No. 792946-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SARA LACY, as the Personal Representative of the Estate of Cecil D. Lacy, Jr., deceased,

Plaintiff-Appellee/Cross-Appellee,

v.

SNOHOMISH COUNTY,

Defendant-Appellee/Cross-Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

U.S. SUPREME COURT CASES

FEDERAL CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

This case involves a Snohomish County Sheriff's Deputy's unreasonable use of deadly force against an unarmed 46 year-old mentally ill Native American man in the midst of a medical emergency. This Deputy's fateful decision to use deadly force left the Native American man, Cecil Lacy, Jr., dead. The Deputy, who was later joined by two Tulalip Tribal Police officers, stopped Cecil after receiving a report that Cecil was walking in the road. When the Deputy confronted him, Cecil was exhibiting symptoms of a condition called Excited Delirium Syndrome ("ExDs")—a medical emergency. The Deputy did not call for emergency medical services ("EMS") to be staged at the scene upon witnessing Cecil's symptoms.

A fatal struggle ensued during which the Deputy held Cecil down with his body weight face down and in a prone position. After telling the Deputy that he could not breathe, Cecil became unresponsive. The Deputy delayed in rendering Cecil life-saving aid and then employed the wrong CPR techniques. Cecil died at the scene as a result of mechanical positional asphyxia brought on by the Deputy's unreasonable and excessive restraint of Cecil in that face-down prone position. Cecil was not suspected of committing any crime and was not under arrest.

Plaintiff Sara Lacy, widow and personal representative of the Estate of Cecil Lacy, Jr., ("Ms. Lacy") brought her negligence, battery and assault claims against Snohomish County ("Defendant") to trial. At trial, Ms. Lacy presented eyewitness testimony that Cecil was exhibiting ExDs symptoms, the Deputy held Cecil face down in a prone position during the struggle, and that the Deputy

delayed in rendering CPR and when he finally did, he used the wrong technique. Ms. Lacy presented expert testimony that Cecil was experiencing ExDs during his encounter with the Deputy, and that a reasonable law enforcement officer would have recognized that Cecil was in the midst of a medical emergency requiring an immediate call for EMS to be staged. Ms. Lacy also presented evidence that a reasonable law enforcement officer would not have restrained Cecil in a face-down prone position during the struggle. Further, Ms. Lacy presented expert testimony that Cecil died as a result of mechanical positional asphyxiation caused by the Deputy's restraint of Cecil in a face-down prone position. Following Ms. Lacy's case in chief, the trial court granted Defendant's CR 50(a)(1) motion for directed verdict. Ms. Lacy appealed.

II. ASSIGNMENTS OF ERROR AND ISSUES THEREIN

A. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S CR 50(A)(1) MOTION FOR DIRECTED VERDICT.

1. Did the trial court impermissibly weigh evidence, make credibility determinations, and draw improper inferences in granting Defendant's CR 50(a)(1) motion for directed verdict? Yes.

2. Did Plaintiff present evidence of proximate cause sufficient enough to survive Defendant's CR 50(a)(1) motion for directed verdict? Yes.

B. THE TRIAL COURT ERRED WHEN IT EXCLUDED PLAINTIFF'S EXPERT OPINION.

1. Did the trial court abuse its discretion by prohibiting Plaintiff's police practices expert from citing national law enforcement model policies and procedures as the basis of her expert opinion? Yes.

C. THE TRIAL COURT ERRED WHEN IT EXCLUDED PLAINTIFF'S EVIDENCE.

1. Did the trial court abuse its discretion when it excluded evidence of Pendergrass's expired CPR certification? Yes.

2. Did the trial court abuse its discretion when it excluded evidence of Snohomish County Sheriff's Office policies? Yes.

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

1. Deputy Pendergrass Responds To A Traffic Hazard On Marine View Drive And Encounters Cecil.

On September 18, 2015, Snohomish County Sheriff's ("SCSO") Deputy Tyler Pendergrass ("Pendergrass") responded to a call from Snohomish County dispatch about an area check for a possible traffic hazard while out on patrol around 9:47 p.m. Verbatim Report of Proceedings ("VRP"), Vol. V at 429; Trial Ex. 101 at 1. Snohomish County dispatch informed Pendergrass that a "possibly intoxicated" citizen had been reported walking in the roadway of Marine View Drive. *Id*.

Pendergrass arrived on scene around 10:06 p.m. and found Cecil walking on the side of the road while swinging his arms. VRP, Vol. V at 512; Trial Ex. 107 at 1. Pendergrass parked on the shoulder behind Cecil, turned on his patrol vehicle's lights, and exited his vehicle. VRP, Vol. V at 433. Cecil turned around and approached Pendergrass at a fast pace. *Id.* Pendergrass instructed Cecil to stop, and Cecil complied. *Id.* Pendergrass observed that Cecil exhibited "wide eyes," that he was overweight, and that he was "extremely sweaty" and moving erratically. *Id.* These are all classic symptoms of ExDs. *See* VRP, Vol. IV at 278, 334; *id.*, Vol. VI at 619-20, 642, 650. Pendergrass then contacted Snohomish County dispatch at 10:07 p.m. VRP, Vol. V at 433, 512; Trial Ex. 107 at 1. This call was not, however, for EMS; it was for law enforcement back up. VRP, Vol. V at 433, 512.

Pendergrass commanded Cecil to stop walking, detained him on the side of the roadway, and began to question him. *See id.*, at 435-36. Pendergrass first asked Cecil what he was doing. *Id.* at 436. Cecil replied that he was out walking for his nightly exercise. *Id.* Pendergrass then asked Cecil what his name was and where he lived, and Cecil told him. *Id*. Pendergrass could understand only part of what Cecil was saying because his speech was so rapid. *Id.* at 435-36. Cecil did inform Pendergrass, however, that he had been diagnosed with two mental health conditions. *Id.* at 436. Throughout their conversation, Cecil continued to move erratically, speaking rapidly, and sweating excessively. *Id.* at 435-36.

Pendergrass grew increasingly concerned with Cecil's behavior because it was not "normal for somebody out exercising." *Id.* at 437, 449. Pendergrass knew something was wrong. *Id.* Although Cecil informed Pendergrass of his mental health conditions and was exhibiting the signs and symptoms of ExDs, Pendergrass failed to recognize that this situation was a medical emergency failed to call EMS. *Id.* at 443. Pendergrass chose instead to believe that Cecil was under the influence of methamphetamine. *Id*. Pendergrass later admitted that ExDs is in fact a medical emergency. *Id.* at 566.

2. Tulalip Police Arrive On Scene.

Two officers from the Tulalip Police Department—Officer Gross and Sergeant Johnson—arrived on the scene at around 10:07 p.m. *Id.* at 513; Trial Ex. 107 at 1. Tulalip Police and Snohomish County have concurrent jurisdiction over the Tulalip Indian Reservation. VRP, Vol. III at 211. Tulalip Police do not, however, supervise SCSO Deputies, and calls to 911 from the Tulalip Indian

Reservation go to Snohomish County dispatch. *Id.*, Vol. IV at 345-46, 349-50. After the 911 call was routed to Snohomish County dispatch and Pendergrass responded, Tulalip dispatch separately contacted Officer Gross around 9:57 p.m. and sent him to the scene. *Id.*, Vol. III at 211, 218-20.

Officer Gross arrived to the area of the scene about a minute before Pendergrass arrived, but Officer Gross parked about 100 to 200 yards down the road and waited for Sergeant Johnson to arrive. *Id.* at 224; *id.*, Vol. V at 431, 434, 540. While Officer Gross was en route, Sergeant Johnson instructed Officer Gross to wait in his patrol vehicle until he arrived on scene before Officer Gross made contact with Cecil. *Id.*, Vol. III at 223-24. Once Sergeant Johnson arrived on scene, he approached Officer Gross as Pendergrass was questioning Cecil on the shoulder of Marine View Drive. *Id.*, Vol. IV at 351.

Sergeant Johnson overheard Cecil tell Pendergrass that "this is my reservation" as he approached. *Id.* Sergeant Johnson then joined Pendergrass's conversation with Cecil. *Id.* at 352; *see* Trial Ex. 101. After asking Cecil some questions, Sergeant Johnson twice asked Pendergrass "[w]e can give him a ride home if that's okay with you" and "We can take him if that's cool with you guys." *Id.*, Vol. V at 565; Trial Ex. 101 at 00:1, 00:34. Pendergrass consented.

Sergeant Johnson informed Cecil that they were going to give him a ride home, but that they had to put handcuffs on him first. Trial Ex. 101 at 01:08; VRP, Vol. IV at 353-54. Cecil objected and asked firmly that the officers call his wife, Ms. Lacy, to come get him. Trial Ex. 101 at 01:09-01:15. As Sergeant Johnson attempted to de-escalate Cecil, Pendergrass pulled out his Taser and

threatened to use it on Cecil, yelling "Cecil, you need to relax or you are going to get tazed!" *Id*. at 01:18-01:19. Cecil continued to speak rapidly, move erratically, and excessively sweat. *Id.*; VRP, Vol. IV at 351-52.

Sergeant Johnson then explained to Cecil that he could not walk in the roadway, that Cecil was going to get a ride home, and clarified that Cecil was not under arrest. Trial Ex. 101 at 01:24-01:28. Cecil insisted that he not ride in handcuffs. *Id.* at 01:29. Pendergrass chimed in by once more yelling at Cecil, "Cecil, either we are going to give you a ride home or we are going to give you a ride to the hospital. That's your choice." *Id.* at 01:31-01:32. Sergeant Johnson then asked Cecil what he wanted to do, and Cecil again asked the officers to call his wife, or handcuff him in front because of his bad shoulders. *Id.* at 01:37-01:40. Sergeant Johnson agreed, reassuring Cecil that they were there to help him. *Id.* at 01:42-01:43.

Sergeant Johnson then frisked Cecil, and found no weapons, drugs or drug paraphernalia. VPR, Vol. IV at 355. Sergeant Johnson handcuffed Cecil around 10:12 p.m. *Id.*, Vol. V at 514; Trial Ex. 107 at 1. As Cecil and the officers walked to Officer Gross's patrol vehicle, Cecil informed the officers that he had "spent years in mental institutions and got [his] ass beat and hosed." Trial Ex. 101 at 02:35-02:39. After the officers placed Cecil in the patrol vehicle, Cecil exited while saying that he did not want to go back to the mental institution. VRP, Vol. III at 231; *id.*, Vol. V at 459. The Tribal Officers calmed Cecil down and placed him back into the patrol vehicle. *Id.*, Vol. V at 459.

Pendergrass chose not to leave the scene once Tulalip Police arrived on scene. *Id.* at 507. He chose not to leave when Sergeant Johnson began conversing with Cecil. *Id.* He chose not to leave when Cecil was handcuffed. *Id.* He chose not to leave the scene once Cecil was placed in the patrol vehicle. *Id.* at 510.

Sergeant Johnson and Pendergrass then began to talk a few feet away, when Cecil began to exit the patrol vehicle a second time. *Id.* at 461; *id.*, Vol. IV at 355.

3. The Fatal Struggle Between Cecil And Pendergrass.

A struggle between the officers and Cecil began when Cecil tried to get away around 10:13 p.m. *Id.*, Vol. V at 469-50, 514. All three officers went "hands" on Cecil, attempting to restrain him. *Id.* at 461. Cecil drug the three officers to the front of the patrol vehicle. *Id.* at 514. Pendergrass attempted to apply his Taser to Cecil's right shoulder in drive-stun mode, but it had no effect so Pendergrass dropped the Taser on the ground. *Id*. at 463. Sergeant Johnson's body camera fell to the ground during the struggle. *Id.*, Vol. IV at 356, 365.

Sergeant Johnson took Cecil to the ground using a leg sweep. *Id.* at 358-59; *id.*, Vol. III at 233. Cecil ended up face down on the ground in a prone position. *Id.* Officer Gross controlled Cecil's legs and Sergeant Johnson controlled Cecil's arms. *Id.*, Vol. V at 464-65; *id.*, Vol. IV at 359; *id.*, Vol. III at 234. Sergeant Johnson instructed Officer Gross to cross Cecil's legs; Sergeant Johnson never gave any commands to Pendergrass. *Id.*, Vol. IV at 359-60. Pendergrass chose to control Cecil's torso area, however, by applying weight to

Cecil's back and "holding him down" while Cecil was in the prone position. *Id.*, Vol. V at 465, 468; *id*., Vol. IV at 360; *id.*, Vol. III at 234. Contrary to the testimony of Sergeant Johnson, Officer Gross and an earlier recorded statement, Pendergrass denied at trial that he held Cecil face down in a prone position. *Id.*, Vol. V at 465-66.

As Cecil continued to struggle, Pendergrass again called for backup—not medical aid—around 10:14 p.m. *Id.*, Vol. V at 515.

During the struggle while face down on the ground, Cecil informed Pendergrass "I can't breathe." *Id.*, Vol. IV at 361; *id.*, Vol. V at 417. Although Pendergrass heard Cecil say he could not breathe, Pendergrass chose not to alleviate the pressure on Cecil's back, or roll Cecil onto his side or place Cecil in a seated position. *Id.*, Vol. V at 473. Cecil then struggled to survive for approximately ten to fifteen seconds when suddenly he became unresponsive. *Id.*; *see also id.*, Vol. IV at 361.

During the struggle, the Tulalip officers believed that Cecil was scared and trying to get away; they did not think Cecil was trying to hurt them. *Id.*, Vol. III at 231; *id.*, Vol. IV at 356, 358.

4. Cecil Becomes Unresponsive After Pendergrass Restrains And Struggles With Him In A Face-Down Prone Position.

The officers rolled Cecil over when they realized he was unresponsive. *Id.*, Vol. IV at 361; *id.*, Vol. III at 235. Pendergrass' "instincts took over" and he began instructing Sergeant Johnson to check Cecil's vitals as he *walked* to his patrol vehicle to locate latex gloves and a CPR mask. *Id.*, Vol. V at 473-74, 480, 494, 500-01. At 10:18 p.m., Pendergrass informed Snohomish County dispatch

that he was working on ascertaining Cecil's breathing status. *Id.* at 516; Trial Ex. 107 at 1. After about twenty to twenty-five seconds had passed, Pendergrass then *walked* back to Cecil's body and began CPR at 10:19 p.m. *Id.*, Vol. V at 475, 516; Trial Ex. 107 at 2.

5. EMS From Tulalip Bay Fire Department And Marysville Fire Department Arrive On Scene.

Emergency Medical Technicians ("EMTs") with the Tulalip Bay Fire Department ("Tulalip Bay") arrived on scene at 10:22 p.m.—four minutes after being dispatched at 10:17 p.m. Trial. Ex. 108 at 1. EMTs provide basic life support services such as CPR and AED. VRP, Vol. IV at 305-06.

Tulalip Bay provided medical assistance to Cecil immediately upon arrival at the scene. *Id.*, Vol. V at 504-05; VRP, Vol. IV at 361-62; *id.*, Vol. III at 240-41; *see also* Def. Trial Ex. 109 at 9:30-10:10. Cecil had been unresponsive for approximately three to four minutes by the time Tulalip Bay EMTs began rendering life-saving aid to Cecil. Trial Ex. 108 at 1; Trial Ex. 107 at 1-2.

The Marysville Fire Department paramedics arrived on scene at 10:29 p.m.—twelve minutes after being dispatched at 10:17 p.m. Trial. Ex. 108 at 1. Paramedics have the ability to chemically sedate citizens, provide advanced cardiac life support, and administer treatment specifically for ExDs. VRP, Vol. IV at 308-09, 322-23.

Cecil was pronounced dead at the scene. Trial. Ex. 111 at 2. The Snohomish County Medical Examiner determined that Cecil's cause of death was "*cardiac arrhythmia due to acute drug intoxication due to methamphetamine*." *Id.* at 1 (emphasis in original). Cecil only had 0.18mg/l of methamphetamine in

his system at the time of his death. *Id.* At no time was Cecil under investigation or arrest for a criminal offense. *Id.*, Vol. V at 510; *id.*, Vol. IV at 355.

After the fact, Pendergrass admitted that despite the actions of others at the scene that night, he is responsible for his own actions. *Id.*, Vol. V at 561. According to the involved officers, who was in charge throughout the encounter with Cecil was "fluid." *Id.*, Vol. IV at 365.

B. PROCEDURAL BACKGROUND

Plaintiff Sara L. Lacy filed a second amended complaint against Defendant Snohomish County on May 30, 2017. CP at 1-15. Trial in this matter commenced on October 15, 2019. *Id.* at 1732. Ms. Lacy called a total of nine witnesses in her case in chief. *Id.* at 1822. Relevant here, Ms. Lacy called three fact witnesses, the involved officers: Officer Gross, Sergeant Johnson, and Pendergrass. *Id.* Ms. Lacy called three expert witnesses: Dr. Jared Strote, an expert in emergency medicine; Sue Peters, an expert in police practices; and, Dr. Bennett Omalu, an expert forensic pathologist and neurologist. *Id.*

1. Dr. Jared Strote's Testimony.

The trial court qualified Dr. Jared Strote as an expert in emergency medicine. VRP, Vol. IV at 277. Dr. Strote received his medical doctorate from Harvard University and holds a masters degree from Duke University in Neuro-Biology. *Id.* at 271. Dr. Strote serves as an emergency physician at Harborview Medical Center and University of Washington Medical Center. *Id.* at 269. Dr. Strote also works as an Associate Professor of Emergency Medicine at the University of Washington Medical School. *Id.* at 270.

Dr. Strote testified that Cecil experienced ExDs on September 18, 2015, during his encounter with Pendergrass. *Id*. at 278, 334. Dr. Strote opined that Pendergrass's actions contributed to Cecil's death when he: failed to recognize the encounter as a medical emergency and immediately call for medical aid; restrained Cecil in a prone position and applied weight on Cecil's back; and, delayed in administering CPR. *Id.* at 314, 324-26. Dr. Strote concluded to a reasonable degree of medical certainty that Cecil would not have died but for Cecil's interaction with law enforcement on September 18, 2015. *Id.* at 328; *see also id.* at 284-85, 290-91. Dr. Strote also testified that Cecil did not die as a result of the residual amount of methamphetamine in his system. *Id.* at 286, 329.

2. Sue Peter's Testimony.

The trial court qualified Retired King County Sheriff Detective Sue Peters as an expert in police practices. *Id.*, Vol. VI at 612. Ms. Peters served for over twenty-nine years in the King County Sheriff's Office as a patrol officer and detective with the Major Crimes Unit. *Id.* at 592-94.

Ms. Peters opined on the standard of care applicable to law enforcement officers when they encounter a situation involving a citizen exhibiting the signs and symptoms of ExDs.[1] Ms. Peters testified that Cecil was quite obviously exhibiting the signs and symptoms of ExDs during his encounter with Pendergrass. *Id*. at 619-20, 642, 650. Ms. Peters explained that when a reasonable law enforcement officer encounters a citizen experiencing ExDs symptoms, the officer should be able to recognize those symptoms and treat the

[1] *See McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989) (expert testimony generally required to establish standard of care).

situation as a medical emergency. *Id.* at 613-14, 616-17, 631-32. Ms. Peters opined that when a reasonable law enforcement officer encounters a situation involving a citizen exhibiting signs of ExDs, he or she should immediately call for EMS to be staged and call for backup. *Id.* at 613-14, 616-17, 631-32, 649-50. Ms. Peters determined that Pendergrass failed to recognize that Cecil exhibited signs of ExDs during their encounter on September 15, 2018, and failed to treat the incident as a medical emergency by immediately staging EMS. *Id.* at 621, 649. Ms. Peters also opined that while waiting for EMS, a reasonable officer (1) would not attempt to detain an individual exhibiting these symptoms in a patrol vehicle, and would instead (2) de-escalate the situation by gathering information, trying to calm the individual, and not making threats. *Id.* at 637-38, 643, 648.

Ms. Peters opined further that a reasonable law enforcement officer should not restrain a citizen exhibiting ExDs symptoms in a face-down prone position with weight on his back, and should ultimately avoid a prolonged struggle with a citizen in a prone position. *Id*. at 642, 646-47. Ms. Peters explained that citizens "in a state of [ExDs] are at a risk for in-custody death or death shortly after an event such as a struggle or a prolonged struggle." *Id.* at 625. Thus, a reasonable law enforcement officer should not "put a large amount of weight or pressure on their backside when they are in a face-down prone position because it interferes with their breathing" and must instead "try other techniques to avoid pressure on an individual's chest area." *Id.* Ms. Peters opined further that when a citizen communicates that he cannot breathe when being restrained with weight on his back, a reasonable law enforcement officer must "alleviate that pressure

immediately and roll the individual onto either their side or in a seated position." *Id.* at 626. Ms. Peters also opined that a reasonable law enforcement officer should take a citizen experiencing ExDs signs into custody either on their side or in a seated position. *Id.* at 628, 647.

3. Dr. Bennett Omalu's Testimony.

Plaintiff called Dr. Bennett Omalu as an expert in forensic pathology and neuropathology. *Id.*, Vol. VII at 702, 707-08. Dr. Omalu is a board certified physician in anatomic pathology, clinical pathology, forensic pathology, neuropathology, and medical management, and serves as a medical examiner for three counties in California. *Id.* at 710, 702-03.

Dr. Omalu concluded that Cecil's cause of death was mechanical positional asphyxiation, and that the asphyxiation was a significant and substantial factor in Cecil's death. *Id.* at 727. Dr. Omalu opined, to a reasonable degree of medical certainty:

> In my expert opinion, significant amounts of pressure were applied on the trunk of Cecil by a police officer, by one police officer, which increases intrathoracic pressure, which compromised his respiration, which resulted in asphyxia injury to the brain, which resulted in his death.

Id. at 736, 767. Dr. Omalu explained that asphyxia is the deprivation of oxygen to human brain cells, and that the mechanism of asphyxia in Cecil's case was mechanical. *Id.* at 728, 754. Dr. Omalu further opined that the mechanical pressure Pendergrass placed on Cecil's torso "disrupted the mechanisms for conveying oxygen to the human brain," and that upon examination, Cecil's brain tissue reflected a specific asphyxia injury. *Id.* at 722-23, 728, 720, 755, 772-74. Dr. Omalu concluded that the pressure Pendergrass applied to Cecil's torso—the

mechanical positional asphyxia—caused the asphyxia, which caused the fatal cardiac arrhythmia. *Id.* at 732-33. Dr. Omalu further testified that Pendergrass's decision to continuously struggle with Cecil while he was restrained in a prone position with weight on Cecil's torso made the asphyxia injury irreversible. *Id.* at 764. Dr. Omalu also testified that the small amount of methamphetamine in Cecil's system did not cause the asphyxia and did not cause Cecil's death. *Id*. at 734, 776.

4. The Trial Court Grants Defendant's Motion For Directed Verdict.

October 25, 2018, following the presentation of Ms. Lacy's case in chief, Defendant moved for directed verdict pursuant to CR 50(a)(1). CP at 1794. Ms. Lacy submitted a written response the next morning, arguing that: (1) had Pendergrass initiated de-escalation techniques and ensured the situation was treated as the medical emergency it would have avoided Cecil charging out of the back of the police vehicle and the ensuing struggle—because, as Ms. Lacy's experts testified, Cecil would not have been in a police vehicle to begin with; (2) Pendergrass' use of force was excessive, per the testimony of Ms. Lacy's experts; and (3) Pendergrass breached his duty to immediately initiate lifesaving aid to Cecil for anywhere between one and five minutes, which resulted in a total loss of any chance that Cecil would have survived Pendergrass' use of force. *Id.* at 1810.

The trial court heard oral argument on October 26, 2018. VRP, Vol. VIII at 738-806. Counsel for Ms. Lacy submitted as follows, in relevant part:

- On causation:

  [W]e have presented clear evidence that Mr. Lacy was exhibiting signs and symptoms of excited delirium and that a reasonable officer would have noticed and treated this as a medical emergency and that Deputy Pendergrass made the decision upon noticing those signs and symptoms *not* to treat it as a medical emergency, not to call aid. And the fact of the matter is that had he treated it as a medical emergency, had he called aid, at that point there would have been no need for Mr. Lacy to get in a [patrol] car . . . . It wouldn't make any sense for him to get in a [patrol] car and go home or go to a hospital when there would be aid on the way there. There would be no reason for him to be handcuffed. He wouldn't need to be put in the vehicle [or] to be in custody. There would be no life-ending struggle because he wouldn't be in the car in the first place, wouldn't need to get out, and there would be no reason to do anything other than stand on the side of the road and talk to the guy and wait for aid to arrive. . . . [U]nfortunately, Deputy Pendergrass's decision to treat this *not* as a medical emergency but instead be treated as someone who is on drugs who needed to be restrained is what led to . . . the series of events that ended up with Deputy Pendergrass on top of him that resulted in his death. . . . Ms. Peters testified that had they been de-escalating on the side of the road instead of trying to put him in a car for a ride home as they should have been as if this was a medical emergency, the series of events probably -- more probably than not wouldn't have occurred.

- On excessive force:

  [W]e provided evidence that the force applied by Deputy Pendergrass is, in fact, what led to his death. . . . Everyone is in agreement that deadly force was unwarranted here. And, again, there is case law stating very, very specifically that someone with signs and symptoms of Mr. Lacy, being put on the ground prone with weight on his back constitutes deadly force, and that's what a reasonable officer should know. Ms. Peters testified to that as well.

- On false imprisonment:

  [I]nitially when Deputy Pendergrass came upon Mr. Lacy . . . he had the authority to detain him under a Terry stop. But after the Terry stop and the reasonable suspicion o[f] whatever crime has suspected at the time was gone, Mr. Lacy should have been free to leave. And the fact was that he was never free to leave. . . . Mr. Lacy's belief would reasonably be that he was not free to leave,

> based on actions of Deputy Pendergrass yelling at him saying you're going to either come with us or you're going to get tasered. A reasonable person would believe that he was at that time not free to leave when he should have been.

Id. at 797-802 (emphasis added).

The trial court granted Defendant's CR 50(a)(1) motion by written order dated October 29, 2019. CP at 1823-1836.

IV. SUMMARY OF ARGUMENT

The trial court erred when it granted Defendant's CR 50(1)(a) motion for directed verdict. The trial court impermissibly weighed evidence, made credibility determinations, and drew improper inferences from the evidence. Ms. Lacy presented substantial evidence that Pendergrass proximately caused Cecil's death—evidence that the trial court either improperly discounted or wholly ignored. Ms. Lacy also presented substantial evidence that Pendergrass used excessive force. In sum, the trial court erroneously granted Defendant's CR 50(a)(1) motion and removed questions only the jury could properly decide. *See Joyce v. State, Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005) (cause in fact is "usually a question for the jury"). The trial court further abused its discretion by excluding relevant evidence and portions of proper expert opinion offered by Ms. Lacy's witnesses. Accordingly, this Court must reverse the trial court's decision and remand this matter for a new trial.

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V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT GRANTED SNOHOMISH COUNTY'S CR 50(A)(1) MOTION FOR DIRECTED VERDICT.

1. Standard Of Review

Under CR 50(a)(1),

> [i]f, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

When ruling on a CR 50 motion, the trial court must interpret the evidence most strongly against the moving party and in a light most favorable to the non-moving party. *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254-55 (1963); *see also Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995). The trial court must accept the nonmoving party's evidence as true and draw all reasonable inferences in the light most favorable to the non-moving party. *McPhaden v. Scott*, 95 Wn. App. 431, 437, 975 P.2d 1033 (1999). The non-moving party is "not bound by the unfavorable portion of the evidence, but is entitled to have the case submitted to the jury on the basis of the evidence . . . most favorable to her contention." *Venezelos v. Dep't of Labord & Indus.*, 67 Wn.2d 71, 72, 406 P.2d 603 (1965) (internal quotations and citations omitted).

The standard for judgment as a matter of law proves rigorous: a trial court that grants a motion for directed verdict must find that the non-moving party has presented absolutely no legally sufficient evidentiary basis for a reasonable jury to find in favor of the non-moving party, *Ramey v. Knorr*, 130 Wn. App. 672, 675,

124 P.3d 314 (2005); *Lambert v. Smith*, 54 Wn.2d 348, 351-52, 340 P.2d 774 (1959), and conclude that as a matter of law, there stands no substantial evidence or reasonable inferences to sustain the verdict. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 348 P.3d 389 (2014); *Peterson v. Littlejohn*, 56 Wn. App. 1, 11-12, 781 F.2d 1329 (1989). The "[s]ubstantial evidence" required to survive a CR 50(a) motion is only "evidence sufficient to persuade a fair-minded, rational person that the premise is true." *Hawkins v. Diel*, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 619, 285 P.3d 187 (2012) (internal quotation marks omitted).

The trial court cannot exercise discretion to parse the evidence when considering judgment as a matter of law. *Goodman*, 128 Wn.2d at 371. The trial court also cannot "substitute its view of the evidence for that of the jury." *Krechman v. Cty. of Riverside*, 723 F.3d 829, 842 (9th Cir. 2014).[2] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, [when] he [or she] is ruling on a motion for . . . directed verdict." *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 768, 776 F.2d 98 (1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The Washington Supreme Court "has long recognized that it is the function and province of the jury to weight the evidence and determine the credibility of the witnesses and decide undisputed questions of fact." *State v. Dietrich*, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969).

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[2] Where a state rule parallels a federal rule, such as the state and rules that apply to motions for judgment as a matter of law, analysis of the federal rule may be looked to for guidance in interpreting the state rule. *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998).

A trial court must deny a CR 50 motion if any proper evidence exists upon which reasonable minds might reach the conclusions needed to reach a verdict for the plaintiff. *Indus. Indem. Co. of the N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990). If any such evidence has been presented, the trial court must deny the CR 50 motion and submit the question to the jury. *Levy v. N. Am. Co. for Life and Health Ins.*, 90 Wn.2d 846, 851, 586 P.2d 845 (1978); *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996). "An order granting judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict." *Schmidt v. Coogan*, 162 Wn.2d 488, 493, 173 P.3d 273 (2007).

"It is error to grant a motion for judgment as a matter of law unless the court can say that when viewing the evidence in the light most favorable to the nonmoving party, there is neither evidence nor reasonable inference from evidence sufficient to sustain the verdict." *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 299, 991 P.2d 638 (1999). This Court applies the same standard as the trial court when reviewing a directed verdict ruling, *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013), and reviews judgments as a matter of law *de novo*. *Faust v. Albertson*, 167 Wn.2d 531 n. 2, 222 P.3d 1208 (2009).

2. The Trial Court Impermissibly Weighed Evidence, Made Credibility Determinations, And Drew Improper Inferences.

In its evaluation of the evidence presented at trial, the trial court failed to interpret the evidence in the light most favorable to Ms. Lacy, accept her evidence as true, and evaluate the evidence that proves most favorable to her. This is

reversible error. *Davis*, 63 Wn.2d at 254; *McPhaden*, 95 Wn. App. at 437; *Venezelos*, 67 Wn.2d at 72.

a. Evidence Regarding Pendergrass's Face-Down Prone Restraint Of Cecil.

In its written order, the trial court accorded no weight to evidence that Pendergrass contributed directly to Cecil's death when he restrained Cecil in a face down and prone position by placing weight on his back. *See* CP at 1865-1877. The trial court erroneously interpreted the evidence most strongly *against* Ms. Lacy—rather than Defendant; erroneously interpreted the evidence in a light *most favorable* to Defendant—rather than Ms. Lacy; failed to accept Ms. Lacy's evidence as true and draw reasonable inferences in her favor; failed to accord Ms. Lacy's evidence any weight; and resolved disputed questions of fact meant for the jury. What follows are the most significant errors.

i. Pendergrass Restrained Cecil In A Face-Down, Prone Position.

The trial court based its causation and excessive force decisions on the fact that "Pendergrass tried to control Cecil's torso by placing some weight on him between his shoulders and his buttocks." CP at 1870. The trial court failed to recognize that Pendergrass held Cecil face down and in a prone position when he was placing weight on his back. VRP, Vol. III at 233; *id.*, Vol. IV at 359; *id.*, Vol. V at 465, 468. Ms. Lacy also presented evidence that Pendergrass continued to restrain Cecil in this position throughout the duration of the struggle, even after Cecil communicated that he could not breathe. *Id.*, Vol. V at 470-71, 473; *see also id.*, Vol. IV at 361.

In failing to accept as true Ms. Lacy's evidence that Pendergrass restrained Cecil face down and in a prone position, the trial court erred. *McPhaden*, 95 Wn. App. at 437. Although Pendergrass denied at trial that Cecil was restrained face down and in a prone position, is well settled that conflicting statements elevate questions for the jury alone, *Dunnell v. Dep't of Soc. & Health Servs.*, 118 Wn. App. 1019 (2003), and the trial court may not give more weight to certain evidence than other evidence, as it did here. *Lambert*, 54 Wn.2d at 351-52. Here, Ms. Lacy adduced evidence from the other involved officers that Cecil was in a face down and prone position.

ii. Ms. Lacy's Police Practices Expert Opines That Pendergrass Fell Below The Standard Of Care By Detaining Cecil In A Face-Down Prone Position, With Weight On His Back Throughout The Struggle.

The trial court found that Ms. Peters' opinion "that handcuffing and prone positioning techniques are currently taught at the Criminal Justice Training Center as the best techniques for non-compliant suspects" meant that the restraint used was *per se* reasonable. CP at 1875; *see also id.* at 1876 ("The only expert from plaintiff qualified to testify about police procedures did not offer any proof that any force used by Deputy Pendergrass was unreasonable.").[3] The trial court accorded no weight, however, to Ms. Peters' testimony that while prone detention may be appropriate for *some* citizens, prone positioning should not be used when detaining citizens exhibiting ExDs symptoms, and alternative techniques should instead be used. *See id.* at 1826-1834. The trial court also failed to accord any

[3] In a Catch-22, this is because the trial court explicitly ruled that Ms. Peters was not allowed to testify whether the use of force was reasonable. VRP, Vol. VI at 606.

weight to Ms. Peters' testimony that a reasonable law enforcement officer would avoid a prolonged, prone-position struggle with citizens in Cecil's condition, and that weight on a citizen's torso area should be removed immediately upon indication that he cannot breathe. *Id*. The trial court therefore erred in according portions of Ms. Peters' testimony no weight. *Herron*, 112 Wn.2d at 768.

iii. Ms. Lacy's Emergency Medicine Expert Opines That Deputy Pendergrass's Restraint Of Cecil In A Prone Position Contributed To Cecil's Death.

The trial court likewise accorded no weight to Dr. Strote's testimony that Pendergrass's restraint of Cecil in a prone position with weight on his back, followed by a prolonged struggle in that position, was a significant contributory factor to Cecil's death. *Compare* CP at 1829-1832, *with* VRP, Vol. III at 207, 209-10; *see also State v. Neher*, 52 Wn. App. 298, 301, 759 P.2d 475 (1988), *aff'd*, 112 Wn.2d 347, 771 P.2d 330 (1989) (proof of "a contributory cause is sufficient" to prove but-for causation). The trial court therefore erred in giving no weight to Dr. Strote's medical causation testimony regarding prone positioning. *Herron*, 112 Wn.2d at 768.

iv. Ms. Lacy's Causation Expert Opines That Deputy Pendergrass's Restraint Of Cecil In A Prone Position Was The Cause Of Cecil's Death.

The trial court failed to acknowledge *any* of Dr. Omalu's testimony in its decision to dismiss all of Ms. Lacy's claims on directed verdict. CP at 1825-1835. Dr. Omalu opined that the cause of Cecil's death was mechanical positional asphyxia, and that the asphyxia was a significant and substantial

contributory factor to Cecil's death. *Id.*, Vol. VII at 727, 754. Dr. Omau explained:

> In my expert opinion, significant amounts of pressure were applied on the trunk of Cecil by a police officer, by one police officer, which increases intrathoracic pressure, which compromised his respiration, which resulted in asphyxia injury to the brain, which resulted in his death.

Id. at 767. In other words, the pressure applied to Cecil's torso by Pendergrass caused the asphyxia, *i.e.*, the deprivation of oxygen to Cecil's brain cells. *Id.* at 732-33. Dr. Omalu further opined that Pendergrass's continued detention of Cecil in a prone position with weight on Cecil's back resulted in irreversible asphyxia. *Id.* at 764. The trial court's complete disregard of this critical causation testimony constitutes reversible error. *Herron*, 112 Wn.2d at 768.

v. Plaintiff Presents Evidence That Cecil's Cause of Death Was Not Methamphetamine Toxicity.

The trial court found that Cecil "died of heart arrhythmia and methamphetamine toxicity at the scene." CP at 1828. At trial, however, Dr. Omalu concluded that Cecil's cause of death was mechanical positional asphyxia—*not* methamphetamine toxicity. VRP, Vol. VII at 727, 734. Dr. Omalu testified that the small amount of methamphetamine in Cecil's system did not cause the asphyxia and did not cause the fatal arrhythmia; rather, Pendergrass's detention of Cecil in a prone position coupled with the weight on Cecil's back caused Cecil's death. *Id*. Dr. Strote likewise testified to a reasonable degree of medical certainty that a "small amount of methamphetamine in [Cecil's] blood[,]" existed but that amount "was much lower than the toxic levels of methamphetamine that can kill you" and that Cecil did not die from the

methamphetamine. *Id*., Vol. IV at 286. Dr. Strote observed that Cecil's "methamphetamine levels were extremely low." *Id.* at 330.

The trial court thus erred in according the testimony of Dr. Omalu and Dr. Strote regarding methamphetamine toxicity no weight and otherwise construing evidence on this issue in the light most favorable to Defendant. *Herron*, 112 Wn.2d at 768; *Davis*, 63 Wn.2d at 254-55; *Goodman*, 128 Wn.2d at 371.

b. Evidence Of EMS Response Timing.

The trial court found that EMS would not have arrived on the scene in time to render Cecil life-saving aid if they had been dispatched sooner, reasoning that when Tulalip Bay EMTs arrived on scene at 10:22—four minutes after being dispatched at 10:17 p.m.—they could not immediately render aid "because the scene was not safe," and that by the time Marysville Fire Department paramedics arrived on scene at 10:29 p.m.—twelve minuets after being dispatched at 10:17 p.m.—"Cecil was deceased." CP at 1830.

First, the evidence indicates that the twelve minutes that it took the Marysville Fire Department paramedics to arrive was not set in stone. There is evidence in the record that the computer aided dispatch ("CAD") timestamps that this estimate is based on "are not completely accurate." VRP, Vol. V at 515; *see also id.*, at 561 ("Q. . . . [T]hose CAD timestamps can be inaccurate, correct? A. That is correct."). The twelve-minute estimate itself thus presents a jury question.

Second, even assuming the CAD timestamps are correct, when Tulalip Bay EMTs arrived on scene shortly after Cecil went unresponsive, the scene had been rendered safe and they were able to render aid immediately. *Id.*, Vol. IV at 361-62; *id.*, Vol. III at 240-41; Trial Ex. 109 at 9:30-10:10. Thus, had

Pendergrass acted as a reasonable law enforcement officer in calling for EMS to be staged upon observing Cecil exhibit ExDs symptoms at 10:07 p.m., Tulalip Bay would have been on scene four minutes later at 10:12 p.m., and the Marysville Fire Department would have been on scene twelve minutes later at 10:19 p.m. Trial Ex. 109 at 9:30-10:10. In other words, even if Cecil had not been fully detained at 10:12 p.m. and the struggle inevitably ensued with Pendergrass restraining Cecil in a face-down prone position, Tulalip Bay would have been ready on scene *before* Cecil went unresponsive around 10:18 p.m. And, the Marysville Fire Department would have been on scene by 10:19 p.m., able to render ExDs medications to Cecil. Rather than construing the evidence in the light most favorable to Ms. Lacy on this issue, however, the trial court erroneously construed it in the light most favorable to Defendant and most strongly against Ms. Lacy. This constitutes reversible error. *Davis*, 63 Wn.2d at 254-55; *Goodman*, 128 Wn.2d at 371; *McPhaden*, 95 Wn. App. at 437.

c. Detection Between Methamphetamine Use And ExDs.

The trial court determined that Dr. Strote "testified that it was unlikely that Deputy Pendergrass could have detected the distinction of someone who took methamphetamine and someone who was suffering from exited delirium." CP at 1830. Dr. Strote actually testified, however, "I'm not saying the symptoms of excited delirium and methamphetamine intoxication are the same" and acknowledged that there is "some overlap" in the symptoms. VRP, Vol. IV at 303. Dr. Strote explained that because of the overlap between symptoms, the question is not whether the person is experiencing the effects of an intoxicant, an organic brain disorder, or any combination thereof: "The question is whether they

are at risk of having a medical emergency"—and "in this case that was pretty clear." *Id.* at 304. Ms. Peters similarly testified from a reasonable law enforcement perspective that officers should be trained to recognize the signs of ExDs and that they are not required to make diagnoses. *Id.*, Vol. VI at 616. Ms. Peters and Dr. Strote also each explained some significant symptomatic differences between methamphetamine toxicity and ExDs, including the presence of factors such as "tweaking," "pock marks or acne," "missing teeth," and thin build that indicate methamphetamine toxicity; all of which were absent in Cecil's presentation. *Id.*, Vol. VI at 641; *id.*, Vol. IV at 303. Ms. Peters and Dr. Strote further testified that Cecil presented symptoms *exclusive* to ExDs. *Id.*, Vol. VI at 642; *id.*, Vol. IV at 275, 280, 282, 290, 334. And, as Dr. Strote and Ms. Peters explained at trial, the question is not whether Pendergrass could have *diagnosed* methamphetamine toxicity versus ExDs—as the trial court mistakenly asked—but whether Pendergrass *recognized correctly* the situation as a medical emergency, regardless of medical cause, and responded accordingly. *Id.*, Vol. IV at 276, 281-82, 304, 334; *id.*, Vol. VI at 595, 613, 616-17, 632, 647-48, 650. The trial court erred by weighing and otherwise parsing Dr. Strote's testimony regarding a law enforcement officer's ability to distinguish between methamphetamine intoxication and ExDs. *Herron*, 112 Wn.2d at 768; *Goodman*, 128 Wn.2d at 371. The trial court further erred by construing the evidence in a light most favorable to Defendant and most strongly against Ms. Lacy. *Davis*, 63 Wn.2d at 254-55; *Goodman*, 128 Wn.2d at 371; *McPhaden*, 95 Wn. App. at 437.

d. Evidence Of Tulalip Officer's Involvement.

The trial court impermissibly weighed evidence and invaded the province of the jury by allocating fault between the involved officers. The trial court found "that Sergeant Johnson's decision to take [Cecil] home was inconsistent with excited delirium." CP at 1830-31. The trial court also concluded that there was no evidence "that all of the duties fell to Deputy Pendergrass alone." *Id.* at 1832. The trial court determined that Pendergrass was not the first officer on the scene and that there was "uncontroverted evidence that Sergeant Johnson took over the lead." *Id.* The trial court found that "[w]hile Deputy Pendergrass may have been complicit by his failure to object to Sergeant Johnson's decision to give [Cecil] a ride home, there is no evidence that had Deputy Pendergrass said no to this decision, the outcome would have been different." *Id.*

First, the trial court erroneously weighed evidence and made credibility determinations by finding that Officer Gross was the first officer on the scene. *See Herron*, 112 Wn.2d at 768; *see also Goodman*, 128 Wn.2d at 371. In actuality, based on the evidence at trial, Officer Gross arrived in the area about a minute before Pendergrass did, but that Officer Gross parked his patrol vehicle 100 to 200 yards up the road from Cecil. VRP, Vol. V at 431, 434. On directed verdict, Ms. Lacy is not bound by the unfavorable portion of the evidence, but the evidence that is most favorable to her contention. *Venezelos*, 67 Wn.2d at 72. The trial court also completely ignored the crucial fact that Pendergrass was the first officer to make contact with, engage with, and detain Cecil. *Id.*, Vol. V at 432, 436.

Second, the trial court erroneously weighed evidence and impermissibly construed the evidence most strongly against Ms. Lacy by concluding that "uncontroverted evidence" existed that Sergeant Johnson took over as "lead." The evidence presented at trial indicated that who was in charge throughout the incident proved "fluid," that Sergeant Johnson asked permission from Pendergrass to take certain actions, and that Pendergrass instructed Sergeant Johnson. *Id.*, Vol. IV at 365; *id.*, Vol. V at 565; VRP, *id.*, Vol. V at 473-74, 480, 494, 500-01.

Third, the trial court weighed evidence, failed to accept Ms. Lacy's evidence as true and found certain evidence not credible by concluding "there is no evidence that had Deputy Pendergrass said no to [Sergeant Johnson asking to give Cecil a ride home], the outcome would have been different." CP at 1832. Again, the trial court wholly ignored Ms. Lacy's evidence that Pendergrass's detention of Cecil in a prone position with weight on his back during the struggle caused Cecil's death and that had Pendergrass acted in accordance with the applicable standard of care there would have been no reason to physically engage with Cecil at the time and in the manner that unfolded.

Fourth, the trial court erroneously weighed evidence and allocated fault by finding the Tulalip officers liable for Cecil's damages when they "took over the lead." CP 1874. Pendergrass admitted at trial that he is in fact responsible for his own actions regardless of who "took over" and, again, Sargent Johnson at trial "characterize[d] who was in charge of th[e] incident as fluid." VRP, Vol. V at 561-62; *id.*, Vol. IV at 365. The trial court improperly invaded the province of

the jury by allocating fault to the involved Tulalip officers and ignoring Sargent Johnson's testimony. *See* RCW 4.22.070; WPI 21.10.

3. The Trial Court Erred When It Granted The Directed Verdict Motion; Ms. Lacy Presented Substantial Evidence Of Proximate Cause.

Focusing solely on its erroneous interpretation of the evidence surrounding Pendergrass's failure to immediately stage EMS and the medical response following Pendergrass's struggle with Cecil, as discussed above, the trial court found that Ms. Lacy "has failed to present any evidence that Defendant's actions were the proximate cause of Cecil's death" and concluded "Plaintiff has not established the 'but-for' causation necessary to prevail on a negligence claim." CP at 1826.

This was a critical error. Ms. Lacy had in fact presented *substantial* evidence of proximate cause—both direct and circumstantial—regarding the causal connection between Pendergrass's failure to timely stage EMS, his prone positioning of Cecil with weight on his back during the struggle, and his delay in rendering CPR to Cecil.

a. Negligence

The elements of a negligence action are duty, breach, proximate cause, and damages. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

> Only rarely, however, is it proper to take either the question of whether a [duty] was violated or the question of proximate cause from the jury. A trial court may direct a verdict on questions of negligence in only two classes of cases: (1) where the circumstances of the case are such that the standard of care is the same under all circumstances and its measure is defined by law; and (2) **where the facts are undisputed and only one reasonable inference can be drawn therefrom**. Even where negligence is clear, **proximate cause is still a jury question unless the facts**

and inferences concerning proximate cause are not subject to dispute.

Manson v. Foutch-Miller, 38 Wn. App. 898, 902, 691 P.2d 236, 238–39 (1984) (quotation omitted, emphasis added). Although proximate cause generally is a question of fact and for the jury to determine, *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn. App. 326, 330, 966 P.2d 351 (1998), the trial court appeared to dismiss Ms. Lacy's negligence claim based on the proximate cause element. CP at 1826-1832.

"A proximate cause is one that in a natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred." *Attwood*, 92 Wn. App. at 330. There may be more than one proximate cause of an injury. *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 396, 558 P.2d 811 (1976). The inquiry is whether a reasonable person could conclude that there is a greater probability that the conduct in question was a proximate cause of the plaintiff's injury than there is that it was not. *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 425-26, 456 P.2d 1020 (1969).

Proximate cause has two elements: cause in fact and legal causation. *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983). The trial court seemed to find that Ms. Lacy had failed to present substantial evidence of cause in fact. CP at 1832. To show cause in fact, a plaintiff must establish that the damages would not have occurred but for the defendant's negligence. *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996). "Because the question of proximate cause is for the jury, '**it is only when the facts are**

undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.'" *Id.* (quoting *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 230 (1982)) (emphasis added); *see also Klossner v. San Juan Cty.*, 21 Wn. App. 689, 692, 586 P.2d 899 (1978), *aff'd*, 93 Wn.2d 42, 605 P.2d 330 (1980) ("The question of whether or not the defendant's conduct caused plaintiff's harm is generally a question of fact. It is only when the inferences are plain that proximate cause is a question of law.") (citation omitted); *Leach v. Weiss*, 2 Wn. App. 437, 440, 467 P.2d 894 (1970) ("It is only when the facts are undisputed and the inference plain that proximate cause becomes a question of law."). "**Direct evidence or precise knowledge of how an accident occurred is not required; circumstantial evidence is sufficient**." *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App. 2d 115, 118, 404 P.3d 97 (2017) (citing *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 281, 78 P.3d 177 (2003); *Klossner*, 21 Wn. App. at 692; *Raybell v. State*, 6 Wn. App. 795, 803, 496 P.2d 559 (1972)).

Although an expert may not testify as to legal conclusions, *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002), *rev. denied*, 148 Wn.2d 1019 (2003), experts may properly opine about causation. *See, e.g., Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995) (citing *McLaughlin*, 112 Wn.2d at 837). Expert testimony is *required*, however, only where the nature of "the injury involves obscure medical factors which are beyond an ordinary law person's knowledge, necessitating speculation in making a finding," such as in the case of medical causation. *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244,

254, 722 P.2d 819 (1986); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). Expert testimony is not required when "inferences arising from circumstantial evidence," *Klossner*, 21 Wn. App. at 692, "'affords room for men of reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not.'" *Gerard v. Peasley*, 66 Wn.2d 449, 456, 403 P.2d 45 (1965) (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171 (1961)); *see also McLaughlin*, 112 Wn.2d at 837–38 ("If, from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists, the evidence is sufficient.") (citing *Bennett v. Dep't of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981)).

b. The Trial Court Erred By Requiring Direct Medical Expert Causation Evidence.

The trial court cited two non-Division I cases in its causation analysis, *Fabrique v. Choice Hotels International, Inc.,* 144 Wn. App. 675, 687-88, 183 P.3d 1118 (2008), and *Merriman v. Toothahker*, 9 Wn. App. 810, 515 P.2d 509 (1973). Both of these involved *medical* causation testimony and stand for the unremarkable position that:

> No medical [sic] opinion on a question of this kind is susceptible of scientific precision and there will always be an "iffy" element involved. However, if in the physician's expert judgment, the causal relationship is probable or more likely than not, the quality of the evidence rises above speculation and conjecture and may be considered by the trier of the fact.

Merriman, 9 Wn. App. at 815.

Here, the medical causation testimony of Dr. Omalu established, to a reasonable degree of medical certainty, that Pendergrass "compromised [Cecil's]

respiration, which resulted in asphyxia injury to the brain, which resulted in his death." VRP, Vol. VII at 736, 767. This is the only *medical* causation evidence necessary. *McLaughlin*, 112 Wn.2d at 837-38; *Bennett*, 95 Wn.2d at 533. Yet the trial court held that "there is no evidence to support" Ms. Lacy's theory:

> that if Deputy Pendergrass would have called aid right away, there would have been no reason for Sergeant Johnsen to put Mr. Lacy in handcuffs, there would have been no need for Mr. Lacy to get into the back seat of Officer Gross's patrol car and there would have been no reason to do anything other than wait for aid to arrive.

CP 1873. The trial court then faulted Ms. Lacy for not presenting *direct medical expert* causation evidence to support this contention. But such evidence was not required. Neither direct nor medical expert causation evidence is necessary when, as here, a reasonable person can infer from the evidence presented "that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not." *Gerard*, 66 Wash. at 449 (quotation omitted).

This is especially so here, where Ms. Lacy's police practices expert confirmed Ms. Lacy's theory of causation by testifying—prompted by the court it self, nonetheless—that a reasonable law enforcement officer, having recognized ExDs and appropriately called for aid, would *not* have put Cecil in the back of a patrol car:

> THE COURT: All right. Please walk us through the steps an officer should go through to get an individual who is suffering from excited delirium into the back of a police car.
>
> THE WITNESS: Well, from a safety perspective, from a police officer, the best alternative is not into the back of a police car . . . . If they are displaying bizarre behavior, aggressive behavior, that puts the officer on alert. . . . [I]t's not recommended that if someone is showing and displaying all these signs that you should

> put them in your car and drive them somewhere. You want to actually get that person – it's called a medical emergency. You want to get aid to them because as an officer, you know, if you're driving down the freeway and he goes downhill in the back of the car, then you have to pull off and call aid. And so it can deteriorate very quickly.

VRP, Vol. VI at 247-48. Instead, a reasonable law enforcement officer would have used de-escalation tactics on the side of the road, until aid arrived. *See id.*, at 618, ("And this event as well, you know, take your time and you may de-escalate, speak with the individual. If there are traffic hazards, you would call additional units maybe to block the roadway if you need to."); *id.* at 637 (a reasonable officer would "[i]nterview and speak to him. De-escalate the situation. Don't make any threats towards him. Try to calm him. And meanwhile, you have EMS coming to evaluate him.").

c. Plaintiff Presented Substantial Evidence Of Proximate Cause Regarding Pendergrass's Failure to Immediately Stage EMS.

The trial court determined that even if Pendergrass treated the situation as a medical emergency and called for EMS to be staged immediately, "there is nothing in the record to suggest that Cecil would have lived had he done so." CP at 1829-30. In support of this conclusion, the trial court found that the Tulalip Bay Fire Department could not provide medical assistance upon arriving on scene at 10:22 p.m. because "the scene was not safe," and the Marysville Fire Department did not arrive on scene until 10:29 p.m. after being dispatched at 10:17 p.m., after Cecil was deceased. *Id.* at 1830.

First, as noted above, the evidence indicates that the time that it would have taken medical aid to arrive had it been called immediately is not set in stone.

There is evidence in the record that the CAD timestamps that the trial court's estimate is based on "are not completely accurate." VRP, Vol. V at 515; *see also id.* at 561 ("Q. . . . [T]hose CAD timestamps can be inaccurate, correct? A. That is correct.").

But even assuming that the timestamps are accurate—which the court erroneously did—Pendergrass observed Cecil exhibiting ExDs symptoms at 10:07 p.m., and although he did call for backup at that time, he failed to call for EMS to be staged. *Id.*, Vol. V at 433, 512. Ms. Peters opined that Pendergrass failed to recognize the encounter with Cecil as a medical emergency by immediately stage EMS. *Id.*, Vol. VI at 612-14, 616-17, 621, 631-32, 649-50. Dr. Strote opined that "had EMS been called earl[ier] he would not have died more likely than not to a reasonable degree of medical probability," and specifically faulted Pendergrass for "not getting the paramedics there earlier, not getting the EMTs there earlier." *Id.*, Vol. IV at 284-85, 314; *see also id.* at 290, 314, 324, 326. Dr. Strote testified that EMTs provide excellent CPR and basic life support services, and that paramedics provide more advanced life support, including ExDs treatment. *Id.* at 305-06, 308, 323-24. Dr. Strote explained that CPR is "basically a bridge" to keep a patient alive until paramedics arrive and can administer more advanced life-saving treatments. *Id.* at 322. Dr. Strote further opined that rendering CPR immediately after a patient is unresponsive significantly increases that person's chances of survival, and that Pendergrass's failure to immediately render CPR significantly contributed to Cecil's death. *See id.* at 295-96, 319-23.

The trial court also relied on evidence that was not in the record regarding Tulalip Bay's ability to immediately render life-saving aid to Cecil upon their arrival at the scene. CP at 1830. The trial court found that "Tulalip Bay Fire, which includes only EMTs and no paramedics, did arrive on the scene but could not perform CPR immediately upon arrival because the scene was not safe." *Id.* There is no evidence in the record to support this finding.

What is more, Sergeant Johnson and Officer Gross each testified that when Tulalip Bay arrived on scene at 10:22 p.m. shortly after Cecil became unresponsive, the EMTs began rendering life-saving aid to Cecil immediately upon arrival and did not need to wait for the scene to be rendered safe. VRP, Vol. IV at 361-62; *id.*, Vol. III at 240-41. Dashboard camera footage from a Tulalip Police vehicle that arrived on scene around the time Cecil went unresponsive further confirms that when the Tulalip Bay Fire Department arrived on scene, the EMTs immediately began to render life-saving aid. Trial Ex. 109 at 9:30-10:10. There is no evidence in the record to support the trial court's finding that Tulalip Bay EMTs "could not perform CPR immediately upon arrive because the scene was not safe." CP at 1830.

In addition, Tulalip Bay, whose EMTs are capable of providing basic life saving aid such as CPR and AED, and the Marysville Fire Department, whose paramedics are capable of administering ExDs treatments, were not dispatched until 10:17 p.m.—right around the time Cecil went unresponsive. Trial Ex. 108 at 1. Tulalip Bay arrived on scene four minutes after being dispatched at 10:22 p.m., and the Marysville Fire Department arrived on scene twelve minutes later at 10:29

p.m. *Id*. Interpreting this evidence in the light most favorable to the Plaintiff and drawing all reasonable inferences in her favor, a fair-minded person could conclude that had Pendergrass acted as a reasonable law enforcement officer in calling for EMS to be staged upon observing Cecil exhibit ExDs symptoms at 10:07 p.m., Tulalip Bay would have been on scene four minutes later at 10:12 p.m. and the Marysville Fire Department would have been on scene twelve minutes later at 10:19 p.m. In other words, even if the struggle inevitably ensued with Pendergrass restraining Cecil in a prone position, Tulalip Bay would have been ready on scene *before* Cecil went unresponsive around 10:18 p.m. (and thus able to provide competent CPR) and the Marysville Fire Department would have been on scene around the time Cecil went unresponsive at 10:19 p.m. (and thus able to render ExDs medications) had an EMT been called at the proper time.

Ms. Lacy presented substantial evidence of proximate cause predicated on Pendergrass's failure to timely stage EMS—evidence which the trial court ignored. At the very least, "from the facts and circumstances and the medical testimony given, a reasonable person can infer that the causal connection exists" here. *McLaughlin*, 112 Wn.2d at 837. To the extent that the trial court held otherwise, it was in error.

d. Plaintiff Presented Substantial Evidence Of Proximate Cause Regarding Pendergrass's Prone Positioning Of Cecil.

The trial court found that after Cecil ended up on the ground during the struggle,

> Officer Gross tired to control Cecil's feet, while Sergeant Johnson pulled Cecil's handcuffed arms from under his body and held them down. Deputy Pendergrass tried to control Cecil's torso by placing

> some weight on him between his shoulders and his buttocks. During the struggle, Cecil indicated that he could not breathe and became unresponsive.

CP at 1828. The trial court also found that Cecil "died of heart arrhythmia and methamphetamine toxicity," *id.*, and that evidence suggested that Pendergrass could not have detected the difference between a citizen experiencing ExDs and a citizen under the influence of methamphetamine. *Id.* at 1830. With regard to expert testimony on the prone positioning issue, the trial court found that Dr. Strote opined that "placing Cecil in a prone position on the ground" was a "medical mistake." *Id.* at 1829. The trial court failed to take into consideration the expert opinions offered by Dr. Strote and Dr. Omalu regarding the medical causation of Cecil's death arising from Pendergrass's prone positioning of Cecil. *See* CP at 1826-1834. The trial court also failed to address the expert opinion of Mr. Peters regarding the standard of care applicable to the restraint of Cecil. *Id.*

Ms. Peters and Dr. Strote testified that Cecil was exhibiting ExDs symptoms throughout his interaction with Cecil. *Id.*, Vol. IV at 278, 334; *id.*, Vol. VI at 619-20, 642, 650. Ms. Peters opined that reasonable law enforcement officers should not restrain and should avoid prolonged struggles with citizens exhibiting ExDs symptoms in a prone position. *Id.*, Vol. VI at 625, 642, 646-47. Ms. Peters also testified that reasonable law enforcement officers should use alternative techniques when restraining a citizen exhibiting ExDs symptoms such as detaining the citizen on his side or in a seated position. *Id.* at 625, 628, 647. Ms. Peters testified further that if a citizen is detained in a prone position with pressure, and that citizen then states that he cannot breathe, a reasonable law

enforcement officer should immediately alleviate the pressure on the citizen's body and roll him onto his side or into a seated position. *Id.* at 626.

Dr. Strote testified to a reasonable degree of medical certainty that Pendergrass's restraint of Cecil in a prone position with weight on his back followed by a prolonged struggle in that position proved a significant contributory factor to Cecil's death. *Id.*, Vol. IV at 732-33, 750, 765.

Although the trial court found that Cecil "died of heart arrhythmia and methamphetamine toxicity at the scene," CP at 1828, both Dr. Strote and Dr. Omalu concluded that **Cecil did not die as a result of methamphetamine toxicity**. VRP, Vol. VII at 727, 734; *id.*, Vol. IV at 286. Rather, Dr. Omalu opined that the cause of Cecil's death was mechanical positional asphyxia, and that the asphyxia was a significant and substantial contributory factor to Cecil's death. *Id.*, Vol. VII at 727. Dr. Omau explained

> In my expert opinion, significant amounts of pressure were applied on the trunk of Cecil by a police officer, by one police officer, which increases intrathoracic pressure, which compromised his respiration, which resulted in asphyxia injury to the brain, which resulted in his death.

Id. at 736. Dr. Omalu opined further that Deputy Pendergrass's continued detention of Cecil in a prone position with weight on Cecil's back resulted in *irreversible* asphyxia. *Id.* at 764.

In short, Mr. Peters opined that Pendergrass failed to meet the applicable standard of care by detaining Cecil in a prone position with weight on his back while Cecil was exhibiting signs of ExDs, and then continued to struggle with him in this position even after Cecil exclaimed that he could not breathe. Based on

Mr. Peters' testimony, a fair-minded person could conclude that Pendergrass failed to act as a reasonable law enforcement officer. As a result of Pendergrass's failure to act as a reasonable law enforcement officer, Plaintiff presented the medical causation testimony of Dr. Strote and Dr. Omalu that—if taken as true as it must be on directed verdict—established that Cecil died as a result of being detained in a prone position with weight on his back. The evidence shows that Plaintiff met her burden by presenting substantial evidence of proximate cause predicated on Pendergrass's restraint of Cecil in a prone position with weight on his back throughout the struggle.

e. Plaintiff Presented Substantial Evidence Of Proximate Cause Regarding Deputy Pendergrass's Delay In Providing CPR.

The trial court found that "[t]he jury cannot speculate as to the cause of death. Dr. Strote's medical testimony did not provide sufficient causal connection between Deputy Pendergrass's actions and Cecil's death. Ms. Peters' testimony was only that 'maybe' we wouldn't be here had EMS been staged sooner." CP at 1831. In so finding, the trial court wholly ignored Dr. Omalu's medical testimony, as discussed above.[4]

About ten to fifteen seconds after Cecil told Pendergrass that he could not breathe, Cecil became unresponsive. VRP, Vol. V at 437. Because Pendergrass

[4] The likely explanation for this is that the trial court had already made up its mind by the time that Dr. Omalu testified. The bulk of Ms. Lacy's case was completed by October 18, 2018. Because of scheduling issues, Dr. Omalu could not appear in court until October 25. On October 18, Defendant notified the trial court that it would move for a directed verdict on causation as soon as Dr. Omalu's testimony was completed and Plaintiff had rested her case on October 25. CP 1866; VRP, Vol. IV at 696. The trial court responded: "And I had anticipated that you might make a motion and had planned on asking you to make that motion once Dr. Omalu testified." VRP, Vol. IV at 697. There is no mention whatsoever of Dr. Omalu's medical causation testimony in the trial court's Order.

had held Cecil down in a prone position until he became unresponsive, however, Cecil needed to be turned over in order to fully ascertain his breathing status. *Id.*, Vol. IV at 360-61; *id.*, Vol. III at 234-35. Vital time proved lost. Pendergrass then instructed Sergeant Johnson to check Cecil's breathing status while he walked to and from his Snohomish County patrol vehicle to look for gloves and a CPR mask. *Id.*, Vol. V at 473-74, 480, 494, 500-01. More vital time lost. Pendergrass informed Snohomish County dispatch at 10:18 p.m. that he was attempting to ascertain Cecil's breathing status, but did not start CPR until 10:19 p.m. *Id.* at 475, 516.

Dr. Strote testified to a reasonable degree of medical certainty that Pendergrass's delay in providing CPR to Cecil proved a factor that contributed to Cecil's death. *Id.*, Vol. IV at 293, 295-96, 314, 319-322, 326. Dr. Strote opined that in situations requiring CPR, *every minute is vital* to survival. *Id.* at 295-96, 320-21. Dr. Strote testified further that the correct way to perform CPR is to perform chest compressions immediately, rather than waste crucial time checking for a pulse or breathing, and that chest compressions should be performed prior to administering rescue breaths through a CPR mask. *Id.* at 296-97, 319.

Interpreting the evidence in a light most favorable to Ms. Lacy and drawing all reasonable inferences in her favor, a reasonable fair-minded person could conclude that Pendergrass's delay in rendering the correct form of CPR to Cecil proximately caused Cecil's death. Accordingly, whether Pendergrass's delay in rendering life saving aid to Cecil was the proximate cause of Cecil's

death proves a proper question that a jury must answer. *Attwood*, 92 Wn. App. at 330.

In this case, taking the evidence in the light most favorable to Ms. Lacy it cannot be said, as a matter of law, that the evidence is not substantial or that there exists no reasonable inference to sustain a verdict for Ms. Lacy on her negligence claim. *See Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997); *see also* CR 50(a)(1).

4. The Trial Court Erred When It Granted The Directed Verdict Motion Because Plaintiff Presented Substantial Evidence Of Excessive Use Of Force.

The trial court concluded that "[t]here is no evidence that the force used on Cecil was excessive," reasoning that "[t]he only expert from plaintiff qualified to testify about police procedures did not offer any proof that any force used by Deputy Pendergrass was unreasonable" and that "[s]he did not offer any testimony on the level of force or the reasonableness of force used by Deputy Pendergrass." CP at 1833-34; *see also id.* at 1832 ("there is nothing to indicate that Deputy Pendergrass escalated the situation or that excessive force was used . . . there is no testimony at all that any of the officers engaged in excessive force."). Not only did the trial court impermissibly weigh evidence and make a credibility determination in so finding, it also completely disregarded the substantial evidence Ms. Lacy presented at trial that Pendergrass's restraint of Cecil in a prone position with weight on his back constituted textbook excessive force and was unreasonable under the circumstances, thus entitling Ms. Lacy to submit her battery claim to the jury.

a. Excessive Force

Ms. Lacy brought a claim of battery against Snohomish County based on Pendergrass's restraint of Cecil in a prone position. CP at 11-12. A battery is a harmful or offensive contact with a person resulting from an act intended to cause the person to suffer such a contact or apprehension that such contact is imminent. *McKinney v. Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000). Washington recognizes the state tort of battery by a law enforcement officer in an excessive use of force case. *Orn v. City of Tacoma*, No. 13-5974, 2018 WL 1709497, Slip op. at 9 (W.D. Wash. Apr. 9, 2018) (citing *Staas v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000)). A law enforcement officer is liable for battery if unnecessary or excessive force is used in accomplishing a detention. 6B Wash. Prac., Civil Jury Instruction Handbook § 6:7; *Orn*, 2018 WL 1709497, Slip op. at 9 (citing *Staats*, 139 Wn.2d 757).

The degree of force used by a law enforcement officer must be reasonable given the totality of the circumstances at the time, and the reasonableness of a particular use of force must be judged objectively from the information available at the time from the perspective of a reasonable officer on the scene. *Graham v. Connor*, 490 U.S. 386, 397 (1989). Applicable factors include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396. Importantly for this case, when assessing the reasonableness of an officer's actions, "the availability of alternative methods of capturing or subduing a suspect" is a factor, *see Chew v. Gates*, 27 F.3d 1432, 1441 n. 5 (9th Cir. 1994), as well as the diminished capacity of an unarmed

detainee. *See Deorle v. Rutherford*, 272 F.3d 1272, 1282-83 (9th Cir. 2002).

It is "clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004). "Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objective unreasonable excessive force." *Id.* This is particularly true where the individual is mentally ill and in an agitated state, as detailed below. *Id.*

For instance, in *Arce v. Blackwell*, 294 Fed. Appx. 259, 2008 WL 4298576 (9th Cir. 2008), the Ninth Circuit found that officers acted unreasonably and used excessive force when they kept the plaintiff, who was in a state of excited delirium, restrained with his chest to the ground while applying pressure to his back and ignoring his pleas that he could not breathe. *Id*. at *2.

Similarly, in *Greer v. City of Hayward*, 229 F. Supp. 3d 1091 (N.D. Cal. 2017), the district court determined that the plaintiff's claim for excessive use of force should proceed to the jury where the officers detained the plaintiff in a prone position while applying weight to his back, and did not remove their body weight even after the plaintiff indicated he was having trouble breathing. *Id.* at 1102-03.

Likewise, in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), officers restrained an unarmed citizen in a prone position who they knew suffered from mental illness and applied weight to his neck and upper torso. *Id.* at

1054. The citizen told the officers that he could not breathe and then went unresponsive. *Id.* at 1054-55. The district court concluded that "[a]ny reasonable officer should have known that such conduct constituted the use of excessive force." *Id.* at 1056-57. As a result, "[p]revailing precedent in the Ninth Circuit is that law enforcement officers' use of body weight to restrain a 'prone and handcuffed individual[] in an agitated state' can cause suffocation 'under the weight of restraining officers,' therefore, such conduct may be considered deadly force." *Garlick v. Cty. of Kern*, 167 F. Supp. 3d 1117, 1155 (E.D. Cal. 2016) (citing *Drummond*, 343 F.3d at 1056-67).

In *Tucker v. Las Vegas Metropolitan Police Department*, 470 Fed. Appx. 627, 2012 WL 690426 (9th Cir. 2012), the Ninth Circuit likewise found that a jury could reasonably conclude that the officers used excessive force in applying their body pressure to restrain a citizen after he was handcuffed and face down on a bed. *Id.* at *2.

b. Plaintiff Presented Substantial Evidence Of Pendergrass's Use Of Excessive Force.

At trial, Sergeant Johnson and Officer Gross testified that Pendergrass restrained Cecil in a face-down prone position while Cecil was handcuffed. VRP, Vol. IV at 360; *id.*, Vol. III at 234. Pendergrass and Sergeant Johnson testified that Pendergrass struggled with Cecil while he was restrained in a prone position. *Id.*; *id.*, Vol. V at 473; *id.*, Vol. IV at 361. All three officers testified that Pendergrass held Cecil face down in a prone position by placing weight on Cecil's back. *Id.*, Vol. V at 465, 468; *id.*, Vol. IV at 360; *id.*, Vol. III at 234. Pendergrass testified that Cecil told him that he could not breathe, and that in

response Pendergrass failed to adjust his restraint of Cecil. *Id.*, Vol. IV at 361; *id.*, Vol. V at 417, 473.

As a threshold issue, the trial court appears to have found no evidence of excessive force because Ms. Peters did not expressly opine on the ultimate issue of whether Deputy Pendergrass's actions constituted "excessive force" or were otherwise "unreasonable." CP at 1832-34. This is an impermissible standard and constitutes clear error.

Expert testimony in excessive force cases generally is admitted to establish the standards applicable to the use of force. *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (admitting expert discussion as to whether officers' conduct comported with law enforcement standards); *Larez v. City of L.A.*, 946 F.2d 630, 635 (9th Cir. 1991) (proper for experts to testify as to general police industry standards); *Whitaker v. Maldanado*, No. 07-0264, 2009 WL 1936803, at *3 (D. Ariz. Jul. 2, 2009) (admitting expert to compare officers' actions to industry standard); *Robinson v. Delgado*, No. 02-1538, 2010 WL 183886, at *6 (N.D. Cal. May 3, 2010) (excluding expert testimony about excessive force but admitting testimony about prison standards); *Estate of Bojcic v. City of San Jose*, No. 05-3877, 2007 WL 3314009, at *3 (N.D. Cal. Nov. 6, 2007) (expert could not opine on whether officers exercised excessive force). The propriety of an expert opinion on "ultimate issues" does not go so far as to permit an expert to offer *legal* conclusions. The Ninth Circuit has explained the somewhat subtle distinction as follows:

> It is well-established, however, that expert testimony concerning an ultimate issue is not per se improper . . . However, an expert

> witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law.

Muhktar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1065 n. 10 (9th Cir. 2002) (citing *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999); *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) ("When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's.") (emphasis in original)). Any "judicially defined terms," "terms that derived their definitions from judicial interpretations," or "legally specialized terms" constitute expression of opinion as to the ultimate legal conclusion. *Duncan*, 42 F.3d at 101-02. Expert testimony regarding excessive use of force should properly opine that an officer should not have acted in a manner that he did, or that he should have done something else. *Estate of Bojcic*, 2007 WL 3314008, at *3. In other words, because whether an "officer's use of force was either reasonable or unreasonable . . . is the ultimate question for the jury to decide," experts are not allowed "to testify that [a] police officer did or did not use excessive force." *Carector v. City of Yakima*, No. 14-03004, 2015 WL 12645758, at *1 (E.D. Wash. Jan. 14, 2015).

Thus, Ms. Peters properly opined on the law enforcement industry standards applicable to Pendergrass's use of force in his restraint of Cecil, "specifically as it has to do with [Cecil's] signs and symptoms of excited delirium." *Id.*, Vol. VI at 625. Ms. Peters testified at trial that a reasonable law enforcement officer should take a citizen exhibiting ExDs symptoms into custody "without placing them in a prone position and without weight on their back side to

restrict breathing . . . because they have the great potential to pass away in custody." *Id.* at 596-97. She elaborated:

> People in a state of excited delirium are at a risk for in-custody death or death shortly after an event such as a struggle or a prolonged struggle. And there's factors basically to assist officers when they encounter this type of individual. That the training is known that you don't want, again, to put a large amount of weight or pressure on their back side when they are in a face-down prone position because it interferes with their breathing. And so you would try to do other techniques to avoid pressure on an individual's chest area . . . it's also recommended to monitor the subject's breathing to make sure they're still breathing.

Id. at 625. Ms. Peters opined further that when "the subject says 'I can't breathe,'" a law enforcement officer should be "able to view the face. And if you are on top of an individual putting pressure, you'd want to alleviate that pressure immediately and roll the individual onto either their side or in a seated position." *Id.* at 625-26.

Ms. Peters then distinguished restraint techniques used by law enforcement officers generally from restraint techniques that should be applied when law enforcement officers detain someone exhibiting the ExDs symptoms Cecil was during the encounter with Pendergrass. *Id.* at 626. Ms. Peters explained "[t]here's still training officers receive on prone positioning and handcuffing techniques where you prone out an individual, such as a felony stop. Those subjects are not at risk, that is still a technique that is taught today." *Id.* Ms. Peters explicitly distinguished this general practice by explaining that restraining a citizen *exhibiting ExDs symptoms* or *suspected of having ExDs* in a prone position is not an option and is "not a recommended technique," specifically a "[p]rone position with weight on the individual's back." *Id.* at 639.

In addition to erroneously according no weight to and parsing portions of Ms. Peters' testimony on this critical distinction in restraint practices, the trial court otherwise *completely* disregarded the evidence presented by Ms. Peters that Pendergrass's restraint of Cecil was not in accordance with established police practices regarding the treatment of citizens exhibiting ExDs symptoms. *See* CP at 1833.

Viewing the evidence in the light most favorable to Ms. Lacy, accepting her evidence as true and drawing all reasonable inferences in her favor, Ms. Lacy met her burden by presenting substantial evidence in support of her contention that the force Pendergrass used in restraining Cecil was unreasonable and excessive. Ms. Lacy presented evidence that: (1) Cecil was experiencing ExDs, (2) Pendergrass restrained Cecil in a prone position with weight on his back, (3) Pendergrass did not remove his body weight from Cecil's back after Cecil stated he could not breathe; and (4) a reasonable law enforcement officer would not detain citizens experiencing ExDs in a face-down prone position with weight on their back, and should remove weight when citizen states that he cannot breathe. Thus, based on Ms. Lacy's substantial evidence, a fair-minded rational person could easily conclude that Pendergrass battered Cecil when he restrained him, and find Snohomish County liable.

B. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EXPERT OPINION.

The trial court abused its discretion by excluding Ms. Peter's expert testimony regarding the basis of her opinion for the applicable standard of care.

1. Standard of Review

This Court reviews a trial court's decision not to admit expert opinion for abuse of discretion. *Myers v. Harter*, 76 Wn.2d 772, 781, 459 P.2d 25 (1969). The trial court abuses its discretion when its "decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *Associated Mort. Investors v. G.P. Kend Const. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). "If the trial court relies on unsupported facts or applies the wrong legal standard, its decision is exercised on untenable grounds or for untenable reasons; and if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, the trial court's decision is manifestly unreasonable." *Id*. (internal quotations and citations omitted).

An expert's opinion proves admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). The court construes helpfulness to the trier of fact broadly. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001). ER 702 controls generally on whether expert opinions are admissible at trial. ER 703 permits experts to base their opinion testimony on facts or data that is not admissible in evidence "[i]f of a type

reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" The otherwise inadmissible facts or data underlying an expert's opinion is admissible for the limited purpose of explaining the basis for an expert's opinion. *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007) (citing *In re Det. of Marshall*, 122 Wn. App. 132, 146, 90 P.3d 1081 (2004), *aff'd*, 156 Wn.2d 150, 125 P.3d 111 (2005)).

The knowledge and experience of a non-scientific witness is relevant to determining his or her reliability, *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 386 n. 14 (9th Cir. 2005), but that expert must base her opinions on relevant objective standards. *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005) (jury could properly rely on testimony of police practices expert who relied on California's Peace Officer Standards and Training).

Expert testimony on industry practice and standards is admissible. *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003). Industry "guidelines and policies may properly be received into evidence as bearing on the standard of care." *Dormu v. Dist. of Columbia*, 795 F. Supp. 2d 7, 29 (D.D.C. 2011). This is particularly true in cases involving negligence and excessive use of force claims against law enforcement officers. *M.R. v. City of Azusa*, No. 13-1510, 2014 WL 12839737, at *8 (C.D. Cal. Oct. 1, 2014) ("Given that [expert witness] grounds his opinions in established police practices standards and given the relevance of those standards in determining whether a reasonable officer would have acted as [defendant] did in this situation, the Court finds [expert witness]'s expert testimony admissible[.]").

2. The Trial Court Abused Its Discretion When It Prohibited Plaintiff's Police Practices Expert From Referencing Policies As A Basis For The Standard Of Care.

The trial court determined that Ms. Peters could not reference Snohomish County policies, national standards, model police policies, or policies from other jurisdictions in support of her testimony regarding the standard of care. VRP, Vol. VI at 588-89; *see, e.g.*, CP 1782-85. The trial court ruled that none of these policies were relevant, and that "any reference to policies is excluded." *Id.* at 589. This was an erroneous ruling.

"'As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration.'" *Reese v. Stroh*, 74 Wn. App. 550, 564, 874 P.2d 200 (1994) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)). Obviously, disregard of industry standards is evidence of a breach of the standard of care and relevant to negligence. *Minors v. Minors*, 81 Wn.2d 533, 503 P. 2d. 59 (1972); *Broten v. May*, 49 Wn. App. 564, 744 P. 2d. 285 (1987). It is thus common practice for standard of care experts to refer to published industry standards, testify that those standards reflect the applicable standard of care, and to explain to the jury how those industry standards were violated. *See, e.g., Pope v. McComas*, No. 07-1191, 2011 WL 1584213, at *20 (W.D. Wash. Mar. 10, 2011) (referencing the National Commission on Correctional Health Care Standards); *Ponzini v. PrimeCare Med.*, 269 F. Supp. 3d 444, 475 (M.D. Pa. 2017) (same); *Edmo v. Idaho Dep't of Correction*, 358 F. Supp. 3d 1103, 1111 (D. Idaho 2018) (referencing World Professional Association of Transgender Health standards); *Camicia v. Howard S.*

Wright Const. Co., 158 Wn. App. 1029 (2010) (referencing American Association of State Highway and Transportation Officials engineering standards and the Manual on Uniform Traffic Control Devices for Streets and Highways). The trial court's erroneous ruling left jurors to guess the "bases and sources" of Ms. Peters' expert's opinion, negatively "affect[ed] the weight to be assigned that opinion," and otherwise invaded the province of the jury. *Reese*, 74 Wn. App. at 564.

As to model policies issued by the International Association of Chiefs of Police ("ICAP"), for instance, trial courts routinely permit police practices experts to rely on and reference these in support of their opinions. *See, e.g., Halcomb v. Wash. Metro. Area Transit Auth.*, 526 F.Supp.2d 24, 30 (D.D.C. 2007) (expert could offer opinions "to the extent those opinions are tied to and based upon identifiable, objective standards of police practice such as those set forth in publications of [ICAP] or similarly authoritative and relevant documents"); *Whitmill v. City of Philadelphia*, 29 F.Supp.2d 241, 246 (E.D. Pa. 1998) (expert testimony that city's policies comported with ICAP standards was admitted); *Sloan v. Long*, No. 16-0086, 2018 WL 1243664, at *2 (E.D. Mo. Mar. 9, 2018) (expert's reliance on guidelines established by ICAP admitted); *see also* CP at 1265-66. Courts have also independently recognized ICAP model policies as a standard of care applicable to police practices. *See, e.g. Green v. City and Cty. of San Francisco*, 751 F.3d 1039, 1042 n. 2 (9th Cir. 2014); *Knickerbocker v. City of Colville*, No. 15-0019, 2016 WL 4367251, at *9 (E.D. Wash. Aug. 11, 2016).

And as to Snohomish County's own policies, every jurisdiction that Ms. Lacy is aware of has held that internal policy violations provides evidence of

unreasonableness—since officers that violate their jurisdiction's policy are deemed to be on constructive notice that their conduct is unreasonable and therefore falls below the applicable standard of care—and allow experts to opine as to whether those internal policies were violated. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 747 (2002); *Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985); *Headwaters Forest Defense v. Cty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002); *Ludwig v. Anderson*, 54 F.3d 465, 473-473 (8th Cir. 1995); *Darden v. City of Forth Worth*, 880 F.3d 722, 732 n.8 (5th Cir. 2018); *Martin v. City of Broadview Heights*, 712 F.2d 951 (6th Cir. 2013); *T.D.W. v. Riverside Cty.*, No. 08-0232, 2009 WL 2252072, at *4 (C.D. Cal. July 27, 2009); *see also Gutierrez v. City of San Antonio*, 139 F.3d 441, 499 (5th Cir. 1998) ("[I]t may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned."). Indeed, the Washington State Supreme Court has explicitly held that "[i]nternal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence." *Joyce*, 155 Wn.2d at 324 (citing *Kelley v. State*, 104 Wn. App. 328, 33-–35, 17 P.3d 1189 (2000); *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 87-88, 1 P.3d 1148 (2000); *Bishop v. Miche*, 137 Wn.2d 518, 522, 973 P.2d 465 (1999)); *see also, e.g., Estate of Connelly v. Snohomish Cty. Pub. Util. Dist. # 1*, 172 Wn. App. 1018 (2012); *Garrison v. Sagepoint Fin., Inc.*, 185 Wn. App. 461, 501 n.26, 345 P.3d 792, 809 (2015); *Centuori v. United Parcel Serv., Inc.*, No. 16-0654, 2017 WL 1194497, at *7 (W.D. Wash. Mar. 30, 2017).

In sum, the trial court's determination that "any reference to policies [wa]s excluded" from the testimony of Ms. Lacy's police practices expert was in error and must be overturned. VRP, Vol. VI at 589.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING MS. LACY'S EVIDENCE.

The trial court erred determining that Pendergrass's expired CPR certification and SCSO policies were irrelevant and thus inadmissible at trial.

1. Standard Of Review

This Court reviews a trial court's ruling on motions in limine and on the admissibility of evidence for an abuse of discretion. *Medcalf v. Dep't of Licensing*, 83 Wn. App. 8, 16, 920 P.2d 228 (1996) (citing *Garcia v. Providence Medical Ctr.*, 60 Wn. App. 635, 642, 806 P.2d 766 (1991)). A trial court abuses its discretion if its exercise of that discretion is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's decision is manifestly unreasonable or its grounds for a decision are untenable if the trial court relied on facts not in the record, applied an improper legal standard, or adopted a view "that no reasonable person would take." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

"The relevance requirement is not a high hurdle." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory*, 158

Wn.2d 759, 835, 147 P.3d 1201 (2006). All relevant evidence is admissible unless its admissibility is otherwise limited. ER 402. The evidence erroneously excluded by the trial court meets this low threshold.

2. The Trial Court Abused Its Discretion By Excluding Evidence Of SCSO Policies.

The trial court excluded evidence regarding the SCSO policies, finding that policies promulgated by the SCSO were irrelevant. VRP, Vol. II at 84; *see also* CP at 1002-03. The trial court abused its discretion because the SCSO policies that governed Pendergrass's behavior were relevant to Plaintiff's negligence as well as her claims for battery and false imprisonment. CP at 1484-85; *cf. Mitchell v. City of Tukwila*, No. 12-238, 2013 WL 6631898, at *2 (W.D. Wash. Dec. 17, 2013) ("[P]olicies regarding use of force and use of a taser are relevant and probative of whether Officer Gurr's conduct was negligent.").

As noted above, "[i]nternal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence." *Joyce*, 155 Wn.2d at 324 (citing *Kelley*, 104 Wn. App. at 33-35; *Tyner*, 41 Wn.2d at 87-88; *Bishop*, 137 Wn.2d at 522; *Estate of Connelly*, 172 Wn. App. 1018; *Garrison*, 185 Wn. App. at 501 n. 26; *Centuori*, 2017 WL 1194497, at *7; *Hope*, 122 S.Ct. at 2519; *Garner*, 471 U.S. at 18-19; *Headwaters Forest Defense*, 276 F.3d at 1131; *Ludwig*, 54 F.3d at 473-473; *Darden*, 880 F.3d at 732 n. 8; *Martin*, 712 F.2d 951; *Gutierrez*, 139 F.3d at 499. Even Defendant's experts are in agreement that these policies are relevant to the standard of care. *See* CP 686 ("In my opinion the SCSO policies comport with contemporary law enforcement policies and practices.").

The same analysis applies to Ms. Lacy's battery claim, which requires proof of the use of excessive force. As noted above, because whether an "officer's use of force was either reasonable or unreasonable . . . is the ultimate question for the jury to decide," experts are not allowed "to testify that [a] police officer did or did not use excessive force." *Carector*, 2015 WL 12645758, at *1. Thus, whether excessive force was used is thus typically a jury question, but evidence of the violation of internal policies is commonly introduced to support or undermine allegations of excessiveness. *See, e.g., Aranda v. City of McMinnville*, 942 F. Supp. 2d 1096, 1103 (D. Or. 2013).

3. The Trial Court Abused Its Discretion By Excluding Evidence Of Deputy Pendergrass's Expired CPR Card.

The trial court granted Defendant's motion in limine No. 7, finding that Pendergrass's expired CPR certification was not relevant. VRP, Vol. II at 77-81, 85; *see also* CP at 1005-06, 1487-1490, 1726, 1729, 1764. This was in error.

Pendergrass's expired CPR certification is extremely probative, and relevant to material issues—specifically Ms. Lacy's negligence claims. *See Mitchell*, 2013 WL 6631898, at *1; ER 402; *see also State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). This evidence shows that Pendergrass had not been trained on the most current CPR procedures at the time of Cecil's death and that Pendergrass was unlikely to render correct CPR when he finally did, which resulted in Pendergrass fatally delaying CPR in order to search for a CPR mask that was no longer required under the current CPR procedures in effect at that time. The fact that Pendergrass was not properly trained on the administration of CPR is highly probative to whether he acted as a reasonably prudent law

enforcement officer. *See Cook, Flanagan & Berst v Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968) ("Professional men in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a [s]tandard minimum of special knowledge and ability.") (quotation omitted). This evidence is extremely relevant, ER 401, and no prejudice was attributed to this evidence, ER 403, thus it is admissible. ER 402.

Defendant has admitted that "a prudent officer would keep up to date with his CPR" certifications. CP at 1663; *see also id.* ("An officer should keep up to date with their certifications, including CPR."); *id.* at 1606-07. Ms. Lacy's police practices expert agrees. *Id.* at 747-52. Pendergrass has admitted that he—not Snohomish County—fell below this standard of care when he was on duty and rendering aid to Mr. Lacy with an expired CPR certification. *Id.* at 743. This evidence is highly probative, as Ms. Lacy made clear below, citing to expert testimony:

> The probative value of Pendergrass's expired CPR certification certainly outweighs and prejudicial effect because it shows that Pendergrass had not been trained on the most current CPR procedures at the time of Mr. Lacy's death and that Pendergrass was unlikely to render correct CPR when he finally did, which resulted in Pendergrass fatally delaying CPR in order to search for a CPR mask that was no longer required under the current CPR procedures in effect at that time.

Id. at 1491. And as Dr. Strote testified at trial:

> In approximately 2010 the emphasis really became on doing CPR if there's any thought that someone could have lost a pulse. Not spending minutes checking for a pulse or checking for breathing, but just starting CPR because . . . every minute lost has a huge impact on a patient's chance of survivability. So the emphasis went

> from you may have heard ABC's which is airway, breathing and circulation. And it went to CAB, circulation first, just start CPR and ask questions later because that's the critical thing.

VRP, Vol. IV at 297-97. But because his certification had expired, Pendergrass did not know this. As he testified at trial:

> Q. . . . [W]hy did you look for an air mask instead of doing chest compressions immediately?
> A. The air mask can assist us with CPR in providing rescue breaths. . . .
> Q. . . . In regard to the properly conducting CPR, do you know what A, B, C means?
> A. Airway, breathing, and can't think of C. . . .
> Q. Yeah. Yeah, so in your thinking when you were doing CPR on Mr. Lacy the first order of priority was -- was the first order of priority airway?
> A. Yes.

Id., Vol. V at 477-79.

In sum, the fact that Pendergrass had let his CPR certification lapse was highly probative and Ms. Lacy was prejudiced by not being allowed to introduce this evidence to the jury. ER 401, 402, 403. This was an abuse of discretion.

VI. CONCLUSION

Ms. Lacy met her burden at trial by producing sufficient evidence regarding proximate cause and excessive use of force. Ms. Lacy therefore requests that this Court reverse the trial court's erroneous grant of Defendant's CR 50(a)(1) motion for directed verdict and remand this matter for a new trial.

Respectfully submitted this 15th day of April 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 April 15, 2019.

Wendy Foster

GALANDA BROADMAN

April 15, 2019 - 3:48 PM

Transmittal Information

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Appellate Court Case Number:	79294-6
Appellate Court Case Title:	Sara L. Lacy, App/Cross-Resp v. Snohomish County, Resp/Cross-App
Superior Court Case Number:	16-2-21526-2

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