No. 79696-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiff-Appellant,

v.

KING COUNTY, *et al.*,

Defendants-Appellees.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

On October 21, 2016, Renee Davis experienced a mental health breakdown and became suicidal. King County Sheriff's Office ("KCSO") Deputy Nicholas Pritchett and KCSO Deputy Timothy Lewis (collectively, "Deputies") knew this, and knew that Renee had easy access to a handgun. Instead of reasonably exercising police practices calculated to avoid the use of force—by Renee or anyone else—the Deputies rushed into Renee's house with their guns drawn, kicked on her bedroom door, and pointed their firearms Renee, without employing de-escalation or crisis intervention tactics. Because she allegedly had a gun in her hand, the Deputies shot and killed Renee within seconds.

Recently, in *Beltran-Serrano v. City of Tacoma*, the Washington State Supreme Court held that law enforcement agents can be held liable for "negligence leading up to [a] shooting, including [a] failure to respond appropriately to clear signs of mental illness or impairment" and other unreasonable pre-shooting conduct, as well as a "lack of adequate training" on how to approach a subject in a crisis state. 193 Wn.2d 537, 544, 442 P.3d 608 (2019). Here, the trial court essentially gutted the duties articulated in *Beltran* by erroneously dismissing Ms. Davis' claims based on the Felony Bar Statute, RCW 4.24.420. Were the trial court's ruling to stand, law enforcement officers would be able to summarily

dismiss claims arising from the death of a citizen when they created the circumstances that caused the fatal confrontation. Officers could simply characterize a now-deceased citizen's pre-death actions as "felonious," based on nothing more than self-serving testimony, and the court's hands would be tied. This was not the intent of RCW 4.24.420; undercuts the Supreme Court's decision in *Beltran*; and otherwise upends the role of a jury in our civil justice system to decide disputed issues of fact.

II. LAW AND AUTHORITY

A. ISSUES RELATED TO RENEE'S INTENT PRECLUDE SUMMARY JUDGMENT ON THE FELONY BAR STATUTE.

1. Plaintiff's Remark Does Not Constitute An Admission of Felonious Conduct.

Advancing a kind of "gotcha!" argument, Defendants submit that "plaintiff's specific admission that Ms. Davis pointed the weapon at the officers to provoke a deadly force response . . . forecloses any notion of accident; it establishes unequivocally direct intent." Am. Appellees' J. Resp. Br. at 8. Not so. Plaintiff has always maintained that whether Renee possessed the capacity to form the requisite intent to commit a felony—and whether she did in fact draw that intent; and whether she even pointed a gun—are disputed issues of fact.

As to the cherry-picked sentence that Defendants repeatedly quote, some context is in order. Because the felony defense is an affirmative

defense, the Defendants have the burden of proof on this issue. WPI 21.08. This burden requires the Defendants to establish each element of the felonies that they allege supports their defense. On January 22, 2019, counsel for Plaintiff deposed Defendant King County pursuant to CR 30(b)(6).[1] During that deposition, King County submitted that RCW 9A.36.011 is "the **only** felony that the County is alleging occurred." CP 295 (emphasis added). And, since "CR 30(b)(6) testimony is binding," Plaintiff relied on this testimony in responding to the Defendants' summary judgment motions.[2] *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 767, 82 P.3d 1223 (2004). Specifically, Plaintiff submitted that *if* Renee did point a gun at anyone, she did not "inten[d] to inflict great bodily harm." RCW 9A.36.011(1). Thus, Plaintiff argued, because a charge under RCW 9A.36.011(1) cannot be sustained if—*as* ***Defendants***

[1] "Rule 30(b)(6) explicitly requires [a municipality] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires persons to review all matters known or reasonably available to it in preparation for the 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial." *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 524, 526 (C.D. Cal. 2008) (quotation omitted).

[2] "[B]ecause a Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know." 7 James Wm. Moore Et Al., Moore's Federal Practice § 30.25[3] (3d ed. 2016). The trial court erred in this regard as well.

argued—Renee's intent was "to commit suicide by provoking police into shooting h[er]," Defendants were not entitled to summary judgment. *State v. Anderson*, 137 Wn. App. 1048, 2007 WL 831730 (2007) (unpublished).

But even assuming that at some point in her argument Plaintiff somehow "admitted" Renee's intent—she did not[3]—"the Washington Supreme Court recently affirmed a plaintiff's right to pursue claims 'under alternative, even inconsistent, theories of recovery.'" *Quinn v. City of Vancouver*, No. 17-5969, 2019 WL 4276608, at *3 (W.D. Wash. Sept. 10, 2019) (citing *Beltran*, 193 Wn.2d at 612). Plaintiff has made crystal clear that an issue of fact as to whether Renee pointed a gun precludes summary judgment:

> Here, because Renee and the Deputies are the only three people who know how Renee's gun was positioned seconds before deadly shots were fired, a jury's assessment of the Deputies' credibility is necessary. . . . [T]he Deputies' self-serving testimony has been called into doubt because there are numerous factual inconsistencies with their version of events surrounding Renee's death. Based on these inconsistencies, a reasonable jury could conclude that because the involved officers lied about the statements made at the time of the shooting, the officers also lied about the facts that would support their claim that Renee posed an imminent threat of harm. . . . The inquest jury in this matter also called the Deputies' version of events into doubt. A majority of the inquest jury found that the Deputies were not concerned for Renee's welfare when the entered

[3] The idea that an estate can somehow know, let alone "admit," what a decedent's state of mind was just prior to her death is a perplexing notion.

> Renee's bedroom; and the jury could not reach a unanimous decision as to whether the Deputies commanded Renee multiple times to show her hands, and more significantly, **whether Renee even pointed a gun at the Deputies**.

Supp. CP at 21 & n.101 (quotation omitted; emphasis added).

It has been clear for decades held that a "court may not simply accept what may be a self-serving account by the police officer" where "the witness most likely to contradict his story—the person shot dead—is unable to testify" and there is some evidence of inconsistent testimony about the facts and circumstances of the event. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *see also Shirar v. Guerrero*, 673 F. App'x 673, 675 (9th Cir. 2016) (same); *Estate of Makarowsky v. Lobdell*, No. 10-5423, 2011 WL 2491613, at *5 (W.D. Wash. June 22, 2011) (same); *Minter for Minter v. City of San Pablo*, No. 12-2905, 2013 WL 6842806, at *10 (N.D. Cal. Dec. 27, 2013) (an officer's "internally inconsistent" deposition testimony "creates a disputed issue as to whether [a subject] pointed a gun . . . , thus precluding summary judgment"); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (denying summary judgment where "the depositions of the officers are internally inconsistent on several points" that were not material, but which exhibited credibility issues).

The same is true here. Plaintiff demonstrated numerous instances where the Deputies' testimony about the event that resulted in Renee's

needless death was internally inconsistent.[4] *See, e.g.*, Supp. CP at 8-9. The trial court erred by accepting the Deputies' self-serving accounts when there was evidence of inconsistent statements made by the Deputies.

2. Other Material Fact Issues Precluded Summary Judgment.

Even assuming that Renee engaged in felonious conduct, the remaining questions of material fact related to the proximate cause element of the Felony Bar Statute should have prevented summary judgment on Defendants' motion.

The Felony Bar Statute contains two general requirements: (1) "that the person injured of killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death"; and (2) "the felony was a proximate cause of the injury or death." RCW 4.24.420. If, for the sake of argument, Renee committed Second or Third Degree Assault, summary judgment is only appropriate if no questions of material fact exist regarding whether the alleged felony was a proximate cause of Renee's death when the Deputies' own negligent acts and omissions

[4] Although Defendants suggest in a footnote that Plaintiff is relying on mere speculation to contradict the Deputies' account, Am. Appellees' J. Resp. Br., at 8, "a party cannot win a motion for judgment by labeling as 'speculation' those reasonable inferences it would rather the jury not draw." *Phillips v. City of Albuquerque*, No. 97-1324, 2000 WL 36739923, at *7 (D.N.M. May 1, 2000) (quotation omitted).

precipitated the deadly confrontation with Renee. CR 56(c); *Beltran*, 193 Wn.2d at 544.

Here, in the absence of the Deputies' entry into Renee's bedroom, the deadly confrontation with Renee would not have occurred. *See, e.g.*, *Newlun v. Sucee*, 194 Wn. App. 1008, at *6, *rev. denied*, 186 Wn.2d 1027, 385 P.2d 125 (2016) (unpublished). The Deputies' own negligent acts and omissions—the Deputies' failure to de-escalate the situation, wait for backup, contact a supervisor, attempt to contact Renee or T.J. by means other than forcefully yelling outside and inside Renee's home, treat Renee like a barricaded subject, and critically, the Deputies' rushed and unnecessary entry into Renee's bedroom when the Deputies knew that Renee was suicidal and likely armed—alone precipitated the deadly confrontation with Renee. In other words, it is entirely likely that a reasonable jury might find that but for the Deputies' own negligent acts and omissions, Renee would still be alive. "Issues of negligence and proximate cause are generally not susceptible to summary judgment." *Owen v. Burlington N. and Santa Fe. R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

B. ONLY A JURY CAN DETERMINE WHETHER RENEE POSSESSED FELONIOUS INTENT.

Persons in a severely decompensated state have distorted perceptions, judgment and/or decision-making. Renee's behavior at the relevant time—as reported by the Deputies themselves—reflects profound deficits in each of these areas. Her judgment and decision-making, in other words, were markedly compromised. And as a result of these deficits, whether Renee possessed the capacity to intend to assault during her mental health crisis is a question better left to a jury. While her conduct as described by the Deputies suggests the appearance of assaultive capacity, her debilitated mental state, in which she arguably did not know what she was doing, rendered such capacity absent.[5]

King County claims that *State v. Bea*, 162 Wn. App. 570, 254 P.3d 948 (2011), contradicts Ms. Davis' contention that only a jury can infer criminal intent. Am. Resp. Br. at 8, 9 n.3. It does not. In *Bea*, the defendant was convicted by a jury of first-degree assault. 162 Wn. App. at 573. In affirming the conviction, the appeals court held that "[a] ***jury*** may infer criminal intent from a defendant's conduct" and otherwise addressed

[5] Under Washington law, diminished capacity is a defense to any crime that includes an element of intent. *See* WPIC 18.20 ("Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent.").

the parameters on a jury's ability to draws such an inference. *Id.* at 573-74 (emphasis added). *Bea* makes explicitly clear that only "[a] ***jury***" may draw in inference of criminal intent from a defendant's conduct. *Id.* (emphasis added).

Even if the trial court could properly infer criminal intent, the trial should have drawn all facts and reasonable inferences in Renee's favor. *Havens v. C & D Plastics, Inc*., 124 Wn.2d 158, 177, 876 P.2d 435 (1994). Several reasonable inferences relevant to Renee's intent may be drawn from her conduct. Renee may not have known that the two armed men that entered her bedroom with guns pointed at her were KCSO deputies. Renee may have been acting in self-defense because the Deputies pointed their weapons at her first and it was dark in the room. Or, the more likely explanation, because Renee was in the midst of a mental health crisis and lacked the capacity to form the requisite intent.

The underlying facts in this case give rise to differing opinions on Renee's intent, particularly given the lack of direct evidence of Renee's intent. "If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate." *Owen*, 153 Wn.2d at 788. The Washington Supreme Court has explained that under these circumstances, where "different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, et

cetra, a summary judgment would not be warranted." *Preston v. Duncan*, 55 Wn.2d 678, 681-82, 349 P.2d 605 (1960). Here, because reasonable minds can differ on the inferences drawn from facts relevant to Renee's intent, and because different inferences as to ultimate facts including Renee's intent, but also ultimate facts as to the Deputies' own negligence, summary judgment is inappropriate.

C. APPLICATION OF THE FELONY BAR STATUTE WITHOUT EVIDENCE OF A CONVICTION OR ADMISSION OF FELONIOUS CONDUCT IS UNPRECEDENTED.

Washington and federal common law analyzing the Felony Bar Statue have nearly universally applied the defense on summary judgment to bar claims only where an underlying criminal conviction exists. *See, e.g., White v. Pletcher*, 17 Wn. App. 1072 (2012) (unpublished); *Bruglia v. Wash. State Patrol*, No. 13-5891, 2014 WL 2216066 (W.D. Wash. Apr. 8, 2014); *Haugen v. Brosseau*, No. 01-5018, 2001 WL 35737104 (W.D. Wash. Sept. 24, 2001). This case is different. Renee will never be convicted, she will never admit to felonious conduct, no charges will be brought against her, and we will never know if she possessed the requisite intent to be convicted of a felony. Because she's dead. The Felony Bar Statute does not apply, and was not meant to apply, to this case.

In fact, even where an underlying criminal conviction exists, courts still refuse to apply the Felony Bar Statute on summary judgment where,

as here, the defendant's own improper conduct precipitated the alleged felonious conduct. In *Newlun v. Sucee*, 194 Wn. App. 1008, *rev. denied*, 186 Wn.2d 1027, 385 P.3d 125 (2016), this Court affirmed the trial court's decision declining to apply the Felony Bar Statute to preclude the plaintiff's claims where an underlying criminal conviction existed because it was at least arguable that but for the defendant's own unlawful conduct, none of plaintiff's alleged injuries would have occurred. *Id.* at *6. The Court held that the defendant's own preexisting improper conduct raised disputed issues of fact about whether a causal relationship between the plaintiff's commission of a felony and the plaintiff's injuries. *Id.*

Without citing to any authority, Defendants also argue that because juries are bound by different evidentiary standards at trial, a criminal conviction is inapposite. Am. Resp. Br. at 13. This is a scarecrow argument. A jury will apply the preponderance of the evidence standard to Defendants' felonious conduct defense. WPI 16.01. Plaintiff does not argue that the absence of a criminal conviction precludes a jury from finding that the Felony Bar Statute applies. A jury may reach that conclusion in this case, but a jury—not the trial court—must make that determination. The evidentiary standard a jury will apply in this case, however, has no bearing on the issue presently before the Court. To be clear, Plaintiff does not claim that a criminal conviction is required to

assert a felonious conduct defense. Rather, under the circumstances in this case, only a jury may properly determine whether the Felony Bar Statute precludes the claims—not the trial court on summary judgment. Defendants are surely allowed to *assert* a felonious conduct defense, but only a jury may determine whether the Felony Bar Statute applies.

The one appellate court that, in *dicta*,[6] did not base its application of the Felony Bar Statute on a conviction apparently did so based on the admission of felonious conduct by the plaintiff. *Estate of Lee v. City of Spokane*, 101 Wn. App. 158, 2 P.3d 979 (2000). After dismissing the plaintiff's state law claims, the *Lee* court went on to discuss "two additional immunity defenses" that the defendants asserted: (1) "common law qualified immunity," and (2) "statutory immunity" under RCW 10.99.070. 101 Wn. App. at 176. Then—without explanation, discussion, or analysis—the following three sentences appear:

> By the plaintiffs' 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. RCW 9A.36.011. It is a complete defense to any action for damages for wrongful death that the person killed was engaged at the time in the commission of a felony and that the felony was a proximate cause of death. RCW 4.24.420.

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[6] "A statement is *dicta* when it is not necessary to the court's decision in a case. *Dicta* is not binding authority." *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) (citation omitted).

Lee, 101 Wn. App. at 177. This *dicta* in *Lee* did not address inconsistencies in officer testimony, *mens rea*, causation, or any of the issues raised by Plaintiff in this action. This is likely why, in the nearly twenty years since *Lee* was issued, there is no published or unpublished appellate case applying the Felony Bar Statute in a similar manner or relying on *Lee*'s short-shrift application. In addition, despite Defendants' attempt to play "gotcha!," the case is distinguishable because, as explained above, Plaintiff does not admit that Renee pointed a gun at anyone.[7]

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully reiterates her

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[7] But even had she, for the reasons discussed above, the Felony Bar Statute would still be inapplicable. Public policy also supports this rule. At least 50% of the people shot and killed by law enforcement in the United States have mental health problems. Gary Howell, *The Dark Frontier: The Violent and Often Tragic Point of Contact Between Law Enforcement and the Mentally Ill*, 17 Scholar 343, 359 (2015). But interactions between police and mentally ill or suicidal persons does not have to end in tragedy:

> There are a number of nonlethal methods for restraining a suicidal suspect. One such method is "tactical withdrawal": once an officer determines that an individual is suicidal, the officer can create greater physical distance between him or herself and the individual. Physical distance will mitigate the threat posed to police officers and give officers more time to formulate a plan of action to calm and neutralize the suicidal individual.

Rahi Azizi, *When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealing With Suicidal Suspects*, 41 GOLDEN GATE U. L. REV. 183, 210 (2011). Applying the Felony Bar Statute in the manner urged by Defendants disincentivizes these types of tactics and encourages what occurred here—a storm the house and ask questions later type of mentality that allows police departments to get off scot-free when they fail to train on de-escalation techniques.

request that the trial court's order on summary judgment should be reversed and this case remanded back to the trial court for trial.

Respectfully submitted this 9th day of October 2019.

GALANDA BROADMAN, PLLC

s/Gabriel S. Galanda

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CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

3. Today, I served the foregoing document, via email on the following parties:

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The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, on October 9, 2019.

s/Wendy Foster

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GALANDA BROADMAN

October 09, 2019 - 10:54 AM

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