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.

BRIEF OF APPELLANT

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A. INTRODUCTION

Renee Davis was a twenty-three year old member of the Muckleshoot Indian Tribe and mother of three children, with a fourth on the way, at the time of her death. Renee grew up in the foster care system and experienced sexual abuse as a child, domestic violence as a young woman, and depression throughout her short life, resulting in at least two suicide attempts as a minor. On October 21, 2016, Renee experienced a mental health breakdown and again became suicidal. She texted her boyfriend, T.J. Molina "I am about to shoot myself." T.J. alerted King County Sheriff's Office ("KCSO") Deputy Nicholas Pritchett that Renee was likely suicidal and armed with a handgun. Minutes later, Pritchett and KCSO Deputy Timothy Lewis (collectively, "Deputies") rushed into Renee's closed bedroom with their guns drawn and pointed at Renee, without employing de-escalation or crisis intervention tactics ("CIT"). The Deputies shot and killed Renee within seconds. Renee was five months pregnant with a boy at the time of her death; T.J. was the father.

Despite the fact that the Deputies' own negligent conduct needlessly precipitated the fatal confrontation with Renee, the absence of direct evidence of Renee's specific intent to commit any felony, and the fact that Renee was never convicted of a felony or otherwise admitted to felonious conduct, the trial court erroneously dismissed Ms. Davis' claims

based on the Felony Bar Statute, RCW 4.24.420, on summary judgment. In doing so, the trial court impermissibly drew inferences, weighed evidence, and made credibility determinations. More importantly, the trial court's decision effectively abrogated a law enforcement officer's duty to act with reasonable care when encountering citizens, particularly those in the midst of a mental health crisis. The trial court's decision now enables law enforcement officers to summarily dismiss claims against them arising from the death of a citizen when they created the circumstances that caused the fatal confrontation, because they now can simply characterize the now deceased citizen's actions as felonious. This Court should therefore reverse the trial court's summary judgment dismissal of Ms. Davis' claims based on the Felony Bar Statute and remand for further proceedings.

B. ASSIGNMENTS OF ERROR

1. ASSIGNMENTS OF ERROR

The trial court erred in granting King County and the Depuites' motion for summary judgment dismissing Ms. Davis' claims based on the Felony Bar Statute, RCW 4.24.420.

2. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

a. Can a trial court infer criminal intent on summary judgment where no direct evidence of intent exists for the purposes of the Felony Bar Statute defense? No.

b. Does the Felony Bar Statute apply on summary judgment to preclude claims where no underlying criminal conviction exists and the plaintiff has not otherwise admitted to felonious conduct? No.

c. Does the Felony Bar Statute apply on summary judgment to preclude claims where questions of fact exist regarding whether the alleged felony was the proximate cause of the plaintiff's injuries?

C. STATEMENT OF THE CASE

1. T.J. RECEIVES TEXT MESSAGES FROM RENEE, MAKES CONTACT WITH PRITCHETT.

Around 6:30 p.m. on October 21, 2016, Pritchett was parked at the powwow grounds on the Muckleshoot Indian Reservation ("Reservation") during his patrol shift, when T.J. approached him. CP at 247. After receiving several text messages from Renee, T.J. sought out Pritchett to talk about his concerns and ask for help. *Id.* at 249.

Minutes earlier, at 6:21 p.m., Renee sent T.J. a text message: "[w]ell come and get the girls or call 911 I'm about to shoot myself." *Id.* at 347. Renee sent him another text message at 6:28 p.m. that said "[t]his is to show you I'm not lying," with a photo of a superficial injury of

unknown origin. *Id.*; *see also id.* at 248. Worried about Renee, her children and their unborn son, T.J. sought KCSO help. *Id.* at 249.[1]

Pritchett was familiar with both Renee and T.J. *Id.* at 246. Pritchett had responded to incidents at Renee's home in which she was a victim of domestic violence, including when Renee's ex-boyfriend and the father of two of her children strangled her, as well as other "DV assaults where he was pretty brutal to her." *Id.*; *see also id.* at 393-96. A few months prior to her death, Renee learned that this ex-boyfriend would soon be released from prison, so she obtained a Washington State issued concealed carry license and legally purchased a handgun. *See id.* at 349.[2]

T.J. showed Pritchett the text messages from Renee. *Id.* at 248. Pritchett thought the picture T.J. showed Pritchett on his phone could be some kind of injury or "a photo off the internet," but was not sure. *Id.* at 255. T.J. also told Pritchett that Renee had access to a rifle and a handgun, which she had obtained the concealed carry permit for; had her two children with her; and that she was pregnant. *Id.* at 248, 399-400,

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[1] It is common for residents of the Reservation to personally seek out law enforcement officers for help rather than call 911. *Id.* at 248.

[2] Renee had legally purchased a Springfield 9mm pistol approximately seven months earlier. *Id.* When Renee purchased her pistol she had already obtained her Washington State issued concealed pistol permit. *Id.*

404. Although Renee was actively communicating from her cell phone, Pritchett failed to ask for Renee's (or T.J.'s) phone number. *Id.* at 250.

2. PRITCHETT CONTACTS DISPATCH AND ARRIVES AT RENEE'S HOME.

Pritchett advised dispatch of a suicidal female possibly armed with a rifle, who had two children with her, at 6:37 p.m. *Id.* at 311; *see also id.* at 250. Although T.J. had only shown him a single picture, Pritchett also advised "[s]he's texting *pictures* of fresh injuries, unsure who is injured." *Id.* at 311 (emphasis added); *see also id.* at 251. Pritchett said nothing about the handgun. *Id*. Pritchett informed dispatch that he would be conducting a welfare check and provided Renee's full name and birthdate—*information he could recall from memory based on prior contacts*. *Id*.

Pritchett arrived in Renee's neighborhood at 6:44 p.m. *Id.* at 311. He approached Renee's home on foot to survey the area and search for any signs of distress coming from the home—he observed none. *Id.* at 251-52. Pritchett returned to his vehicle to await backup, yet did nothing to prepare for engaging Renee: he did not reach out to T.J., or to Renee herself by phone, or otherwise attempt to gather more intelligence or formulate a plan. *Id.* at 252. While waiting he also observed no signs of distress coming from the home. *Id.*

3. DEPUTY LEWIS RESPONDS AND ARRIVES AT RENEE'S HOME.

Deputy Lewis was commuting home when he overheard Pritchett's radio transmissions and decided to respond. *Id.* at 263-64; *see also id.* at 311. Lewis was not working a patrol shift that day, and had instead attended a firearms "training" at the KCSO range. *Id.* at 263. While at that firearms "training" for approximately eight hours, Lewis fired over 400 rounds from an AR-15 assault rifle and his glock 9-millimeter. *Id*. Lewis made no efforts to obtain information about the situation from Pritchett or dispatch while en route to Renee's home. *Id.* at 265-66.

Lewis arrived on scene at approximately 6:45 p.m. *Id.* at 311. Pritchett hastily told Lewis select information he had learned from T.J., the route they would take to approach Renee's house on foot, as well as the location of a large oak tree in Renee's front yard that Pritchett suggested could be a shelter from gunfire. *Id.* at 265. Critically, according to Ms. Davis' experts, Pritchett fell below the standard of care by failing to:

- Tell Lewis that he had prior contacts with Renee and the nature of those contacts; that he had been inside Renee's home before and the layout of the house; that Renee was pregnant; and that Renee had a handgun as well as a concealed carry permit. *Id.* at 252, 266.

- Show Lewis the text message correspondence between T.J. and Renee or the photo of the superficial cut that T.J. showed

> Pritchett less than ten minutes earlier—in fact, Pritchett did not even tell Lewis about T.J. *Id.* at 268, 311.

Lewis failed to ask Pritchett for more intelligence about the situation. *Id.* at 266. In turn, both Deputies failed to:

- Develop a plan for what to do with Renee's children if they entered the home, or what to do if they encountered Renee armed inside the home; the only plan the Deputies had developed prior to approaching Renee's home was to go in. *Id.* at 266.

- Develop a plan on how to encounter an individual experiencing a behavioral crisis consistent with the little training they did have. *Id.* at 266-67.

- Wait for the other *four* responding officers to arrive on scene or even check on their status prior to responding to the house, including their supervisor. *Id.* at 253-54, 267-77, 311-12.

- Attempt to contact Renee or T.J. by phone prior to approaching the house. *Id.* at 268.

The Deputies evaluated this situation involving an armed suicidal female with two small children in the home *for less than a minute* before rushing to approach Renee's front door. *Id.* at 311-12.

4. THE DEPUTIES RUSH TO RENEE'S DOOR, FORCEFULLY KNOCK AND ANNOUNCE.

The Deputies approached Renee's home on foot by 6:52 p.m. *Id.* at 252-53, 266, 312. They could not see into or hear any noise from the house, or anything that indicated anyone was in distress inside. *Id.* at 253, 267. The Deputies began to pound loudly on the front door, siding, and

windows of the home. *Id.* at 268-69. They repeatedly and forcefully yelled "Sheriff's Office!," "It's the police!" and "Come to the door!" *Id.* at 254, 269. At no point did the Deputies announce: "Renee, this is a welfare check," "Renee, we're here to help you," or "Renee, we are here to check on you and your children." *Id.* at 254, 270. The Deputies also did not take into account the effect loud banging and knocking by two male police figures would have on a young pregnant woman in a suicidal state. *Id.* at 270. They knocked, banged, and yelled for approximately four minutes. *Id.* at 269, 311-12. They did not attempt any other means of communication.

At 6:54 p.m., Lewis attempted to break into Renee's home by removing a screen on the living room window. *Id.* at 270. As Lewis pried the screen off the window, he saw Renee's two children in the living room—uninjured—and asked them to open the door. *Id*. After Renee's three year-old opened the door, the Deputies rushed into the home with firearms drawn and without a warrant. *Id.* at 270, 312. They did not wait for the other responding officers to arrive on scene, contact their supervisor, or gather any intelligence prior to entry. *Id*.

5. THE DEPUTIES ENTER RENEE'S HOME.

The Deputies entered Renee's home at 6:56 p.m., immediately encountering her children. *Id.* at 271. Lewis placed the children behind

him in the front door area of the house then turned his back to the children and walked back inside the house, leaving them unattended. *Id.* at 256, 270, 272. The Deputies continued to yell "It's the police, the Sheriff's Office!," but they heard no response. *Id.* at 272-73.

Now feeling insecure about the inadequate staffing they had in the home—having decided earlier not to wait for backup when they knew backup was enroute and just minutes away—Pritchett and Lewis rushed to "clear" the house. *Id.* at 273. Pritchett reached the door to Renee's bedroom—where he knew she was, because one of her children had told him—kicked off a child safety device from the knob on the door, and called to Lewis. *Id.* at 256, 273. Lewis left the children in the front door area to join Pritchett in Renee's bedroom. *Id.* at 273.

6. THE DEPUTIES FATALLY SHOOT RENEE.

The Deputies entered the bedroom and observed Renee lying in her bed covered in a blanket up to her neck staring blankly at the door. *Id.* at 256, 273. They saw no evidence that she was injured or in distress. *Id*. Instead of treating Renee like a barricaded subject, retreating to the safety of the hallway or considering a limited walk-way containment, the Deputies instead aggressively shouted at Renee to show her hands; according to Lewis, Renee did not respond, while Pritchett recalls she said "no." *Id.* at 242, 274. Lewis pointed his firearm at Renee as Pritchett

ripped the blanket off of her. *Id.* at 257, 273-74. Although the Deputies each claim to have seen Renee with a gun, they recall things differently:

- According to Lewis: Renee had a gun near her right hand, "either laying on her bed or against her leg or somewhere down," with the muzzle facing the foot of the bed (which Lewis thought may have been unintentional). *Id.* at 275.

- According to Pritchett: Renee had a gun resting between her legs in her right hand. *Id.* at 257.

The Deputies reported that Renee had a magazine in her left hand, and claimed that Renee then raised the gun and somehow pointed it at both of them at the same time. *Id.* at 257, 275. At that point:

- According to Lewis: Pritchett and Lewis each yelled at Renee to "drop the gun," then simultaneously fired, *id.* at 258, 275; or

- According to Pritchett: Only Pritchett yelled "gun," moved and fired along with Lewis—according to Pritchett. *Id*.

Pritchett and Lewis shot her three times at close range, causing Renee to slump over and say, "It's not even loaded," before falling off the bed onto the floor. *Id.* at 258-59.

Less than one minute transpired between when the Deputies entered Renee's home to when they fatally shot her. *Id.* at 312.

7. RENEE DIES.

After the Deputies shot Renee, they heard her two children screaming while running out of the house, at which point Lewis left

Pritchett alone in the bedroom with Renee. *Id.* at 258, 276, 351. While outside the home, Lewis encountered Auburn Police Officer Derek Pedersen, who took the hysterical children to his vehicle. *Id.* at 276. There also are two stories about what happened to Renee's gun—the Deputies' version and Officer Pedersen's account:

- According to the Deputies: Pritchett put Renee's gun in his utility belt as Lewis reentered the bedroom—although Lewis did not see Pritchett pick the gun up off the bed and does not remember a conversation about the gun that Pritchett claims they had, *id.* at 258, 276; or

- According to Pedersen: Renee's gun was still in her hand while she was on the floor by the time Pedersen entered to the bedroom along with Lewis. *Id.* at 351.

Either way, Pedersen moved the bed away from Renee so that she could receive medical attention. *Id.* at 258-59, 276. Renee was still breathing. *Id.* at 258. At 6:59 p.m., Pritchett finally cleared medical aid to enter, at which point the Deputies went outside and talked to each other about the shooting.[3] *Id.* at 272, 277, 312.

Less than twenty minutes elapsed between when T.J. relayed his concerns to Pritchett and when Renee was shot. *Id.* at 311-12. Less than a minute elapsed between when the Deputies arrived at the home and approached the front door. *Id.* About a minute elapsed between when

[3] This violated KCSO policy. *See id.* at 302.

they entered the home and opened fire on Renee. *Id*. Renee had no alcohol or drugs in her system. *Id.*

8. TRIAL COURT DISMISSES MS. DAVIS' CLAIMS BASED ON THE FELONY BAR STATUTE, RCW 4.24.420.

Rose Davis, as personal representative of the Estate of Renee Davis, filed suit in King County Superior Court against King County, Pritchett, Lewis, former KCSO Sheriff Urquhart, and KCSO Sheriff Johanknecht[4] (collectively, "King County") for negligence, battery, negligent use of excessive force, and outrage on January 3, 2018.

King County moved for summary judgment seeking to dismiss all of Ms. Davis' claims based primarily on RCW 4.24.420 ("Felony Bar Statute").[5] King County argued that Renee was guilty of Second or Third Degree Assault. In opposition, Ms. Davis argued that no direct evidence of Renee's specific intent existed and that the trial court could not infer

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[4] Ms. Davis voluntarily dismissed Defendant Johanknecht. Ms. Davis' sustained her claims against former Sheriff Urquhart. *Pavish v. Meyers*, 129 Wash. 605, 612, 225 P. 633 (1924) (it has long been the law in Washington that "[a] sheriff is responsible for his deputies, for they are acting in his private service in his name and stead, and are only public officers through him."). Ms. Davis presented evidence that Urquhart failed to "adequately train and supervise [KCSO] deputies [and] created an environment where the conduct of these deputies on October 21, 2016 was excessive." CP at 422-23. In fact, it "would be obvious to any Chief or Sheriff exercising his or her professional judgment that KCSO's failure to train and supervise would result in suicidal persons, such as Renee, at additional and unnecessary risk of serious harm and/or death." *Id.*

[5] Defendants also moved to dismiss Ms. Davis' claims on summary judgment based on the public duty doctrine and a challenge to Ms. Davis' negligent use of excessive force claims. Those issues have since been mooted by the Washington Supreme Court's opinion in *Beltran-Serrano v. City of Tacoma*, No. 95062-8, 442 P.3d 608 (Jun. 13, 2019), which largely tracked Ms. Davis' argument in opposition.

Renee's specific intent from the circumstances—that task is for the jury alone. RP at 29-31, 34. Ms. Davis also argued that the Felony Bar Statute applies on summary judgment to bar claims only where there exists an underlying criminal conviction or the plaintiff otherwise admits to felonious conduct. RP at 32-33. Ms. Davis further argued that proximate cause issues related to causation and the Deputies' own negligent and unreasonable conduct precluded summary judgment. RP at 31-33. Finally, Ms. Davis argued that this case should proceed to a jury for compelling policy reasons. RP at 33-34.

The trial court granted King County's motion solely on the basis of RCW 4.24.420. CP at 524. The trial court observed that "this case illustrates in a number of respects some issues that you can tell I find somewhat troubling in terms of holes or gaps in the law." RP at 53. The trial court explained that it was

> troubled by the fact that [the Felony Bar Statue] by its terms forecloses any inquiry into A, responsibility that the deputies or the county may have had … there may be issues of fact with respect to actions that Deputy Pritchett and Deputy [L]ewis chose to take with the knowledge hat at least Deputy Pritchett had about Ms. Davis being a domestic violence survivor, being in possession of a firearm, having moments earlier indicated her intent to kill herself, indicating that she already has some kind of a wound that she sent a photo of so that Mr. Molina would know she wasn't kidding about her intent to harm herself.

> And certainly in hindsight, there is an argument that these deputies did not act reasonably in the way they approached [Renee].

Id. at 54-55. The trial court specifically noted that issues of fact regarding the reasonableness of the Deputies' conduct were present, which are reserved exclusively "for the trier of fact" to determine. *Id*. at 55. The trial court concluded by explaining "if a court is going to make new law in this issue, it should be in an appellate court, not a Superior Court." *Id*.

D. ARGUMENT

1. STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court." *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987). This Court will only affirm a grant of summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (citing CR 56(c)). A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.2d 886 (2008). The Court construes all facts

and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972).

In ruling on summary judgment, the Court cannot weigh evidence or assess witness credibility. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 663 (2006). In fact, the U.S. Supreme Court has made clear that a trial court cannot make credibility determinations, weigh evidence, or draw inferences on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). The making of credibility determinations, weighing of evidence, and drawing of inferences are solely reserved for the jury. *Id.*

"[S]ummary judgment should be granted sparingly in excessive force cases'" like this one. *Gonzales v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc)). "This principle applies with particular force where," as here, "the only witness other than the officers was killed during the encounter. *Id.* at 795. Under these circumstances, courts "must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify." *Id.* (internal quotation marks omitted).

The Felony Bar Statute provides:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death. However, nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983.

King County bears the burden of proof on its Felony Bar Statute affirmative defense in this case. *See* CR 8(c) (defining affirmative defenses); *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 319 P.3d 987 (2014) (noting defendants bear burden of proof on affirmative defenses). Because King County bears the burden of proof, it is obligated to produce evidence on every element of the defense, demonstrate that there are no genuine issues of material fact, and establish that it is entitled to judgment as a matter of law. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

2. THE TRIAL COURT ERRED IN GRANTING KING COUNTY'S MOTION FOR SUMMARY JUDGMENT BASED ON THE FELONY BAR STATUTE, 4.24.420.

The trial court erred by granting King County's summary judgment motion based on its finding that Renee was guilty of some felony. Although unclear, it appears the court found that Renee was guilty of either Second or Third-Degree Assault. CP at 54, 524. Specifically, the trial court erred in three ways: (a) by inferring Renee's specific intent

to commit Second or Third-Degree Assault when no direct evidence of Renee's specific intent exists in this case; (b) by applying the Felony Bar Statute when Renee was not convicted of a felony and did not otherwise admit to felonious conduct; and, (c) by applying the Felony Bar Statute when questions of fact exist regarding whether the alleged felony was the proximate cause of Renee's injuries.

"A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree … [a]ssaults another with a deadly weapon, [or] "[w]ith intent to commit a felony, assaults another." RCW 9A.36.021(1)(c), (e). "A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree … [a]ssaults a law enforcement officer or employee of a law enforcement agency who was performing his or her official duties at he time of the assault." RCW 9A.36.031(1)(g).

Under the Felony Bar Statute, King County was required to establish that Renee's conduct constituted a felony and that this felony was the proximate cause of her injury. *See* RCW 4.24.420. First, Renee was never convicted of a felony, and Renee did not otherwise admit to felonious conduct. No direct evidence of her specific intent to commit a felony exists; it can only be inferred under the circumstances after

evidence is weighed and credibility determinations are made, which is solely reserved for the jury. *Anderson*, 447 U.S. at 248. Second, King County cannot establish that Renee's injuries were casually related to the commission of a felony. Renee's purported felonious conduct must proximately cause the injury, but it was the Deputies' own negligent conduct that led to Renee's death. Indeed, Renee's injuries—caused by the Deputies' own acts and omissions—was not caused by Renee's alleged felonious conduct. It occurred prior to that activity. Put another way, questions of fact exist regarding whether the felony was a proximate cause of the injuries. Thus, there can be no causal link between Renee's alleged illegal activity and the Deputies' negligence. Accordingly, the trial court erred in finding that King County met its burden because causation issues preclude summary judgment.

a. The Trial Court Erred By Inferring Renee's Intent To Commit Second Or Third Degree Assault.

No direct evidence of Renee's specific intent to commit either Second or Third Degree Assault exists—or will ever exist in this case—because Renee is dead. Only evidence from the circumstances surrounding Renee's death is present with regard to her specific intent. The only people that can provide an account of what occurred prior to Renee's death are the Deputies who shot her, whose account is inherently

self-serving. Only a jury can infer Renee's specific intent from the circumstantial evidence, which requires the weighing of evidence, the making of credibility determinations and the drawing of inferences. *See Barker*, 131 Wn. App. at 624; *see also Anderson*, 447 U.S. at 248. The trial court erred in usurping functions solely reserved for the jury by inferring Renee's specific intent, thus improperly weighing evidence, making credibility determinations, and drawing inferences. *Id.*

i. Second And Third-Degree Assault Require Specific Intent.

Intent is a nonstatutory element of assault. *State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 139 (1992) (citing *State v. Hopper*, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992)). "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). Because "[i]ntent and knowledge have been statutorily defined by the Legislature," they "have specific legal definitions aside from any common understanding or dictionary definitions which might be ascribed to them." *State v. Allen*, 101 Wn.2d 355, 361, 678 P.2d 798 (1984) (citing RCW 9A.08.010(1)(a), (b)). "Intent" to commit a criminal act means more than merely "knowledge" that a consequence will result. *Compare* RCW

9A.08.010(1)(a) (defining "intent) *with* RCW 9A.08.010(1)(b) (defining "knowledge"); *State v. Caliguri*, 99 Wn.2d 501, 505, 664 P.2d 466 (1983).

Second-degree assault requires specific intent to cause reasonable fear and apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 713, 716, 887 P.2d 396 (1995); *State v. Abuan*, 161 Wn. App. 135, 158, 257 P.3d 1 (2011). Third-degree assault likewise requires "specific intent to cause bodily harm or to create an apprehension of bodily harm." *State v. Allen*, 176 Wn. App. 1035, at *4 (2013) (unpublished) (citing *State v. Williams*, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011)); *State v. Hess*, 169 Wn. App. 1042, at *2 (2012) (unpublished). "The concept of specific intent involves an intention in addition to the intention to do the physical act." *State v. Edmon*, 28 Wn. App. 98, 62, P.2d 1310, *rev. denied*, 95 Wn.2d 1019 (1981); *see also State v. Nelson*, 17 Wn. App. 66, 72, 561 P.2d 1093, *rev. denied*, 89 Wn.2d 1001 (1977) (the term "general intent" means the intent to do the physical act which the crime requires).

ii. No Direct Evidence Of Renee's Specific Intent To Commit Second And Third Degree Assault Exists In This Case.

A criminal act in and of itself does not establish a person's intent as a matter of law. *See State v. Bea*, 162 Wn. App. 570, 579-80, 254 P.3d 948 (2011). This is because "[i]ntent is rarely provable by direct evidence." *State v. Gallo*, 20 Wn. App. 717, 729, 582 P.2d 558 (1978). In

this case, there is no direct evidence—and there will never be any—direct evidence of Renee's intent: neither the Deputies nor any other witness can testify about Renee's state of mind; and Renee will never provide direct evidence of her intent because she is dead. *State v. Smith*, 200 Wn. App. 1015, at *4 (2017) (unpublished) ("The State likely could present no direct evidence of intent, since a witness may not testify to another's state of mind.") (citing cases).

The only specific intent evidence that exists—which again does not constitute *direct* evidence of Renee's specific intent—is the *indirect* Deputy testimony, which represents inherently self-serving testimony.[6] Courts have recognized that officers in deadly force cases like this one are often the only witnesses to certain events because the other possible witness is dead as a result of the challenged use of deadly force. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *see also Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116 (9th Cir. 2016) (same). Because of the danger posed by self-serving officer testimony in these kind of situations, courts "may simply not accept what may be as a self-serving account by

[6] The inquest jury in this matter 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 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 pointed a gun at the Deputies**. *In re Inquest into the Death of Renee L. Davis*, No. 416IQ3902, at 3-4 (May, 26, 2017) (Court's Interrogatories to the Inquest Jury).

the police officer." *Estate of Villarreal ex rel. Villarreal v. Cooper*, 929 F. Supp. 2d 1063, 1072 (E.D. Wash. 2013) (citing *Scott*, 39 F.3d at 915).

Courts in Washington evaluating the Felony Bar Statute on summary judgment apply this same principle. For instance, in *Estate of Villarreal ex rel. Villarreal v. Cooper*, 929 F. Supp. 2d 1063 (E.D. Wash. 2013), law enforcement officers fatally shot a suspect after he allegedly swerved towards them. The suspect had never been convicted of a felony or otherwise admitted to felonious conduct. *Id.* at 1072. The U.S. District Court for the Eastern District of Washington denied summary judgment on RCW 4.24.420, based on fact issues associated with the swerve and other aspects of the incident. *Id*. at 1078. The court explained "[t]he only evidence in the record regarding [the suspect's] swerve toward Officer Cooper comes from statements by Officer Cooper," thus it could not simply accept the officer's self-serving account. *Id*. at 1072 (citing *Scott*, 39 F.3d at 915). Even though the officer testified that he believed the suspect was attempting to hit him with the vehicle, the court ultimately determined that a "reasonable fact-finder could conclude that a reasonable officer would have thought that [the suspect]'s swerve was not malicious and that he was not trying to hit Officer Cooper" based on the circumstances surrounding the encounter. *Id.*

Similarly here, because the Deputies are the only people who know what happened before the deadly shots were fired, a jury's assessment of the Deputies' credibility and weighing of the circumstances surrounding Renee's death is necessary. Numerous courts have held that "summary judgment should be granted sparingly in excessive force cases," like this one, particularly "where the only witness other than the officers was killed during the encounter." *Gonzales*, 747 F.3d at 795.

iii. Only A Jury May Draw The Inference Necessary To Establish Specific Intent By Weighing Evidence And Making Credibility Determinations.

Indirect evidence of intent "may be gathered, nevertheless, from all of the circumstances surrounding the event." *Gallo*, 20 Wn. App. at 729. Where, as in this case, "there is no direct evidence of the actor's intended objective or purpose"—as there is in this case—only a jury may infer the requisite specific intent "from circumstantial evidence." *Bea*, 162 Wn. App. at 579 (citing *Caliguri*, 99 Wn.2d at 506); *Smith*, 200 Wn. App. 1015, at *4 ("A jury may infer that a defendant acted with intent…"); *State v. Shelton*, 71 Wn.2d 838, 839, 431 P.2d 201 (1967)); *Allen*, 176 Wn. App. 1035, at *4 (jury infers defendant's intent to commit third-degree assault of law enforcement officer); *Byrd*, 125 Wn.2d at 716 ("trial court's instructional error impermissibly removed the element of intent

from the jury."). The requisite intent in this matter cannot be inferred from the mere display of a weapon alone. *State v. Star*, 5 Wn. App. 2d 1042, 2018 WL 4998400 (2018) (unpublished) (citing *State v. Karp*, 69 Wn. App. 369, 374-76, 848 P.2d 1304 (1993)); RP at 54.

And even the jury's inference of intent is a permissive inference—not a mandatory one. *See State v. Brunson*, 128 Wn.2d 98, 106, 905 P.2d 346 (1995) ("[T]he language of the instruction is clearly discretionary. The instruction tells the jury it 'may' infer criminal intent and '[t]his inference is not binding on you and it is for you to determine what weight, if any, such inference is to be given' … Nothing in the instruction suggests the jury must infer criminal intent if it finds unlawful entry. The jury is free to accept or reject the inference."). And "[w]hile the trier of fact is *permitted* to draw an inference or presumption that a [actor] intends the natural and probable consequences of his or her acts," the actor is likewise "entitled to have the jury give equal consideration to the possibility that he [or she] did not act intentionally, including any theory of nonintentional conduct that he [or she] might offer." *Id.* at 579-80. In fact, the law does not presume that a person intends the ordinary consequences of his or her voluntary acts. *See id.* (citing *Sandstrom v. Montana*, 442 U.S. 510, 512-13, n. 3 (1979)).

iv. The Trial Court Erred By Applying The Felony Bar Statute When No Direct Evidence Of Renee's Specific Intent Exists, And In Inferring Specific Intent From The Circumstances By Weighing Evidence And Making Credibility Determinations.

In this case, King County cannot establish each element of either Second or Third-Degree Assault because there is no direct evidence of Renee's specific intent and only a jury may infer Renee's intent, requiring the weighing of evidence and for credibility determinations to be made, which are solely jury functions and cannot be conducted by the trial court on summary judgment. The trial court therefore impermissibly invaded the exclusive province of the jury by inferring Renee's specific intent from the circumstantial evidence, *see Bea*, 162 Wn. App. at 579, thus impermissibly making credibility determinations, weighing the circumstantial evidence, and drawing an inference. *Barker*, 131 Wn. App. at 624; *Anderson*, 447 U.S. at 248.

Sufficient evidence exists for a reasonable jury to conclude that Renee lacked the specific intent necessary to establish Second or Third Degree Assault for the purposes of the Felony Bar Statue affirmative defense based on any number of factors present at the time of her death. *See Villarreal*, 929 F. Supp. 2d at 1072 (reasonable fact-finder could conclude that plaintiff's swerve was not malicious and that he was not

trying to hit the officer given 911 calls and reports of erratic driving). These factors include, for example, her mental state, history of depression and abuse, pre-shooting statements and conduct, suicidal ideation, the unloaded gun, personal history and characteristics, as well as the Deputies' own negligent conduct, pre-shooting tactical errors, and completely unnecessary and rushed confrontation of Renee at gunpoint in her bedroom less than a minute after entering her home. *See* WPIC 18.20; *State v. Davis*, 64 Wn. App. 511, 515-17 (1992), *rev'd on other grounds*, 121 Wn.2d 1, 846 P.2d 527 (1993) (diminished capacity is an affirmative defense to second degree assault where supported by evidence of a mental health condition); *State v. Eakins*, 127 Wn.2d 490, 902 P.2d 1236 (1995) (evidence of defendants character trait of peacefulness was pertinent to issue of whether he had diminished capacity to form intent); *State v. Mierz*, 127 Wn.2d 460, 478, n. 12, 901 P.2d 286 (1995) (self-defense available in assault situation). Given the inconsistencies in the Deputies' testimony, a reasonable jury could also conclude that Renee never even pointed a firearm at the Deputies—as a number of Inquest jurors did when confronted with this same testimony. *In re Inquest into the Death of Renee L. Davis*, No. 416IQ3902, at 3-4 (May 26, 2017). Because a reasonable juror could conclude that because the involved officers lied about circumstances surrounding the shooting, and that therefore "the

officers also lied about the facts that would support their claim that [Renee] posed an imminent threat of harm," summary judgment was inappropriate. *J.J.D. v. City of Torrance*, No. 14-7463, 2016 WL 6674996, at *5 (C.D. Cal. Mar. 22, 2016).

b. The Trial Court Erred By Applying The Felony Bar Statute Where No Previous Criminal Conviction Or Admission Of Criminal Conduct Exists.

All crimes, no matter their severity, have one thing in common: they require a factual determination to be proved. State and federal courts have almost exclusively applied the Felony Bar Statute to prevent a civil suit from proceeding to a jury to cases where either (1) the plaintiff already had been convicted of the felony, or (2) the commission of a felony was admitted in "the plaintiffs' own account" of the incident. *Estate of Lee v. City of Spokane*, 101 Wn. App. 158, 2 P.3d 979 (2000). Neither of those circumstances is present here. The trial court erred by applying the Felony Bar Statute on summary judgment to prevent a jury from deciding Ms. Davis's claims (and King County's Felony Bar Statute affirmative defense) when Renee was never convicted of Second or Third-Degree Assault and where she nor Ms. Davis otherwise admitted to committing each element of the felony.

Courts in Washington have almost universally applied the Felony Bar Statute to prevent plaintiffs from recovering in tort for injuries incurred as a result of police action taken in hot pursuit of the fleeing plaintiff. *See, e.g., Estate of Villarreal*, 929 F. Supp. 2d at 1078; *Bruglia v. Wash. State Patrol*, No. 13-cv-5891, 2014 WL 2216066 (W.D. Wash. Apr. 8, 2014); *Haugen v. Brosseau*, No. 01-5018, 2001 WL 35937104 (W.D. Wash. Sept. 24, 2001); *see also Dickinson v. City of Kent*, No. C06-1215RSL, 2007 WL 4358312 (W.D. Wash. Dec. 10, 2007).

In *Bruglia v. Washington State Patrol*, No. 13-cv-5891, 2014 WL 2216066 (W.D. Wash. Apr. 8, 2014), the plaintiff sued the Washington State Patrol and officers following a high-speed auto chase. The plaintiff pled guilty to felony vehicular assault as a result of the auto chase, and otherwise admitted to each and every element of felony vehicular assault. *Id.*, at *1. The plaintiff then filed a civil suit against the involved officers and Washington State Patrol seeking damages for injuries he sustained as a result of the high-speed auto chase. *Id.* The U.S. District Court for the Western District of Washington granted the defendants' summary judgment motion based on the Felony Bar Statute because the plaintiff had previously been convicted of felony vehicular assault and otherwise admitted to each element of that offense. *Id.* at *1-2, 5.

In *Haugen v. Brosseau*, No. 01-5018, 2001 WL 35937104 (W.D. Wash. Sept. 24, 2001),[7] law enforcement officers shot the plaintiff after he fled from them in a vehicle. *Id*. at *2-4. The plaintiff then pleaded guilty to a felony count of attempting to elude a pursuing police vehicle. *Id.* at *4. The plaintiff then filed civil § 1983 and state law tort claims against the involved officer and municipality. *Id.* The court determined that the defendants were entitled to dismissal of the state tort claims under the Felony Bar Statue when the plaintiff pleaded guilty to attempting to elude a pursuing police vehicle. *Id.* at *10-11.

In *White v. Pletcher*, 170 Wn. App. 1012 (2012) (unpublished), the trial court dismissed the defendant's state law counterclaims against the plaintiffs based on the Felony Bar Statute following the defendant's conviction of second degree assault. In 2009, a jury convicted the defendant of second-degree assault. *Id*. at *1. During the criminal trial, the defendant "repeatedly testified that he 'defended' himself when he struck [the plaintiff] with the tire iron." *Id.* On appeal, Division II of the Court of Appeals in the subsequent civil case relied on the fact that "[t]he jury in the criminal trial concluded that [the defendant] did not act in self

[7] *Aff'd in part, rev'd in part*, 339 F.3d 857 (9th Cir. 2003), *opinion amended on denial of reh'g*, 351 F.3d 372 (9th Cir. 2003), *cert. granted, judgment vacated*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004), and *cert. granted, judgment rev'd*, 543 U.S. 194, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004).

defense. Thus, any injuries suffered after [the defendant] began his assault of [the plaintiff] were incurred while he was engaged in the commission of a felony." *Id.* at *4. Thus, the court held that the Felony Bar Statute precluded the defendant's counterclaims based on the criminal conviction for second-degree assault. *Id.*

In *Estate of Lee v. City of Spokane*, 101 Wn. App. 158, 2 P.3d 979 (2000), following a domestic dispute between a husband and wife, the wife returned to the home with law enforcement officers. *Id.* at 163-64. Against the advice of the officers, the wife attempted to unlock the front door of the home while the officers took up positions next to her. *Id*. at 164. After shouting through the door "get the f* * * out of here … or two people are going to die tonight," the husband opened the door and pointed a gun at one of the officers, and the other officer shot the husband. *Id.* As personal representative of the husband's estate, the wife filed § 1983 and state law tort claims against the involved officers and City of Spokane. *Id*. at 165. Division III of the Washington State Court of appeals determined that "[b]y plaintiffs' own account, [the husband] pointed a gun at [one of the officers and the wife] after threatening to shoot them. This is first degree assault, a felony." *Id.* at 177 (citing RCW 9A.36.011). The court held that the Felony Bar Statute precluded the plaintiff's claims. *Id.*

Unlike the plaintiffs in *White*, *Haugen*, and *Bruglia*, whose claims were barred under RCW 4.24.420 based on the underlying criminal conviction, Renee was never convicted of Second or Third Degree Assault as a result of her encounter with the Deputies on October 21, 2018. And unlike the plaintiffs in *White*, *Haugen*, *Bruglia*, and *Lee*, who all admitted—either in the criminal or civil proceedings—to felonious conduct, Renee never admitted to acts constituting felonious conduct. The Felony Bar Statute therefore cannot apply *on summary judgment* to preclude Ms. Davis' claims; a jury must determine the question of whether the Felony Bar Statute applies under these particular circumstances. The trial court erred by applying the Felony Bar Statute on summary judgment to bar claims in the absence of a criminal conviction or admission by Renee.

c. The Trial Court Erred By Applying The Felony Bar Statute On Summary Judgment To Dismiss Claims When Questions Of Fact Exist Regarding Whether The Alleged Felony Was The Proximate Cause Of Renee's Injuries.

Ms. Davis presented substantial evidence that the Deputies "unreasonably escalated the situation, neglected to use a negotiator or other individual trained in talking to mentally ill people, and aggressively precipitated the use of deadly force," throughout their encounter with Renee. *Stewart v. City of Prairie Village, Kan.*, 904 F. Supp. 2d 1143,

1156 (D. Kan. 2012); CP 379-391, 333-45, 422-23. In the absence of the Deputies' decision to confront Renee at gunpoint—and to otherwise fail to take reasonable care when approaching the incident—Renee's injuries would not have occurred. In other words, but for Deputies' own negligence, none of Renee's injuries would have occurred. *Newlun v. Sucee*, 194 Wn. App. 1008, at *6, *rev. denied*, 186 Wn.2d 1027, 385 P.3d 125 (2016). The trial court erred in granting summary judgment because questions of fact as to causation exist in this case. *See id.*; RCW 4.24.420 (requiring proximate cause). The trial court further erred in granting summary judgment because it impermissibly weighed evidence and made credibility determinations by ignoring and otherwise disregarding Ms. Davis' evidence of the Deputies own negligent conduct that precipitated and caused the ultimate use of deadly force. *See Newlun*, 194 Wn. App. 1008, at *6; *see also Barker*, 131 Wn. App. at 624.

The proximate cause requirement in the felony bar statue "corresponds with the common law rule of proximate cause being an element of negligence." *Sluman v. State of Washington*, 3 Wn. App. 2d 656, 701 (2018) (citing *Wuthruch v. King Cty.*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016)). "Proximate cause consists of two elements: cause in fact and legal causation." *Id.* (citing *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985)). Cause in fact concerns the "but for" consequences of

an act: those events the act produced in a direct, unbroken sequence, and that would not have resulted had the act not occurred. *Id.* (citing *Smith v. Dep't of Corr.*, 189 Wn. App. 839, 850, 359 P.3d 867 (2015), *rev. denied*, 185 Wn.2d 1004, 366 P.3d 1244 (2016)). "Legal causation rests on considerations of logic, common sense, policy, justice, and precedent as to how far the defendant's responsibility for the consequences of its actions should extend." *Id*.

The question of proximate cause is ordinarily for the jury and is generally not susceptible to summary judgment. *Owed v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) ("[I]ssues of negligence and proximate cause are generally not susceptible to summary judgment."); *cf. Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993) (holding it was a question of fact whether a passenger could be more at fault than drive under statute prohibiting recovery if plaintiff is intoxicated, such intoxication is a proximate cause of his injuries, and the plaintiff was more than 50% at fault).

In *Newlun v. Sucee*, 194 Wn. App. 1008, *rev. denied*, 186 Wn.2d 1027, 385 P.3d 125 (2016), an undercover police officer with the Northwest Regional Drug Task Force transmitted the plaintiff's voice through a body wire while the plaintiff was conducting a marijuana sale. *Id.* at *1. The plaintiff was then charged with felony delivery of

marijuana. *Id.* at *2. The police office had, however, failed to obtain written authorization for the body wire, and as a result, the charge was reduced to a misdemeanor, to which the plaintiff plead guilty. *Id.* The plaintiff then sued members of the Task Force for violation of the Privacy Act, Chapter 9.73, RCW. *Id.* The trial court denied the Task Force's summary judgment motion based on the Felony Bar Statute. *Id.*

Division I of the Court of Appeals concluded that issues regarding "whether the felony was a proximate cause of the alleged injury" precluded summary judgment. *Id.* at *5. This Court explained:

> The Task Force contends there is a causal relationship between Newlun's commission of a felony and his claimed injuries. It argues that "but for Mr. Newlun's agreement to sell the informant drugs and steps toward engaging in the sale, his voice would have never been transmitted . . . ." But in the absence of the unauthorized body wire, neither the agreement nor the sale would have resulted in Newlun's alleged injuries. It is at least arguable that but for the Task Force's decision to transmit Newlun's conversations without complying with the statute, none of Newlun's claimed injuries would have occurred.

Id. at *6 (internal quotations and citations omitted). This Court ultimately "agree[d] with the trial court that there are disputed issues of fact about whether there is a causal relationship between Newlun's commission of a felony and his alleged injuries." *Id.*

Here, "[i]nstead of reasonably attempting to mitigate the likelihood of death" posted by Renee's mental health crisis and attendant suicidality,

the Deputies' decision to confront Renee at gunpoint "exacerbated that risk." *Thomas v. Cannon*, 289 F.Supp.3d 1182, 1196 (W.D. Wash. 2018); CP at 333-45, 422-23. It has long been establish[ed] that an officer acts unreasonably when he aggressively confronts an armed and suicidal/emotionally disturbed individual." *Hastings v. Barnes*, 252 F. App'x 197, 206 (10th Cir. 2007) (citing *Allen v. Muskogee, Okla.*, 119 F.3d 837, 840 (10th Cir. 1997)); *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995); *see also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."); *Glenn v. Wash. Cty.*, 673 F.3d 864, 872 (9th Cir. 2011) (it is not "reasonable to use a significant amount of force to try to stop someone from attempting suicide" and noting that "it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself"); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1043 (9th Cir. 2018) ("[A] mentally disturbed person may respond differently to police intervention than does a person who is not

mentally disturbed. Officers should bear this in mind when going about their duties.").[8]

At the time the Deputies chose to confront Renee at gunpoint in her bedroom, she was suicidal, in a mental health crisis, and *maybe* had a superficial wound somewhere on her body. Renee also was alone in her bedroom, did not advance towards the Deputies or anyone else, and "posed only a minimal threat to anyone's safety," chiefly her own. *Drummon v. City of Anaheim*, 343 F.3d 1052, 1057-58 (9th Cir. 2003).

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[8] *Herrera v. Las Vegas Metropolitan Police Department* is on point here as well:

> At the time of his interaction with the police, Herrera was in a severely emotional mental state. This was clear to the officers not only from the information they received upon their arrival, but also during the course of their interaction with Herrera. Yet, the officers took a confrontive approach with Herrera and did not retreat or reconsider that approach, even when it was clear that Herrera was becoming more agitated. . . . The question of whether the officers used force that was objectively reasonable under the totality of the circumstances is properly left to the jury.

298 F. Supp. 2d 1043, 1051 (D. Nev. 2004). And as the U.S. District Court for the Western District of Washington recently noted in a well-reasoned decision denying summary judgment in a similar case involving a suicidal subject:

> In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. . . . Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.

McGregor v. Kitsap Cty., No. 17-5436, 2018 WL 2317651, at *4, n.7 (W.D. Wash. May 22, 2018).

The Deputies then engaged in unreasonable conduct by confronting Renee at gunpoint. *Maddox on Behalf of D.M. v. City of Sandpoint*, No. 16-cv-00162, 2017 WL 4343031, at *3 (D. Idaho Sept. 29, 2017); *see also Doornbos v. City of Chicago*, 868 F.3d 572, 583 (7th Cir. 2017) (holding that trial courts must take into account whether "an officer's unreasonable . . . conduct proximately causes the disputed use of force"); *Williams v. Ind. State Police Dep't*, 797 F.3d 468, 483 (7th Cir. 2015) ("The sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances."); *Pauly v. White*, 874 F.3d 1197, 1219 (10th Cir. 2017) ("[T]he reasonableness of the use of force depends not only on whether the officers were in danger at the precise moment that they used force, but also on whether the officers' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.").

Ms. Davis' experts have confirmed the unreasonableness of the Deputies' conduct. CP at 33-34, 379-91, 422-23. Courts give expert opinion in this area substantial weight, since the "reasonableness of the particular use of force must be judged from the perspective of a reasonable police officer on the scene." *DeSantis v. City of Santa Rosa*, No. 07-3386, 2008 WL 11387034, at *5 (N.D. Cal. Oct. 28, 2008), *aff'd*, 377 F. App'x 690 (9th Cir. 2010).

King County will undoubtedly argue hat but for Renee's alleged pointing of the unloaded firearm at the Deputies, they would not have shot her. This Court rejected a similar argument in *Newlun*. *Id.* at *6. As this Court similarly observed in *Newlun*, in the absence of the Deputies' negligent entry into Renee's bedroom with guns drawn and pointed at her within seconds of entering her home, the fatal shooting would not have resulted in Ms. Davis' alleged injuries because Ms. Davis would not have had the opportunity to point a gun at them (assuming for the sake of argument that she did). *Id.* It is likewise arguable in this case that but for the Deputies' negligent actions—i.e., failure to de-escalate the situation, wait for backup, contact a supervisor, attempt to contact Renee or T.J. by other means, treat Renee like a barricaded subject, and most importantly, enter Renee's bedroom when they knew she was suicidal and likely armed—none of Ms. Davis' claimed injuries would have occurred. *Id*. As this Court concluded in *Newlun*, here there are disputes issues of fact about whether there exists a casual relationship between Renee's alleged commission of a felony and her alleged injuries. *Id.* The trial court therefore erred in granting King County's summary judgment motion.

d. Public Policy Compels Reversal Of The Trial Court's Decision.

This Court should be reticent to affirm the trial court's decision based on the Felony Bar Statute under these circumstances for compelling public policy reasons. The Felony Bar Statute should not be read so broadly as to terminate all civil state law remedies for plaintiffs injured as a result of law enforcement officer negligence. As a matter of public policy, law enforcement officers should not be able to summarily dismiss claims arising from the death of a citizen when they created the circumstance leading up to the fatal confrontation and where the only other witness to the incident is dead. As this state's Supreme Court has recently held, officers will be liable if they "unreasonably fail[] to follow police practices calculated to avoid the use of deadly force." *Beltran-Serrano v. City of Tacoma*, 442 P.3d 608, 611 (Wash. 2019). Reading the Felony Bar Statute as Defendants urge would entirely gut this duty.

To dismiss Ms. Davis' claims under these circumstances would effectively abrogate a law enforcement officer's duty to act with reasonable care. Dismissal would give law enforcement officers license to act with impunity or negligently when they kill a citizen because after the fact, with no other witness to the events, they could simply characterize the deceased citizen's actions as felonious.

All of the issues raised by King County's felonious conduct defense illustrates why it is essential for this issue to go to a jury and why it is inappropriate for summary judgment. Whether Renee committed a felony and whether the felonious conduct statute bars Ms. Davis' claims is a question that only a jury can and should decide.

E. CONCLUSION

Ms. Davis requests this Court to reverse the trial court's dismissal of her claims based on the Felony Bar Statute, RCW 4.24.420, and remand this matter for further proceedings.

Respectfully submitted this 25th day of July 2019.

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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 July 25, 2019.

s/Wendy Foster

Wendy Foster

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