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Supreme Court No. 98831-5
(COA No. 79394-2)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Respondent,

v.

KERRY ZIEGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Officer Kerry Zieger, petitioner here and appellant below, respectfully requests that this Court accept review pursuant to RAP 13.4(b) of the Court of Appeals decision terminating review dated June 29, 2020, a copy of which is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. In ordinary negligence cases, expert testimony is not required to establish breach of an applicable standard of care. The Court of Appeals held that expert testimony was required because the issue of breach was not within the ordinary knowledge and experience of laypersons. Did the Court of Appeals err by holding that Officer Zieger's breach of duty claim required expert testimony when Sergeant James Dymont has the requisite knowledge and experience to testify as to whether the Respondent City of Seattle ("City") breached the duty of care owed to Officer Zieger?

2. Breach is the failure to exercise ordinary care. The Court of Appeals ruled that Officer Zieger raised no evidence to show that the City breached the duty of care owed to him by failing to provide him with a higher protection bicycle helmet on May Day 2016. Did the City breach the duty of reasonable care when it failed to provide Officer Zieger with a higher protection bicycle helmet when it knew that the regular bicycle

helmet did not provide the necessary face and head protection for violent protests, knew that May Day is historically a violent event where injuries to officers are certain, and knew that a previous injury had been prevented with the higher protection helmet the year prior?

3. The Court of Appeals ruled that Officer Zieger could not prove that the City's actions in failing to provide him with a higher protection bicycle helmet proximately caused his serious head injury. Did the Court of Appeals err in finding an absence of proximate cause when Officer Zieger presented evidence to show that the higher protection helmet had significantly more facial and head protection than the regular bicycle helmet and Sergeant Dymant testified that Officer Zieger's head injury would more likely than not have been prevented had he been wearing the higher protection bicycle helmet?

C. STATEMENT OF THE CASE

The parties do not dispute that May Day is historically a violent event, and that prior to May Day 2016, the Seattle Police Department ("Department") command staff was briefed on the potential weapons and tactics that may be used by anarchist protesters during the demonstrations. Clerk's Papers ("CP") 119-120.¹ With that history and knowledge, on

¹ See CP 13; CP 128-129; CP 204-209; CP 225; CP 239; and CP 303.

May 1, 2016, Officer Zieger was ordered by his chain of command to work as an augment bicycle officer with the East Precinct bicycle squad. CP 119-120. Officer Zieger arrived at the Department's West Precinct for roll call. CP 119-120. Following roll call, he located a bicycle and a bicycle helmet, and was eventually called to the West Precinct with his squad to "gear up" and then directed to Westlake Park where the anti-capitalist march was scheduled to begin. CP 119-120.

Sergeant James Dymont has extensive experience as a supervisor on the Department's bicycle squad and has been intimately involved in the Department's bicycle helmet selection process since about 2000. CP 127; CP 145-146. Since 2012 or 2013, Sergeant Dymont was integrally involved in looking for a bicycle helmet that suited the Department's "crowd management needs better." CP 147-148; CP 149.

Sergeant Dymont researched and discovered the Bell Super 2R higher protection bicycle helmet, which provided "much better protection" than the regular bicycle helmet because of the additional safety accessories, including removeable chin protection and military specialized goggles, which were designed to fit better with the helmet. CP 150-151;

CP 153-154; CP 155-156.² Sergeant Dyment testified that the regular bicycle helmet's lack of protection placed officers "at increased risk when deployed in situations that become violent with projectiles being thrown at them." CP 128; CP 273.

The Bell Super 2R suited the Department's "needs better than anything else out on the market," and, as a result, the Department began purchasing and integrating them into the Department at the end of 2014, beginning of 2015. CP 145; CP 157-158.³

When Officer Zieger arrived at the West Precinct on May Day 2016, to pick up his protective gear, he was told by Officer Scott Lucky, that only the older bicycle helmet was available, not the Bell Super 2R helmet. CP 120. Officer Zieger took the older bicycle helmet, followed his employer's direction, and rode with his bicycle squad to Westlake Park in downtown Seattle where his squad positioned themselves in an alley on

² Photographs comparing the regular bicycle helmet with the Bell Super 2R helmet also show the difference in protection between the two helmets, particularly in the area where Officer Zieger was injured. CP 128; CP 236.

³ Sergeant Dyment testified that in 2015, the Department decided "collectively" that the more-protective Bell Super 2R helmet would be the standard bicycle helmet. CP 164-166; and *see also* CP 128; CP 239 (in an email from Sergeant Dyment to the Seattle Police Foundation, he states that the Bell Super 2R helmet "...provides the *protection necessary for police in riot control situations....*")

the southeast corner of Westlake Park to monitor the protest and wait for direction. CP 120.⁴

Without the higher protection helmet to protect him from the violent crowd, Officer Zieger continued with his bicycle squad through downtown Seattle when he and his squad observed two other bicycle officers who appeared to be separated from their squad that were surrounded by protesters. CP 121. As Officer Zieger and his squad set up to assist the other officers, about 50 to 70 protesters surrounded him and began assaulting him and his squad with weapons, including a road flare and cans of soup. CP 121. While the crowd of approximately 50 protesters continued the assault, Officer Zieger turned around, and saw a large concrete rock come toward his head. CP 121. He felt a thud as the rock struck him above his left eye. CP 121. Officer Zieger deployed his pepper spray to protect himself and his fellow officers from the violence until the blood from his head wound temporarily blinded him. CP 121. Officer Zieger suffered a permanent head injury following the violence on May Day 2016. CP 122.

⁴ At about the same time, the Department was notified that the protest was going to “get violent,” and the Seattle Police Operations Center dispatch began reporting that protesters were being hit with rocks, batons, bricks, and flares. CP 128; CP 257-260.

Given his familiarity and understanding of the safety features of the Bell Super 2R, Sergeant Dymont opined that if Officer Zieger had been wearing the Bell Super 2R on May Day 2016, his injury as sustained would, more likely than not, have been prevented.⁵

The undisputed evidence⁶ demonstrates that while the Department equipped all of its full-time bicycle squad officers with the Bell Super 2R helmet with the increased head and facial protection and ballistic goggles, there were not enough helmets to equip all of the augment officers working on the frontlines of the violent May Day 2016 protests, including Officer Zieger. CP 273. The command staff was also aware that another officer's "serious injury" was "prevented" on May Day 2015, the year prior, because the officer was wearing the Bell Super 2R higher protection bicycle helmet. CP 122; CP 124-125.

D. ARGUMENT

RAP 13.4 provides that "a petition for review will be accepted by the Supreme Court only ... (4) If the petition involves an issue of

⁵ CP 171-172; and *see also* CP 129, and 290 (Deputy Chief Garth Green opined that Officer Zieger was injured because "we did not have enough [full face bicycle helmets] to outfit our officers and an officer was injured due to it.")

⁶ The City does not dispute the fact that there were not enough Bell Super 2R helmets for all of the bicycle squad officers working May Day 2016.

substantial public interest that should be determined by the Supreme Court.”

This petition involves an issue of substantial public interest and must be decided by this Court because it involves the City’s responsibility to provide adequate protective equipment to its bicycle squad officers working large scale violent protests. While there are current debates on how the Department should be generally equipping its officers in protest situations, there should be no debate that providing adequate head and facial protection to bicycle officers (who often do not have the same level of protection as other patrol officers) is a necessary and essential part of the equipment that should be provided to officers working May Day and other large scale, violent, crowd management events.

Moreover, the state legislature believed that the duty that police departments in Washington owe their police officers is so great that it carved out an exemption to the industrial insurance statute to allow officers who are injured on the job to sue their employers for negligence under RCW 41.26.281. Given that this case involves serious safety risks involving law enforcement officers working violent protest events, the potential harm caused in failing to adequately protect officers during violent protests, and the statutory duty the City owes to its police officers

to keep them safe, this case involves an issue of substantial public interest and should be accepted for review.

1. Expert Testimony is Not Required in Ordinary Negligence Cases

The Court of Appeals erroneously held that Officer Zieger's breach of duty claim required expert testimony. Not only is expert testimony not required in this case, but even if it is, Sergeant Dymant is qualified to provide that testimony.

In ordinary negligence cases, expert testimony is not required to establish a breach of an applicable standard of care. *See Peterson v. State*, 100 Wn.2d 421, 437 (1983). Washington courts have not required expert testimony if the “the act in question is within the ordinary knowledge and experience of laypersons....” *AAS-DMP, L.P. Liquidating Trust v. Acordia Northwest, Inc.*, 115 Wn. App. 833, 841-42 (2003), and *see also Slack v. Luke*, 192 Wn. App. 909, 916-17 (2016) (in legal malpractice action, court held that “Washington does not require expert testimony ‘when the negligence charged is within the common knowledge of lay persons.’”)

In medical negligence cases, “special rules have been developed limiting the admission of expert testimony regarding the standard of care of a physician.” *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App.

28, 33 (2000). “However, in ordinary negligence and products liability cases where obscure medical facts are not involved, traditional rules apply.” *Id.* at 34. Moreover, under ER 701, “[a] lay witness may testify as to his or her opinion under circumstances of personal knowledge based upon rational perceptions when it would help the jury understand the witnesses’ testimony or a fact in issue.” *Id.*, and *see also Unger v. Cauchon*, 118 Wn. App. 165, 177-78 (2003).

The Court of Appeals erred in holding that the breach of duty alleged by Officer Zieger is not within the ordinary knowledge and experience of laypersons and that Sergeant Dymment’s testimony does not support the fact that reasonable prudence called for the Bell Super 2R helmet for all officers on May Day 2016. Slip Op. at 7-9.

Whether Sergeant Dymment is testifying as a layperson or as an expert, Officer Zieger presented evidence to show that given his length of experience on the bicycle squad and extensive involvement in bicycle equipment acquisition at the Department, he has the relevant knowledge, experience, and expertise to provide competent testimony as to whether the City breached the duty of care owed to Officer Zieger. CP 145-149.

Sergeant Dymment spent several years researching a bicycle helmet that suited the Department’s “crowd management needs better.” CP 147-149. The Court of Appeals’ assertion that Sergeant Dymment did not testify

that reasonable prudence called for the Bell Super 2R helmet for all officers on May Day 2016, is rebutted by the evidence. Sergeant Dymant testified that the “lack” of “protection” provided by the regular bicycle helmet will put “officers at increased risk when deployed in situations that become violent with projectiles being thrown at them.” CP 128; CP 273.

Sergeant Dymant’s testimony that finding a higher protection bicycle helmet for the Department’s bicycle squad officers was “very important, important enough to where I’ve [Sergeant Dymant] researched this and found out about these helmets and wanted to have those...there’s just a higher level of protection” is evidence that reasonable prudence required the Department to provide the Bell Super 2R helmet to all bicycle squad officers on May Day 2016 – evidence that was not properly considered by the Court of Appeals. CP 161-162.

For those reasons, Sergeant Dymant’s testimony may be properly relied upon as evidence as to whether the City breached the duty of care owed to Officer Zieger, and proximately caused his head injury on May Day 2016. It should be left to a jury to weigh that evidence.

2. The City of Seattle Breached the Duty of Care Owed to Officer Zieger

The Court of Appeals erred in holding that Officer Zieger failed to present evidence that the City breached the duty of care owed to him.

“Breach is the failure to exercise ordinary care, or alternatively phrased, the failure to exercise such care as a reasonable person would exercise under the same or similar circumstances. Breach is also called ‘negligence.’” *Mathis v. Ammons*, 84 Wn. App. 411, 416 (1996).

Breach and proximate cause are generally fact questions for the trier of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275 (1999). Only if reasonable minds cannot differ, are these factual questions determined as a matter of law. *Id.* “If there is any evidence tending to show that the [defendant] failed to comply with the required standard of care, then the question of negligence must be left to the jury.” *Walker v. King County Metro*, 126 Wn. App. 904, 908 (2005).

“Once the existence of a legal duty is established as a matter of law, the scope of that duty is determined by analyzing the foreseeability of the harm to the plaintiff.” *Lee v. Willis*, 194 Wn. App. 394, 401 (2016) (citing *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468 (1998)).

In the instant action, the Court of Appeals’ holding that Officer Zieger raised no facts to show that the Department affirmatively determined that the regular bicycle helmet was unsuitable for bicycle officers in riot conditions is contradicted by the evidence.

There was no dispute between the parties that May Day is historically a violent event where various weapons and other implements

of harm are used;⁷ injuries to officers and bystanders is not only likely but expected.⁸ In approximately 2013,⁹ the City began proactively searching for a new *and* different helmet after determining that the regular bicycle helmet *no longer provided the necessary level of protection* for its bicycle squad officers working crowd management events where violence against officers was much more likely. CP 149; CP 150-151. The testimony of Sergeant Dymant raises an issue of fact to show that the regular bicycle helmet failed to provide bicycle squad officers with any facial protection, or protection to the side of the head. CP 155-156. Sergeant Dymant testified that this “lack” of “protection” will put “officers at increased risk when deployed in situations that become violent with projectiles being thrown at them.” CP 273.

Contrary to the holding of the Court of Appeals,¹⁰ the fact that the City began researching and purchasing the higher protection Bell Super 2R helmet is evidence that the regular bicycle helmet was no longer suited

⁷ Weapons used during May Day protests include hammers, wrenches, tire irons, batteries, cans of food, road flares, fire extinguishers, bottle rockets, smoke grenades, **rocks, bottles, bricks, construction debris and other improvised weapons of opportunity.** CP 197-202.

⁸ CP 13; CP 303 (“[h]istorically, the event has included a large scale Police response, assaults on Officers, significant property damage, and multiple arrests.”); CP 204-209.

⁹ CP 147-151.

¹⁰ Slip Op. 10.

to the task of protecting bicycle officers in violent clashes with protesters. There would be no reason to spend Department resources to research and find a better, more protective bicycle helmet if the regular bicycle helmet was doing its job in protecting officers from harm during these events. The City approved and began purchasing the Bell Super 2R higher protection bicycle helmet because:

...[I]t...provides the *protection necessary for police in riot control situations*. The removeable chin bar allows the officer to have one helmet (which is one of the safest made) that has face protection that is removable (in case we need to access our gas mask). *This level of protection provided officers with the confidence to execute our maneuvers while rocks and canned food was thrown at them.*

CP 239 (emphasis added).

The City's decision to begin purchasing a new, more protective helmet is evidence that the City rejected the regular bicycle helmet in favor of the Bell Super 2R higher protection helmet for its bicycle officers working crowd management events.

In addition to the well-known history of violence on May Day, the City was also aware that the Bell Super 2R higher protection helmet prevented an injury on May Day 2015. In her May 2, 2016 email to Officer Zieger, former Department Police Chief Kathleen O'Toole, states that she "expedited the original purchase" of Bell Super 2R helmets and

was “so thankful” she did when she learned that “a serious injury was prevented as a result” on May Day 2015. CP 124-125.

Even though there was a foreseeable risk of violence to officers on May Day and the City was aware that a prior injury was prevented with the Bell Super 2R helmet, the City only provided its full-time bicycle squad officers with the Bell Super 2R higher protection helmet, but failed to ensure there were enough higher protection helmets for the augment officers who were working on May Day 2016, including Officer Zieger.¹¹

The exact harm and danger that could befall the bicycle squad officers was not only reasonably foreseeable but was actually predicted by the City in advance of May Day 2016 because the City *knew* that the regular bicycle helmet did not provide bicycle squad officers with adequate face and head protection, *knew* that the Bell Super 2R bicycle helmet had extra head, face, and eye protection, *knew* that the Bell Super 2R had prevented a serious injury a year prior on May Day 2015, *knew* of the historical violence that occurred on May Day, *knew* that May Day 2015 was particularly large and violent, and *knew* that protesters would be throwing hard items at officers on May Day, (such as rocks, bottles,

¹¹ CP 273 (“full time officers on bicycles...have the Bell Super 2R helmets with increased head protection as well as the ballistic goggles with military specifications for protection,” “our augment officers on bikes do not generally have the same protection....”

bricks, and construction debris). Being fully aware of the risks and dangers, the City ordered Officer Zieger to the frontlines of the May Day protest with the old, less-protective helmet.

Accordingly, this Court should grant review and reverse the Court of Appeals because there is a genuine issue of material fact to show that the City breached the duty to use reasonable care by failing to provide Officer Zieger with a Bell Super 2R higher protection helmet on May Day 2016.

3. The City's Breach Proximately Caused Officer Zieger's Head Injury

To prove negligence, Officer Zieger need only demonstrate that the City's action or failure to act was the proximate cause of his harm. *See, e.g., HBH v. State of Washington*, 197 Wn. App. 77, 93 (2016) (citing *Wuthrich v. King County*, 185 Wn.2d 19, 25 (2016)).

“Direct evidence or precise knowledge of how an accident occurred is not required; circumstantial evidence is sufficient.” *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App. 2d 115, 118 (2017) (citing *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281 (2003)). “The inquiry is whether a reasonable person could conclude that there is a greater probability that the conduct in question was the proximate cause of the

plaintiff's injury than there is that it was not." *Id.* at 118-19 (citing *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 425-26 (1969)).

Proximate cause includes two elements: cause in fact and legal cause. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609 (2011). To establish "cause in fact," a plaintiff must show "that the harm suffered would not have occurred but for an act or omission of the defendant," i.e., "but for" the defendant's breach of duty, the plaintiff would not have been injured. *Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 322 (2005), and see also *Hartley v. State*, 103 Wn.2d 768, 778 (1985). "As a determination of what actually occurred, cause in fact is generally left to a jury." *Wuthrich v. King County*, 185 Wn.2d 19 (2016) (quoting *Hartley*, 103 Wn.2d at 778.) Indeed, "such questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion is possible." *Hartley*, 103 Wn.2d at 778.

Legal causation, on the other hand, "is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." *Lowman v. Wilbur*, 178 Wn.2d 165 (2013) (quoting *Crowe v. Gaston*, 134 Wn.2d 509 (1998)). In deciding whether a defendant's breach of duty is too remote or insubstantial to trigger liability as a matter of legal cause," Washington courts evaluate "mixed considerations of logic,

common sense, justice, policy, and precedent.” *Id.* (citing *Hartley*, 103 Wn.2d at 779).

The Court of Appeals rejected Sergeant Dymment’s testimony on the issue of causation because he could not claim with absolute certainty that the Bell Super 2R would have prevented or mitigated Officer Zieger’s injury. Slip Op. 14. Nevertheless, the case law analyzing proximate cause only requires that Officer Zieger show that had the City provided him with the higher protection bicycle helmet, his head injury would have more likely than not been prevented. The design and specifications of the helmet itself¹² and Sergeant Dymment’s testimony is sufficient evidence for the issue of proximate cause to go to a jury.

Sergeant Dymment testified *in detail* about his knowledge of the design and benefits of the Bell Super 2R helmet, the various safety-enhancing features of the Bell Super 2R,¹³ the shortcoming of the regular bicycle helmet in adequately protecting officers in violent protest

¹² See photograph comparing the regular bicycle helmet with the Bell Super 2R with removeable safety features. CP 236.

¹³ The safety-enhancing features include the “removeable chin protection” that provided “jawline protection,” “military specialized goggles,” and “integrated venting.” CP 150-151; CP 153-154; CP 155-156.

situations,¹⁴ and ultimately why the Department selected the higher protection helmets for its bicycle squad officers. CP 150-151; CP 153-154; CP 155-156; CP 157-158.

Given Sergeant Dymment's expertise, knowledge, considerable research, and familiarity with the regular bicycle helmet and the higher protection Bell Super 2R helmet (which is not in dispute), Sergeant Dymment was in the best position to testify as to whether Officer Zieger's head injury as sustained would have been prevented had he been wearing the Bell Super 2R helmet. Sergeant Dymment testified in relevant part:

I believe it would have mitigated the injury and potentially stopped that injury just based on the integration of the goggle and the helmet itself and the nature in which his injury was sustained...

I believe it [the Bell Super 2R] probably would have - - it would have - - *it would probably would have worked, right?* I mean, we didn't test it, *but the fact that it's designed and you have that lip and level and - - it would have protected him from that helmet."*

CP 171-172.

Sergeant Dymment's testimony raises a genuine issue of material fact as to whether Officer Zieger's head injury would not have occurred *but for* the fact he was wearing the regular bicycle helmet rather than the

¹⁴ While the Bell Super 2R provided substantial face and head protection, the regular bicycle helmet (the Zen or Hex) provided "no protection of the face" or "the side of the head." CP 155-156.

Bell Super 2R helmet. Contrary to the holding of the Court of Appeals, *absolute certainty is not required to show proximate cause*. Officer Zeiger need only present evidence to show that a reasonable person could conclude that there is a greater probability (more than there is not) that the City's actions proximately caused his harm. Based on Sergeant Dymont's testimony and the visible safety features of the Bell Super 2R in comparison to the regular bicycle helmet, a reasonable person could certainly conclude that there is a greater probability, more than there is not, that the lack of higher protection bicycle helmet was the proximate cause of Officer Zieger's head injury.

Officer Zieger also raised a genuine issue of material fact concerning legal causation because the City's breach of duty is not too remote or insubstantial to trigger liability as a matter of legal cause given the fact the City was *aware* the regular bicycle helmet no longer adequately protected its bicycle officers during protests, was *aware* of the known dangers and risks to its officers during May Day, and was *aware* that another injury was prevented the year prior with the Bell Super 2R higher protection helmet. The foreseeability of harm to Officer Zieger based on the evidence offered provides important common sense, policy, and justice considerations that create a genuine issue of material fact as to legal causation.

Accordingly, this Court should grant review and reverse the Court of Appeals.

E. CONCLUSION

For the reasons set forth above, Petitioner Officer Zieger respectfully requests that the Supreme Court grant review pursuant to RAP 13.4(b).

DATED this 28th of July, 2020.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KERRY ZIEGER,)	No. 79394-2-1
)	
Appellant,)	
)	DIVISION ONE
v.)	
)	
CITY OF SEATTLE, a municipal)	UNPUBLISHED OPINION
subdivision in the State of Washington,)	
)	
Respondent.)	
_____)	

MANN, C.J. — Kerry Zieger, a Seattle police officer, appeals the summary judgment order dismissing his negligence lawsuit against the City of Seattle (City) arising from an injury he suffered, while on-duty, during a protest on May Day 2016. Zieger contends that the trial court erred when it concluded that he failed to present a dispute of material fact demonstrating the City breached its duty and the breach proximately caused Zieger’s injury. We disagree and affirm.

I.

A. May Day 2016

The Seattle Police Department (SPD) anticipated and planned for several marches and protests on May Day in 2016. The “Workers’ and Immigration Rights

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March” began in the morning as a large permitted demonstration. In the early evening hours, another group gathered downtown in Westlake Park for an unpermitted event referred to as the “May Day Anti-Capitalist March.” In the past, similar events resulted in violence and property damage. SPD anticipated the use of homemade weapons, ranging from hammers and wrenches to bricks, construction debris, and fireworks.

Zieger was assigned to bicycle patrol during the anti-capitalist part of the May Day protests. Because Zieger was not a full-time bike officer, SPD issued him a bicycle and helmet on the day of the protests. Zieger already had SPD issued eye protection and hardened body gear.

The day of the protest, two different styles of bicycle helmets were in use, the standard Zen or Hex model (collectively referred to as the “standard helmet”) and the Bell Super 2R.¹ The Bell Super 2R provides more facial protection because it has removable chin protection and the ability to integrate goggles. When Zieger arrived for his gear, all Bell Super 2R helmets were in use; thus, he was provided with the standard helmet. Other officers in his bicycle squad were also provided standard helmets instead of the Bell Super 2R helmets that day.

After receiving his gear, Zieger and his squad proceeded to Westlake Park in downtown Seattle. Zieger patrolled an area outside a parking lot on Second Avenue near either Stewart or Pine Street when he heard that two officers from another squad were surrounded by protestors. Zieger and his squad cleared a path through the protestors to reach the trapped officers. The trapped officers were in an alcove of a

¹ It is unclear from the record exactly which standard helmet Zieger wore, but it appears the Zen or Hex models are similarly different from the Bell Super 2R.

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building. Zieger and his squad formed a protective fence around the officers while they regrouped and extracted the officers. In the process of regrouping, Zieger realized that a crowd of 50 to 70 people was shouting in front of them. This crowd was not part of the main march. The crowd began throwing objects at the officers, including a road flare. Zieger saw the road flare land behind them and looked back to make sure it was not a bomb. As Zieger turned around, he saw a rock coming toward him and felt it hit his forehead above his left eye. Blood from his wound got in his eye and affected his vision. A SWAT (special weapons and tactics) team arrived and deployed less-lethal munition to diminish the crowd. Zieger deployed his pepper spray and fellow officers escorted him to a transport van for medical treatment.

Due to his injuries, Zieger took six weeks off from work to recover. Zieger has a permanent scar and suffers from periodic headaches and numbness connected to his injury.

B. Acquisition of the Bell Super 2R Helmet

SPD began purchasing and integrating the Bell Super 2R, bicycle helmets into its bicycle squad at the end of 2014. Sergeant James Dymont has served as a supervisor on the City's bike squad since 2012 and was involved in equipment selection and acquisition. In this role, he would identify a need, assess the benefits of different equipment available for purchase and get permission from the chain of command to purchase the equipment when he thought that it would be an improvement from SPD's current equipment.

In 2013, Dymont began looking for overall protective gear in response to an officer injuring his knee. This search included looking for more protective helmets.

Dyment was unable to find any helmets specifically marketed as riot gear for bicycle officers. Instead, Dyment was familiar with a new helmet, designed for “Enduro” style racing, and thought it would suit SPD’s needs for more protective gear. Specifically, the Bell Super 2R has a removable chin guard and SPD could combine the Bell Super 2R with “military specified goggles” to create “much better protection” than any other helmets on the market. Also, an integrated venting system allows goggles to vent through the helmet and prevents fogging.

Bike helmets are essential equipment, but SPD Deputy Chief Marc Green indicated that on May 1, 2016, equipping bike officers with a Bell Super 2R helmet was not considered essential. “[A]t that time there was no rule, custom, or practice within SPD that established this newer style of helmet as ‘essential safety equipment.’” Consistent with SPD’s practice of incrementally and proactively improving its protective equipment, SPD was transitioning to the Bell Super 2R helmet, but the standard helmets had been “successfully [in] use by SPD for years prior to May 1, 2016, and continued to be in use as of that date.”

After Zieger’s injury the City asked Dyment to evaluate whether the Bell Super 2R could have prevented a head injury like Zieger’s. Dyment expressed his opinion that “it would have mitigated that injury and potentially stopped that injury just based on the integration of the goggle and helmet itself and the nature in which his injury was sustained,” and he believed “that the goggles did provide some significant protection to [Zieger], based on where his injury occurred.”²

² It is unclear from the record how familiar Dyment was with the location of Zieger’s injury. Further, Dyment provided his opinion to SPD in hindsight.

C.

Zieger sued the City claiming that SPD was negligent for failing to prevent or protect him from the assault. Zieger alleged that SPD failed to exercise reasonable care by (1) not issuing a prompt dispersal order; (2) by not providing him with the Bell Super 2R helmet; and (3) by not providing him less-lethal munitions known as “blast balls.”

The City moved for summary judgment contending that Zieger lacked sufficient evidence to establish negligence and proximate cause on all three claims. The trial court granted summary judgment on all three claims. Zieger appeals only the trial court’s conclusion that Zieger failed to present a dispute of material fact that the City had breached its duty to equip Zieger with a Bell Super 2R helmet and this failure caused his injury.

II.

We review summary judgment orders de novo. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is appropriate if there “is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law.” CR 56(c). “In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.” Young, 112 Wn.2d at 225. If the defendant is the moving party and makes their initial showing, the inquiry shifts to the party with the burden of proof at trial to make a showing sufficient to establish the existence of an element essential to that party’s case. Young, 112 Wn.2d at 225. If the party with the burden of proof at trial fails to make that showing, then the trial court should grant summary judgment. Young, 112 Wn.2d at

225. In reviewing summary judgment, the court considers all facts and inferences in the light most favorable to the nonmoving party. Donatelli v. D.R. Strong Consulting Eng'g, Inc., 179 Wn.2d 84, 89, 312 P.3d 620 (2013).

To establish a claim of negligence, a plaintiff must prove the following elements: (1) that the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) injury to the plaintiff resulted; and (4) the defendant's breach was the proximate cause of the injury. Hoffstatter v. City of Seattle, 105 Wn. App. 596, 599, 20 P.3d 1003 (2001). "Negligence is generally a question of fact for the jury, and should be decided as a matter of law only 'in the clearest of cases and when reasonable minds could not have differed in their interpretation' of the facts." Bodin v. City of Stanwood, 130 Wn.2d 726, 741, 927 P.2d 240 (1996) (quoting Young v. Caravan Corp., 99 Wn.2d 655, 661, 663 P.2d 834 (1983)). At issue before us is whether the City breached a duty of care and whether the breach was the proximate cause of Zieger's injury.

A.

Zieger contends that the trial court erred in concluding that the breach of duty he alleged was not within the ordinary knowledge and experience of laypersons, and thus needed expert testimony. We disagree.

The parties do not dispute that cities owe employee police officers a statutory duty not to injure them by negligent acts or omissions. RCW 41.26.281; Locke v. City of Seattle, 133 Wn. App. 696, 705, 137 P.3d 52 (2006). The Law Enforcement Officers' and Firefighters' (LEOFF) Retirement System provides a cause of action, stating:

If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the

privilege to benefit under this chapter and also have cause of action against the government employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

RCW 41.26.281. The trial court acknowledged that the City owed a duty to Zieger under RCW 41.26.281 to “provide equipment that does not fall below the standard of care for police department employers.” The trial court concluded, however, that “the breaches alleged by Officer Zieger are not within the ordinary knowledge and experience of laypersons” and absence of an expert in this case “calls into question whether [Zieger] can meet his evidentiary burdens.”

To determine whether expert testimony is required as a matter of law, the court determines whether the evidence is such that the fact finder requires expert testimony to aid it in understanding the evidence or in determining an ultimate fact in issue. ER 702; 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 702.16, at 71 (6th ed. 2016). We review de novo whether expert testimony was required as a matter of law. Pagnotta v. Beall Trailers of Oregon, Inc., 99 Wn. App. 28, 36, 991 P.2d 728 (2000). “The pertinent inquiry is, of course, whether the subject would be commonly understood among lay people, not whether the subject would be commonly understood among experts. A subject that is commonly understood by experts is unobjectionable on that basis.” 5B TEGLAND, supra, § 702.16, at 73.

Ziegler's claim requires the fact finder to understand the standard of care for a reasonable police department outfitting its bike officers for riot conditions, and whether SPD's actions were prudent given the standard of care. We agree with the trial court that this is not something commonly understood by a lay person. For example, neither

helmet is specifically designed for police use in riot conditions. Indeed, the record reflects that there is no industry standard related to these helmets. Without an industry or department standard, a lay person is unlikely to understand the standard of care.

Moreover, Zieger's contention that SPD should not have deployed him without a Bell Super 2R helmet necessarily implies that SPD made tactical decisions between deploying a full fleet of bike officers equipped with both the standard helmets and the Bell Super 2R helmet, or deploying less bike officers who were all equipped with the Bell Super 2R helmet. This type of decision is also not within the ordinary knowledge and experience of laypersons because tactical decisions require specialized knowledge. It could well be that deploying fewer officers—only those with the Bell Super 2R helmet—would have put those officers at greater risk of harm.³ This is not within the common knowledge of a lay person.

On appeal, Zieger argues that the City's witness, Dymont, provided the expertise necessary. While Dymont might be qualified, he did not testify that reasonable prudence called for the Bell Super 2R helmet for all officers on May Day 2016. To the contrary, Dymont testified that the Bell Super 2R is still not an official industry or department standard. While Dymont believed the Bell Super 2R was a superior helmet, and the integrated goggles could have provided better protection, this does not demonstrate that ordinary care or reasonable prudence required the City to deploy only officers wearing the Bell Super 2R helmet.

³ At oral argument, Zieger's counsel conceded that, had SPD deployed only officers wearing the Bell Super 2R helmet, the result would have meant a smaller police presence to conduct crowd control. Even if the smaller police presence had superior equipment, there could have been a greater risk of harm to those officers and bystanders because it would have been more difficult to effectively control the protestors' movement with less police presence.

We agree with the trial court that Zieger's breach of duty claim required expert testimony.

B.

While Zieger offered no expert testimony on the standard of care, the trial court nonetheless examined whether he could meet his burden to establish the standard of care and breach of that duty. Ziegler contends that the trial court erred in concluding that he failed to demonstrate a genuine issue of fact showing that the City breached the duty of care owed to him on May Day 2016. We disagree.

"Breach is the failure to exercise ordinary care, or alternatively phrased, the failure to exercise such care as a reasonable person would exercise under the same or similar circumstances." Mathis v. Ammons, 84 Wn. App. 411, 416, 928 P.2d 431 (1996). Whether the facts establish breach is a question of fact. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Here, Zieger makes the conclusory argument that:

[t]he standard of care required the City to exercise reasonable care, not minimal or inferior care. The City's actions and rationale in selecting and purchasing the Bell Super 2R over the regular bicycle helmet is evidence demonstrating the City rejected the old bicycle helmet because it no longer met the safety needs of its bicycle squad officers.

(Emphasis added). Zieger failed, however, to offer evidence demonstrating that SPD rejected the use of the standard helmet. Instead, SPD continued to use the standard helmet during the transition period. Zieger has not pointed to any custom or practice in

other police departments demonstrating a rejection of the standard helmet or that other departments have rejected phased acquisition of new equipment.⁴

Zieger contends that he presented evidence that SPD should have known that the standard helmet had apparent shortcomings because SPD believed the Bell Super 2R offered superior protection. Therefore, Zieger argues, deploying officers with the standard helmets once SPD began purchasing a superior helmet was a breach of the standard of care. Zieger mischaracterizes the evidence of SPD's proactive activities to find more protective equipment as evidence that the standard of care changed. While Zieger is correct that the City was in the process of upgrading to a more protective helmet, Zieger failed to present evidence that SPD affirmatively determined that the standard helmet was unsuitable for bicycle officers in riot conditions. Zieger asks this court to allow the jury to assume that the standard helmet was below the standard of care because SPD began purchasing a helmet with better face protection. While it is undisputed that the Bell Super 2R provides more protection for its wearer, Zieger has failed to present evidence, from which a reasonable juror could conclude that the standard helmet fell below the standard of care.

The trial court did not err when it concluded that Zieger did not present evidence to establish a dispute of material fact on the issue of breach.

⁴ Zieger points to a May 2, 2016, e-mail from then SPD Chief, Kathleen O'Toole, where she indicated that the Bell Super 2R protected an officer from an injury on May Day 2015, and that this statement demonstrates that SPD knew it needed superior helmets to protect against injuries like the one sustained by Zieger. Zieger contends that this e-mail shows that "the City was aware that a prior injury was prevented with the Bell Super 2R helmet," "but failed to ensure there were enough higher protection helmets for the augment officers who were working on May Day 2016." Regardless of O'Toole's statement, Dymant, who was in charge of searching for more protective equipment, had no knowledge of the May 2015 head injury when he was making his decision to purchase the Bell Super 2R helmet.

C.

Zieger next contends that the trial court erred in concluding that he failed to demonstrate a genuine issue of material fact to show the City's failure to provide him the Bell Super 2R helmet was the proximate cause of his head injury. Again, we disagree.

Proximate causation has two elements: cause in fact and legal causation. Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 609, 257 P.3d 532 (2011). To establish cause in fact, a plaintiff must show "that the harm suffered would not have occurred but for an act or omission of the defendant." Joyce v. State Dep't of Corrections, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Whether the defendant's acts were a "but for" cause of the plaintiff's injury is typically a question of fact for the jury. Ang v. Martin, 154 Wn.2d 477, 482, 114 P.3d 637 (2005) (internal quotation marks omitted).

Legal causation is a question of law. Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." CH2M Hill, 171 Wn.2d at 611 (internal quotations omitted). "A determination of legal liability will depend upon mixed considerations of logic common sense, justice, policy, and precedent." CH2M Hill, 171 Wn.2d at 611 (internal quotations omitted).

"The plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable." Attwood v. Albertson's Food Ctrs. Inc., 92 Wn. App. 326, 331, 966

P.2d 351 (1998). “But evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility.” Attwood, 92 Wn. App. at 331.

Zieger offers Dymment’s deposition as evidence that creates a dispute of material fact on causation. Specifically, Zieger contends that he presented evidence to show that Dymment was intimately involved with and tasked by SPD to improve gear and equipment for the SPD bicycle squad. Zieger contends that “Dymment explained in detail his knowledge of the design and benefits of the Bell Super 2R helmet and ultimately why the Department selected” those helmets and that he expressed an opinion that the Bell Super 2R would have mitigated or potentially stopped the injury. This testimony, Zieger contends, established a dispute of material fact on the issue of “but for” causation.

Reviewing the evidence in the light most favorable to the nonmoving party, the evidence does not present a dispute of material fact. But for causation requires Zieger to show that, had SPD provided him with the Bell Super 2R helmet, he would not have sustained his injury, or the injury would have been substantially mitigated. There is nothing in the record showing the location of Zieger’s injury or how the two helmets fit on Zieger’s head. Zieger cites a photograph in the record showing a group of officers at the 2016 May Day protests with some officers wearing the standard helmet and others wearing the Bell Super 2R. The photograph was taken from a distance and is not evidence from which a reasonable juror could conclude that, had Zieger been wearing the Bell Super 2R, he would have been protected from a projectile. In addition, the photograph shows, even in wearers of the Bell Super 2R, there is a gap between the rim of the helmet and the goggles where skin remains exposed.

Further, Dyment indicated that the facial protection provided by the Bell Super 2R depends on how big the wearer's head is relative to the helmet size. Dyment indicated that he has a larger head and so more of his face and head is exposed than someone with a smaller head. Dyment also indicated that there is no adopted official standard that makes the Bell Super 2R helmets the standard helmet for bicycle officers doing crowd control in riot conditions. Further, the International Police Mountain Biking Association's standard helmet is the ANSI Snell standard, which is not used by SPD.

Zieger cites the following portion of Dyment's deposition as evidence of a dispute of material fact over causation:

Q. Okay. So do you have any specific recollection of what you actually said in terms of what your concerns were? So what exactly you expressed about the issue concerning the helmet?

A. [Dyment]: When you say "specific," I can't give you the exact dialogue I had and with who.

Q. Yeah.

A. But I believe that it was requested of me to evaluate what my thoughts—hey, does this helmet protect officers better and so would it have stopped this injury or what have you, was my discussion with them, and you know, I can't guarantee that it would stop that. There is no way to say, "Hey, if you got a rock thrown at your head and you're wearing that helmet it's not going to hurt you." I can't give that guarantee.

I believe it would have mitigated that injury and potentially stopped that injury just based on the integration of the goggle and the helmet itself and the nature in which his injury was sustained which, you know, I believe that the goggles did provide some significant protection to [Zieger], based on where his injury had occurred, and I think that that the helmet/goggle integration is much better than the one on the Zen or Hex, and I hadn't seen—he either had a Zen or Hex, I believe. Just from looking at—over on the video from my recollection it might have been a slightly different helmet, but that style of helmet, that integration.

Q. Okay. And I think you pretty much explained in your answer, but I just want to have a little more clear answer for the record.

A. Uh-huh.

Q. So what about that integration system for the Bell Super 2R do you believe would have potentially mitigated the injury that [Zieger] suffered on May Day?

A. Just the fact that it's designed to be integrated, right?

Q. Okay.

A. I mean, so that where they join is, I think—and the fit system on that helmet potentially could have provided better protection for him right? So I can't say, hey, for sure—

Q. Sure.

A. —he would not have gotten hurt if he was wearing that helmet, right? I don't think anybody could potentially say that, but I think it would have—I believe it probably would have—it would have—it probably would have worked, right? I mean, we didn't test it, but the fact that it's designed and you have that lip and level—it would have protected him from that helmet.

Dyment's testimony is based on his concerns he expressed to SPD following Zieger's injury. This does not satisfy Zieger's burden to establish a dispute of material fact for the issue of "but for" causation. Even if Dyment were qualified to testify about causation, Dyment could only speculate that the Bell Super 2R would have prevented or mitigated Zieger's injury. Dyment indicates that it potentially could have mitigated Zieger's injury, but that he cannot say for sure.

The trial court did not err when it concluded that Zieger failed to present evidence to establish a dispute of material fact on the element of causation.

We affirm.

No. 79394-2-1/15

Mann, C.J.

WE CONCUR:

H.S.J.

Dwyer, J.

CERTIFICATE OF SERVICE

I certify that on the 28th day of July, 2020, I electronically filed the Petition for Review and this Certificate of Service with the Washington State Court of Appeals, Division I and the Washington State Supreme Court.

Additionally, I caused to be served a true and correct copy these documents on all parties/counsel of record in the manner indicated below:

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DATED this 28th day of July, 2020, in Seattle, Washington.

s/ Lara Harlan
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