NO. 79294-6-I

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

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

Appellant/Cross-Respondent

v.

SNOHOMISH COUNTY,

Respondent/Cross-Appellant

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

This is an unfortunate case where Snohomish County Sheriff Deputy Tyler Pendergrass assisted two Tulalip Tribal Police Officers, Sergeant Johnsen and Officer Gross, in attempting to take Cecil Lacy Jr,[1] an individual who was walking in traffic, at night, on a busy rural highway and who appeared to be under the influence of methamphetamine.

Deputy Pendergrass was the first to make contact with Cecil on the dark roadway. About 30 seconds after Deputy Pendergrass made contact, Sergeant. Johnsen and Officer Gross arrived and took control of the situation. Sergeant. Johnsen engaged Cecil and was able to secure Cecil's agreement to take him safely off the roadway and give him a ride home. Prior to placing Cecil in the Tulalip Tribal Police vehicle Sergeant. Johnsen frisked Cecil and stated he would need to place Cecil in handcuffs for safety. Cecil objected to being handcuffed with his arms behind his back due to shoulder pain, but suggested and then agreed to have his hands cuffed in front. After Cecil was handcuffed, Sergeant. Johnsen placed Cecil in the back of the Tulalip Police vehicle.

[1] Sara Lacy (Lacy) sued the County in her personal capacity and as a personal representative of the Estate of Cecil Lacy. To avoid confusion, Mr. Lacy's first name will be used hereinafter. No disrespect to Mr. or Mrs. Lacy is intended.

Shortly after sitting down in the vehicle, Cecil charged out of the back seat, assaulted Officer Gross, and knocked the body camera off of Sergeant Johnsen. Deputy Pendergrass, who was merely observing at this point, came to the assistance of the Tribal Police Officers. Deputy Pendergrass attempted a Taser application, but was unsuccessful and his hand was pinched between Cecil and the Tribal Police vehicle. Sergeant Johnsen then took the entire group to the ground. Between the three officers, they were able to restrain Cecil after an approximately 30 second struggle. Cecil was calm and talking with the officers after the struggle, but then he became unresponsive. Unlike the Tulalip officers, Deputy Pendergrass took action to revive Cecil by providing CPR. Deputy Pendergrass continued CPR until EMTs arrived and took over. Cecil was pronounced deceased at the scene.

The entire interaction with Cecil lasted approximately nine minutes from first contact with Deputy Pendergrass until Cecil became unresponsive. The interaction with Cecil, the decisions and actions of Tulalip Tribal Sergeant. Johnsen, and the attempts to assist by Deputy Pendergrass were recorded on video, and that video was admitted into evidence and considered in detail by the Superior Court. This Court should affirm the Superior Court's order directing verdict in favor of Snohomish

County because there is insufficient evidence to support any of Lacy's causes of action.

Appellant Sara Lacy (Lacy) brought suit against Snohomish County based on the *respondeat superior* liability of employee Deputy Tyler Pendergrass for acts which occurred in the course and scope of his employment with Snohomish County. Although she also brought suit against Sergeant Michael Johnsen and Tyler Gross of the Tulalip Tribal Police Department, she dismissed them from the lawsuit, and their actions were not before the Superior Court in Lacy's case against Snohomish County. RP 57.

Lacy brought claims for negligence, battery and false imprisonment under Washington State Law. Lacy did not plead any constitutional claims.

Lacy brings this appeal after the Superior Court granted the County's motion for a directed verdict at the close of her case. Snohomish County brings a cross appeal, requesting this Court hold that the Superior Court erred in denying summary judgment on issue of whether Snohomish County owed a legal duty to Cecil or Sara Lacy as a matter of law. Snohomish County asserts that Lacy identified no actionable duty and no such common law duty exists, which further supports the Superior Court's order directing verdict.

II. ISSUES

1. Whether the Superior Court properly granted Snohomish County's motion for a directed verdict where the Superior Court held as a matter of law, the evidence and reasonable inferences were legally insufficient to allow her claims of negligence, battery and unlawful imprisonment to go forward to the jury?

2. Whether the Superior Court properly exercised discretion in evidentiary rulings?

3. Whether the Superior Court erred in denying Snohomish County's motion for summary judgment, holding that Snohomish County owed a common law duty of care to Lacy's decedent, and allowing a claim of Negligent Use of Excessive Force to go forward where the cause of action is not recognized in the State of Washington, and Snohomish County owes no duty under such cause of action?

III. STATEMENT OF THE CASE

A. FACTS ESTABLISHED AT TRIAL.

At about 10:00 p.m. on September 18, 2015, Deputy Charles Tyler Pendergrass was dispatched to a traffic hazard on Marine Drive in Snohomish County. Ex. 104, Ex 105. The 911 caller reported an individual who appeared to be intoxicated and walking in the roadway. *Id.* The dispatch call went to both SnoPac, the dispatching agency for Snohomish County, and the Tulalip Tribal Police Department. *Id.*, Ex. 103.

Officer Gross of the Tulalip Tribal Police Department was the first to arrive in the area and parked his patrol vehicle on the shoulder several yards away from an individual matching the description of the intoxicated male, later identified as Cecil D. Lacy Jr. RP 222-223. Officer Gross

remained in his Tulalip Tribal Police vehicle, as instructed by his Field Training Officer, Tulalip Tribal Police Sergeant Michael Johnsen, for three to five minutes, watching Cecil walk in the area, before Snohomish County Deputy Tyler Pendergrass arrived on the scene. RP 245.

Deputy Pendergrass made initial contact with Cecil. *Id*. at 224. As Deputy Pendergrass approached Cecil, Cecil turned and made a "bee-line" towards him. RP 507, 542. Immediately concerned for his safety, Deputy Pendergrass called for back-up based on Cecil's actions. RP 442. Tulalip Officer Gross joined Deputy Pendergrass, followed by Sergeant Johnsen of the Tulalip Tribal Police Department joined the contact 30-45 seconds later. RP 455.

The video shows that Sergeant Johnsen immediately initiated a conversation with Cecil Lacy, Jr., a tribal member. Ex 101. When asked "what's your deal" by Sergeant Johnsen, Cecil responded that he was a mental patient. *Id*. Throughout this encounter, Cecil exhibited rapid, jerky movements, was extremely sweaty, spoke very rapidly and exhibited mood swings. *Id*. Based on their training and experience, the officer correctly believed Cecil to be under the influence of methamphetamine. RP 374, RP 440.

Sergeant Johnsen indicated to Deputy Pendergrass that Tulalip police would take Cecil home by saying, "We can take him if that's cool

with you." Ex 101 Sergeant Johnsen told Cecil that he would have to handcuff Cecil in order to give him a ride. Ex. 101. Cecil became extremely agitated at this point. *Id*. He indicated that the situation was "wrong" and alternatively asked for an ambulance, for the officers to call his wife or to just go home. *Id*. Officers tried to calm him down and explain his options to him; one of the options stated by Deputy Pendergrass was that Cecil needed to calm down or he would be stunned with a Taser. *Id*. They also indicated that they would either give him a ride home or give him a ride to the hospital. *Id*.

Eventually, Cecil asked the officers if they would handcuff him in front because he had a bad shoulder. *Id*. He also told them that he had spent two lengthy periods in a mental hospital and did not want to go to the hospital. *Id*. Sergeant Johnsen agreed to Cecil's request to be handcuffed in front. He patted Cecil down, placed his handcuffs on Cecil, and escorted him to Officer Gross's Tulalip police vehicle. *Id*.

Cecil initially got into the car. *Id*. Deputy Pendergrass and Sergeant Johnsen went to the rear of the patrol car –approximately five to ten feet away – while Officer Gross attempted to ask Cecil the spelling of his last name and otherwise engage him in conversation. RP 250. Cecil abruptly left the rear seat of the car, through the door that had not been closed by Officer Gross, and shoved Officer Gross aside. RP 243, RP 356.

The officers testified that they were afraid for Cecil's safety – they thought that he was trying to escape and run into the street. RP 356. A short struggle of 30-60 seconds ensued, during which Sergeant Johnsen performed a leg sweep to get Cecil to the ground. RP 358. The officers also fell to the ground, and Sergeant Johnsen's body camera was knocked off during the struggle. RP 460.

Officer Gross tried to control Cecil's feet, while Sergeant Johnsen pulled Cecil's handcuffed arms from under his body and held them down. RP 359, 393. Deputy Pendergrass tried to control Cecil's torso by placing some weight on him between his shoulders and his buttocks. RP 465. After the struggle ended and Cecil was calming down, Deputy Pendergrass eased pressure off of Cecil's Torso and continued to talk to him, encouraging him to calm down. RP 470, 553-554. Deputy Pendergrass continued to talk with him, encouraging him to take deep breaths, and Cecil was responsive and talking back to him. *Id*. Shortly after, the officers observed Cecil was not responding to them. RP 555.

The officers rolled him over; Sergeant Johnsen attempted to find a pulse and noted that Cecil was still breathing, while Deputy Pendergrass went to get gloves and a CPR mask from his vehicle. RP 474, 555. When Deputy Pendergrass returned, 20-25 seconds later, Sergeant Johnsen was struggling to find Cecil's pulse so Deputy Pendergrass began and continued

chest compressions until others arrived to take over. RP 475, 574. Cecil, died of heart arrhythmia and methamphetamine toxicity at the scene. Exhibit 111. From the time Deputy Pendergrass arrived on the scene to the time Cecil died, approximately nine minutes elapsed. Exhibit 107.

B. PROCEDURAL HISTORY

Snohomish County moved for summary judgment on July 20, 2018, arguing the County owed no duty of care to Cecil, based on the alleged theories of negligence, that Deputy Pendergrass had a duty to recognize Cecil was suffering from a medical emergency and summon aid, and or, the County had a duty to detain Cecil for involuntary detention under RCW 71.05. CP, Sub No. 67, RP 2-43.

Lacy argued in response that her claim of negligence was based on a common law duty of care and that the legislative exception to the Public Duty Doctrine did not apply. *Id*. CP Sub No. 72

The County also moved for dismissal of Lacy's negligent training, supervision and retention claim as improper based on *respondeat superior* liability, when the County had admitted that Deputy Pendergrass's acts occurred in the course and scope of his employment with Snohomish County. Lacy withdrew her claim for negligent training and supervision in response. CP, Sub No. 67.

The Superior Court issued a letter decision, granting the County's motion to dismiss Lacy's claim for outrage based on insufficient evidence of outrageous conduct, and recognizing Lacy's dismissal of her negligent training and supervision claim. CP, Sub No 78. The Superior Court held that the Public Duty Doctrine did not apply to the case because Lacy was asserting a duty to act with reasonable care under common law. *Id*. The decision further held that "the officers had a specific duty to act because they had Cecil in their care." "While Plaintiff is not claiming any violation of a statutory duty, the Court finds that Deputy Pendergrass did not have a duty to call for a medical health team. No finding is being entered with regard to any claim of negligence or common law duty to act." *Id*.

The Court also denied the motion for summary judgment on the negligence claim, "While it may be appropriate to instruct the jury as to either intentional tort or the negligence claim that will only become apparent through evidence presented at trial, or perhaps motion *in limine*." *Id*.

Snohomish County moved for clarification or reconsideration of the Superior Court's letter decision, which the Superior Court denied outright. CP Sub No. 98. Snohomish County then moved to stay the trial date and certify the issue for discretionary review, on whether the Superior Court should allow a non-recognized claim of "Negligent Use of Excessive Force," to go forward to trial as an unrecognized cause of action, and on the

basis that the County did not owe Lacy a duty under that theory. CP, Sub No. 84.

The Superior Court denied the County's motion to stay and certify, in the process, clarifying her earlier decision, "'While it may be appropriate to instruct the jury as to either the intentional tort or the negligence claim, *that will only become apparent through evidence presented at trial…'* To that extent, the Court clarifies its previous ruling." CP Sub No. 109

The Superior Court heard the parties' motions *in limine* on October 11, 2018. RP 420-577. The County moved to exclude evidence of the County's training and Snohomish County Sheriff's Office Policy and procedures and limit any argument that Snohomish County was negligent based on the County's training as an agency, as irrelevant to the ultimate issue of whether Deputy Pendergrass acted wrongfully. CP 1002-1003.

Lacy argued in response that even though she had voluntarily dismissed her negligent training and supervision claim, she reserved the right to introduce evidence of training or alleged lack thereof, by Snohomish County, CP 1484-1487. Lacy submitted one policy about responses of Deputies to medical emergencies, which was not adopted by Snohomish County until after the incident giving rise to her amended complaint, but made no proffer of any other policies or argument of policy relevance to the underlying negligence theories. CP 1665-1668. The Superior Court granted

the County's motion excluding policy evidence and denied the motion as to training material. CP 1764.

The Superior Court was forced to revisit this decision excluding policy evidence six days into trial, when Lacy proposed policy material in the form of an "illustrative exhibit" she intended to present to aid her expert's testimony with. CP at 1779-1785. Despite not submitting the policies at any time prior to the sixth day of trial, neither in proposed trial exhibits, the Joint Statement of Evidence, discovery responses, or other opportunity, Lacy sought to place the policies of other agencies before the jury as an illustrative exhibit.

The Superior Court excluded the polices of other agencies based on the Superior Court's previous decision on the County's motion *in limine*, excluding Snohomish County Policy as irrelevant to the *respondeat superior* analysis, and the negligent training and supervision claim having been withdrawn. RP 586-587. The Superior Court also excluded the material because Lacy did not disclose it at any time prior to the morning of her expert's testimony and the policies were not illustrative. *Id*. The Superior Court reasoned that discussion of other agencies' policies would raise questions about Snohomish County policies on the issue. *Id*.

Trial proceeded and the County filed its motion for a directed verdict under CR 50(a) after Lacy called her final witness and rested. CP

1794-1809. The Superior Court allowed Lacy time to file a written response and heard argument on the motion the next day. CP 1810-1820 and RP 783-806.

The Superior Court issued a written order directing verdict for Snohomish County, finalizing the order on October 29, 2019. CP 1823-1836. The parties appeal.

IV. ARGUMENT

A. THE SUPERIOR COURT'S ORDER GRANTING A DIRECTED VERDICT FOR DEFENDANT SNOHOMISH COUNTY SHOULD BE AFFIRMED.

1. Standard of Review

When reviewing an Order Granting Motion for Directed Verdict, the appellate court reviews the order de novo, applying the same standard as the trial court. *Sing v. John L. Scott, Inc*. 134 Wn.2d 29, 948 Wn.2d 816, (1997). Whether the evidence presented is sufficient to create a factual issue for the jury is a question of law for the trial court's determination. *Id*. In determining whether the evidence is sufficient, the court is not permitted to weigh the evidence in any respect. *Id*. Similar to a motion for summary judgment filed under CR 56, the court must view the evidence in favor of the nonmoving party and allow the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Faust v.*

Albertson, 167 Wn.2d 531, 539, 222 P.3d 1208 (2009); *Hawkins v. Diel,* 166 Wn. App. 1, 269 P.3d 1049 (2011).

One who challenges a Directed Verdict "admits the truth of the opponent's evidence and all inferences which can reasonably be drawn [from it]." *Davis v. Early Constr. Co.,* 63 Wn.2d 252, 254,386 P.2d 958 (1963). [The court must] interpret the evidence against the [original] moving party and in a light most favorable to the opponent." *Id. Faust v. Albertson*, 167 Wn.2d 531, 537-538, 222 P.3d 1208 (2009). If substantial evidence supports the non-moving party's position, the motion for directed verdict must be denied and the case submitted to the jury. *Rhodes v. DeRosier*, 14 Wn. App. 946, 949, 546 P.2d 930 (1976). Whether there is substantial evidence to create an issue of fact for the jury is a question of law. *Id*. Evidence is substantial to support a verdict if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Brown v. Superior Underwriters,* 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

Washington courts consistently find that a directed verdict is the appropriate outcome where plaintiffs fail to demonstrate specific facts to support their claims. *See, e.g., Alejandre v. Bull*, 159 Wn.2d 674, 689-90, 153 P.3d 864 (2007) (affirming directed verdict where plaintiffs presented no evidence in support of required element of their cause of action and

actual testimony refuted the element); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193, 23 P.3d 440 (2001) (affirming directed verdict where testimony failed to show that alternative course of action was medically necessary and therefore it would not have led to a different outcome).

2. The Superior Court Correctly Held that Lacy Presented Insufficient Evidence on the Theories and Claims She Prosecuted at Trial.

Lacy claimed three negligence theories against the County; 1) Deputy Pendergrass failed to stage medical aid upon coming into contact with Cecil; 2) Deputy Pendergrass detained Cecil in a manner that led to the use of excessive force; and 3) Deputy Pendergrass failed to promptly initiate CPR. CP 960. Lacy also brought a battery claim based on a theory that the use of a prone position hold on a person with "certain risk factors" constituted the use of deadly force. CP 963-964 Finally, Lacy alleged False Imprisonment of Cecil because he was "restrained," despite not being a criminal suspect or a threat to himself or others. CP 964-965.

Given every opportunity, Lacy failed to produce evidence that drew the requisite causal connection between the acts complained of and the alleged injury. Because she is missing key – and necessary – elements of proof in her claims, the Court properly directed a verdict in favor of the County on all claims. *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30 (2000) ("Where there is 'a complete failure of proof

regarding an essential element of the nonmoving party's case,' all other facts become immaterial and the moving party is entitled to judgment as a matter of law.") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

3. Lacy Failed to Submit Sufficient Evidence of Proximate Cause

In negligence cases, a plaintiff must show four elements – duty, breach, causation, and damages. *Reyes v. Yakima Health District*, 191 Wn.2d 79, 89, 419 P.3d 819 (2018). Proximate causation consists of two elements: cause in fact and legal causation. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, 257 P.3d 532 (2011). Cause in fact concerns "the 'but for' consequences of an act – the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). A negligence action cannot be sustained where there is no evidence that the alternative actions suggested by the plaintiff would have prevented the death. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 164-65, 194 P.3d 274 (2008) (no medical testimony that had respiratory therapist summoned a doctor or different sutures had been used that tracheotomy patient would not have died).

While cause in fact is for the jury unless reasonable minds could not differ, legal causation is a question of law, resting on policy concerns about

how far a defendant's potential liability should extend. *See, e.g.*, *Hartley v. State*, 103 Wn.2d 768,778-779, 698 P.2d 77 (1985).

A causal connection cannot rest on mere assumptions. *Miller v. Dep't of Labor & Indus.*, 1 Wn. App. 473, 480, 462 P.2d 558 (1969) (with "nothing more substantial . . . than two or more conjectural theories, the jury . . . [may not] speculate, and a judgment n.o.v. is proper"); *Estate of Bordon ex rel. Anderson v. State, Dep't of Corr.*, 122 Wn. App. 227, 244, 95 P.3d 764 (2004) (speculation not allowed).

Here, the trial court properly ruled as a matter of law that evidence of causation on Lacy's theories of negligence was insufficient to pass the claims to the jury. Lacy's brief extends many pages to pointing to evidence the Superior Court improperly weighed or draw inappropriate inferences, however much of that evidence was not relevant to the actual theories she pled and attempted to prove at trial. The evidence that supported her actual theories and claims was insufficient.

a. Lacy presented no evidence that had Deputy Pendergrass called aid the second he stepped out of his car, either paramedics would have revived Cecil after his heart stopped.

Lacy offered insufficient evidence that had Deputy Pendergrass summoned aid immediately on initial contact with Cecil, Cecil would have survived.

Lacy offered no testimony or evidence that summoning paramedics immediately would have prevented Cecil's death. Lacy's medical expert, Dr. Jared Strote, admitted in his testimony that the only personnel who carry and can administer the drugs Dr. Strote alleges would have countered Cecil's alleged excited delirium are paramedics, not EMTs.

> Q And then the other two things that EMS could do for somebody with excited delirium, you talked the chemical sedation and the advanced cardiac life-support that paramedics can provide, correct?
>
> A Correct.
>
> Q And both of those are paramedic specific skills that EMTs can't provide?
>
> A Correct.
>
> Q And I believe you -- well, when you rendered your opinions in this case did you have a knowledge about the fire departments or EMS agencies that covered this area?
>
> A When I initially did my report I did not -- I was not aware of that. That's correct.
> RP 308-309.

There is no evidence to suggest that Cecil would have lived, had Deputy Pendergrass summoned Emergency Medical Services (EMS) immediately as suggested by Lacy's expert, Sue Peters. Although the Tulalip Bay Fire Department personnel arrived on the scene first, Lacy provided no evidence that any of them were paramedics equipped with medications necessary to treat Excited Delirium, (they were not), or that

there was any treatment they could provide prior to Cecil going unresponsive. In contrast, the admitted CAD log for the Marysville Fire Department paramedics that responded to the call shows that they were dispatched at 10:17 P.M. and did not arrive on scene until 10:29 P.M. – a response time of 12 minutes. Ex. 108. The testimony by the officers on the scene reveals that the entire incident with Cecil – from first contact by Deputy Pendergrass to the point Cecil became unresponsive – lasted approximately nine minutes. Ex. 107. Even if paramedics had been dispatched the moment Deputy Pendergrass stepped out of his car, Cecil would have been dead for three minutes by the time the paramedics arrived, and there is absolutely no testimony that Cecil could have been revived at that point.

Lacy argues on appeal that evidence at trial showed CAD dispatch times are not exact and are subject to a delay from the dispatcher hearing the report and typing it into the CAD, resulting in a variance of about a minute in some cases, but Lacy presented insufficient evidence to show that the CAD reports are inaccurate by the several minutes required such that the outcome in this case would have been different. RP 528. Allowing the claim to go to the jury on the insufficient evidence of timing presented by Lacy would require the jury to speculate to reach a different outcome. Evidence of a causal link was insufficient.

The general medical testimony Lacy's experts have provided, that getting aid sooner rather than later is better, does not suffice to carry her burden. The medical testimony must be that the paramedics could have revived Cecil on a more likely than not basis, to a reasonable degree of medical certainty:

> Medical testimony as to a causal relationship between the negligent act and the subsequent injuries or condition complained of must demonstrate "'that the injury "probably" or . . "more likely than not" caused the subsequent condition, rather than that the accident or injury "might have," "could have," or "possibly did" cause the subsequent condition.' " Importantly, medical testimony must be based on the facts of the case and not on speculation or conjecture. Finally, such testimony must also be based upon a reasonable degree of medical certainty.

Fabrique v. Choice Hotels Intern., Inc., 144 Wn. App. 675, 687-88, 183 P.3d 1118 (2008) (internal citations omitted). The opinion offered by Dr. Strote failed to meet this standard.

Here, no testimony gave the jury a basis to connect Deputy Pendergrass's actions or omissions with a different outcome, showed that Cecil would not have died, or established that he could have been revived had Deputy Pendergrass taken other actions. *See Bordon*, 122 Wn. App. at 241-44 (affirming directed verdict where the evidence left "gaps in the chain of causation"); *Hungerford v. State Dep't of Corr.*, 135 Wn. App. 240, 254, 139 P.3d 1131 (2006) ("rank speculation" insufficient for proximate cause).

There is insufficient evidence as a matter of law, to support the theory that had Deputy Pendergrass called or staged aid immediately, the outcome would be different. The Superior Court's directed verdict on this issue should be affirmed.

b. Lacy presented no evidence that had Deputy Pendergrass began chest compressions immediately after Cecil was observed unresponsive, Cecil would have been revived.

The same analysis applies to Lacy's theory of negligence that CPR was not started soon enough. Lacy failed to provide evidence that CPR performed by Deputy Pendergrass on the side of the road, even if it was started immediately, would have resuscitated Cecil.

Lacy's experts opined as to the general benefits of starting CPR sooner rather than later, but none have opined that a faster start to CPR would have changed the outcome in these circumstances, on a more likely than not basis and to a reasonable degree of medical certainty. In fact, Dr. Strote's testimony on direct exam established that, in general, it is highly *unlikely* that CPR will revive anyone in cardiac arrest:

> …… "[B]ut I don't think you can quantify one minute in a specific case equals now you're 50 percent chance less likely. I think the key is that everything we're taught, and the American Heart Association keeps emphasizing this, is that we don't know exactly how much is lost with each second, or 30 seconds, or minute." RP 321-322

Dr. Strote reemphasized this low likelihood of successful resuscitation on cross-examination: "…and, again, your chance of survival isn't starting super high to begin with[.]" RP 321.

Lacy argues that Tulalip EMTs could have arrived sooner on scene, but offers no evidence that had EMTs been on scene, and had they engaged Mr. Lacy the instant he went unresponsive, Tulalip Bay EMT CPR could have revived Mr. Lacy and he would have survived.

"It is axiomatic that to establish causation between the liability-producing situation and the claimed injuries or subsequent condition, the medical testimony must reasonably exclude, as a probability, every hypothesis other than the one relied on to remove it from the realm of speculation or conjecture." *Merriman v. Toothaker*, 9 Wn. App. 810, 814, 515 P.2d 509 (1973) (emphasis added) (citing *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968)).

Dr. Strote testified that the chances of being revived through CPR *begin* at some "relatively small" level and, overall, chances of CPR reviving someone is not high to begin with. So even if Deputy Pendergrass had started CPR *immediately*, it was still – based on Dr. Strote's own testimony – more likely than not that Cecil would *not* have survived.

With regard to the claim that CPR was delayed, Dr. Strote testified that there was no way to quantify the decrease in chance of survival for every minute that is lost between the heart stopping and CPR starting.

> But I don't think you can quantify one minute is a specific case equals now you're 50 percent chance less likely. I think the key is that everything we're taught, and the American Heart Association keeps emphasizing this, is that we don't know exactly how much is lost with each second, or 30 seconds, or minute. RP 321-322.

Dr. Strote's ultimate conclusion was damning to Lacy's claims about Deputy Pendergrass's CPR performance: "The likelihood that CPR is going to bring someone back is relatively rare." RP 322.

The significance of these failures in Lacy's evidence is the Superior Court properly held the evidence that was offered was insufficient allow the jury any reasonable basis for ruling that Deputy Pendergrass was negligent for failing to take these actions. Without the evidence to make those causal connections, the jury would be required to speculate to conclude that a different result would have occurred had Deputy Pendergrass taken the actions Lacy recommended.

It is well-established that facts relied upon to demonstrate a causal connection cannot rest on assumptions. *Miller v. Dep't of Labor & Indus.*, 1 Wn. App. 473, 480, 462 P.2d 558 (1969) (where there is "nothing more substantial to proceed upon than two or more conjectural theories, the jury will not be allowed to speculate, and a judgment n.o.v. is proper."). Lacy

did not offer any evidence that Deputy Pendergrass's chest compressions were otherwise deficient or that if he performed CPR differently, Cecil would have been revived. Without *any* evidence that a quicker call to paramedics or start to CPR would have prevented the death, there can be no causal link and a directed verdict in favor of Snohomish County was appropriate.

c. Lacy failed to present evidence that different tactics by Deputy Pendergrass would have avoided Cecil charging out of the back of the Tulalip police vehicle and assaulting officers.

Lacy's claim of "Negligent Use of Excessive Force", was articulated as: Deputy Pendergrass fell below a standard of care by escalating the situation with Cecil rather than deescalating it, which resulted in the need to use force. CP at 1265. Assuming for the sake of argument that the Superior Court was not in error in allowing an unrecognized claim to go forward, it only addresses duty and breach. The County addresses the duty issue below. Lacy failed to present any evidence that different tactics would have prevented Cecil from charging from the police vehicle and initiating the physical altercation with the officers that led to the metabolic collapse that caused his death. Lacy also failed to present evidence of other, better tactics that would have changed the outcome of what occurred. Lacy merely offered testimony generally

that the officers should have "deescalated," RP 618, 637. That failure of proof means no causal connection was established.

Lacy also presented evidence that Deputy Pendergrass should not have advised he would use a Taser if Cecil did not calm down, or mentioned the potential of being taken into custody, and noted the refusal of the officers to call Cecil's wife to retrieve him. RP 638. But the testimony does not support the claim as to Deputy Pendergrass, because only the comment about deploying a Taser can be attributed to him, and Cecil in fact deescalated and elected to voluntarily go home with the Tulalip Police officers after that comment had been made.

Cause in fact requires proof that there was "a sufficiently close, actual, causal connection between *defendant's* conduct and the actual damage suffered by plaintiff." *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969) (emphasis added). While Deputy Pendergrass did make the Taser comment when Cecil began resisting the Tulalip officers' attempt to handcuff Cecil with his hands behind his back, the situation deescalated almost immediately thereafter when Cecil volunteered to be handcuffed with his hands in front of him and to voluntarily walk to the Tulalip Police vehicle for transport to his house. Given Cecil's de-escalation and subsequent voluntary decision to cooperate with the officers in the minutes after the Taser comment, there is insufficient evidence to

support the claim that the Taser comment is what sparked his attempt to flee from the officers. There is no testimony or other evidence that suggests such a connection. To reach the conclusion that there is a connection, would require a speculative conclusion as to what was going through Cecil's mind when he decided to flee the patrol car.

The other actions Lacy complained of cannot be a basis for liability for Deputy Pendergrass, because they were not his actions to begin with. The actions of the tribal officers were not put before the Superior Court by Lacy. To the extent that the decision to place Cecil in the back of the patrol car was what prompted the altercation, the testimony is clear that that decision was made by the Tulalip Police officers on the scene, not Deputy Pendergrass. Ex. 101, RP 377-378.

In addition, the only evidence presented shows that Cecil voluntarily offered to be handcuffed with his hands in front and taken home by the Tulalip Police, not Deputy Pendergrass. RP 354. There is no evidence that Deputy Pendergrass had a right of control over the actions of the Tulalip Police officers such that liability for their actions can be imputed to him. *See Adams v. Johnston*, 71 Wn. App. 599, 611, 860 P.2d 423 (1993) (joint venture for purposes of tort liability requires a right of control over the other participants). Nor is there any evidence that it was Deputy Pendergrass who made the decision to transport Cecil rather than

call Cecil's wife to retrieve him. Ex. 101. Without testimony or a reasonable inference to support the causal connection between the Taser comment and Cecil's initiation of the struggle, the claim fails and it was proper to direct a verdict should be directed in favor of Snohomish County.

B. LACY FAILED TO PRESENT SUFFICIENT EVIDENCE THAT THE FORCE USED ON CECIL WAS EXCESSIVE, AND THEREFORE FAILED TO CARRY HER BURDEN ON THE BATTERY CLAIM.

Lacy's battery claim is based on Deputy Pendergrass's restraint of Cecil in a prone position. Even accepting that as Lacy's theory of battery, she presented insufficient evidence that restraining a combative subject on the ground was excessive or unnecessarily violent under Washington State law. She presented insufficient evidence on the force itself.

Under Washington law, a battery is a harmful or offensive contact, resulting from an act intended to cause the individual, to suffer such a contact, contact is not consented to, is not lawful and is not privileged. *McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000). Force is lawful when it is necessarily used by a police officer in the performance of a legal duty or to prevent a mentally disabled person from committing an act dangerous to any person. RCW 9A.16.020. A police officer may become a tortfeasor in the course of using force, but only if "unnecessary violence or excessive force is used in accomplishing the arrest." *Boyles v. City of*

Kennewick, 62 Wn. App. 174, 176, 813 P.2d 178 (1991). *See also, Strange v. Spokane County*, 171 Wn. App. 585, 599, 287 P.3d 710 (2012), (Washington law provided the appropriate standard for use of force.) But once again, Lacy failed to produce evidence that Deputy Pendergrass used "unnecessary violence or excessive force" in effectuating the detention of Cecil. Lacy brought this claim under Washington State Law and state law is the standard for evaluating whether sufficient evidence was presented that Deputy Pendergrass committed battery, when it was lawful for him to use force in the performance of his legal duties. Lacy did not bring a constitutional claim for excessive force under the Fourth Amendment to the United States via a civil rights claim under 42 U.S.C §1983. Lacy relies on *Graham v. Connor*, 490 U.S. 386 (1989) and other federal case law to suggest that the court must determine whether law enforcement is liable for the state tort of battery by undertaking the analysis used in §1983 excessive force claims under the Fourth Amendment. Yet Lacy points to no precedent supporting her reasoning that a Fourth Amendment analysis applies to a Washington State tort of battery. Although a law enforcement officer may be potentially liable for battery if excessive force is used, the use of the term "excessive force" does not convert the state tort of battery into a §1983

excessive force claim[2] or require an analysis under the Fourth Amendment. Furthermore, even if the same analysis used under the Fourth Amendment for §1983 excessive force claims applied here, no evidence exists to support the proposition that Deputy Pendergrass used excessive force.

The testimony of the officers actually on the scene, including Deputy Pendergrass, showed that they briefly restrained Cecil after taking him to the ground to gain control of him after he assaulted the Tulalip Police officers. Lacy's expert, Susan Peters, opined only that officers should recognize heightened risk factors when individuals are exhibiting signs of excited delirium in terms of the type of restraints used. RP 632. More particularly, Ms. Peters provided no opinion testimony on the characterization of the actual force used by Deputy Pendergrass, such as whether it was necessary, overly aggressive or uncalled for in that situation or not.

In fact, the Court clearly recognized – and agreed with the County on – the critical distinction between Ms. Peters' opinion that Deputy Pendergrass failed to recognize so-called risk factors and an opinion that the force used was excessive:

> Mr. Tempski: She did not, Your Honor, opine about the propriety…propriety of the specific use of force tactics. She talked about her opinion

[2] Appellant never pled a §1983 excessive force claim. CP 1-15

> that Deputy Pendergrass failed to recognize risks, and that's different than whether or not…
>
> The Court: It is. It is. And you can't expand her testimony to something that…Defendant was not provided notice of.

RP 609. The Court proceeded to limit Ms. Peters' testimony to the non-excluded opinions of Ms. Peters that were in her prior deposition and report – which did not include an opinion on the propriety of the force actually used, any analysis of the tactics. RP 610. Lacy faults the Superior Court for requiring an opinion on the ultimate issue, but that is not the evidentiary insufficiency. Lacy presented insufficient evidence that the officers, and particularly Deputy Pendergrass, acted beyond what was called for to respond to Cecil's assaultive actions. The evidence shows that it took three officers to engage, meet Cecil's level of aggression, restrain him and ultimately calm him. Nothing in the evidence suggests the force was excessive to the situation or violent.

Tulalip Tribal Police Sergeant Michael Johnsen testified that he performed a leg sweep, taking Cecil to the ground, he restrained Cecil's arms, and Tulalip Officer Gross attempted to restrain Cecil's legs, while Deputy Pendergrass addressed his torso. RP 393, 503. Sergeant Johnsen also testified that the type and uses of force with Cecil were consistent with his training and how he trains other officers:

Q: Was there anything in that -- in what you did, you, Officer Gross, Deputy Pendergrass, in terms of restraining Cecil on the ground that was inconsistent with your training or how you train other officers?

A No.

RP 402.

Deputy Pendergrass's testimony provided some additional details as to how he assisted the Tulalip Tribal Police Officers restrain Cecil:

Q Your testimony, you never put your weight on Cecil's back?

A His upper left shoulder which involves his back.

Q So while you were on the ground at what point -- or strike that.

A So as I explained my body position where I was on his upper left shoulder during that time trying to tell him to calm down, he's okay. And he was replying to us. He was saying he was struggling to breathe. He was freaking out, and he was able to physically -- the physical struggle had ended. So at that point I backed off of him. I had placed my right knee on the ground, and my left knee was up in the air. And I had my left-hand on his shoulder making sure he was okay. Keeping that positive contact in case the incident decided to become reagitated and I'd have to re-engage. Cecil's saying he's freaking out. He's having a hard time breathing. He's -- he can't breathe. I said, "Cecil, you're breathing, talking. You're breathing. Just focus on deep breaths, just deep breaths, and calm down. And he was saying, "Okay, okay."

RP 470-471.

Critically in Lacy's description of the use of force, she fails to put it into any temporal context. The entire incident lasted less than nine minutes,

and the actual restraint, the limited level of force used by all three officers lasted approximately 30 seconds before Deputy Pendergrass released pressure except for a hand on Cecil's shoulder.

> Q. And you testified that pressure that you were putting on him that lasted for how long?
>
> A About 30 seconds.
> RP 552.

Lacy claims the Superior Court erred by not considering opinion evidence of medical expert, Dr. Omalu. Dr. Omalu did not testify about any of the specific uses of force in this case, or how the uses of force were excessive or unnecessarily violent.

> In my expert opinion, significant amounts of pressure were applied on the trunk of Mr. Lacy 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. That was in one statement what happened to Mr. Lacy. RP 766-767.

Lacy argues this testimony was ignored by the Superior Court and supported a causal link. However, this testimony did not support any of the claims she actually pled, failure to stage aid immediately, failure to begin chest compressions sooner, negligent tactics, it also does not establish that anything about the restraint was excessive or unnecessarily violent sufficient to send the claim of battery to the jury.

Because there was insufficient evidence to establish that the force used by Deputy Pendergrass was excessive or unnecessarily violent, the jury could only reach a conclusion that the force was unlawful by speculating based on the end result, *i.e.*, Cecil's death. But *post hoc, ergo propter hoc* ("after this, therefore because of this") is not the law: "[C]oincidence is not proof of causation." *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 489, 84 P.3d 1231 (2004).

Similarly "The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury." *Theonnes v. Hazen,* 37 Wn. App. 644, 648-649, 681 P.2d 1284 (2012). *See also Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wn.2d 391, 400, 722 P.2d 787 (1986); *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 164, 106 P.2d 314 (1940) ("the opinions of expert witnesses are of no weight unless founded upon facts in the case. The law demands that verdicts rest upon testimony, and not upon conjecture and speculation"); 5A K. Tegland, Wash.Prac., Evidence § 297 (1989). Dr. Omalu provided an opinion that would force the jury to speculate based only on the outcome, and there was insufficient evidence linking that outcome to Deputy Pendergrass, or the force used in this case.

What the evidence showed and the Superior Court concluded was that Deputy Pendergrass put weight into Cecil's torso, preventing him from bucking up, for 30 -60 seconds, removed that pressure as soon as the fight was over, Cecil was talking and breathing and calming down and then subsequently went unresponsive.

The Superior Court did not grant the directed verdict on the battery claim because Lacy failed to offer expert testimony on whether the force used was excessive, the Superior Court granted the order directing verdict based on insufficient evidence of any type that the force was excessive or unnecessarily violent. This Court should affirm the Court's order on battery.

C. LACY APPEARS TO HAVE ABANDONED HER CHALLENGE TO THE SUPERIOR COURT'S DIRECTED VERDICT FOR SNOHOMISH COUNTY ON THE CLAIM OF FALSE IMPRISONMENT. THE SUPERIOR COURT PROPERLY GRANTED VERDICT FOR SNOHOMISH COUNTY ON FALSE IMPRISONMENT.

Lacy did not address her claim of Unlawful Imprisonment before this Court, even so, Lacy provided insufficient evidence in support of her theory that Deputy Pendergrass's initial detention of Cecil constituted False Imprisonment and the directed verdict for the County was correct. To establish claim of False Imprisonment, Lacy must present evidence that Cecil was deprived of his personal liberty or freedom by Deputy Pendergrass through the use or threat of force, and that Deputy Pendergrass

acted without lawful authority. *Dang v. Ehredt*, 95 Wn. App. 670, 685-86, 977 P.2d 29 (1999). The evidence before the Superior Court was clear that the detention was done with the requisite authority based on the community caretaking function of police officers, which recognizes that officers may detain persons in the course of a routine check on a person's health and safety, and that such a brief stop is lawful if the officer contacting the individual is, in fact, checking on their health and safety. *State v. Kinzy*, 141 Wn.2d 373, 387, 5 P.3d 668 (2000). The Superior Court properly held that the failure of evidence supported a directed verdict for Snohomish County on to her claim for False Imprisonment.

D. THE SUPERIOR COURT'S EVIDENTIARY DECISIONS DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

Lacy challenges a series of evidentiary rulings the Superior Court made *in limine* and during trial, related to policy evidence. Cites. Lacy also claims the Superior Court erred by excluding expert testimony regarding the basis of her opinion for the applicable standard of care. Finally, Lacy argues the Superior Court erred in excluding evidence of Snohomish County policy and procedure and excluding evidence that Deputy Pendergrass's CPR certification was out of date by a few months.

1. Standard of Review

A trial court's decision to exclude evidence will be reversed only where it has abused its discretion. *Kappelman v. Lutz*, 167 Wn. 2d 1, 6, 217 P.3d 286, 288 (2009), *citing, State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). An abuse of discretion occurs when the trial court's decision is based on untenable grounds or untenable reasons. *Id*., *citing, State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 402–03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003))). A trial court's decision is manifestly unreasonable if it adopts a view "that no reasonable person would take." *Id*. "A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.* (citing *Mayer*, 156 Wn.2d at 684, 132 P.3d 115). *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 669, 230 P.3d 583, 585 (2010).

2. The Superior Court Properly Excluded Evidence of Snohomish County Policies and Procedures, the Policies of Other Agencies and Model Policy Materials and CPR Certification as Irrelevant.

Snohomish County moved *in limine* to exclude any evidence of training, or lack of training, any argument the County was negligent based

on its training, or lack of training, evidence regarding certifications, department policies or policy manuals, or reference to their content as irrelevant and superfluous, based on Lacy's withdrawal of the negligent training and supervision claim after the County moved to dismiss it at summary judgment.. CP Sub No. 78. The Superior Court granted the County's motion *in limine* as to evidence of policy, but denied it as to training, allowing Lacy to present evidence of training. *Id*. The Superior Court revisited the prior ruling when Lacy attempted to offer evidence of policy of uninvolved agencies, which had not been identified as exhibits, in discovery, or as the basis of her expert's opinion, presented in the form of proposed "illustrative exhibits," six days into trial. RP 585-586. The Superior Court's decision was not an abuse of discretion.

a. The Court properly excluded general policy evidence as irrelevant based on dismissal of the negligent training and supervision claim.

There is no cause of action for negligent training or supervision when defendant employer admits that the actions of defendant employee were within the scope of employment. *See Anderson v. Soap Lake School District*, 191 Wn. 2d 343, 423 P.3d 197, 2018 WL 3765079 (2018); *also LaPlant v. Snohomish County*, 162 Wn. App. 476, 480, 271 P.3d 254 (2011). When an employer admits agency (and will thus automatically be

held responsible for the acts of its employees if the employee is found to have acted in a negligent manner), issues of whether the employer was negligent in its training and supervision of its employees are "immaterial." *Id.; see also Gilliam v. DSHS*, 89 Wn. App. 569, 584-85, 950 P.2d 20, *review denied*, 135 Wn.2d 1015 (1998); and *Whaley v. State*, 90 Wn. App. 658, 676, n. 39, 956 P.2d 1100 (1998). The only question is whether the employee's actions were wrongful.

Throughout the course of this case in the trial court, Snohomish County repeatedly admitted that all alleged actions by Deputy Pendergrass occurred in the course and scope of his employment, rendering claims of negligent training or supervision superfluous. CP 22.

The trial court excluded policy evidence, holding, whether the County as an entity, "put policy down on paper," was not relevant to whether Deputy Pendergrass acted wrongfully.

> THE COURT: And I agree. It is all -- with regard to whether or not Deputy Pendergrass acted negligently, it's not whether his boss didn't put the policy down on paper. It's not relevant as to whether Snohomish County had a policy about -- down on paper. And so I will exclude any reference to policies. I will grant -- so exclude any reference to policies. That's granted. The exclude any reference to training materials or training -- I'm not sure of training records -- would be admissible.
> RP 84.

Lacy followed up, requesting the motion excluding policy be made binding on both parties.

> MR. DREVESKRACHT: One point of clarification. We would just ask that that ruling go both ways. That if we're not allowed to introduce the evidence of policy, that the plaintiff also is not allowed to introduce evidence of policy.
>
> THE COURT: That's fair. Okay.
> RP 85

The Superior Court excluded policy evidence because it was an issue of supervision and therefore irrelevant. Lacy requested that Snohomish County also not be allowed to introduce evidence of policy in support of Deputy Pendergrass's actions, the point of which, was the County would not be able to point to policy material as evidence Deputy Pendergrass was not negligent. The holding of *Laplant* supports this ruling. In reversing the trial court's denial of the County's motion to dismiss the negligent training and supervision claim as superfluous, the *Laplant* decision noted that the deputies could not defend against *Laplant's* negligence claims by asserting they simply complied with the County's pursuit policy. 162 Wn. App. at 481. This supports exclusion of policy evidence as irrelevant to the issue of whether an individual acted negligently.

The cases cited by Lacy do not support her argument that the superior court erred in excluding evidence of policy and procedure. *Joyce v. Department of Corrections* was decided before *Laplant*, and held that it was error to allow negligent hiring, training and supervision claims to go

forward in a case based on *respondeat superior* liability. 155 Wn.2d 306, 324, 119 P.3d 825 (2005). *Kelley v. State*, was a "Negligent supervision" claim against the Department of Corrections based on DOC's monitoring and supervising of a parolee on community custody after a criminal conviction. 104 Wn. App. 328, 17 P.3d 1189 (2000). The "negligent supervision:" line of cases under this theory are entirely different than a claim of negligent supervision by an employer of an employee based on employment. *Kelley* references DOC policies generally, but there was no challenge to the relevancy of policy, or argument that because a CCO failed to comply with policy he was grossly negligent. *Id*.

Lacy also cites to *Bishop v. Miche*, in support of her argument that policy argument was relevant. However, Lacy cites to the fact section of the case and not to the holding. 137 Wn.2d 518, 522, 973 P.2d 465, 467 (1999). *Bishop* is also a "negligent supervision," of a probationer case, belonging to the same theory and line of holdings as *Kelley* and *Joyce*.

Garrison v. Sagepoint Financial was a case based on an employee acting outside of the scope of employment, and the court dismissed the claim against his employer. 185 Wn. App. 461, 504, 345 P.3d 792, 809 (2015).

The Supreme Court recently addressed the issue of *respondeat superior* claims, and when an employer can be sued for negligent

supervision of an employee who acts outside the scope of employment. *See, Anderson v. Soap Lake*, 191 Wn.2d 343, 423 P.3d 197 (2018). It was clear to the Superior Court that Lacy intended to offer policy evidence against Snohomish County and not Deputy Pendergrass, therefore federal case law on constitutional violations and policies on the use of deadly force was not relevant or persuasive to the decision the Superior Court made to exclude policy in this case. *See, Anderson v. Soap Lake*, 191 Wn.2d 343, 423 P.3d 197 (2018). The Superior Court's decision to exclude policy, and Snohomish County policy specifically, was based on tenable grounds and should be affirmed.

b. The Superior Court's decision to exclude evidence Deputy Pendergrass's CPR card was expired was not an abuse of discretion.

Snohomish County sought *in limine* to exclude evidence of Deputy Pendergrass's CPR card, which at the time of the incident was overdue on the basis that it was a supervision oversight by the County, not Deputy Pendergrass, and as such, was irrelevant. CP 1002, 1005.

Lacy could not cite to any statute, administrative code, or policy which required possession of an unexpired CPR card. Lacy also could not, and did not cite the Superior Court to any expert testimony that showed that CPR standards changed at any time between Deputy Pendergrass's certification, and the incident. RP 79. In fact the evidence was to the

contrary, the standards changed after this incident. *Id*. Further, Lacy chose not to propose the CPR certification as an exhibit or the joint statement of evidence. There was no purpose for the evidence other than for prejudicial purposes. There is no basis for admission of evidence if it is only offered for prejudicial purposes. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583, 586 (2010). The Superior Court made a tenable decision to exclude evidence of the CPR certification.

> THE COURT: So I think that evidence of the way that he applied CPR is admissible, but you need to have testimony as to what he did wrong. And the fact that, as your expert testifies, that techniques change frequently, we don't have evidence at this point that he knew that the standards had changed, because apparently they hadn't changed until after September of 2015. So I -- it is absolutely 100 percent relevant the way he applied CPR. The fact that his card was expired is not. That -- your example of the CDL license isn't really a very good one because if somebody gets in a car accident, it's the fact that they're a crappy driver -- excuse me, a bad driver -- and -- that wasn't very judicial. I apologize. It was evidence that he's a bad driver, not that he or she didn't go to the Department of Licensing and get their license. That's not relevant. It's the acts that are there. So I'm going to –
>
> …
>
> THE COURT: All right. I am still going to grant the defendant's Motion to -- actually, this says preclude references, and I think it should be exclude references -- -- to his certification or card being expired. And that's just the certification and the card. The techniques that he used, whether he administered CPR negligently is -- that is still a key issue to be addressed through evidence. But the certification, whether or not his license was expired, is not relevant. So defendant's Motion 7 is granted. Cite.
>
> RP 78-81.

The County also moved for exclusion of evidence of the certification lapse as inadmissible 404(b) evidence. To the extent that

allowing a CPR card to expire is somehow a bad act, evidence of other bad acts is prejudicial in and of itself, and is not admissible to prove the character of a person in order to show action in conformity therewith. While ER 404(b) is primarily at issue in criminal cases, it is invoked in civil cases as well. *See Dickerson v. Chadwell, Inc.*, 62 Wn. App. 34, 48-49, 857, p.2d 648, *review denied*, 125 Wn.2d 1022 (1994). In *Dickerson*, a trial court allowed evidence of prior slapping incidents as evidence that made it more likely the civil defendant assaulted someone in a particular instance. *Id*. at 433. Allowing evidence of Deputy Pendergrass' expired CPR card is precisely the type of allegation of "other wrongful act" evidence the *Dickerson* court ruled warranted a new trial. Lacy offered little in response to this argument before the trial court. Under a 404(b) analysis, Lacy showed no basis for admission of the bad act evidence, other than eliciting a prejudicial, emotional response.

Based on the record before the trial court, the court did not abuse discretion.

c. <u>The Superior Court did not err in limiting Lacy's expert testimony based on its ruling on supervision, and as not timely disclosed.</u>

Lacy argues that Superior Court abused its discretion by "excluding Ms. Peter's expert testimony regarding the basis of her opinion for the applicable standard of care." Brief of Appellant at 50. Lacy does not identify

the specific evidence the Superior Court improperly excluded. It appears Lacy is referencing the Superior Court's decision to exclude Lacy's proposed illustrative exhibit. CP 1779-1793. The proposed policy material consisted of undated Spokane County Sheriff's Office Policies, policy from Charles County Maryland, material from the Western Pennsylvania Police Chiefs association, and excerpts from an unidentified book. *Id*.

In addition to violating the Superior Court's reasoned ruling *in limine* excluding policy, the Superior Court properly excluded the policy slides on the basis that they were not proper "illustrative exhibits."

The trial court has wide latitude in deciding to admit or exclude demonstrative evidence. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 426, 114 P.3d 607 (2005). Determining whether the similarity is sufficient is within the trial court's discretion, and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 816, 975 P.2d 967 (1999) (plurality opinion).

Lacy's proposed "illustrative exhibit," was policy material, not any kind of summary of evidence that would already be admitted, and it was evidence which the Superior Court excluded as irrelevant. The Superior Court heard argument and addressed the basis of her decision not to allow its use as an illustrative exhibit:

> THE COURT: All right. Well, obviously I haven't had a chance to read the brief or the case law that's cited here. Demonstrative exhibits are fine, but they have to -- as Mr. Tempski indicates -- meet certain criteria. Here, these are excerpts of other people's policies, not Snohomish County, not Tulalip Tribal Police, that are emphasizing -- they're evidence in and of themselves. They're not demonstrative. They are excerpts from manuals. It's not -- it wouldn't comply with the best evidence rule, because they are only excerpts. And if, as Mr. Tempski says, one of them at least indicates that it's not to be used as information describing the policy or how to react to delirium, then that in and of itself is problematic. I'm not going to allow this. This is information that is new to Snohomish. It's -- the defendant. It's new to the jury. And Ms. Peters can rely upon her training and expertise. She can rely upon evidence that has been elicited in this case to form her opinions, but I'm not going to allow publication of these aids or these -- this PowerPoint, because it is not a summary of information. It's new information, and it's not necessarily complete or applicable to the police agencies at issue in this case. So I'm not going to allow that PowerPoint
>
> RP 586-586.

The Superior Court did not abuse discretion by improperly limiting Lacy's expert, Sue Peters' testimony on the standard of care because it was not relevant, not disclosed, and was not illustrative. The Superior Court's decision was tenable on any of those grounds alone and was not an abuse of discretion.

E. THE SUPERIOR COURT ERRED IN DENYING SNOHOMISH COUNTY'S MOTION TO DISMISS LACY'S NEGLIGENCE CLAIMS FOR FAILING TO ESTABLISH A DUTY OF CARE, AND FOR FAILING TO DISMISS "NEGLIGENT USE OF EXCESSIVE FORCE" AS AN UNRECOGNIZED CLAIM AND FOR WHICH NO DUTY WAS OWED.

The County moved to dismiss Lacy's negligence claim based on

lack of any duty owed by Snohomish County to Cecil. CP, Sub No. 67 Lacy argued that because she asserted a "common law negligence claim," the County owed Cecil a duty. RP 23-25. The County also moved to dismiss the "negligent use of excessive force claim, as unrecognized in Washington State, and for which no particularized duty was owed. RP 15. The County filed a cross appeal of the Superior Court's final decision in this case. This Court should hold that the Superior Court's decision denying summary judgment, and allowing the negligence claims to go forward was error. In the alternative, this Court should affirm the directed verdict for Snohomish County on the basis Lacy failed to establish a legal duty.

1. Standard of Review

When reviewing an Order Granting Summary Judgment, the appellate court reviews the order de novo, engaging in the same inquiry as the trial court. *Korslund v. DynCorp Tri–Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment will be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR56(c). The existence of a legal duty is a question of law. *Crow v. Gaston*, 134 Wn.2d 509, 515, 951 P.2d 1118 (1998).

2. The Superior Court Erred by Allowing Lacy to go Forward Under a Common Law Duty of Negligence

Lacy failed to establish that the County owed a legal duty to Cecil to recognize that Cecil was suffering from a medical emergency and stage aid, and that Deputy Pendergrass owed a duty to perform CPR. Lacy's claim that Deputy Pendergrass "negligently used excessive force," with his tactical decisions, is not a recognized claim in Washington State. The Superior Court erred in allowing the unrecognized claim of Negligent Use of Excessive Force to go forward and in allowing the negligence claim to go forward based on a common law duty. As no specific individual duty was owed, the County cannot be liable and such claims cannot survive.

While the legislature's waiver of sovereign immunity exposed governmental entities to suit, a plaintiff seeking to bring a claim against a governmental entity must still prove "the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury." *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 753, 310 P.3d 1275, 1287 (2013) (quoting *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 605, 257 P.3d 532 (2011)).

Because the government is tasked with responsibilities greater than those of an ordinary citizen, the public duty doctrine adds an additional step to the analysis, and courts are directed to "carefully analyze the threshold

element of duty," and "determine whether a duty is actually owed to an individual claimant rather than the public at large." *Id.* (internal citations and quotations omitted). In other words, "governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law." *Washburn,* 178 Wn.2d at 753. Under the public duty doctrine, to proceed with her negligence claims, a plaintiff must "show that the duty breached was owed to her individually, rather than to the public in general." *Bratton v. Welp*, 145 Wn.2d 572, 576, 39 P.3d 959, 961 (2002).

The Superior Court erred in refusing to utilize the "focusing tool" of the public duty doctrine in evaluating whether Lacy could assert her "common law" negligence and Negligent Use of Excessive Force claims. The Superior Court's conclusion that the public duty doctrine has *only* been used to determine whether the government owes a tort duty of care based upon a statute was not supported by any case law. *See Munich v. Skagit Communication Center,* 175 Wn.2d 871, 891, 288 P.3d 328 (2012). (Chambers, J., concurring) ("I will concede that several of our cases have appeared to analyze both statutory duties and common law duties under the public duty analytical framework.") (citing cases).

The negligence claims Lacy asserted arise from the County's statutory obligations to the general public to preserve the peace, RCW 36.28.010**.**020**,** and in particular are expressly excused from liability by

RCW ch. 71.05, which governs the detention of individuals with mental disorders. Statutory obligations imposed on government are frequently owed to the public at large and not to any particularized class of individuals. This explains why the public duty doctrine is used in evaluating obligations imposed uniquely on a governmental entity by statute, as noted by Justice Chambers in his concurrences in cases analyzing this duty or lack thereof. *See, Cummins v. Lewis County,* 156 Wn.2d 844, 861-74, 133 P.3d 458 (2006), and *Munich, 175* Wn.2d at 885-95, 288 P.3d 328. But the public duty doctrine is nothing more than a "focusing tool" that directs the court to identify a particularized duty of care owed to a specific individual — one of the "exceptions" to the public duty doctrine — as a predicate to imposing tort liability for a governmental function that has no non-governmental analog. That is why it is applied to law enforcement activities. *Munich* itself concludes that the public duty doctrine can apply to police services and law enforcement activities. Lacy did not establish that any exceptions to the public duty doctrine applied.

The public duty doctrine was also employed in analyzing the tort claims raised in *Chambers-Castanes v. King County,* 100 Wn.2d *275*, 284, 669 P.2d 451 (1983) (duties owed by police "are owed to the public at large and are unenforceable as to individual members of the public."); *Bailey v. Town of Forks,* 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1988)

(applying public duty doctrine to law enforcement activities, but concluding that the "failure to enforce" exception applied to create an actionable duty); *Rodriguez v. Perez*, 99 Wn. App. 439, 443, 994 P.2d 874 ("For example, the duty of police officers to investigate crimes is a duty owed to the public at large and *is therefore not a proper basis for an individual's negligence claim."* (emphasis added), *rev. denied*, 141 Wn.2d 1020 (2000); and *Torres v. City of Anacortes*, 97 Wn. App. 64, 74, 981 P.2d 891 (1999) ("The relationship of police officer to citizen is too general to create an actionable duty. Courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual."), *rev. denied*, 140 Wn.2d 1007 (2000).

The law enforcement cases are of particular relevance to the facts of this case. There is no duty found in investigative actions of officers. Their duties are dictated by statute and no actionable duty as been recognized.

The County's duty in this case was not based on the common law, and is not a duty that it has in common with any private person. The trial court's refusal to employ the public duty doctrine as a focusing tool in evaluating Lacy's negligence claim based on the assertion that it arose as a matter of "common law" was error even under the reasoning of Justice Chambers' concurrence in *Munich.* Lacy did not establish that the County

owed a particularized duty in this case and the Superior Court erred in not granting summary judgment.

Deputy Pendergrass was acting in accordance with the general statutory duty of police officers. He did not owe any particularized duty in this case. The Superior Court reserved the issue of whether Lacy's negligence claim based on common law could go forward. The Superior Court wanted to hear the evidence prior to making a decision as a matter of law. This Court should affirm the order granting directed verdict, on the grounds that no recognized legal duty was established, Negligent Use of Excessive force is not a recognized cause of action and is subject to a duty analysis, and the County is entitled to judgment as a matter of law on that ground.

V. CONCLUSION

This Court should affirm the Superior Court's order granting a directed verdict for Snohomish County as a matter of law. This Court should also affirm the Superior Court's evidentiary rulings as they did constitute an abuse of discretion. In the alternative, this Court should affirm the Superior Court's order granting the directed verdict on the basis Snohomish County owed no duty of care as a matter of law.

Respectfully submitted on May 16, 2019.

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DECLARATION OF SERVICE

I certify that on May 16, 2019, I served a true and correct copy of the foregoing Brief of Respondent/Cross-Appellant upon the person/persons listed herein by the following means:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, WA, this 16th day of May, 2019.

Teresa Kranz, Legal Assistant

SNOHOMISH COUNTY PROSECUTOR'S OFFICE, CIVIL DIVISION, TORT

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