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.

APPELLANT SARA LACY'S REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

GABRIEL S. GALANDA, WSBA #30331
RYAN D. DREVESKRACHT, WSBA #42593
BREE R. BLACK HORSE, WSBA #47803
GALANDA BROADMAN, PLLC
8606 35th Avenue NE, Ste. L1
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509
Attorneys for Plaintiff-Appellee/Cross-Appellee

TABLE OF CONTENTS

I. INTRODUCTION 7

II. LAW AND ARGUMENT 8

A. MS. LACY PRESENTED SUFFICIENT EVIDENCE OF PROXIMATE CAUSE. 8

B. MS. LACY PRESENTED SUFFICIENT EVIDENCE OF BATTERY. 11

1. Courts in Washington Apply Graham And Other Fourth Amendment Federal Precedent To Determine Whether A . Law Enforcement Officer's Conduct Was Reasonable For The Purposes Of A Battery Claim. 11

2. Ms. Lacy Presented Sufficient Evidence That Deputy Pendergrass Used Excessive Force. 16

C. THE TRIAL COURT IMPROPERLY LIMITED THE BASIS FOR SUE PETERS' TESTIMONY REGARDING THE STANDARD OF CARE. ... 19

D. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE. 20

1. Policy Evidence Is Relevant To Ms. Lacy's Negligence And Battery Claims. 20

a. Policy Evidence Is Relevant Because Snohomish County Alleged Comparative Fault Against Cecil. 20

b. Courts Routinely Permit Experts To Reference Policies As The Basis For Standard Of Care And Excessive Force Testimony. 23

2. The Trial Court Improperly Prevented Ms. Lacy's Experts From Testifying Regarding Deputy Pendergrass's Expired CPR Card. 24

E. THE TRIAL COURT PROPERLY DENIED SUMMARY JUDGMENT ON MS. LACY'S NEGLIGENCE CLAIMS. 25

1. The Public Duty Doctrine Does Not Apply To Ms. Lacy's Negligence Claims. 25

2. Washington Law Recognizes Ms. Lacy's Claim For Negligent Use Of Excessive Force. 29

a. The Washington Supreme Court's Decision In Beltran Permits A Claim For Negligent Use Of Excessive Force… 30

b. Washington Law Does Not Otherwise Bar Ms. Lacy's Negligent Use Of Excessive Force Claim. 31

III. CONCLUSION …… 29

TABLE OF AUTHORITIES

WASHINGTON CASES

Amend v. Bell, 89 Wn.2d 124, 570 P.2d 138 (1977)..... 20, 21, 22

Anderson v. Soap Lake School Dist., 191 Wn.2d 343, 423 P.3d 197 (2018) 19, 20

Babcock v. Mason Cty. Fire Dist. No. 6, 144 Wn.2d 774, 30 P.3d 1261 (2001). 27

Beltran-Serrano v. City of Tacoma, No. 95062-8, 2019 WL 2455660 (Wash. Jun. 13, 2019)..... passim

Boyles v. City of Kennewick, 62 Wn. App. 174, 813 P.2d 178 (1991) 11, 12, 31

Brown v. MacPherson's, Inc., 86 Wn.2d 293, 545 P.2d 13 (1975)..... 28

Cowiche Canyon Conservancy v. Balwsky, 118 Wn.2d 801, 828 P.2d 549 (1992) 29

Darkenwald v. State Emp't Sec. Dep't, 183 Wn.2d 237, 350 P.3d 647 (2015)... 29

Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010) 26

Fire Protection Dist. v. Yakima, 122 Wn.2d 371, 858 P.2d 245 (1993)..... 29

Gallegos v. Freeman, 172 Wn. App. 616, 291 P.3d 265 (2013) 13

Janows v. Univ. of Wash., 69 Wn. App. 799, 851 P.2d 683 (1993) 29

Laplant v. Snohomish Cty., 162 Wn. App. 476, 271 P.3d 254 (2001)..... 19

Litho Color, Inc. v. Pac. Emp'rs Ins. Co., 98 Wn. App. 286, 991 P.2d 638 (1999) 10

Mancini v. City of Tacoma, 188 Wn. App. 1006, 2015 WL 3562229 (2015) 11, 25, 26, 28

McKinney v. City of Tukwila, 103 Wn. App. 391, 13 P.3d 631 (2000)..... 13, 14

Mehlert v. Baseball of Seattle, Inc., 1 Wn. App. 2d 115, 404 P.3d 97 (2017) 9

Mita v. Guardsmark, LLC, 182 Wn. App. 76, 328 P.3d 962 (2014) 25, 27

Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 288 P.3d 328 (2012) 25, 26, 28

Robb v. City of Seattle, 176 Wn.2d 427, 395 P.3d 212 (2013) 30

Staats v. Brown, 139 Wn.2d 757, 991 P.2d 615 (2000)..... 11, 12, 13, 14

State v. Ward, 125 Wn. App. 138, 104 P.3d 61, 64 (2005) 8

Strange v. Spokane Cty., 171 Wn. App. 585, 287 P.3d 710 (2012)..... 12

Ullrich v. Columbia & Cowlitz R. Co., 189 Wash. 668, 66 P.2d 853 (1937)..... 31

Whaley v. State Dep't of Soc. and Health Servs., 90 Wn. App. 658, 956 P.2d 1100 (1998) 30

U.S. SUPREME COURT CASES

Graham v. Connor, 490 U.S. 386 (1989) ……..11, 13, 14, 15

FEDERAL CASES

Arce v. Blackwell, 294 Fed. App'x. 259 (9th Cir. 2008) 17

Bates v. King Cty., No. 05-1348, 2007 WL 1875907 (W.D. Wash. June 27, 2007) 15

Bennett v. Gow, 345 Fed. App'x. 286 (9th Cir. 2009)..... 15

Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004)..... 17

Conely v. City of Lakewood, No. 11-6064, 2012 WL 6148866 (W.D. Wash. Dec. 11, 2012)..... 31

Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003) 17

Garlick v. Cty. of Kern, 167 F. Supp. 3d 1117 (E.D. Cal. 2016)..... 17

Greer v. City of Hayward, 229 F. Supp. 3d 1091 (N.D. Cal. 2017)..... 17

Griffith-Guerrero v. Spokane Cty., No. 15-0342, 2017 WL 2786472 (E.D. Wash. June 27, 2017) 14

Hernandez v. Kunkle, No. 12-02178, 2013 WL 179546 (W.D. Wash. Jan. 15, 2013) 16

Ibarra v. Snohomish Cty., No. 16-0317, 2016 WL 4193863 (W.D. Wash. Aug. 9, 2016) 16

Martinez-Rodriguez v. United States, No. 08-0265, 2011 WL 4437010 (W.D. Wash. Sept. 22, 2011) 15

Miller v. Gilbert, No. 16-5891, 2018 WL 5115102 (W.D. Wash. July 20, 2018). 16

Orn v. City of Tacoma, No. 13-5974, 2018 WL 19610671 (W.D. Wash. Apr. 27, 2018) 33

Saman v. Robbins, 173 F.3d 1150, 1156-57 (9th Cir. 1999) 14

Smith v. City of Hemet, 394 F.3d 689, 703 (9th Cir. 2005) 19

Thompson v. City of Olympia, No. 18-5267, 2019 WL 498734 (W.D. Wash. Feb. 8, 2019) 33

Tucker v. Las Vegas Metro. Police Dep't, 470 Fed. App'x. 627 (9th Cir. 2012) 17

Wakgira v. City of Seattle, No. 08-1108, 2009 WL 2406330 (W.D. Wash. Aug. 3, 2009) 16

WASHINGTON STATUTES

RCW 4.22.070 22

OTHER STATE COURT CASES

Hayes v. Cty. of San Diego, 57 Cal. 4th 622, 305 P.3d 252 (2013) 32

I. INTRODUCTION

Just days prior to the commencement of trial in this case, Snohomish County filed a motion for discretionary review in this Court, urging that the Court stay the trial date because of the Washington Supreme Court's consideration of claims like Ms. Lacy's "common law claim based on a law enforcement officer's claimed negligent use of excessive force" and whether a "limitation of the public duty doctrine . . . to only those obligations imposed by statute, ordinance or regulation" in *Beltran-Serrano v. City of Tacoma*, No. 95062-8. Mot. For Discretionary Review, *Lacy v. Snohomish Cty.*, No. 78938-4-I (Wash. App. Ct. Div. I), at 3-4 (Sept. 20, 2018). Snohomish County recognized, rightly, that the Supreme Court's decision in *Beltran* would be dispositive on a number of the issues that it raised in its summary judgment briefing—the same issues that it raises now, on cross-appeal, and which are intertwined with the errors Ms. Lacy has identified below.

Yesterday, our Supreme Court issued its decision in *Beltran*; it did not go in Snohomish County's favor. *Beltran-Serrano v. City of Tacoma*, No. 95062-8, 2019 WL 2455660 (Wash. Jun. 13, 2019). In fact, the decision renders most, if not all of the issues identified in Snohomish County's cross-appeal hollow. It also is favorable to Ms. Lacy on a number of her assignments of error.

There is now no question about it: Ms. Lacy met her burden at trial. Ms. Lacy therefore respectfully reiterates her request 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.

II. LAW AND ARGUMENT

A. MS. LACY PRESENTED SUFFICIENT EVIDENCE OF PROXIMATE CAUSE.

Snohomish County submits that Ms. "Lacy presented no evidence that had Deputy Pendergrass called aid the second he stepped out of his car, either [sic] paramedics would have revived Cecil after his heart stopped." Resp. Br. at 17.

First, this is wrong. Ms. Lacy presented evidence that "CAD timestamps can be inaccurate," rendering the twelve-minute CAD estimate it took for paramedics to arrive a jury question. VRP, Vol. V at 561. In response, Snohomish makes up evidence, submitting that "a variance of about a minute in some cases" is insufficient "to show that the CAD reports are inaccurate by the several minutes." Resp. Br. at 18-19. But there is no evidence in the record that supports Snohomish County's claim that timestamps are inaccurate up to one minute—or by ten minutes—just that they "can be inaccurate." VRP, Vol. V at 561. Construing this evidence in the light most favorable to Ms. Lacy, as it must be, this was a jury issue.

At any rate, Ms. Lacy also presented evidence that paramedics would have been on scene at 10:19 p.m. had they been called immediately—able to render aid to Mr. Lacy within seconds of becoming unresponsive. *Id.*, Vol. IV at 361-62; *id.*, Vol. III at 240-41; Trial Ex. 109 at 9:30-10:10. Snohomish County fails to address this evidence and offer any argument in response "and thus, concedes this point." *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61, 64 (2005).

Second, and more importantly, the kind of direct medical evidence as to each and every step of Ms. Lacy's theory of causation demanded by Snohomish County is not required. Dr. Omalu established, to a reasonable degree of medical certainty, that Pendergrass "compromised [Mr. Lacy]'s respiration, which resulted in asphyxia injury to the brain, which resulted in his death." VRP, Vol. VII at 736, 767. For the remainder of the causation analysis, "[d]irect evidence . . . is not required; circumstantial evidence is sufficient." *Mehlert v. Baseball of Seattle, Inc.*, 1 Wn. App. 2d 115, 118, 404 P.3d 97 (2017) (citation omitted). Given the circumstantial evidence presented, a reasonable juror could have easily inferred that "if Deputy Pendergrass would have called aid right away . . . there would have been no reason to do anything other than wait for aid to arrive." CP 1873. Because Mr. Lacy would not have been placed in a vehicle, there would have been no struggle getting out of it, and Pendergrass would not

have compromised Mr. Lacy's respiration, killing him.

Beltran supports this theory of causation. In *Beltran*, as here, the plaintiff contended that an officer "unreasonably failed to follow police practices calculated to avoid the use of deadly force" and alleged "negligence leading up to the shooting, including her failure to respond appropriately to clear signs of mental illness or impairment, her decision to continue to engage with [the suspect], and her decision to prevent him from walking away." 2019 WL 2455660, at *3. That a reasonable juror could find that, under a "totality of the of the circumstances," this "series of actions culminat[ed] in the use of deadly force" is all that *Beltran* requires. *Id.* at *4-5.[1]

In fact, though, here Ms. Lacy took it one step further than required. In addition to circumstantial evidence (and common sense), a reasonable juror could have also relied upon the *direct* evidence of Ms. Lacy's police practices expert to make an inference as to causation; she specifically testified that a reasonable law enforcement officer, having recognized Excited Delirium syndrome ("ExDs") and appropriately calling for aid, would not have put Mr. Lacy in the back of a patrol car and

[1] In fact, in *Beltran* the plaintiff's police practices expert testimony that the officer "failed to recognize [the suspect] was affected by mental illness and did not follow basic police procedures" was sufficient to survive summary judgment. *Id.* at *3, n.5. Notably, Ms. Lacy's police practices expert in this case—Ms. Peters—is the same police practices expert as utilized by the plaintiff in *Beltran*, and she gave an almost identical opinion at trial in this case.

would have instead used de-escalation tactics on the side of the road until aid arrived. *Id.*, Vol. VI at 637, 641-42, 647-48. The trial court erred by requiring anything more.

B. MS. LACY PRESENTED SUFFICIENT EVIDENCE OF BATTERY.

Snohomish County claims that Ms. Lacy presented "insufficient evidence that restraining a combative subject on the ground was excessive or unnecessarily violent under Washington State law." Resp. Br. at 26. Snohomish County is wrong. The testimony of the involved officers and Ms. Peters presented direct evidence that Deputy Pendergrass's use of force was sufficiently excessive to sustain a verdict in Ms. Lacy's favor on her battery claim. *See Litho Color, Inc. v. Pac. Emp'rs Ins. Co.*, 98 Wn. App. 286, 299, 991 P.2d 638 (1999).

1. Courts in Washington Apply *Graham* And Other Fourth Amendment Federal Precedent To Determine Whether A Law Enforcement Officer's Conduct Was Reasonable For The Purposes Of A Battery Claim.

In response to Ms. Lacy's legal authority supporting her contention that Deputy Pendergrass's use of force was unreasonably excessive, Snohomish County incorrectly argues that Washington courts do not utilize *Graham v. Connor*, 490 U.S. 386 (1989), and its progeny when evaluating a state battery claim against a law enforcement officer. Resp. Br. at 27. This is a misstatement of the law. Trial and appellate courts in

Washington routinely apply *Graham* and other federal Fourth Amendment precedent in determining whether a law enforcement officer may is liable for common law battery. *See, e.g., Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000) (citing *Graham*, 490 U.S. at 396); *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229, at *9 (2015).

Snohomish County argues that when a court evaluates whether a law enforcement officer defendant is liable for battery the question is whether "it was lawful for him to use force in the performance of his legal duties." Resp. Br. at 27. As Snohomish County admits, however, a police officer "becomes a tort feasor and is liable as such for assault and battery 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) (emphasis added). In other words, the question is not whether Deputy Pendergrass had authority to use force, as Snohomish County misleadingly claims, but whether that force was excessive. *Id.*

In support of its argument that Washington courts do not apply *Graham*, Snohomish County also cites *Strange v. Spokane County*, 171 Wn. App. 585, 287 P.3d 710 (2012), for the proposition that "Washington law provided the appropriate standard for use of force." Resp. Br. at 27. *Strange* did not, however, involve any claim of battery against a law enforcement officer, and the only issue regarding the officer's use of force

in that case was whether a Washington statute vested the officer with the authority to use force at all. 171 Wn. App. at 598. That is not at issue in this case; *Strange* is inapposite. Rather, the issue in this case is whether Deputy Pendergrass's use of fore was excessive. *Boyles*, 62 Wn. App. at 176. Snohomish County otherwise fails to cite any applicable authority for its position that courts in Washington do not use the guidelines set forth in *Graham* and its progeny in analyzing whether force was excessive for the purposes of a state law battery claim. *See* Resp. Br. at 27-33.

Snohomish County also fails to respond to or refute Ms. Lacy's authority supporting her contention that Deputy Pendergrass's use of force constituted textbook excessive force. *See id.* First, in *Staats v. Brown*, 139 Wn.2d 757, 991 P.2d 615 (2000), the Washington Supreme Court articulated the "test of reasonableness" applicable to battery claims against law enforcement officers by relying on *Graham* as it governs Fourth Amendment excessive force claims: the "(1) severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 774 (citing *Graham*, 490 U.S. at 396); *see also Gallegos v. Freeman*, 172 Wn. App. 616, 642 n. 15, 291 P.3d 265 (2013) (holding law enforcement officer's use of force reasonable based on Fourth Amendment and federal precedent and

dismissing plaintiff's state law assault and negligence claims). Courts in Washington apply *Graham* and other federal Fourth Amendment precedent in analyzing battery claims against law enforcement officers because "[t]he standards for adjudicating Section 1983 claims grounded on constitutionally prohibited excessive force as the same standards that apply to both state law and battery claims." *Griffith-Guerrero v. Spokane Cty.*, No. 15-0342, 2017 WL 2786472, at *8 (E.D. Wash. June 27, 2017) (citing *Saman v. Robbins*, 173 F.3d 1150, 1156-57 (9th Cir. 1999) (treating Section 1983 and state law battery claim as synonymous)).

This Court also has used *Graham* and other federal law governing excessive use of force to evaluate a battery claim premised on unreasonable use of force. *See McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000); *Mancini*, 2015 WL 3562229, at *9 (citing *Staas*, 139 Wn.2d at 774; *Graham*, 490 U.S. at 396). For instance, in *McKinney v. City of Tukwila*, 103 Wn. App. 391, 13 P.3d 631 (2000), Division I applied *Graham* and other federal court precedent interpreting the Fourth Amendment to determine that the force the law enforcement officers used was reasonable and on that basis, dismissed plaintiff's assault and battery claims. *Id.* at 408-409. The appellate court concluded that "[h]aving found above that the officers' use of force was reasonable [under the Fourth Amendment], we find that they are entitled to state law

qualified immunity for the assault and battery claims." *Id.* at 408-09 (citation omitted). The court further determined that "because we found that the officers' use of force was reasonable, the assault and battery claims against [the officers] fail because the touching was lawful." *Id.* at 409.

Federal courts applying Washington law to common law battery claims also evaluate whether a law enforcement officer acted reasonably under the Fourth Amendment and the standard set forth in *Graham* and its progeny. *See, e.g., Bennett v. Gow*, 345 Fed. App'x. 286 (9th Cir. 2009) (affirming dismissal of state law battery claim based on determination that use of force was reasonable under *Graham* and Fourth Amendment) (citing *Staats*, 139 Wn.2d 757; *McKinney*, 103 Wn. App. 391); *Martinez-Rodriguez v. United States*, No. 08-0265, 2011 WL 4437010, at *6 (W.D. Wash. Sept. 22, 2011) ("When assessing the liability of federal law enforcement officers for torts committed in the course of making an arrest, Washington law employs the 'objective reasonableness' standard of the Fourth Amendment."); *Bates v. King Cty.*, No. 05-1348, 2007 WL 1875907, at *12 (W.D. Wash. June 27, 2007) (denying summary judgment on battery claim based on denial of summary judgment on federal excessive force claim because there had been no determination as to whether force used was reasonable under Fourth Amendment, *Graham*

and other federal precedent); *Hernandez v. Kunkle*, No. 12-02178, 2013 WL 179546, at *8 (W.D. Wash. Jan. 15, 2013) (denying summary judgment on state law assault and battery claim based on earlier denial in same order with respect to a federal excessive force claim); *Ibarra v. Snohomish Cty.*, 2016 WL 4193862, No. 16-0317, at *11 (W.D. Wash. Aug. 9, 2016) (same); *Miller v. Gilbert*, No. 16-5891, 2018 WL 5115102, at *6 (W.D. Wash. July 20, 2018) (same); *Wakgira v. City of Seattle*, No. 08-1108, 2009 WL 2406330, at *13 (W.D. Wash. Aug. 3, 2009) (holding that the same factual issues that prevent summary judgment on Fourth Amendment excessive force claim also prevent summary judgment on common law assault and battery claim). Snohomish County's contention that courts in Washington do not use *Graham* or other federal Fourth Amendment to determine whether an officer used excessive force in the context of a battery claim is baseless. The trial court erred.

2. Ms. Lacy Presented Sufficient Evidence That Deputy Pendergrass Used Excessive Force.

Snohomish County claims that the testimony of the involved officers was insufficient to establish that Deputy Pendergrass used excessive force. Resp. Br. at 28-30. The testimony of Deputy Pendergrass, Sergeant Johnson, and Officer Gross clearly established, however, that Deputy Pendergrass restrained Mr. Lacy in a face-down

prone position while Mr. Lacy was handcuffed and that Deputy Pendergrass continued to struggle with Mr. Lacy while he was restrained in that prone position, even after Mr. Lacy stated that he could not breathe. VRP, Vol. III at 234; *id.*, Vol. IV at 360-61; *id.*, Vol. V at 417, 465, 468, 473. If the jury finds this evidence credible, Deputy Pendergrass's conduct constitutes textbook use of excessive force. *See, e.g., Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) (restraint of unarmed mentally ill citizen in prone position with weight on his neck and upper torso was use of excessive force); *Garlick v. Cty. of Kern*, 167 F. Supp. 3d 1117 (E.D. Cal. 2016) (same); *Arce v. Blackwell*, 294 Fed. App'x. 259 (9th Cir. 2008) (restraining suspect in state of excited delirium in face-down prone position with weight on his back was excessive force); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004) ("[P]utting 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."); *Tucker v. Las Vegas Metro. Police Dep't*, 470 Fed. App'x. 627 (9th Cir. 2012) (same); *Greer v. City of Hayward*, 229 F. Supp. 3d 1091 (N.D. Cal. 2017) (officers restraint of suspect in prone position with weight on his back, even after suspect indicated he was having difficultly breathing, should proceed to jury as excessive use of force). Accordingly, the testimony of the involved

officers alone shows that Ms. Lacy presented sufficient evidence that Deputy Pendergrass used excessive force.

In response to Ms. Lacy's argument that the trial court erred in requiring Ms. Peters to offer impermissible expert testimony on the ultimate issue of whether Deputy Pendergrass used excessive force, and that at trial Ms. Peters sufficiently opined on the standards applicable to Deputy Pendergrass's use of force, Snohomish County only claims that "Ms. Peters provided no opinion testimony on the characterization of the actual force used by Deputy Pendergrass."[2] Resp. Br. at 28. Snohomish County is wrong; Ms. Peters did offer testimony that adequately characterized Deputy Pendergrass's use of force. VRP, Vol. VI at 596-97, 625-26, 639. Ms. Peters testified, for example, that Deputy Pendergrass's use of force—specifically the restraint tactics used by Deputy Pendergrass on Mr. Lacy—are contrary to accepted practices and recommended techniques in the law enforcement industry. *Id.* This too is sufficient evidence of excessive use of force. *See Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005); *see also* Appellant's Br. at 46-47 (Apr. 15,

[2] Snohomish County argues that the trial court did not error in dismissing Ms. Lacy's battery claim by ignoring Dr. Omlau's expert testimony. Resp. Br. at 31-32. Ms. Lacy did not, however, allege that the trial court erred in not considering Dr. Omalu's testimony in connection with her battery claim. Appellant's Brief at 42-49 (Apr. 15, 2019). The only expert testimony Ms. Lacy contends is relevant to her battery claim is that of Ms. Peters, her police practices expert, which (as described above) was not even necessary for a jury to find that excessive force was used. *Id.* at 45-49.

2019). This is a jury question. The trial court erred.

C. THE TRIAL COURT IMPROPERLY LIMITED THE BASIS FOR SUE PETERS' TESTIMONY REGARDING THE STANDARD OF CARE.

Snohomish County argues the trial court "did not err in limiting Lacy's expert testimony based on its ruling on supervision, and as not timely disclosed." Resp. Br. at 42. Snohomish County is under the impression that Ms. Lacy "does not identify the specific evidence the [trial court] improperly excluded," and thus limits its response to an illustrative exhibit Ms. Lacy attempted to introduce at trial during the testimony of Ms. Peters. *Id.* at 42-43. Snohomish County then generally, and without citation to legal authority, goes on to argue that the illustrative exhibit contained irrelevant policy evidence. *Id.* at 43-44.

The larger issue on appeal is, however, that the trial court improperly prohibited Ms. Peters—a police practices expert—from referencing "Snohomish County policies, national standards, model police policies, or policies from other jurisdictions *in support of her testimony regarding the standard of care*." Appellant's Br. at 52 (Apr. 15, 2019) (emphasis added). Courts regularly admit as relevant to the standard of care issue expert testimony premised on industry standards, model policies, and policies in other jurisdictions—particularly as the basis for police practices expert testimony. *Id.* at 52-53. Snohomish County fails

to respond or otherwise refute this authority.

D. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE.

1. Policy Evidence Is Relevant To Ms. Lacy's Negligence And Battery Claims.

Snohomish County claims that the trial court "properly excluded general policy evidence as irrelevant based on dismissal of the negligent training and supervision claim." Resp. Br. at 36. Although Ms. ALcy presented no negligent supervision or training claim at trial, Snohomish County discusses *Anderson v. Soap Lake School District*, 191 Wn.2d 343, 423 P.3d 197 (2018), and *Laplant v. Snohomish County*, 162 Wn. App. 476, 271 P.3d 254 (2001), at length. *Id.* at 36-40. Snohomish County also fails to address Ms. Lacy's contention that expert witnesses regularly reference policy evidence as the basis for their standard of care and excessive force testimony. *See id.*

a. Policy Evidence Is Relevant Because Snohomish County Alleged Comparative Fault Against Cecil.

In contrast to *LaPlant* is the Supreme Court's decision in *Amend v. Bell*, 89 Wn.2d 124, 130, 570 P.2d 138 (1977). It is the Washington State Supreme Court's decision in *Amend* that has binding precedential value under the facts of this case—not *LaPlant*. *Cf. also Anderson*, 191 Wn.2d at 361 (no comparative fault claims).

In *Amend*, our Supreme Court held that a defendant could not exclude or limit evidence of defendant's conduct on the issue of comparative negligence—as Snohomish County does in this case—while seeking to introduce all evidence of plaintiff's conduct:

> The essential question is whether, in a comparative negligence setting, a defendant can shield his total alleged acts of negligence from the jury by admitting to one act of negligence while exposing all of the blameworthy conduct of the plaintiff. We think not.
>
> Comparative negligence means comparison. The trier of fact compares the negligence of plaintiff and defendant. Fault is compared to fault. Thus to determine the negligence of the parties, the trier of the facts must hear the totality of fault.

89 Wn.2d at 130. The court then applied these binding principles to the facts of *Amend*, explaining that "[f]ailure to yield the right of way may be a proximate cause of a collision, but how much more responsibility for the injury was attributable to the defendant who might have been intoxicated or speeding." *Id.* at 130-131. The court determined that where there is "comparative negligence, we must look at all of the proximate causes of the collision and its consequent injuries," and "compare <u>all</u> of the defendant's fault with all of the plaintiff's fault." *Id.* at 131. The court cautioned that if the defendant's contentions were upheld, then the

> trier of fact would not learn what actually happened in a complex series of acts and conditions which caused the ultimate results. Such is not comparative negligence.

> Comparative negligence is comparative: plaintiff's conduct versus defendant's conduct.

Id. Notably, in *Beltran* the Supreme Court chose not to endorse the reasoning of *LaPlant* when it easily could have. *Beltran-Serrano*, 2019 WL 2455660, at *2, n.3.

In this case, Snohomish County failed to implement an ExDs policy, which Ms. Peters would have testified fell below the standard of care based on standard industry practice. CP at 960-61, 1486, 1478. Ms. Peters also would have testified that Deputy Pendergrass's conduct—restraining Mr. Lacy in a face-down position while he was in a state of ExDs and struggling with Mr. Lacy on the ground in that position, even after Mr. Lacy told Deputy Pendergrass that he could not breathe—fell below the applicable standard of care based on standard industry practice, which includes model policies and procedures on how to restrain an individual experiencing ExDs and those implemented by most jurisdictions around the nation.

Snohomish County alleged comparative fault against Mr. Lacy. RCW 4.22.070; CP 28-29. Snohomish County's failure to adopt and implement policies and procedures for how to properly interact with an individual exhibiting ExDs symptoms, particularly how to restrain that individual, evidences Snohomish County's negligence, and most critically,

explains to the jury what actually happened in that complex series of acts and conditions that occurred on September 18, 2016, that caused Deputy Pendergrass to act in the manner that he did and the ultimate result, Mr. Lacy's death. *Amend*, 89 Wn.2d at 130-131. Because Snohomish County raised comparative negligence against Mr. Lacy, the jury must be able to properly and *fully* assess each party's conduct: Snohomish County's conduct—particularly its failure to adhere to the applicable standard of care—Deputy Pendergrass' conduct, and Mr. Lacy's conduct. *Id.* at 131.

b. Courts Routinely Permit Experts To Reference Policies As The Basis For Standard Of Care And Excessive Force Testimony.

Policy evidence is relevant to Ms. Lacy's negligence and battery claims because it is well established that such evidence informs an expert's standard of care and excessive force testimony. Washington and federal courts routinely permit standard of care experts to testify regarding both the defendant agency's policies as well as national model policies and policies utilized by other jurisdictions when opining on the applicable standard of care. *See* Appellant's Br. at 52-55, 56-57 (Apr. 15, 2019) (collecting cases).

As discussed above, in *Beltran* the Supreme Court recognized a claim against an officer for her "negligence leading up to the [intentional conduct], including her failure to respond appropriate to clear signs of

mental illness or impairment, her decision to continue to engage with [the suspect], and her decision to prevent him from walking away." 2019 WL 2455660, at *3. Our Supreme Court also referenced the testimony of Beltran-Serrano's police practices experts, which included Ms. Peters, referencing the officer's failure to conform to department policy and unfamiliarity with procedures guiding law enforcement interactions with mentally ill subjects. *Id.* at *3, n.5.

Snohomish County fails entirely to address the crux of Ms. Lacy's appeal on this issue, instead relying solely on *Laplant*, which is inapplicable given the comparative fault at issue in this case. *See* Resp. Br. at 36-40. If this Court were to hold that an expert cannot reference the defendant's internal policies, industry standards, and other model policies for the applicable standard of care—as the trial court erroneously held—that would fly in the face of decades of well-established federal and state court precedent holding that experts, like Ms. Peters, can reference policy evidence as the basis for the applicable standard of care.

2. The Trial Court Improperly Prevented Ms. Lacy's Experts From Testifying Regarding Deputy Pendergrass's Expired CPR Card.

Snohomish County argues that the trial court properly excluded evidence of Deputy Pendergrass's expired CPR card because it was irrelevant, not included in the Joint Statement of Evidence, and because it

was offered for "prejudicial purposes." Resp. Br. at 40-41. The fact that Deputy Pendergrass's CPR card was expired is, however, extremely relevant to Ms. Lacy's claim that Deputy Pendergrass negligently applied CPR. Ms. Lacy's decision not to include the expired CPR card on the Joint Statement of Evidence is of no consequence because Ms. Lacy intended her experts, namely Dr. Strote and Ms. Peters, to testify regarding the implications of the lapsed certification as it relates to the allegedly negligent CPR Deputy Pendergrass performed on Mr. Lacy.

E. THE TRIAL COURT PROPERLY DENIED SUMMARY JUDGMENT ON MS. LACY'S NEGLIGENCE CLAIMS.

As noted above, *Beltran* conclusively establishes that the trial court properly denied summary judgment on Ms. Lacy's negligence claims because (1) the public duty doctrine does not apply to negligence claims premised on a common law duty of reasonable care, and (2) Washington courts do recognize a claim for negligent use of excessive force.

1. The Public Duty Doctrine Does Not Apply To Ms. Lacy's Negligence Claims.

Snohomish County argues that the trial court "erred by refusing to utilize the 'focusing tool' of the public duty doctrine in evaluating whether Lacy would assert her 'common law' negligence and Negligent Use of Excessive Force claims." Resp. Br. at 46. Snohomish County's argument is fundamentally flawed, however, because it misrepresents Ms. Lacy's

negligence claims as "aris[ing] from the county's statutory obligations to the general public." *Id.* Ms. Lacy's negligence claims are not premised on a duty imposed by statute. CP at 8-10. Rather, Ms. Lacy's negligence claims arise from Deputy Pendergrass's common law duty to act with reasonable care; thus the public duty doctrine does not apply. *Beltran,* 2019 WL 2455660, at *5-7; *see also Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 962 (2014) (public duty doctrine does not apply to plaintiff's negligence claim alleging breach of a common law duty to exercise reasonable care).

The public duty doctrine applies only to negligence claims premised on a duty imposed by statute, ordinance, or regulation. *Beltran*, 2019 WL 2455660, at *5-7; *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229 (2015) (citing *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012)). "[T]he only governmental duties [the Washington Supreme Court] has limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation." *Munich*, 175 Wn.2d at 886. The Washington Supreme Court "has never held that a government did not have a common law duty solely because of the public duty doctrine," *Beltran*, 2019 WL 2455660, at *6 (citing *Munich*, 175 Wn.2d at 887), and "the public duty doctrine and never been applied by the Supreme Court to bar a claim

alleging the breach of a common law duty imposed by a governmental actor." *Mancini*, 2015 WL 3562229 at *8. To do so "would undermine the value of tort liability to protect victims, deter dangerous conduct and provide a fair distribution of risk of loss." *Beltran*, 2019 WL 2455660, at *6 (citing *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 407, 241 P.3d 1256 (2010) (Chambers, J., concurring)).

Beltran also conclusively resolved that the public duty doctrine does not apply to claims like Ms. Lacy's, which are based on a common law duty of reasonable care:

> At common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others, [and t]his duty applies in the context of law enforcement and encompasses the duty to refrain form directly causing harm to another through affirmative acts of misfeasance.

Id., at *6 (citation omitted). The Supreme Court explained that the plaintiff's "negligence claims arise out of [the officer]'s direct interaction with him, not the breach of a generalized duty. The City therefore owed Beltran-Serrano a duty in tort to exercise reasonable care." *Id.* at 16. Because the specific duty owed arose from the officer's "affirmative interaction with" the plaintiff, "[t]he public duty doctrine [did] not apply." *Id.* at 17. The same analysis applies here.

But were there any question, relying on Justice Chamber's binding

concurrence in *Munich*, this Court held in *Mancini* that where a plaintiff has alleged a breach of a common law duty applicable to private and governmental actors alike, the public duty doctrine does not bar a negligence claim. *Id.* at *8. And in *Mita*, Division III likewise held that "[t]he public duty doctrine does not apply where, as here, a plaintiff alleges the public entity breached a common law duty it shares in common with private entities." 182 Wn. App. at 84.

Here, the trial court was not required apply the public duty doctrine because Ms. Lacy's negligence claims were based on a common law duty of reasonable care that arose from Deputy Pendergrass' "affirmative interaction with him." *Beltran*, 2019 WL 2455660, at *7.

But even if the public doctrine did apply to the facts of this case—it does not—an enumerated exception to the public duty doctrine applies. Specifically, the "rescue doctrine" exception. *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). The rescue doctrine recognizes that a duty to exercise reasonable care arises when a person undertakes "to render aid to or warn a person in danger." *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975). Under this exception, liability is established "when governmental agents fail to exercise reasonable are after assuming a duty to warn or come to the aid of a particular plaintiff." *Id.*, at 796 n.7 (Chambers, J., concurring).

In *Beltran*, the Supreme Court also addressed the applicability of the rescue doctrine exception to the public duty doctrine. *Beltran*, 2019 WL 2455660, at *7, n.10. The court explained that the officer "initiated contract with Beltran-Serrano and sought to educate him about panhandling laws," and during the course of their interaction, the officer's "unreasonable escalation of the encounter to the use of deadly force significantly increased the risk of harm." *Id.* Here, that is precisely what occurred. Pendergrass assumed a duty to aid Mr. Lacy and failed to exercise reasonable care in effecting that duty.

In sum, the trial court did not error by denying summary judgment on Ms. Lacy's common law negligence claim. Because Ms. Lacy asserted that a common law duty—the duty to act with reasonable care—the "public duty doctrine" does not apply to Ms. Lacy's common law negligence claims. *Munich*, 175 Wn.2d at 886-88; *Mancini*, 2015 WL 3562229, at *8. But even if it did, the rescue doctrine provides an exception. This Court should therefore affirm the trial court's denial of summary judgment on Ms. Lacy's negligence claim.

2. Washington Law Recognizes Ms. Lacy's Claim For Negligent Use Of Excessive Force.

As a threshold issue, Snohomish County's challenge to Ms. Lacy's Negligent Use of Excessive Force claim as "unrecognized" cannot be

considered on appeal. Snohomish County fails to offer any argument or legal authority in support of appeal of this issue.[3] *See* Resp. Br. at 46-50. Where a party fails to support an issue with argument or citation to authority, this Court must disregard that issue on appeal. *Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); *Fire Protection Dist. v. Yakima*, 122 Wn.2d 371, 383, 858 P.2d 245 (1993).

a. The Washington Supreme Court's Decision In Beltran Permits A Claim For Negligent Use Of Excessive Force.

In *Beltran*, the Supreme Court examined "whether a claim of negligence can be based on [a law enforcement officer's] shooting of Beltran-Serrano when it is clear that the shooting was intentional, i.e., volitional." 2019 WL 2455660, at *6. Like Snohomish County does here, the city in *Beltran* claimed that there was "no such thing as the negligent commission of an intentional tort." *Id*. The court rejected the city's argument, noting that the defendant "misunderstands both the nature of [the] negligence claim and the nature of its law enforcement duty"—just as Snohomish County does in this case—holding that a plaintiff may bring a claim premised on the failure to use reasonable care to avoid the use of

[3] A party cannot cure its failure to present such legal authority or argument for the first time in a reply brief. *See Fire Protection Dist.*, 122 Wn.2d at 383; *Cowiche Canyon Conservancy v. Balwsky,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Janows v. Univ. of Wash.*, 69 Wn. App. 799, 809, 851 P.2d 683 (1993).

force based on a totality of the circumstances standard, as Ms. Lacy urges here. *Id.* at *7-8.

b. Washington Law Does Not Otherwise Bar Ms. Lacy's Negligent Use Of Excessive Force Claim.

Ms. Lacy's claim is otherwise permissible under Washington law. First, this claim is a general negligence claim. As discussed above, Deputy Pendergrass had a duty of reasonable care "to exercise that degree of skill and knowledge normally possessed by members of [his] profession." *Whaley v. State Dep't of Soc. and Health Servs.*, 90 Wn. App. 658, 672, 956 P.2d 1100 (1998); *see also Robb v. City of Seattle*, 176 Wn.2d 427, 436-37, 395 P.3d 212 (2013). Ms. Lacy's "negligent use of excessive force claim is not a separate claim, but is an issue within the general negligence claim." *Conely v. City of Lakewood*, No. 11-6064, 2012 WL 6148866, at *12 (W.D. Wash. Dec. 11, 2012). It was styled in the manner it was, though, because it asks the jury to find that Deputy Pendergrass created pre-intentional circumstances that rendered what might have otherwise been a reasonable use of force unreasonable, in that Deputy Pendergrass, through his negligence, created any perceived need to use excessive deadly force. Ms. Lacy did not, in other words, contend that Deputy Pendergrass's intentional acts are a basis for a claim sounding in negligence. Just the opposite. Ms. Lacy asserts that the unintentional

conduct preceding any use of force fell below the applicable standard of care, and that such conduct caused the reasonably foreseeable use of excessive, and ultimately deadly, force. Put another way, "an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred." *Ullrich v. Columbia & Cowlitz R. Co.*, 189 Wash. 668, 672, 66 P.2d 853 (1937); *see also Boyles*, 62 Wn. App. at 178 ("[T]here are no Washington cases mandating a claim of assault and battery for all injuries inflicted during or after an arrest.").

Washington law permits a negligent use of force claim under a totality of the circumstances standard. *Beltran*, 2019 WL 2455660; *see also Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 638, 305 P.3d 252 (2013); *Orn v. City of Tacoma*, No. 13-5974, 2018 WL 1961067, at *1 (W.D. Wash. Apr. 27, 2018); *Thompson v. City of Olympia*, No. 18-5267, 2019 WL 498734, *4 (W.D. Wash. Feb. 8, 2019). The Supreme Court's adoption the "totality of the circumstances" approach, as set forth in *Hayes*, 57 Cal. 4th 622, 638, 305 P.3d 252 (2013), is dispositive. *Beltran*, 2019 WL 2455660, at *4.

III. CONCLUSION

Ms. Lacy met her burden at trial by producing sufficient evidence regarding proximate cause and excessive use of force. *Beltran* confirms it.

Ms. Lacy respectfully reiterates her request 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. This case belongs to the people.

Respectfully submitted this 14th day of June 2019.

Gabriel S. Galanda, WSBA #30331
Ryan Dreveskracht, WSBA #42593
Bree R. Black Horse, WSBA #47803
Galanda Broadman, PLLC
8606 35th Avenue NE, Ste. L1
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509
Attorneys for Plaintiff-Appellant/Cross-Appellee

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.

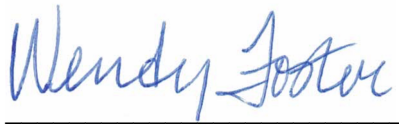
2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.

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

Bridget E. Casey
SNOHOMISH COUNTY PROSECUTING ATTORNEY
3000 ROCKEFELLER AVE M/S 504
EVERETT, WA 98201-4046
425-388-6330
Email: bcasey@snoco.org
Attorney for Defendant-Appellee/Cross-Appellant Snohomish County

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 June 14, 2019.



Wendy Foster

GALANDA BROADMAN

June 14, 2019 - 1:07 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
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

The following documents have been uploaded:

- 792946_Briefs_20190614130516D1750293_2596.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Appellant Reply Brief.pdf

A copy of the uploaded files will be sent to:

- bcasey@co.snohomish.wa.us
- gabe@galandabroadman.com
- ryan@galandabroadman.com
- tkranz@snoco.org

Comments:

Sender Name: Wendy Foster - Email: wendy@galandabroadman.com
Filing on Behalf of: Bree Renee Black Horse - Email: bree@galandabroadman.com (Alternate Email:)

Address:
PO Box 15146
Seattle, WA, 98115
Phone: (206) 557-7509

Note: The Filing Id is 20190614130516D1750293