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No. 79696-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

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

*Plaintiff/Appellant,*

v.

KING COUNTY, et al.,

*Defendants/Appellees.*

# APPELLEES' JOINT RESPONSE BRIEF

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# I. INTRODUCTION

Plaintiff/Appellant's opening paragraph under her "Introduction" section is almost identical to her opening paragraph in her summary judgment response before the trial court. However, her introduction to this Court withholds a key, material admission she made to the trial court. Her statement to the trial court read:

> **Renee was indeed armed, suicidal, and engaged in behavior with the intent to provoke law enforcement to kill her by brandishing a firearm.** [1]

Plaintiff admitted to the trial court that Ms. Davis pointed a firearm at deputies with the intent to provoke a deadly response. The trial court relied on that information, and appellant submitted no evidence to the contrary.

This Court's review is constrained to the information the parties provided the trial court at summary judgment. Plaintiff's dissembling on this crucial admission, while simultaneously arguing material facts exist that were not placed before the trial court, reveals this appeal's lack of merit.

This Court should affirm the trial court's summary judgment ruling for the following reasons:

*First*, the plaintiff has admitted Ms. Davis was in the course of a felony that caused her injuries.

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[1] Plaintiff did not include this admission or her responsive briefing to the individual office's summary judgment motion in her clerk papers submitted to this Court.

*Second,* even if plaintiff had not made that admission, a trial court may infer intent through objective evidence, especially in the absence of disputed material facts.

*Third*, the felony bar statute does not require a criminal conviction or plaintiff's admission of a felony.

*Fourth*, proximate cause is not a jury question where no disputed issues of material fact exist and jurors could only reach but one conclusion.

*Last*, plaintiff's public policy argument in reality asks this Court to violate public policy as specifically established by the legislature via RCW 4.24.420.

## II. COUNTER-STATEMENT OF THE CASE

Defendants filed summary judgment motions requesting dismissal of plaintiff's claims. CP 70, 77. Both defendants argued plaintiff's claims were barred by RCW 4.24.420, the felony defense statute. CP 86, 444, 471-72. Defendants pointed out that plaintiff's own police practices expert, D.P. Van Blaricom, testified the officers' shooting of Ms. Davis after she pointed the gun at them was justified. CP 86. Further, defendants cited and discussed *Estate of Lee ex. rel. Lee v. City of Spokane*, 101 Wn. App. 158, 2 P.3d 979 (2000), a case that applied RCW 4.24.420 at the summary judgment level to dismiss the plaintiff's claims in that matter, and that is virtually identical factually regarding the felony threat presented to the officers. CP 86-87,

In her response to the motion, plaintiff admitted that Ms. Davis pointed a firearm at deputies, stating:

> **Renee was indeed armed, suicidal, and engaged in behavior with the intent to provoke law enforcement to kill her by brandishing a firearm.**

SUPP. CP. Despite that admission, plaintiff argued RCW 4.24.420 did not preclude her claims because Ms. Davis's intent was to commit suicide, not inflict bodily harm.[2] SUPP. CP.

Plaintiff additionally argued a criminal conviction or a party's admission to a felony was required in order for RCW 4.24.420 to bar a claim at summary judgment. *Id*. She also argued that factual questions existed as to whether her commission of a felony caused her injuries. *Id*. Her response to defendants' felony defense argument was limited to three short paragraphs.

During the parties' summary judgment hearing, the trial court asked plaintiff/appellant to identify what issues of material fact existed that would prevent summary judgment under RCW 4.24.420. Instead of producing said facts, appellant/plaintiff argued the trial court was not permitted to infer intent from undisputed facts:

> MS. BLACK HORSE: Right. I'm going to address the felonious conduct statute next.
>
> THE COURT: Yeah.

[2] Plaintiff mistakenly argued that Ms. Davis was accused of Assault in the First Degree, which requires "intent to inflict great bodily harm." RCW 9A.36.011(1). However, defendants argued Ms. Davis committed Assault in the Second or Third Degree when she pointed a firearm at the deputies.

MS. BLACK HORSE: So issues of material fact exist here.

THE COURT: What are they and where do they come from?

MS. BLACK HORSE: Correct. So they are twofold. One is with the felonies themselves, and the second one is with the proximate cause issue. So the felonious statute uses the term proximate cause.

THE COURT: Yeah. A proximate cause.

MS. BLACK HORSE: Correct. And so Assault 2 and 3 requires specific intent. Now here we have no direct evidence of Ms. Davis's specific intent, because she is dead and no other witness can testify as to her state of mind. So - -

THE COURT: So we - -

MS. BLACK HORSE: - - in order to establish her intent - -

THE COURT: Wait a minute. Why does it require intent? If she - - if she points a firearm at someone, specifically a sheriff's deputy, isn't intent inferred?

MS. BLACK HORSE: So intent can be inferred from the facts and circumstances of the case.

THE COURT: Yeah.

MS. BLACK HORSE: But that inference can only be drawn by a jury. And here, the county has admitted specifically through Sergeant Lockhart's deposition testimony that they don't known what her intent was. And so that inference as to her intent has to be drawn by a jury. It can't be drawn by the Court - -

THE COURT: But where are any facts that would allow a jury to draw any other conclusion? In other words, if she had just been kind of moving her arm around holding the gun, maybe. But both of these officers say she raised the gun and pointed it in their direction. That's an assault.

MS. BLACK HORSE: So the jury could infer that she didn't intend to create this apprehension - - the specific intent to create and apprehension of bodily harm based on her mental state, background, history of depression, suicidal ideation, the deputies' own negligent conduct and tactical errors, the fact that the gun was

> unloaded, her statement after she was shot that she didn't even know that the gun was unloaded. Again - -
>
> THE COURT: It doesn't matter that the gun wasn't loaded. The definition of a deadly weapon includes an unloaded firearm.
>
> MS. BLACK HORSE: That is correct. But - - so here, because we lack any direct evidence of her intent, which we'll never have because she's dead, an inference has to be drawn, and only a jury can draw an inference.
>
> THE COURT: Well, how will we ever have - - in other words, if she were merely wounded and she was alive - -
>
> MS. BLACK HORSE: Correct.
>
> THE COURT: - - and she were being prosecuted for assault in the 2nd degree, all right? We probably would never have any knowledge of her intent unless she decided to waive her 5th amendment right to remain silent and testify about her intent.

RP (28:19-31:6). At summary judgment, plaintiff presented no evidence that could create a material issue of fact as to whether Ms. Davis pointed a handgun directly at responding deputies. She failed to provide the court any evidence that could cast doubt upon the deputies' testimony, or that otherwise would provide a basis for an adverse inference. She admitted and the record is clear that Ms. Davis pointed a firearm at deputies to provoke a lethal response. Plaintiff/appellant cannot rewrite the record by hiding material information from this Court on appeal.

## III. ARGUMENT

Summary judgment orders are reviewed de novo and this Court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). This Court examines the pleadings, affidavits and depositions before the trial court and must "take

the position of the trial court and assume facts [and reasonable inferences] most favorable to the nonmoving party." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). As the nonmoving party, all facts and reasonable inferences must be viewed in a light most favorable to plaintiff. *See id*. Questions of fact may be determined as a matter of law "when reasonable minds could reach but one conclusion." *Hartley*, 103 Wn.2d at 775. Summary judgment is proper if the record before the trial court establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

**A. Plaintiff admits facts constituting felony assault.**

While the plaintiff's appeal focuses on the idea of inferred intent, addressing the question of inferred intent in this circumstance puts the cart before the horse. As provided in *State v. Bea*, *infra,* "Where there is no direct evidence of the actor's intended objective or purpose, intent may be inferred from circumstantial evidence." Here there *is* direct and undisputed evidence of intent – plaintiff's specific admission that Ms. Davis pointed the weapon at the officers to provoke a deadly force response. The admission forecloses any notion of accident; it establishes unequivocally direct intent. Pointing a handgun at a person is plainly an assault under Washington law. Under RCW 9A.36.021(1)(c), Assault in the Second Degree occurs when a person "assaults another with a deadly weapon." A "[d]eadly weapon" is any "loaded or unloaded firearm…

which, under the circumstances in which it is used…or threatened to be used, is readily capable of causing death or substantial bodily harm." *State v. Winings*, 126 Wn. App. 75, 87, 107 P.3d 141 (2005), citing RCW 9A.04.110. Even if "unloaded" was not specifically called out in the statute, there is no dispute that Ms. Davis had the loaded magazine in her possession, which rendered the weapon "readily capable of causing death or substantial bodily harm." *See*, *e.g.*, *State v. Hall*, 46 Wash.App. 689, 695–96, 732 P.2d 524 (1987) ("…stolen rifle and ammunition were not only easily accessible and available for use, they were in the possession of the defendants and ready for use, which is more than is required to be armed with a deadly weapon" – affirming conviction for first degree burglary).

The admission further unequivocally establishes felony Assault in the Third Degree. RCW 9A.36.031(g) provides that a class C felony is committed when the suspect "Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." Again, there is no material issue of fact as to whether the deputies were performing their official duties at the time Ms. Davis pointed the handgun at them.

Nor is there any question as to whether the plaintiff's act was in fact an assault. WPIC 35.30 provides the definition of assault under Washington's criminal code:

. . .

> "[An assault is [also] an act[, with unlawful force,] done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

By admitting that Ms. Davis brandished the weapon at the deputies, plaintiff has admitted an intent to "create apprehension and fear of bodily injury," in this case for the specific purpose of evoking a deadly force response from the deputies in self-defense.

No inference based upon circumstantial evidence is required to find that Ms. Davis was in the course of committing a felony when she was shot – plaintiff has admitted it.

**B. A trial court may infer intent from objective evidence.**

Even if plaintiff had not admitted Ms. Davis was in the course of a felony at the time of her demise, her contention the trial court may not infer Ms. Davis' intent is unsupported by Washington law. Indeed, it is contradicted by the very cases she cites. For example, *State v. Bea*, 162 Wn. App. 570, 579, 254 P.3d 948 (2011) reads:

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

(citations omitted). Further, *State v. Gallo*, 20 Wn. App. 717, 729, 582 P.2d 558 (1978) holds:

> Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event.

Here, the trial court correctly noted that

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

The trial court correctly pointed out at the summary judgment hearing that it may rely on objective circumstantial evidence where no facts exist to support a different conclusion:

> THE COURT: Wait a minute. Why does it require intent? If she - - if she points a firearm at someone, specifically a sheriff's deputy, isn't intent inferred?
>
> MS. BLACK HORSE: So intent can be inferred from the facts and circumstances of the case.
>
> THE COURT: Yeah.
>
> MS. BLACK HORSE: But that inference can only be drawn by a jury.[3] And here, the county has admitted specifically through Sergeant Lockhart's deposition testimony that they don't known what her intent was. And so that inference as to her intent has to be drawn by a jury. It can't be drawn by the Court - -
>
> THE COURT: But where are any facts that would allow a jury to draw any other conclusion? In other words, if she had just been kind of moving her arm around holding the gun, maybe. But both of these officers say she raised the gun and pointed it in their direction. That's an assault.

RP (29:17-30:8). Plaintiff never presented any evidence contradicting the deputies' testimony.[4] It is a fundamental tenet of summary judgment

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[3] This is mere argument without support in the law. None of the cases cited by plaintiff hold intent can only be inferred by a jury. Indeed, plaintiff cites to criminal cases for this proposition, not civil matters applying a summary judgment standard.

[4] If plaintiff wanted the trial court to accept that Ms. Davis did not point a gun at the deputies, she was required to submit evidence supporting that factual theory. Indeed, plaintiff's cited cases demonstrate she must present evidence that contradicts the deputies' account to create a

precedent that the non-moving party must provide some actual evidence or reasonable inference that creates a material issue of fact to avoid dismissal. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-50 (1986). Here the undisputed facts establish that Ms. Davis pointed a handgun directly at officers engaged in their official duties. The trial court correctly held that under the undisputed facts, no reasonable jury could infer anything other than an intent to assault the deputies.

Noticeably absent from plaintiff's argument surrounding intent is any reference to *Estate of Lee ex rel. Lee v. City of Spokane*, 101 Wn. App. 158, 2. P.3d 979 (2000), a case that unequivocally demonstrates intent may be inferred by the court.

In *Lee*, the defendant officers had probable cause to arrest the decedent for domestic violence. The officers and decedent's wife went to the door of the decedent's residence. Decedent's wife attempted to unlock the door to the residence, but decedent held the lock in a locked position. The decedent's wife asked him several times to let her in and he responded, "get the f*** out of here … or two people are going to die tonight." 101 Wn. App. at 164. The decedent's wife backed away. Shortly

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factual dispute. *See Newmaker v. City of Fonti*na, 842 F.3d 1108 (9th Cir. 2016) (officer's version of events contradicted by video evidence and inconsistent statements); *Estate of Villarreal ex rel. Villarreal v. Cooper*, 929 F. Supp. 2d 1063 (E.D. Wash. 2013) (officers' version of events contradicted by witness testimony); *Gonzalez v. Anaheim*, 747 F.3d 789 (9th Cir. 2014) (speed analysis determined officer's version of events was not physically possible, contradicting his testimony); *J.J.D. v. City of Torrance*, No. 14-7463, 2016 WL 6674996 (C.D. Cal. Mar 22, 2016) (officer's version of events was inconsistent with the physical evidence).

thereafter, decedent opened the front door holding a rifle with the scope pointed down. *Id*. When officers commanded the decedent to drop the gun, he refused, instead raising it and pointing it directly at one of the officers. *Id*. Both officers drew their guns and one officer fired a single shot at the decedent, killing him. After the trial court denied the officer's summary judgment motion on certain state law claims, the appellate court reversed, holding RCW 4.24.420 barred plaintiff's state law claims because he was committing a felony when he pointed a gun at the officers and his wife. *Id*. at 177.

Contrary to appellant's position, in *Lee* it was the court, not a jury, that inferred decedent's intent from the undisputed evidence. A court may infer the requisite intent to cause reasonable fear of harm where a defendant wields a deadly weapon in a menacing or threatening manner towards a particular person. *See*, *e.g*., *State v. Hupe*, 50 Wn.App. 277, 748 P.2d 263 (1988) (upholding conviction of assault with unloaded rifle), *disapproved of on other grounds by State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Krup*, 36 Wn. App. 454, 676 P.2d 507 (1984) (upholding second degree assault conviction where defendant pointed knife at victim, threatened to kill her, and stabbed knife into counter top before exiting victim's store); RCW 9A.04.110(6) (definition of deadly weapon includes "loaded or unloaded firearm"). Reviewing the objective, undisputed evidence, the trial court found:

> Given the undisputed facts in this case, Ms. Davis pointed a firearm at Deputy Pritchett and Deputy [Lewis] … which

> prompted them to open fire on her and cause her death. Any contrary information is purely speculation. There isn't any evidence to support it.
>
> The definition of assault makes it pretty clear that when someone points a firearm at another person, regardless of whether the firearm is loaded or unloaded, is engaged in the commission of a felony because there is not issue of material fact that in the minds of the these two deputies their lives were in danger. Ms. Davis, though a volitional act, created an apprehension in their minds that they were in mortal danger, which prompted them to shoot her.

RP (54:1-15). The trial court did not abuse its discretion and its ruling is consistent with binding precedent.

## C. Neither a criminal conviction nor an admitted felony is necessary to apply the felony defense on summary judgment.

Nothing in the statute or applicable precedent requires a criminal conviction or the admission of a felony before a trial court applies the felony defense statute to undisputed facts. Plaintiff's argument is unfounded.

### i. RCW 4.24.420 does not require a prior criminal conviction.

The plain language of RCW 4.24.420 makes evident that a criminal conviction is not required to apply the felony defense. The statute only requires proof that Ms. Davis "was engaged in a felony." Indeed, Washington's Pattern Civil Jury Instructions contain no conviction requirement:

> <u>WPI 16.01 Felony—Defense</u>
>
> It is a defense to any [action] [claim] for damages that the person [injured] [killed] was then engaged in the commission of a felony, if the felony was a proximate cause of the [injury] [death].
>
> <u>WPI 16.02 Felony—Elements</u>

> (Fill in felony) is a felony.
>
> In order to find that the [person injured] [person killed] was engaged in the commission of this felony, you must find: (fill in elements of the felony).

A conviction is not required, accordingly, by the plain language of the statute and because a civil jury does not apply the same evidentiary standard as a criminal jury. The proof required to establish the commission of a felony in civil case is a preponderance of the evidence. *Levy, Tabor, Schultz and Bergdahl v. Metropolitan Life Ins. Co*., 20 Wn. App. 503, 507, 581 P.2d 167 (1978). A conviction for the felony involved is simply not required for the assertion of the defense. *Id*. at 507; *see also Young v. Seattle*, 25 Wn.2d 888, 895, 172 P.2d 222 (1946); *Estate of Lee*, *supra*.

Appellant's argument that RCW 4.24.420 requires a felony conviction is unfounded. The trial court correctly applied the statute to bar plaintiff's claims.

**ii. Application of RCW 4.24.420 at summary judgment does not require admission of a felony.**

Relying on *Estate of Lee*, appellant contends she must admit to a felony[5] before a trial court may grant summary judgment under RCW 4.24.420. This proposition is unsupported by the very case she relies upon. In *Lee*, Division Three found that "[b]y the plaintiff's own account, Mr. Lee pointed a gun at Officer Langford and Ms. Lee after threatening to shoot them. This is first degree assault, a felony." 101 Wn. App. at 177. The plaintiff in *Lee* never admitted to the commission of a felony, rather

[5] Or, alternatively, be convicted of a felony in a criminal proceeding.

the Estate admitted to the objective facts that established Mr. Lee was engaged in the commission of a felony. Here, as earlier described, plaintiff has admitted Ms. Davis pointed a firearm at the deputies:

"Renee [Davis] was indeed armed, suicidal, and 'engaged in behavior with the intent to provoke law enforcement to kill her' by brandishing a firearm."

Consistent with the appellate court's holding in *Lee*, the trial court applied the objective undisputed facts to find that Ms. Davis was engaged in the commission of a felony, barring her claims under RCW 4.24.420.

**D. There is no reasonable dispute that Ms. Davis's commission of a felony was a proximate cause of her injuries.**

Proximate cause is a question of law "when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion[.]" *Bordynoski v. Bergner*, 97 Wn.2d 335, 340, 644 P.2d 1173 (1982) (quoting *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945)). Accordingly, the issue of proximate cause may be determined on summary judgment where the evidence is undisputed and only one reasonable conclusion is possible. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975). Here, the trial court correctly determined that Ms. Davis' act of pointing a firearm at the deputies (a felony), was a proximate cause of her death.

Indeed, there is no evidence whatsoever that anything other than plaintiff's admitted act of pointing a firearm at the deputies caused the deputies to fire upon her. Plaintiff can scarcely argue otherwise in good

faith given her admission that her intent was to cause the officers to fire upon her. Any alternative theory of causation is nothing more than pure speculation. A nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value." *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); see also CR 56(e).

Appellant's reliance on *Newlun v. Sucee*, No. 72642-1-I (Wash. Ct. App. May 23, 2016) (unpublished) is misplaced. In *Newlun*, Bellingham police detective Hanger wore a wire that transmitted his conversations to another officer during a controlled drug buy operation. Plaintiff Newlun was the target of the operation and was arrested and charged after selling marijuana and hashish to Detective Hanger. In the criminal proceeding, Newlun moved to suppress the evidence of the drug transaction gathered from the transmitter, claiming it violated RCW 9.73.210,[6] which requires a commanding officer first give written authorization for a wire. The criminal court suppressed the evidence. Newlun later pleaded guilty to a misdemeanor charge.

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[6] RCW 9.73.210(2) reads:

> Before any interception, transmission, or recording of a private conversation or communication pursuant to this section, the police commander or officer making the determination required by subsection (1) of this section shall complete a written authorization which shall include (a) the date and time the authorization is given; (b) the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known; (c) the expected date, location, and approximate time of the conversation or communication; and (d) the reasons for believing the consenting party's safety will be in danger.

Newlun then filed a civil action under RCW 9.73[7] *et seq*. against numerous law enforcement personnel and agencies, claiming his privacy rights were violated by the electronic transmission of his private conversations. Newlun sought general damages under RCW 9.73.060 and exemplary damages under RCW 9.73.230. Defendants moved for summary judgment on the grounds that Newlun's claims were barred under RCW 4.24.420, the felony defense statute. The trial court denied the motion.

On appeal, this Court held there was no dispute that Newlun was engaged in a commission of a felony at the time of the occurrence that caused his alleged injury. However, it held a question existed as to whether his injury was proximately caused by his felonious act or the defendants' use of an unauthorized body wire. This Court found it was at least arguable that but for defendant's decision to transmit Newlun's conversations without complying with the statute, none of Newlun's claimed injuries would have occurred.

An important factual distinction renders *Newlun* inapplicable to this case. In *Newlun*, the injury – violation of privacy by use of an unauthorized body wire – was not caused by (i.e., responsive to) his commission of a felony. Law enforcement would have improperly transmitted Newlun's private conversations even if he did not commit a felony by attempting to sell drugs. Newlun's sale of the drugs was not,

[7] Chapter 9.73 RCW addresses the transmission and recording of private communications.

accordingly, a proximate cause of his injury. Newlun's injury would have occurred whether he committed a felony or not.

Here, in contrast to *Newlun*, the deputies' actions were responsive to and caused by Ms. Davis' felonious acts. There is no evidence the deputies would have fired upon her but for her felonious behavior. Unlike the plaintiff in *Newlun*, her commission of felony assault led directly to her injury. *Newlun,* even as non-binding authority, is simply inapplicable to this case.

In addition to *Newlun*, appellant cites numerous 42 U.S.C. § 1983 federal civil rights cases in support of her contention that the deputies' alleged unreasonable conduct proximately caused Ms. Davis' injuries. However, none of those cases addresses proximate cause under Washington's felony defense statute. As RCW 4.24.420 makes clear, "nothing in this section shall affect a right of action under 42 U.S.C. Section 1983." In short, RCW 4.24.420 serves as a defense to state law claims, not federal constitutional claims.

The federal constitutional rubric is very different. For example, in evaluating Fourth Amendment excessive force claims, courts ask whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). This inquiry requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental

interests at stake. *Id*. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)). "The 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." *Id*. at 396–97. Reasonableness therefore must be judged from the perspective of a reasonable officer on the scene, "rather than with the 20/20 vision of hindsight." *Id*. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

Here, application of RCW 4.24.420 does not require or even suggest this Court assess the reasonableness of the deputies' actions leading up to or after Ms. Davis' felonious act. Instead, the law simply asks the following:

> **WPI 21.08 Burden of Proof on the Issues—Felony Defense**
>
> To establish the defense that the [person injured] [person killed] was engaged in the commission of a felony, the defendant has the burden of proving each of the following propositions:
>
> First, that the [person injured] [person killed] was engaged in committing the felony of(fill in felony)at the time of the occurrence causing the [injury] [death]; and
>
> Second, that this felony was a proximate cause of the [injury] [death].

If appellant wanted to avoid RCW 4.24.420, she could have asserted federal claims under § 1983. Indeed, the trial court noted as much:

And so - - and it's interesting, because ya'll could have gotten around 4.24.420 if you had pled civil rights violations claims under Section 1983.

But I went through the amended complaint and there are no such claims in this case.

RP (33:15-20). The trial court correctly found that all elements of the felony defense have been met and no reasonable juror could find otherwise. Summary judgment was appropriate. Plaintiff's reliance on inapplicable federal civil rights authority is unavailing.

### E. Appellant's public policy argument ignores the exception carved out by our legislature.

In a remarkably thin argument that betrays the absence of foundation, plaintiff claims that public policy requires this Court to overturn the trial court. Plaintiff, however, provides no assessment of the public policy at stake, or why her argument is meritorious. A casual review of precedent shows the argument is not meritorious.

The sound policy behind RCW 4.24.420 prevents those who commit felonies from being rewarded with civil monetary damages as a result of their crimes. To that end, RCW 4.24.420 carves out a very specific exception that plaintiff completely ignores – the ability to proceed with federal constitutional claims. Far from being contrary to public policy, by enacting the felony statute (and its carve out) the legislature *created* public policy. See, e.g. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 213, 193 P.3d 128 (2008) (legislature creates public policy (here on domestic violence) through legislation); *Senear v. Daily Journal American*, 27 Wn. App. 454, 471, 618 P.2d 536 (1980) (legislature, not courts, creates public policy).

Plaintiff's public policy argument is extinguished by the legislature's carve out and only exists in this context because she made the tactical decision not to assert federal civil rights claims. To grant plaintiff's request would, in reality, violate public policy as expressed by our legislature.

## IV. CONCLUSION

Plaintiff admitted to the trial court that Ms. Davis pointed a firearm at deputies to provoke a lethal response; the only evidence shows that her action did provoke that response, and was the proximate cause of her injury. She submitted no evidence, direct or circumstantial, contradicting that evidence. The trial court's ruling was correct. Examining that same evidence *de novo*¸ there is no factual or legal basis to overturn that decision.

DATED: September 9, 2019


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The undersigned certifies under penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **Appellees' Joint Response Brief** on the following individuals:

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## September 09, 2019 - 3:50 PM

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