favorable to the non-prevailing party, it is not free to disregard undisputed evidence considered by the court below. RAP 9.12; *see Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“An appellate court would not be properly accomplishing its charge if [it] did not examine *all* the evidence presented to the trial court”) (emphasis in original). This restatement of the case fairly sets out the facts and addresses some of the factual misstatements in the opening brief:

At 3:00 p.m. on June 29, 2013, Tacoma Police Officer Michel Volk was on patrol when she saw plaintiff Cesar Beltran-Serrano on the corner of East 28th Street and Portland Avenue, an area plagued by aggressive panhandling. (CP 299, 364) Contrary to petitioner’s unsupported assertion (App. Br. 2), Mr. Beltran-Serrano was not “wandering aimlessly on the corner” when Officer Volk saw him, but was holding a sign and walking in and out of traffic approaching vehicles. (CP 302) Although Officer Volk did not believe she had probable cause to cite Mr. Beltran-Serrano for panhandling, she

initiated contact to advise him of the panhandling laws. (CP 304, 364)

When Officer Volk first made contact with Mr. Beltran-Serrano, she said “Hello Sir” and asked him if he was aware of the panhandling laws in Tacoma. (CP 364) Mr. Beltran-Serrano did not respond verbally, but shook his head “no.” (CP 364) Officer Volk asked Mr. Beltran-Serrano if he spoke English, and again he shook his head “no.” (CP 306, 365) Officer Volk then called for a Spanish-speaking officer, Officer Gutierrez, to respond to the scene in the hopes that he could help with communication. (CP 306, 365)

Officer Volk and Mr. Beltran-Serrano waited for a few minutes for Officer Gutierrez to arrive. (CP 308) While waiting, Officer Volk asked Mr. Beltran-Serrano if he had any identification and made a hand motion suggesting a small card, like a driver’s license. (CP 308-09) Mr. Beltran-Serrano patted his pockets, as if looking for his wallet. (CP 309, 365) He then reached down into a hole. (CP 309) Officer Volk stepped closer so that she could see what he was getting. (CP 309) When Mr. Beltran-Serrano stood up, he had a metal object

in his hand that he swung at Officer Volk, striking her in the forearm, which she had raised to block the blow. (CP 308-09)¹

The object that Mr. Beltran-Serrano used to strike Officer Volk has jagged edges and weighs more than 10 pounds. (CP 429, 450):



Witness Winona Stevens described the object as being approximately 12 inches long and four to six inches wide. (CP 424)

When Mr. Beltran-Serrano struck her with the metal object, Officer Volk pulled her service weapon. (CP 365) When he turned his back and began to move away from her, Officer Volk holstered

¹ These facts are taken from Officer Volk's statement and deposition testimony, submitted on summary judgment, which is undisputed. Plaintiff successfully resisted defendant's efforts to take Mr. Beltran-Serrano's deposition, obtaining a protective order prohibiting examination. (7/29/16 Protective Order, Supp. CP ___) Thus, Officer Volk's testimony concerning the events that occurred prior to Mr. Beltran-Serrano's assault is the only competent evidence before the court on summary judgment.

her weapon and instead pulled her Electronic Control Tool (ECT) (commonly referred to as a “taser”). (CP 311, 366) Officer Volk deployed the taser, but it proved ineffective. (CP 311, 366) Mr. Beltran-Serrano turned back towards Officer Volk while raising the metal object. (CP 311-12, 366) Officer Volk threw her taser down, drew her weapon, and fired. (CP 311-12, 366)

Petitioner asserts that Mr. Beltran-Serrano was “unarmed” and “moving away from the officer” when Officer Volk fired her weapon. (App. Br. 8)² This statement is not supported by the record. Ms. Stevens, the eye witness upon whom plaintiff relies so heavily, was interviewed by police immediately after the incident. The transcript of her interview is in the record (CP 419-27) in addition to the declaration plaintiff’s counsel prepared for her. (CP 414-17) Although it states that Mr. Beltran-Serrano “did not have anything

² Petitioner relies upon Officer Volk’s statement that Mr. Beltran-Serrano was “no longer a threat” when she decided to deploy her taser to insinuate that Mr. Beltran-Serrano was still not a threat later in the encounter when she fired her gun. (App. Br. 8) Petitioner’s use of this statement is grossly misleading. Officer Volk testified that when Mr. Beltran-Serrano struck her with the metal object, she pulled her service weapon. When he turned his back towards her and began to move away from her, *at that moment*, she no longer considered him an imminent threat of death or serious bodily harm (even though he still had the metal object in his hand). Therefore, she holstered her weapon and instead pulled her taser. (CP 311-12) When the taser proved ineffective and Mr. Beltran-Serrano turned back towards the officer *while raising the metal club*, only then did she use deadly force. (CP 312)

that resembled a weapon in his hands” (CP 416), the declaration prepared by plaintiff’s counsel omits that Ms. Stevens *did* see an object in Mr. Beltran-Serrano’s hand – a large object that she described as approximately 12 inches long and four to six inches wide. (CP 424) She simply did not recognize the object as a weapon. (CP 425) Further, plaintiff’s own ballistics expert, Matthew Noedel, concluded that Mr. Beltran-Serrano was facing Officer Volk when she discharged her firearm. (CP 469, Figure 11)

Petitioner also asserts that no eye witness corroborated Officer Volk’s account of these events. (App. Br. 4) That is not true. Washington State Patrol Trooper Timothy Rushton testified, consistent with Officer Volk’s testimony, that he saw Mr. Beltran-Serrano swing his arm in a striking motion towards Officer Volk.³ Petitioner’s argument that the dashcam video and Trooper Rushton’s testimony “debunks” the claim of imminent threat (App. Br. 7, 9) mischaracterizes the record on summary judgment. Trooper

³ CP 316 (“Q: You indicated that, after Mr. Beltran stood up, you saw him move his arm in a downward strike towards Officer Volk; is that correct? A: Yes.”); CP 318-19 (“Q: Is it your testimony that Mr. Beltran downwardly struck Officer Volk at this point? A: At some point around this part of the video, yeah, but it’s not visible on the dash camera. All I can say is that I recall from my field of view – from my field of view, not the dash cam, I could see there was something that came down in her – towards her direction from him.”); CP 317 (“Q: Am I correct in understanding that your testimony is that Mr. Beltran downwardly struck Officer Volk at a point that is not in the dash cam video? Is that accurate? A: Correct.”)

Rushton, who was sitting his patrol car facing the corner, could see the interaction between Officer Volk and Mr. Beltran-Serrano even though it was out of view of his dashcam, which was mounted on the upper portion of the windshield on the passenger side of his patrol car. (CP 320; *see also* CP 315-16, 318-19) The dashcam video depicts the urgency with which Trooper Rushton rushed to aid Officer Volk, corroborating the seriousness of the situation. *See* WSP video, time stamp 1:33 to 1:45 (filed electronically and attached as Exhibit U to LeBank Declaration, CP 359-62)

These were the undisputed facts before the trial court on summary judgment. Whether Officer Volk reasonably feared for her safety when she intentionally shot Mr. Serrano-Beltran remains the key factual dispute for trial.

B. Procedural History.

Plaintiff asserted claims for 1) assault and battery; and 2) negligence against the City of Tacoma. (CP 77) With respect to his negligence claims, Plaintiff made the following allegations:

- “Defendant owes a duty of care when engaging in law enforcement functions”;
- “Defendant owes a duty to refrain from negligently, unreasonably, recklessly, and wantonly engaging in the non-consensual invasion of the sanctity of a person’s bodily and personal security”;

- “Defendant owes a duty to refrain from negligently engaging in harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such harm or apprehension that such contact is imminent”;
- “Defendant owes a duty to properly train and supervise its employees in dealing with the mentally ill and in the appropriate use of force”;
- “Defendant breached that duty when they engaged in the improper, unreasonable, unnecessary and excessive use of force, including but not limited to shooting Cesar Beltran in the back while he was trying to walk away from Officer Volk”;
- “Defendant breached that duty, acted unreasonably and was negligent, when it failed to have and follow proper training, policies, and procedures on the standard practices of officers in contacting Spanish speaking individuals with mental illness”;
- “Defendant breached that duty, acted unreasonably and was negligent, when it used unnecessary and improper physical force and violence against Cesar Beltran”; and
- “Defendant breached that duty when it unreasonably, unnecessarily, and without provocation shot Cesar Beltran in the back, torso, and extremities and otherwise engaged in harmful or offensive contact with Plaintiff thereby inflicting an assault and battery on Cesar Beltran.”

(CP 77-78)

While some of plaintiff’s allegations were couched in terms of a breach of a duty of care in negligence, the thrust of many of these allegations is clearly assault and battery. The remaining allegations – negligent training, negligent supervision, negligent use of force – were the focus of the City’s motion for summary judgment. (CP 243)

Under Washington law, “a police officer . . . becomes a tortfeasor and is liable as such for assault and battery if unnecessary violence or excessive force is used in accomplishing [an] arrest.” *Boyles v. City of Kennewick*, 62 Wn. App. 174, 176, 813 P.2d 178, *rev. denied*, 118 Wn.2d 1006 (1991). The City therefore moved for partial summary judgment dismissing plaintiff’s negligent use of force claim because a claim of negligence cannot be based on an intentional act and there was no duty owed to the plaintiff as an individual under the circumstances of this case. (249-50) The City also moved for dismissal of plaintiff’s negligent supervision and training claims because Officer Volk was acting within the scope of employment when she shot plaintiff. (CP 250-52)

The trial court agreed with the City, granting partial summary judgment on negligent use of force, negligent supervision, and negligent training. The court certified its order for discretionary review under RAP 13.4(b)(4). (CP 698-700, 756-61) This Court accepted direct discretionary review on plaintiff’s motion.

III. RESPONSE ARGUMENT

A. The City does not claim it is “immune” from tort liability. But the abolishment of sovereign immunity did not create any new torts.

Plaintiff repeatedly argues that the City is not “immune” from liability for the conduct upon which Plaintiff has attempted to premise his negligence claim. (App. Br. 13, 16, 20, 24, 35-37) That is not the City’s position; the City did not claim below, and does not claim now, that it is “immune” from liability. The City readily acknowledges that the Legislature abolished sovereign immunity for municipalities in 1967 when it enacted RCW 4.96.010, declaring that municipal corporations “shall be liable for damages arising out their tortious conduct, or the tortious conduct of their officers . . . to the same extent as if they were a private person or corporation.” RCW 4.96.010(1).

Plaintiff’s repeated attempts to construe the City’s arguments as an assertion of sovereign immunity are misleading. The City does not claim that it had a sovereign immunity defense to plaintiff’s claim, but that plaintiff failed to state a legally cognizable claim for the negligent use of force on two different grounds: 1) a plaintiff cannot base a claim of negligence on an intentional act; and 2) the City owed no particularized duty of care to the plaintiff as an individual under the circumstances of this case (the public duty doctrine).

This Court has made clear that sovereign immunity and the public duty doctrine are two distinct and independent concepts:

The “public duty doctrine” provides generally that for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one). . . . The concept of “sovereign immunity,” on the other hand, provides generally that despite the existence of apparent duty a municipal corporation, in the exercise of governmental functions, is immune from tort liability.

J & B Dev. Co., Inc. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983) (omitting citations) (*overruled on other grounds in Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988) and *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988)). However, “[a]lthough the Legislature abolished sovereign immunity for municipal corporations in 1967, it did not thereby create any new causes of action or liability. . . . The public duty doctrine recognizes that a fundamental element of any negligence action is a duty owed by the defendant to the plaintiff.” *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (citations and footnote omitted).

This Court must reject plaintiff’s attempts to recraft the City’s position as an assertion of sovereign immunity. But the Court must also recognize that when it abolished sovereign immunity, “the

legislature promised the people of this state that the government and its agents would exercise reasonable care or would be held accountable just like any private person or corporation.” *Cummins v. Lewis County*, 156 Wn.2d 844, 862-63, ¶ 38, 133 P.3d 459 (2006) (Chambers, J. concurring). As Justice Chambers went on to explain, this is because “[i]n our courts of law, every party should be treated equally. It is contrary to fundamental principles of law that one party be granted a special set of rules not afforded to others.” *Cummins*, 156 Wn.2d at 863, ¶ 38.

In this case, contrary to the principles espoused by Justice Chambers, plaintiff proposes that the police, and police departments, not be treated as private defendants would be – a private defendant could not be liable for negligently “engaging in law enforcement functions.” (CP 77) Instead, plaintiff proposes a “special set of rules” that would make police departments vicariously liable when their officers and agents “negligently” engage in deliberate acts – contrary to centuries of law governing the proof of, and defense to, the intentional torts of assault and battery.

B. A plaintiff cannot sue in negligence for an intentional act under Washington law.

Negligence is “an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred.” *Ullrich v. Columbia & Cowlitz R. Co.*, 189 Wash. 668, 672, 66 P.2d 853 (1937) (quoted source omitted); *see also Burr v. Clark*, 30 Wn.2d 149, 155-56, 190 P.2d 769 (1948) (same); *Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 769, ¶ 48, 320 P.3d 77 (2013) (“In order to state a cause of action for negligence it is necessary to allege facts which would warrant a finding that the defendant has committed an *unintentional* breach of a legal duty and that such a breach was a proximate cause of the harm.”) (emphasis added; quoted source omitted), *rev. denied*, 180 Wn.2d 1026 (2014).

In contrast, an intentional tort is a volitional act, undertaken with the knowledge and substantial certainty that reasonably-to-be-expected consequences would follow. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 681-84, 709 P.2d 782, 785-87 (1985) (citing *Garratt v. Dailey*, 46 Wn.2d 197, 279 P.2d 1091 (1955), *Restatement (Second) of Torts* § 8A (1965), and W. Prosser, *Torts* § 8, at 31-32 (4th ed. 1971)). *See also State Farm Fire & Cas. Co. v. Justus*, 199 Wn. App. 435, 451-55, ¶¶ 33-45, 398 P.3d 1258 (discussing definition of intentional conduct (meaning the actor desired to bring about the

consequences of his volitional acts because he knew or was substantially certain the result would occur) as compared to definition of negligent conduct (meaning the actor's volitional actions merely caused an unreasonable risk of harm)), *rev. denied*, 189 Wn.2d 1026 (2017).

There is no question in this case that when Officer Volk fired her weapon, she did so intentionally and deliberately. The discharge of Officer Volk's weapon was a volitional act undertaken with the knowledge and substantial certainty that plaintiff would be struck by the bullets and either injured or killed.

Under Washington law, Officer Volk's act of firing her weapon is potentially a battery. *See Garratt*, 46 Wn.2d at 200 ("A definition (not all-inclusive but sufficient for our purposes) of a battery is the intention infliction of a harmful bodily contact upon another."). Under long-standing, well-developed principles governing the conduct of both private individuals and police officers, whether that intentional act was actionable as a battery hinges on whether the use of force was excessive or unreasonable. *See Arg. § C, infra*. But Officer Volk's intentional act is not a basis for a new cause of action sounding in negligence because "there is no such thing as the 'negligent' commission of an 'intentional' tort." *City of Miami v.*

Sanders, 672 So.2d 46, 48 (Fla. App.), *rev. denied*, 683 So.2d 484 (1996).

Indeed, this Court declined to permit a negligence claim based on intentional conduct by law enforcement officers in *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008). *Brutsche* involved the execution of a search warrant on a suspected methamphetamine lab. Kent police officers caused physical damage to a door and door jamb when using a battering ram to gain entry. Brutsche sued the City of Kent for negligence, trespass, and a taking of property without just compensation, arguing that he offered to give the officers keys to the doors and that the officers had a duty to avoid unnecessary damage in executing the warrant. *Brutsche*, 164 Wn.2d at 669-70, ¶ 7.

In support of his claim, plaintiff relied upon *Goldsby v. Stewart*, 158 Wash. 39, 290 P. 422 (1930), in which this Court held that “officers . . . have a duty to conduct a search in a reasonable manner and to avoid unnecessary damage to the property of third parties.” *Brutsche*, 164 Wn.2d at 671, ¶ 13. In analyzing this statement in *Goldsby* and the *Restatement (Second) of Torts* (1965), this Court in *Brutsche* concluded that *Goldsby* supported a trespass claim, but not a negligence claim. *Brutsche*, 164 Wn. 2d at 673, ¶ 17

(“Therefore, under *Goldsby*, if officers executing a search warrant unnecessarily damage the property while conducting their search, that is, if they damage the property to a greater extent than is consistent with a thorough investigation, they exceed the privilege to be on the land and liability in trespass can result.”). The Court then noted that while the conduct necessary to support a trespass claim under §214 of the *Restatement (Second) of Torts* can be either intentional or negligent, in *Brutsche* the conduct giving rise to the damage “was intentional because the law enforcement officers intentionally and deliberately used battering rams to breach doors.” 164 Wn.2d at 674-75, ¶ 21.

This Court’s analysis of the trespass claim at issue in *Brutsche* is equally applicable to the facts of the instant case. And while the City does not disagree with plaintiff’s argument that “[t]here can be both negligence and intentional tortious conduct in the same case leading to a particular result” (App. Br. 25-26), the negligence claim and intentional tort are never based on the same conduct by the same

person.⁴ That plaintiff has identified no case to the contrary is not surprising, given that the fundamental underpinnings of these claims are analytically distinct.

This Court squarely addressed the distinct nature of intentional torts and negligence claims, concluding “that ‘intentional torts are part of a wholly different legal realm and are inapposite to the determination of fault pursuant to RCW 4.22.070(1)’” in *Tegman v. Accident & Med. Inves., Inc.*, 150 Wn.2d 102, 110, 75 P.3d 497 (2003) (quoting *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994)). See also *Welch v. Southland Corp.*, 134 Wn.2d 629, 633-34, 952 P.2d 162 (1998) (definition of “fault” under 4.22.015, based on negligent or reckless conduct, does not include intentional torts); *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 246,

⁴ In support of his argument, plaintiff cites *Pedroza v. Bryant*, 101 Wn.2d 226, 232-33, 667 P.2d 166 (1984), arguing that a hospital may be liable under a theory of corporate negligence and a physician liable for failure to obtain informed consent – the medical equivalent of common law battery. (App. Br. 25) Plaintiff’s reliance on *Pedroza* is puzzling, as that case did not involve a claim of failure to obtain informed consent against the individual physician. In *Pedroza*, this Court formally recognized the doctrine of corporate negligence in a medical malpractice setting. The plaintiff in *Pedroza*, however, did not allege an intentional tort by the individual defendant physician, or that the defendant physician was an agent of the defendant hospital. The plaintiff in *Pedroza* asserted negligence claims against both defendants – a medical malpractice claim against the individual defendant physician, and a corporate negligence claim against the hospital for giving admitting and treating privileges to the defendant physician accused of malpractice. 101 Wn.2d at 228.

23 P.3d 520 (“[b]ecause the statutory definition of ‘fault’ does not include ‘intentional acts or omissions[,]’ RCW 4.22.070 does not apply to intentional torts”) (quoting *Welch*, 134 Wn.2d at 634); brackets in original), *rev. denied*, 145 Wn.2d 1008 (2001)).⁵

There is no such thing as the negligent commission of an intentional tort. This distinction between negligence and intentional torts is dispositive of plaintiff’s argument in this case.

C. Defenses to common law battery and excessive force claims also demonstrate that Washington law does not allow claims for negligence in the intentional infliction of force.

Plaintiff attempts to skirt this well-established Washington law in an effort to expand liability for law enforcement in a way that is unprecedented and unsupportable, arguing that officers “owe a traditional negligence duty of care . . . not to unreasonably employ deadly force. The reasonableness of the use of deadly force must be assessed under the totality of the circumstances of the interaction.”

⁵ Accord *Roufa v. Constantine*, 2017 WL 120601, *11 (W.D. Wash. Jan. 11, 2017) (plaintiff cannot base a claim of negligence on alleged intentional actions, such as excessive force or unlawful arrest); *Lawson v. City of Seattle*, 2014 WL 1593350, *13 (W.D. Wash. Apr. 21, 2014) (dismissing negligent infliction of emotional distress and negligence claims because a plaintiff cannot base claims of negligence on intentional acts and because the public duty doctrine applies to law enforcement activities); *Willard v. City of Everett*, 2013 WL 4759064, *2 (W.D. Wash. Sept. 4, 2013) (no cognizable claim for negligent where claim is based on intentional act and where police owed no individualized duty to plaintiff pursuant to the public duty doctrine), *aff’d*, 637 Fed.Appx. 441 (9th Cir. 2016).

(App. Br. 1, 14: “under the totality of circumstances, [plaintiff] did not merit such a use of force.”) Plaintiff’s argument ignores that the common law provides a specific defense to a claim of battery where the defendant has a reasonable fear for his or her own safety.

“The law of self-defense is the law of self-preservation. It applies in civil, as well as in criminal, cases. When attacked, one has the right to defend himself, to resist force with force, to the extent of what then appeared to be the apparent danger to the one attacked If he believed in good faith and on reasonable grounds that there was actual danger of great bodily harm and acted as a reasonable and ordinarily cautious and prudent man would have acted under the circumstances as they then appeared to the one assaulted, he was justified in defending himself.” *Robison v. La Forge*, 175 Wash. 384, 387-88, 27 P.2d 585 (1933) (citation omitted); *see also Coles v. McNamara*, 131 Wash. 377, 384-85, 230 P. 430, 433 (1924).

“The use of force is lawful when used by a person about to be injured To establish self-defense, a person must establish that a reasonably cautious and prudent person in his situation would use similar force . . . [and] that he reasonably believed he was in danger of bodily harm Whether an individual acted in self-defense is typically a question for the trier of fact.” *McBride v. Walla Walla*

County, 95 Wn. App. 33, 39-40, 975 P.2d 1029 (citations omitted), *rev. denied*, 138 Wn.2d 1015 (1999).

Plaintiff's argument also ignores that excessive force claims against law enforcement officers under the Fourth Amendment are already evaluated under an objective reasonableness standard, considering the totality of circumstances known to the officer at the time of application of force. *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The objective reasonableness standard mandates that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Further, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 at 396-97.

Under this standard, "officers . . . only need to act within the range of conduct we identify as reasonable." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995). This is because circumstances can "escalate so quickly that the officer must make a snap judgment." *Porter v. Osborn*, 546 F.3d 1131, 1137

(9th Cir. 2008). An officer does not have the “luxury of delay” or “reflection,” and “precious little time for deliberation;” officers “must operate under great pressure and make repeated split-second decisions about how best to apprehend” a suspect. *Bingue v. Prunchak*, 512 F.3d 1169, 1176 (9th Cir. 2008).

Plaintiff’s attempt to expand the scope of negligence liability to include tactical decisions preceding the application of force is contrary to this well-developed law and would deprive law enforcement officers of these established defenses. (See App. Br. 5, 7-8) In particular, plaintiff cannot argue that an otherwise acceptable application of force is somehow rendered excessive (and tortious) because the officer created the need for the use of force by making alleged bad tactical decisions:⁶

[T]he fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself. . . . Thus, even if an officer negligently *provokes* a violent response, that negligent act will not transform an otherwise

⁶ Plaintiff also improperly collapses his analysis of the City’s alleged negligence and the officer’s alleged negligence, urging the Court not to “parse the various aspects of the negligence by the City such as improper training of officers to interact with the mentally ill, improper training in the employment of lethal force, or the negligent and intentional acts by the officer using deadly force.” (App. Br. 34) However, as outlined in Argument § E, *infra*, plaintiff’s claims of negligent training and supervision fail not only because Officer Volk was acting within the course of her employment at all times, but because plaintiff submitted no evidence of negligent training or supervision.

reasonable subsequent use of force into a Fourth Amendment violation.

Billington v. Smith, 292 F.3d 1177, 1190-91 (9th Cir. 2002) (emphasis in original), *overruled on other grounds by City of Los Angeles v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 198 L. Ed. 2d 52 (2017).⁷ See also *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989); *Daniels v. Williams*, 474 U.S. 327, 332-33, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (distinguishing constitutional deprivations from negligently inflicted injuries).

If the use of force was reasonable, the officer cannot be liable for battery in Washington. *Boyles v. Kennewick*, 62 Wn. App. 174, 813 P.2d 178, *rev. denied*, 118 Wn.2d 1006 (1991); *McKinney v. City*

⁷ The Supreme Court in *Mendez* overruled the Ninth Circuit's provocation rule specifically because it looked back in time at conduct other than the immediate circumstances at the time that force was applied:

That inquiry is dispositive: When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim.

The basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim. *Billington, supra*, at 1190 ("The basis of liability for the subsequent use of force is the initial constitutional violation . . .") (emphasis in original).

Mendez, ___ U.S. ___, 137 S. Ct. 1539, 1547, 198 L. Ed. 2d 52 (2017).

of Tukwila, 103 Wn. App. 391, 13 P.3d 631 (2000). The Ninth Circuit distinguished between the Fourth Amendment’s “reasonableness” standard and the duty that may be imposed to exercise “reasonable care” under California tort law in *Billington*, 292 F.3d at 1191. But under Washington law, battery claims are subject to the same limitations as Fourth Amendment excessive force claims; the substantive standard is the same objective reasonableness test for both a Fourth Amendment excessive force claim and a claim for battery under Washington tort law. *McKinney*, 103 Wn. App. at 408-09 (because “the officers’ use of force was reasonable, the assault and battery claims . . . fail because the touching was lawful.”). *See also Staats v. Brown*, 139 Wn.2d 757, 780, 991 P.2d 615 (2000) (officer could be liable for battery “arising out of the use of excessive force to effectuate an arrest.”).

Plaintiff’s proposed new cause of action, sounding in negligence so long as his allegations are couched on the officer’s evaluation and decision to use force (not the force itself), would circumvent both the defense of self-defense and the standard of objective reasonableness applicable to an excessive force claim. Plaintiff conceded below that no Washington authority supports his proposed new cause of action:

THE COURT: Mr. LeBank, I want Washington law . . . I wrote down that California and other jurisdictions allow negligence as a cause of action – in essence, as a cause of action.

MR. LEBANK: Certainly, Your Honor. Certainly. Ms. Homan is absolutely incorrect. There is no Washington case that holds that you may not bring a negligence claim for an officer-involved shooting. And so –

THE COURT: I want the opposite question answered. What is the Washington case law that says you may bring a negligence claim?

(1 RP 18) But even the half-century-old California case petitioner primarily relies upon reflects the same “reasonable care”/ “reasonableness” analysis addressed above.⁸ *Grudt v. City of Los Angeles*, 2 Cal.3d 575, 86 Cal. Rptr. 465, 468 P.2d 825 (1970) (App. Br. 26, 32).

Indeed, since *Grudt* was decided the California courts have recognized that “[i]f the law required police to defend the reasonableness of their conduct any time a plaintiff made a prima

⁸ The California Court distinguished between California and federal law as summarized in *Billington* in addressing the negligence claim asserted in *Hayes v. County of San Diego*, 57 Cal. 4th 622, 160 Cal. Rptr. 684, 305 P.3d 252 (2013) (App. Br. 26, 32). As explained in the text, that distinction is not recognized in Washington. Regardless, a claim such as that considered in *Grudt*, which relied upon the officers’ violation of a City police manual on use of firearms, remains better addressed as one for negligent supervision or training. In this case, such a claim fails for the reasons addressed in Argument § E, *infra*.

facie case by showing an offensive touching, the already heavy burdens law enforcement bears for us would become cetaceous.” *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1275, 74 Cal. Rptr. 2d 614 (1998); *see also Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (Fourth Amendment qualified immunity ‘protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.’).

As to the other out-of-state authority relied upon by plaintiff (App. Br. 26-27), the District of Columbia cases apply D.C. common law permitting the pleading of separate negligence and battery claims arising out of the same force when the negligence claim (as in *Grudt*) invokes a police regulation establishing a standard of care distinct from the excessive force standard,⁹ a “distinct act of negligence, a misperception of fact, may have played a part in the decision to fire,” and a “negligent act that precedes the application of the relevant force or resort to firearms.” *Dist. of Columbia v. Chinn*, 839 A.2d 701, 710-12 (D.C. 2003). *Chinn* synthesizes over 40 years

⁹ No such argument is or could be made here. As set out in Argument §.E, *infra*, plaintiff’s negligent training and supervision and training claims must be dismissed both because Officer Volk was acting within the scope of her employment and because on summary judgment plaintiff offered no evidence of negligent training or supervision.

of D.C. common law (including those cases relied upon by plaintiff), noting that there were two distinct lines of cases. *Chinn* recognizes that a plaintiff cannot merely bootstrap a negligence claim to allegations amounting only to a battery because “[i]t is tautological to speak of the applicable standard of care as being the duty not to use excessive force; that is the precise boundary line of the privilege itself.” 839 A.2d 711.¹⁰

Nor does the possibility of a change in the standard governing police conduct, by statute, initiative, or commission (App. Br. 15, 28-31), provide a basis for this Court to create a new tort. To the contrary, these efforts reflect the recognition that Washington law currently protects a law enforcement officer’s justifiable use of deadly force. *See* RCW 9A.16.040; *Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3, 459 P.2d 389 (1969) (“where a law is amended . . . it is presumed that the legislature intended a change in the law”). As the defenses to common law battery and excessive force

¹⁰ The Louisiana cases relied upon by plaintiff are inapposite. *Picou v. Terrebonne Par. Sheriff’s Office*, 343 So.2d 306 (La. App.), *appl. denied*, 345 So.2d 506 (1977) (App. Br. 27), affirmed judgment for the defendant. *LaBauve v. State*, 618 So.2d 1187 (La. App.), *writ. denied*, 624 So. 2d 1235 (1993) (App. Br. 27), uses excessive force analysis consistent with that discussed in the text. The Arizona Supreme Court has granted review of the intermediate court’s decision in *Ryan v. Napier*, 243 Ariz. 277, 406 P.3d 330 (2017) (App. Br. 27).

claims demonstrate, Washington law does not allow claims for negligence in the intentional infliction of force.

D. Even under plaintiff's theory, law enforcement falls within the scope of the public duty doctrine as a government function, imposed on the City by statute.

Finally, analyzing plaintiff's proposed new negligence claim through the (much-maligned) lens of the public duty doctrine confirms that it cannot be allowed. Plaintiff argues that the City's duty analysis and the application of the public duty doctrine is "nothing more than a backdoor device to effectively restore sovereign immunity despite legislative abolition of that immunity." (App. Br. 36) To the contrary, as outlined in Argument § A, *supra*, sovereign immunity and the public duty doctrine are two distinct legal doctrines, and they exist independently. *J & B Dev.*, 100 Wn.2d at 303. Plaintiff's argument evidences a fundamental misunderstanding about the scope and operation of the public duty doctrine.

Plaintiff asserts that local governments are "liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation." (App. Br. 36, quoting RCW 4.96.010) The City does not disagree with that well-established principle. Plaintiff's argument, however, overlooks the operative

portion of this statement – that the City’s liability extends *only to the same extent as that of a private person or corporation*.

“[G]overnments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law[.]” *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, ¶ 47, 310 P.3d 1275 (2013). “Private persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the State of Washington.” *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 887, ¶ 32, 288 P.3d 328 (2012) (Chambers, J., concurring).

Because the legislature has declared that governments are to be liable for their tortious conduct just like private persons or corporations, governments have historically been held liable for breach in tort of a duty owed by a private person, often without resort to analysis under the public duty doctrine. For example, a city’s building department owes common law, premises-liability duties to those who enter the building department’s offices, because all possessors of land owe the same duties to those who enter, whether the landowners are public or private entities. But that same building department’s duty to issue building permits is a governmental function imposed by

ordinance, and is not a duty shared with private persons. *Munich*, 175 Wn.2d at 888, ¶ 34 (Chambers, J., concurring).¹¹

Because uniquely governmental functions are duties imposed for the good of the public as a whole, these governmental functions do not give rise to an individual duty owed to the plaintiff sufficient to support a negligence action unless the plaintiff can establish a particularized duty of care. In this sense, the public duty doctrine is nothing more than a “focusing tool” that directs the court to identify a particularized duty of care owed to a specific individual – one of the “exceptions” to the public duty doctrine – as a predicate to imposing tort liability for a governmental function.

For the same reason, as Justice Chambers’ premises liability example illustrates, when the government acts in a proprietary capacity, it is liable for breach of an established duty of care just as any

¹¹ Statutory obligations imposed on government are frequently owed to the public at large and not to any particularized class of individuals. This explains why the public duty doctrine is often used in evaluating obligations imposed on a governmental entity by statute, as noted by Justice Chambers in his concurrences in *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 459 (2006) and *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, ¶¶ 30-36, 288 P.3d 328 (2012). But neither *Cummins*, *Munich* nor any other case supports plaintiff’s claim that the public duty doctrine has *only* been used to determine whether the in government owes a tort duty of care based upon a statute. See *Munich*, 175 Wn.2d at 891, ¶ 36 (“I will concede that several of our cases have appeared to analyze both statutory duties and common law duties under the public duty analytical framework.”) (citing cases).

other person or entity would be. “The principal test in distinguishing governmental functions for proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 550-51, 78 P.3d 1279 (2003). *See also Hoffer v. State*, 110 Wn.2d 415, 422, 755 P.2d 781 (1988) (A government acts in a proprietary capacity ‘when it engages in a business-like venture as contrasted with a governmental function.’”) (quoted source omitted).

In applying this test, this Court in *Okeson* concluded that the electric utility operates for the benefit of its customers, and not the general public, and thus, the electric utility is a proprietary function of government. 150 Wn.2d at 551. Similarly, this Court found that the Washington Public Power Supply System was acting in a proprietary capacity because issuing bonds was not a public service, but rather was raising private funds for a public use in *Haberman v. WPPSS*, 109 Wn.2d 107, 158, 744 P.2d 1032, 750 P.2d 254 (1987). In contrast, this Court found that the public duty doctrine was applicable when the bondholder’s allegations focused primarily on the State Auditor’s alleged failure to disclose weaknesses in the bonds and the true extent of Supply System’s financial difficulties in

Hoffer, because the State Auditor “was acting pursuant to noncommercial and uniquely governmental duties:”

Only government officials are charged with auditing public offices and with the registration of securities. Therefore, the Auditor’s acts were not proprietary in nature and the public duty doctrine is applicable to this case.

110 Wn.2d at 422.

Plaintiff argues that the negligence claim here is a “common law cause of action,” but does not assert that Officer Volk or Tacoma was acting in a proprietary capacity. Nor does plaintiff identify any particularized duty of care¹² in support of his argument that the trial court erred in using the public duty doctrine to analyze the claim. (App. Br. 37)

For example, plaintiff relies upon *Coffell v. Clallam County*, 58 Wn. App. 517, 794 P.2d 513 (1990), and *Garnett v. City of Bellevue*, 59 Wn. App. 281, 796 P.2d 782 (1990), *rev. denied*, 116

¹² In particular, plaintiff has not argued, and the facts do not support, application of the special relationship exception to this case. “A special relationship between a municipality’s agents and a plaintiff will exist and thereby give rise to an actionable duty, if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff.” *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 879, ¶ 15, 288 P.3d 328 (2012). In this case, there is no evidence to establish either an assurance by Officer Volk or justifiable reliance by the plaintiff in this case.

Wn.2d 1028 (1991), to support his claim that “governments can be liable for ‘law enforcement activities.’” (App. Br. 18-19; 37-38) But in both of those cases the plaintiff established a particularized duty of care owed to him individually under one of the exceptions to the public duty doctrine.

“The gist of plaintiffs’ claim was that defendant officers stood by while plaintiffs’ building were being destroyed by Caldwell and others, and prevented plaintiffs from doing anything about the destruction even though the officers knew of plaintiff Coffell’s claim of ownership and plaintiff Knodel’s claim of possession” in *Coffell*, 58 Wn. App. at 519. The *Coffell* court concluded that while the public duty doctrine did apply, under this Court’s analysis in *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1987), the “failure to enforce” exception to the doctrine applied.

Similarly, although the *Garnett* court stated that the “public duty doctrine was inapplicable,” its decision was actually an application of the “special relationship” exception to the doctrine:

[T]he officers’ direct contact with the two women established a “special relationship”, which allowed them to sue the officers under the “special relationship” exception to the public duty doctrine.

Keates v. City of Vancouver, 73 Wn. App. 257, 269, 869 P.2d 88 (plaintiff’s “reliance on *Garnett* for the proposition that a duty arises

upon direct contact between the police and the plaintiff is misplaced”), *rev. denied*, 124 Wn.2d 1026 (1994). Thus, these cases do not support plaintiff’s position.¹³

¹³ Plaintiff’s attempts to interject this Court’s § 302B analysis into this case by focusing on the distinction between misfeasance and nonfeasance (App. Br. 17-18) is misplaced, as § 302B has no application to the instant case. This Court has adopted §302B of the *Restatement (Second) of Torts* to create a duty “*in limited circumstances*,” to guard another against the criminal conduct of a third party. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 757-58, ¶ 57, 310 P.3d 1275 (2013) (emphasis added). This duty “can arise ‘where the actor’s own affirmative act has created or exposed the other to a recognizably high degree of risk of harm’ from a third party’s criminal acts. *Washburn*, 178 Wn.2d at 757-58, ¶ 58 (quoted source omitted). For example, in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), this Court reasoned that “absent some kind of special relationship between the plaintiff and defendant under Restatement § 302B, only misfeasance, not nonfeasance, could create a duty to act reasonably to prevent foreseeable criminal conduct.” *Washburn*, 178 Wn.2d at 758, ¶ 60. Because the police had no special relationship with the plaintiff and their conduct did not create a new risk to the plaintiff (but rather simply failed to ameliorate an existing risk by not picking up the shotgun shells), § 302B did not operate to create a duty. *Robb*, 176 Wn.2d at 437-38, ¶ 22. In contrast, in *Washburn*, the Court concluded that the officer had a statutory duty to serve the anti-harassment order and by his affirmative conduct, the officer created a new risk to the decedent. Consequently, § 302B operated to create a duty, imposed on the officer, to guard the decedent against the criminal acts of her boyfriend. *Washburn*, 178 Wn.2d at 60, ¶ 65.

One need look no further than *Munich* to recognize the fallacy of plaintiff's argument.¹⁴ This Court began its analysis by noting that the County owed a statutory duty to the general public under RCW 36.28.010 to preserve the peace and to arrest those who disturb it in *Munich*, 175 Wn.2d at 878, ¶ 13. Because the statutory duty to preserve the peace and enforce the law benefits society as a whole, it did not create an actionable duty owed to the *Munich* plaintiffs. Further, the Court in *Munich* expressly stated that the County's duty to public was mandated by statute; there was no common law duty at issue. 175 Wn. 2d at 878 n.2. Even accepting plaintiff's argument that the public duty doctrine applies only to statutorily-imposed obligations, the City of Tacoma's duty to the general public to

¹⁴ *Munich* is not the only decision to conclude that the public duty doctrine applies to police services and law enforcement activities. See, e.g., *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983) (duties owed by police "are owed to the public at large and are unenforceable as to individual members of the public."); *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1988) (applying public duty doctrine to law enforcement activities, but concluding that the "failure to enforce" exception applied to create an actionable duty); *Rodriguez v. Perez*, 99 Wn. App. 439, 443, 994 P.2d 874 (2000) ("For example, the duty of police officers to investigate crimes is a duty owed to the public at large and is therefore not a proper basis for an individual's negligence claim." (emphasis added), rev. denied, 141 Wn.2d 1020 (2000)); *Torres v. City of Anacortes*, 97 Wn. App. 64, 74, 981 P.2d 891 (1999) ("The relationship of police officer to citizen is too general to create an actionable duty. Courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual."), rev. denied, 140 Wn.2d 1007 (2000).

preserve the peace, enforce the laws, and arrest those who violate the law is, in fact, imposed by statute, charter provisions and ordinances. That duty is not based on the common law and it is not a duty that it has in common with any private person.

Article XI, §11 of the Washington Constitution grants to the City of Tacoma the power to “make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” As a first class charter city, Tacoma “is authorized to enact needed police regulations to punish practices dangerous to public safety or health, and preserve the public peace and good order.” *City of Seattle v. Montana*, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996) (citing Wash. Const., art. XI, §11; RCW 35.22.280(35)).¹⁵ Pursuant to its Charter, the City Council created the Tacoma Police Department, and vested the Police with the duty to prevent crime and enforce all criminal laws and ordinances. City of Tacoma Charter § 3.11; Tacoma Municipal Code 1.06.470.

¹⁵ “Any city of the first class shall have power . . . [t]o provide for the punishment of all disorderly conduct, and of all practices dangerous to public health or safety, and to make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits, and to provide for the arrest, trial, and punishment of all persons charged with violating any of the ordinances of said city.” RCW 35.22.280(35).

Thus, contrary to plaintiff's unsupported assertion, the City has a statutorily imposed duty to provide police services, enforce the law and keep the peace. That duty – to enforce the laws and keep the peace – is imposed solely on government and owed to the public at large. There is no actionable common law duty owed to plaintiff under the circumstances of this case.

E. Because Officer Volk was acting within the course and scope of her employment, plaintiff has no negligent training and supervision claims.

“In Washington, a cause of action for negligent supervision requires a plaintiff to show that an employee acted outside the scope of his or her employment.” *LaPlant v. Snohomish County*, 162 Wn. App. 476, 479, ¶ 10, 271 P.3d 254 (2011); *see also Gilliam v. Dep’t of Soc. & Health Servs.*, 89 Wn. App. 569, 584-85, 950 P.2d 20 (“When an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising the employee.”), *rev. denied*, 135 Wn.2d 1015 (1998) (both citing *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 51, 929 P.2d 420 (1997)). The City was entitled to summary judgment on the negligent training and supervision claims because Officer Volk was acting within the course and scope of employment when she shot plaintiff. (CP 250-52) Plaintiff’s claim on appeal that he is “entitled to argue in the

alternative that the City is liable on its own for the negligent training/supervision of Volk or was liable on the basis of *respondeat superior* for Volk's negligent conduct" (App. Br. 21) is contrary to the undisputed facts and misapprehends the nature of negligent training and supervision claims.

Officer Volk was acting within the course and scope of her employment as a Tacoma police officer during the contact with Mr. Beltran. Plaintiff alleged as much in his complaint (CP 74), and the City conceded as much in its answer. (CP 81) Moreover, in order to impose liability against the City for the alleged assault and battery (Officer Volk's use of deadly force), plaintiff must argue that Officer Volk was acting within the course and scope of her employment, as Officer Volk is not a party to this case. The only way plaintiff can hold the City liable for Officer Volk's intentional acts is pursuant to the doctrine of *respondeat superior*. *Niece*, 131 Wn.2d at 48. Since Officer Volk was acting within the scope of her employment, claims of negligent supervision and training are not cognizable because these causes of action arise only when the employee's tortious conduct is outside the scope of employment. *Niece*, 131 Wn.2d at 48. *See also Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 47, ¶ 60, 380 P.3d 553, *rev. denied*, 186 Wn.2d 1028 (2016).

In addition to the legal bar, the trial court's dismissal of these claims must be affirmed because plaintiff failed to adduce competent evidence to support these claims in response to summary judgment. In order to survive a motion for summary judgment, the party bearing the burden of proof on a claim must adduce evidence to establish each and every element of their prima facie case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Plaintiff did not respond to the City's arguments on the negligent training and supervision claims either in his briefing or at oral argument (*See* CP 335-58; 1 RP 16-26), and presented no evidence to establish that the City had reason to know that Officer Volk presented a risk of danger to others. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *rev. denied*, 123 Wn.2d 1026 (1994); *Peck v. Siau*, 65 Wn. App. 285, 289-90, 827 P.2d 1108, *rev. denied*, 120 Wn.2d 1005 (1992) (both dismissing claims of negligent supervision when no evidence defendant knew or should have known employee constituted a danger). The trial court therefore correctly dismissed plaintiff's negligent supervision and training claims on the facts and the law.

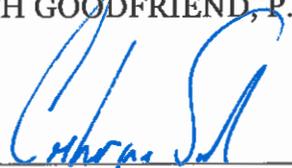
IV. CONCLUSION

The trial court correctly dismissed plaintiff's claims for negligent infliction of intentional force, negligent training, and negligent supervision. This court should affirm and remand for trial on plaintiff's intentional tort claim.

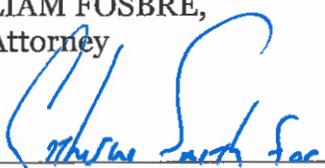
Dated this 11th day of June, 2018.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 11, 2018, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of June, 2018.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

June 11, 2018 - 4:16 PM

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