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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Kaori Stearney,

10 Plaintiff,

11 v.

12 United States of America,

13 Defendant.
14
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No. CV-16-08060-PCT-DGC

ORDER

16 Plaintiff Kaori Stearney, guardian of the estate of R.H. and administrator of the
17 estate of Yuki Hirayama, has sued the United States, alleging that the Navajo Nation
18 Police Department caused a drunk driver to crash into the Hirayama family's van and kill
19 three members of the family. Doc. 59. Plaintiff brings claims for wrongful death,
20 negligence, and negligent infliction of emotional distress under the Federal Tort Claims
21 Act ("FTCA"). *Id.* Defendant has filed a motion for summary judgment, and Plaintiff
22 moves to exclude one of Defendant's experts. Docs. 92, 106. The motions are fully
23 briefed and oral argument will not aid the Court's decision. Fed. R. Civ. P. 78(b); LRCiv
24 7.2(f). The Court will grant the motion for summary judgment in part and deny the
25 motion to exclude the expert.

26 **I. Background.**

27 The following facts are undisputed. On March 28, 2014, at 9:41 p.m., Navajo
28 Nation Police Sergeant David Butler observed a pick-up truck run a stop sign in Tuba

1 City, Arizona. Doc. 109 at 119. Butler activated his emergency lights and siren to
2 initiate a traffic stop, but the truck's driver, Kee Brown, refused to stop. *Id.* Butler soon
3 lost sight of Brown's truck and deactivated his lights and siren. *Id.* At 9:45 p.m., a
4 citizen approached Butler's vehicle and informed him that the same truck was driving
5 erratically and had hit a school yard's fence. *Id.*; Doc. 93-2 at 29-30. When Butler saw
6 Brown again at 9:46 p.m., he reactivated his lights and siren. Doc. 109 at 120. Brown
7 fled in his truck, making his way to the eastbound lane of Highway 160 at milepost 322.
8 Doc. 93-2 at 19.

9 Brown accelerated to speeds in excess of 100 m.p.h., weaving in and out of traffic.
10 *See id.* at 19-20; Doc. 109 at 19-20. Butler's police truck had a governor that kept it from
11 going faster than 98 m.p.h. Doc. 93-2 at 24-25. Butler testified that he ended his pursuit
12 between mileposts 323 and 327 when he judged that Brown was about 0.75 miles ahead
13 of him and pulling away. Doc. 93-2 at 23. Butler testified that he continued following
14 Brown to monitor his location, and drove as fast as possible with his siren and lights
15 activated. *Id.* at 22-24; Doc. 109 at 35.

16 The terrain between mileposts 344 and 345 obstructed Butler's view of Brown's
17 taillights. Doc. 93-2 at 35-36. When Butler came around a curve at milepost 345, he
18 decelerated because he saw a vehicle nearby on Indian Route 6011. *Id.* at 36-37.
19 Quickly determining that the vehicle was not Brown's pick-up truck, he accelerated again
20 and continued east on Highway 160. *Id.* at 37. At about 10:03 p.m., Butler arrived at the
21 scene of a vehicle accident near milepost 346.5. *Id.* at 38; Doc. 109 at 33. Brown had
22 crossed into oncoming traffic and caused a head-on collision with the Hirayama van.
23 Doc. 109-3 at 15. Five people died in the accident. Brown, who had a blood-alcohol
24 level of 0.267, was killed along with his passenger. Doc. 109-1 at 25, 32. R.H.'s father,
25 mother, and brother also were killed. *Id.* at 25-26.

1 **II. Plaintiff’s *Daubert* Motion.**

2 Dr. Joseph Peles, Ph.D., is a bioengineer with background and training in accident
3 reconstruction. Doc. 93-2 at 82. Dr. Peles opined about Brown’s impact speed, Butler’s
4 proximity to the accident when it occurred, the reason for Mr. Hirayama’s left-turn
5 maneuver before impact, and the lines of sight for the three vehicles involved. *Id.*
6 at 88-93.

7 Under Rule 702, an expert may testify on the basis of “scientific, technical, or
8 other specialized knowledge” if it “will assist the trier of fact to understand the
9 evidence,” provided the testimony rests on “sufficient facts or data” and “reliable
10 principles and methods” and “the expert has reliably applied the principles and methods
11 to the facts of the case.” Fed. R. Evid. 702(a)-(d). The proponent of expert testimony has
12 the ultimate burden of showing that the expert is qualified and the proposed testimony is
13 admissible under Rule 702. *See Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th
14 Cir. 1996). The trial court acts as a gatekeeper to assure that expert testimony “both rests
15 on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow*
16 *Pharm., Inc.*, 509 U.S. 579, 597 (1993).

17 Plaintiff challenges Dr. Peles’ opinion regarding lines of sight. Doc. 106. Butler
18 testified that he last saw Brown’s vehicle between mileposts 344 and 345, yet R.H.
19 testified that her father and brother saw police lights just before impact at milepost 346.5.
20 Doc. 93-2 at 90. Dr. Peles visited the relevant stretch of Highway 160 and concluded that
21 the terrain creates a positioning scenario in which Butler could not see Brown yet the
22 Hirayamas could see Butler. *Id.* at 90-91. Plaintiff does not challenge this conclusion.

23 Dr. Peles then considered whether the documents, physical evidence, and
24 testimony could support a conclusion that the three vehicles were positioned in that way
25 on the night of the accident. Doc. 93-2 at 91-93. Relying on calculations based on
26 locations, speeds, and rates of deceleration, Dr. Peles concluded that this scenario was
27 possible. *Id.* at 91-92. Such a scenario would mean that Brown could not have seen
28 Butler’s emergency lights for at least 56.4 seconds before impact. *Id.* at 92.

1 Plaintiff does not challenge the relevance of Dr. Peles' opinion or the reliability of
2 his principles and methods. *See* Doc. 106. Plaintiff instead contends that the data on
3 which Dr. Peles relies to calculate his opinion are uncertain or unreliable. *See id.* at 3-6.
4 Defendant counters that these arguments go to the weight of Dr. Peles' opinion, not to its
5 admissibility. Doc. 116 at 5-8.

6 Plaintiff emphasizes that Dr. Peles lacks evidence that establishes, with certainty,
7 Butler's location when he lost sight of Brown's truck, the specific location where Butler
8 began decelerating, Butler's rates of deceleration, and the distance Butler travelled at 40
9 m.p.h. Doc. 106 at 3-6. And yet Dr. Peles' assumptions on each of these points find
10 support in the record. Butler testified that he lost sight of Brown near a general store
11 between mileposts 344 and 345 and that he began decelerating at a curve near the
12 intersection with Indian Route 6011. Doc. 93-2 at 35, 85-86; Doc. 106 at 32-33.
13 Dr. Peles acknowledged that identifying a precise rate of deceleration would be
14 impossible, so he used a typical rate of low-friction braking. Doc. 106 at 29-31. And
15 Butler testified that he slowed down for only a few seconds before accelerating again
16 once he passed Indian Route 6011. Doc. 93-2 at 85-86; Doc. 109 at 48-52.

17 Although the Court might be required analyze the sufficiency of this evidence and
18 the reasonableness of Dr. Peles' assumptions more fully if he was going to testify before
19 a jury, there will be no jury trial in this FTCA case. 28 U.S.C. § 2402; *Brown v. United*
20 *States*, 993 F.2d 881 (9th Cir. 1993) ("a party bringing an action under the FTCA is not
21 entitled to a jury trial"). Plaintiff does not challenge other opinions of Dr. Peles, so he
22 will testify at trial in any event. The Court will consider the evidence on this specific
23 opinion in detail during the trial and decide whether the opinion of Dr. Peles should be
24 admitted under Rule 702 and, if so, what weight it should receive. The Court will deny
25 Plaintiff's motion to exclude Dr. Peles' opinion before trial.

26 **III. Summary Judgment Standard.**

27 A party seeking summary judgment "bears the initial responsibility of informing
28 the district court of the basis for its motion, and identifying those portions of [the record]

1 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
2 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
3 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is
4 no genuine dispute as to any material fact and the movant is entitled to judgment as a
5 matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
6 party who “fails to make a showing sufficient to establish the existence of an element
7 essential to that party’s case, and on which that party will bear the burden of proof at
8 trial.” *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
9 of the suit will preclude summary judgment, and the disputed evidence must be “such
10 that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

12 **IV. Discussion.**

13 Plaintiff’s complaint contains five counts. Four are brought on behalf of R.H. –
14 wrongful death of R.H.’s father and mother in violation of A.R.S. § 12-611 (Counts One
15 and Two), negligence (Count Four), and negligent infliction of emotional distress (Count
16 Five). Doc. 59 ¶¶ 43-55, 63-73. Count Three is a wrongful death claim brought on
17 behalf of the estate of Yuki Hirayama, R.H.’s brother. *Id.* ¶¶ 56-62. Plaintiff identifies
18 various categories of negligent conduct for each count, including failure to establish and
19 enforce effective policies governing high-risk traffic pursuits, failure to train and
20 supervise Navajo Nation police officers, and improper high-speed chase. *See id.*
21 ¶¶ 43-73. Defendant argues that some of Plaintiff’s claims are barred by the
22 discretionary function exception to the FTCA, that Plaintiff has no evidence of negligent
23 supervision, that Plaintiff cannot show proximate cause, that Plaintiff has no evidence
24 against some of the officers named in the complaint, and that Plaintiff has failed to
25 identify R.H.’s economic loss. Doc. 92.

26 **A. Negligent Failure to Implement Pursuit Policies.**

27 The FTCA waives the United States’ sovereign immunity for claims arising out of
28 torts committed by federal employees acting within the scope of their employment. *See*

1 28 U.S.C. § 1346(b)(1). In the absence of an applicable exception, *see* 28 U.S.C. § 2680,
2 the United States may be sued for money damages “under circumstances where the
3 United States, if a private person, would be liable to the claimant in accordance with the
4 law of the place where the act or omission occurred,” 28 U.S.C. § 1346(b)(1). Defendant
5 argues that the discretionary function exception bars some of Plaintiff’s negligence
6 claims. Doc. 92 at 11-12. That exception bars any tort claim “based upon the exercise or
7 performance or the failure to exercise or perform a discretionary function or duty on the
8 part of a federal agency or an employee of the Government, whether or not the discretion
9 involved be abused.” 28 U.S.C. § 2680(a).

10 The Supreme Court has established a two-part test for determining when the
11 discretionary function exception applies. *Berkovitz v. United States*, 486 U.S. 531,
12 536-37 (1988). First, courts ask whether the challenged action was discretionary –
13 whether it involved an element of judgment. *Gonzalez v. United States*, 814 F.3d 1022,
14 1027 (9th Cir. 2016). This part of the test is not satisfied if a “federal statute, regulation,
15 or policy specifically prescribes a course of action for any employee to follow.”
16 *Berkovitz*, 486 U.S. at 536. Second, if there is room for judgment, courts determine
17 whether the judgment is of a kind that the exception was designed to protect. *Id.*

18 Defendant argues that two of Plaintiff’s negligence claims – asserted in each of the
19 five counts – are subject to the discretionary function exception and therefore cannot give
20 rise to liability under the FTCA. These are Plaintiff’s claims that Defendant “[f]ailed to
21 have safe and/or appropriate policies in place governing pursuit and apprehension of
22 motorists by the Navajo Nation Police,” and “[f]ailed to implement and enforce Navajo
23 Nation Police Department policies and procedures in effect governing pursuit and
24 apprehension of motorists by the Navajo Nation Police Department.” Doc. 57, ¶¶
25 44(j)-(k); 51(j)-(k); 58(j)-(k); 65(j)-(k); 69(j)-(k).

26 Defendant asserts that the first part of the discretionary function test is satisfied
27 because the establishment and enforcement of pursuit policies involves judgment, and
28 there is no federal statute, regulation, or policy that specifically prescribes a course of

1 action for implementing such policies. Doc. 92 at 11. Plaintiff's expert admitted that he
2 knows of no such federal requirement (Doc. 97 at 56), and Plaintiff fails to address this
3 issue in her response. Plaintiff does not dispute that the implementation of a pursuit
4 policy involves judgment, and does not identify any federal requirement that limited
5 Defendant's discretion when establishing and implementing pursuit policies.

6 Defendant argues that the second part of the discretionary function exception is
7 also satisfied, noting that courts have held that law enforcement policy decisions are
8 covered by the exception. *See Horta v. Sullivan*, 4 F.3d 2, 21 (1st Cir. 1993) ("although
9 law enforcement agents have a mandatory duty to enforce the law, decisions as to how
10 best to fulfill that duty are protected by the discretionary function exception to the
11 FTCA"); *Smith ex rel Fitzsimmons v. United States*, 496 F. Supp. 2d 1035, 1040-42
12 (D.N.D. 2007) (BIA officers' conduct in prioritizing enforcement of tribal laws involved
13 element of judgment, satisfying the discretionary function exception's first element).
14 This includes the implementation of policies. *See Ga. Cas. Sur. Co. v. United States*,
15 823 F.2d 260, 263 (8th Cir.1987) ("the means chosen by the Government to enforce the
16 law are protected by the discretionary function exception"); *McElroy v. United States*,
17 861 F.Supp. 585, 591 (W.D. Tex. 1994) ("because it is the mandatory duty of law
18 enforcement agents to enforce the law, decisions as to how best fulfill that duty are
19 protected by the discretionary function exception"). Plaintiff fails to address this
20 argument in her response.

21 Plaintiff seems to respond to an argument Defendant does not make. She asserts
22 that the discretionary function exception "does not shield the conduct of an employee
23 who violates a mandatory policy or directive." Doc. 108 at 11. She then focuses on the
24 conduct of Sergeant Butler during the pursuit and argues that he failed to comply with the
25 pursuit policy established by the Arizona Peace Officers Standards and Training Board,
26 also known as AZPOST. *Id.* at 12-13. But this portion of Defendant's summary
27 judgment motion is not directed at the conduct of the officer; it is directed at Plaintiff's
28 allegation that the United States failed to establish and enforce a pursuit policy. Because

1 Plaintiff provides no response to that argument, and Defendant’s cases and evidence
2 support the argument, the Court will grant summary judgment on Plaintiff’s claims that
3 Defendant failed to establish and enforce appropriate pursuit and apprehension policies.
4 *See* Doc. 57, ¶¶ 44(j)-(k); 51(j)-(k); 58(j)-(k); 65(j)-(k); 69(j)-(k). Such allegations fall
5 within the discretionary function exception.¹

6 **B. Negligent Failure to Train and Supervise.**

7 Plaintiff alleges in each count that Defendant “[f]ailed to properly train and
8 supervise Tribal Police . . . in the proper conduct of police pursuit.” *See* Doc. 57,
9 ¶¶ 44(f); 51(f); 58(f); 65(f); 69(f). To hold an employer liable for negligent supervision,
10 a plaintiff must establish “(1) that the employer knew or should have known that the
11 employee was not competent to perform the assigned task, and (2) that the employer’s
12 failure to supervise the employee caused the plaintiff’s injury.” *Sloan v. United States*,
13 CV-16-8059-PCT-DGC, 2016 WL 3548766, *2 (D. Ariz. June 30, 2016). Defendant
14 argues that Plaintiff has presented no evidence that Sergeant Butler’s training was
15 insufficient, that he had not completed his training, that he had engaged in an improper
16 pursuit before, that he had engaged in any prior misconduct, that he had received any
17 discipline, or even that he had been cited for traffic violations. Doc. 92 at 12. Plaintiff
18 does not address this argument, and her expert has no evidence that Butler failed to
19 receive any training, was inadequately supervised, or previously engaged in any improper
20 pursuit or misconduct. Docs. 93, ¶¶ 71-73; 107, ¶¶ 71-73. The expert also conceded that
21 he has no opinion on the negligent training or supervision issue. Docs. 93, ¶ 69; 107,
22 ¶ 69. Because Plaintiff has not responded to Defendant’s argument on the negligent
23 supervisions claim, the Court will grant summary judgment on that claim. *See* Doc. 57,
24 ¶¶ 44(f); 51(f); 58(f); 65(f); 69(f). As noted above, summary judgment may be entered
25 against a party who “fails to make a showing sufficient to establish the existence of an
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28 ¹ The Court need not address Defendant’s separate argument that Plaintiff cannot
show that an alleged failure to have and implement effective policies caused the accident.
Doc. 92 at 13.

1 element essential to that party’s case, and on which that party will bear the burden of
2 proof at trial.” *Celotex*, 477 U.S. at 322.²

3 **C. Causation.**

4 All of Plaintiff’s claims require a showing of causation. *Quiroz v. ALCOA*
5 *Inc.*, 416 P.3d 824, 828 (Ariz. 2018) (negligence claim requires a showing of causation);
6 *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007) (wrongful death action based on
7 negligence requires a showing of causation); *Rodriguez v. Fox News Network,*
8 *L.L.C.*, 356 P.3d 322, 325 (Ariz. Ct. App. 2015) (negligent infliction of emotional distress
9 requires a showing that the defendant’s conduct *created* an unreasonable risk of bodily
10 harm). The causation requirement encompasses both actual and proximate cause, *Glaze*
11 *v. Larsen*, 83 P.3d 26, 29 (Ariz. 2004), and presents factual issues usually decided by the
12 trier of fact, *Gipson*, 150 P.3d at 230; *see also Ontiveros v. Borak*, 667 P.2d 200, 208
13 (Ariz. 1983) (the issue of causation “should ordinarily be a question of fact for the jury
14 under usual principles of Arizona tort law”). Defendant offers several reasons the Court
15 should enter summary judgment on causation.

16 **1. Actual Cause.**

17 “Actual” or “but for” cause “exists if the defendant’s act helped cause the final
18 result and if that result would not have happened without the defendant’s act.” *Ontiveros*,
19 667 P.2d at 205. Defendant’s act “need not have been a ‘large’ or ‘abundant’ cause of
20 the final result.” *Id.*

21 Defendant contends that Plaintiff cannot show actual causation because there is no
22 evidence that Brown ever saw Butler’s emergency lights. Doc. 92 at 4. Defendant
23 emphasizes that there is no evidence that Brown’s vehicle, which was destroyed in the
24 accident, had rearview mirrors that would allow him to see a following police vehicle.
25 *Id.* Plaintiff responds that it is common knowledge that Ford pickup trucks like Brown’s
26 are manufactured with rearview mirrors, and that Brown’s awareness that Butler was

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28 ² The Court need not address Defendant’s argument that the discretionary function
exception bars Plaintiff’s negligent training and supervision claims. Doc. 92 at 10-11.

1 pursuing him can be inferred from Brown's increased speed and weaving through traffic
2 on Highway 160 after Butler activated his lights and siren and began the pursuit.
3 Doc. 108 at 7-10. Plaintiff also presents testimony from Defendant's police procedures
4 expert, William Katsaris, that Brown should have been on notice of the police pursuit
5 given that Butler followed him with his lights and siren activated for approximately 24
6 miles. *Id.* at 10 (citing Doc. 110 at 33-36). Viewed in the light most favorable to
7 Plaintiff, this is a factual dispute that must be resolved at trial.

8 Defendant next argues that Plaintiff cannot show actual causation because she
9 lacks evidence about Brown's mental state at the time of the accident. Doc. 92 at 4-5.
10 Defendant emphasizes that Plaintiff cannot present testimony from Brown or his
11 passenger, both of whom died in the crash, and has not sought testimony from Brown's
12 family. *Id.* at 5. Defendant suggests that maliciousness, suicide, or mental illness might
13 have caused Brown to cross into oncoming traffic. *Id.* at 9. But Defendant bears the
14 initial burden of "identifying those portions of [the record] which it believes demonstrate
15 the absence of a genuine issue of material fact," *Celotex Corp.*, 477 U.S. at 323, and has
16 identified no evidence to suggest that maliciousness, suicide, or mental illness caused this
17 accident. On the other hand, Plaintiff presents evidence that an allegedly negligent police
18 pursuit caused a drunk driver to flee and, eventually, crash into the Hirayama van.
19 Plaintiff need not establish that Defendant's negligence was the sole or primary cause of
20 the accident, *Ontiveros*, 667 P.2d at 205, and her evidence creates a question of fact on
21 actual causation.

22 Defendant finally contends that Plaintiff cannot show actual cause because there is
23 no evidence that terminating the pursuit would have prevented the accident. Doc. 92
24 at 5-6. The evidence creates a genuine dispute of fact on this issue. Defendant
25 emphasizes that (1) Brown continued to drive recklessly when he hit a fence in Tuba City
26 after Sergeant Butler terminated the first pursuit, (2) Brown was intoxicated and not
27 thinking rationally, and (3) Dr. Kirkham cannot rely on Geoffrey Alpert's study to
28 conclude that Brown would have reacted by driving more safely. Doc. 92 at 5-8.

1 Dr. Kirkham quotes the Alpert study for the proposition that “[m]ore than 70% of
2 captured suspects said that they would have slowed down ‘when I felt safe[.]’” Doc. 112
3 at 10. Although Alpert explained that it would be error to rely “solely” on his data to
4 infer how Brown would have reacted to a terminated police chase (Doc. 101 at 6), a trier
5 of fact need not rely on Alpert’s study alone. The record reflects evidence of Brown’s
6 acceleration in response to attempts to pull him over, Dr. Kirham’s opinion that police
7 generally “spur[] on reckless driving by giving chase” (Doc. 112 at 11), Dr. Kirkham’s
8 opinion that Butler’s pursuit was “a significant and proximate cause” of the accident (*id.*
9 at 10), and a Bureau of Indian Affairs policy that may reflect a recognition that
10 terminated pursuits can improve public safety (*see* Doc. 93-2 at 6). The Court’s function
11 at summary judgment is not to weigh the evidence, but to decide whether there is a
12 genuine issue for trial. *Anderson*, 477 U.S. at 249. The evidence creates a genuine issue
13 on whether terminating the pursuit would have prevented the accident.

14 Defendant’s reliance on *Scott v. Harris*, 550 U.S. 372 (2007), is misplaced.
15 Doc. 92 at 7. *Scott* did not address proximate cause. Rather, it considered whether an
16 officer’s use of a precision intervention technique (“PIT”) maneuver to stop a fleeing
17 suspect was reasonable under the Fourth Amendment. 550 U.S. at 381. The officer
18 argued that the PIT maneuver was justified to eliminate the risk to other motorists,
19 pedestrians, and his colleagues by the suspect’s reckless driving. *Id.* at 383-84. The
20 suspect countered that simply ceasing the pursuit was a more reasonable way to achieve
21 that goal, but the Supreme Court held that “[t]he police need not have taken that chance
22 and hoped for the best.” *Id.* at 385. Whereas the PIT maneuver “was certain to eliminate
23 the risk,” it was uncertain how the suspect would respond to a terminated pursuit. *Id.*
24 Given this uncertainty, the Court concluded that it was reasonable for the officer to
25 employ the PIT maneuver. *Id.* *Scott*’s finding of uncertainty in how a fleeing suspect
26 would respond to a terminated pursuit does not support Defendant’s argument that Brown
27 definitely would have slowed down if Butler turned off his lights and siren.

1 **2. Proximate Cause.**

2 “The proximate cause of an injury is that which, in a natural and continuous
3 sequence, unbroken by an efficient intervening cause, produces an injury, and without
4 which the injury would not have occurred.” *Robertson v. Sixpence Inns of Am., Inc.*, 789
5 P.2d 1040, 1047 (Ariz. 1990). “An original actor may be relieved from liability for ‘the
6 final result when, and only when, an intervening act of another was unforeseeable by a
7 reasonable person in the position of the original actor[.]’” *McMurtry v. Weatherford*
8 *Hotel, Inc.*, 293 P.3d 520, 532 (Ariz. Ct. App. 2013).

9 Defendant argues that the topography of Highway 160 was an intervening
10 circumstance that broke the chain of causation. Doc. 92 at 3-4. The relevant stretch of
11 the highway near the accident includes a sharp curve and steep downgrade that might
12 obstruct a driver’s line of sight. Doc. 93-2 at 90. Defendant offers expert opinion that
13 the terrain made Butler’s emergency lights invisible to Brown for 56.4 seconds before the
14 accident. Doc. 93-2 at 92. Defendant argues that this was sufficient time for a
15 reasonable driver to conclude that the police pursuit had ended, thus eliminating any
16 causal connection between Butler’s pursuit and the accident. Doc. 92 at 3-4. Plaintiff
17 counters that this argument depends on the accuracy of Dr. Peles’ opinion that such a
18 scenario was possible. Doc. 108 at 3-7. Because Dr. Peles’ calculations are based on
19 assumptions that may be inaccurate, Plaintiff argues, there are disputes of fact that
20 prevent the entry of summary judgment on this issue. *Id.*

21 The Court agrees with Plaintiff. As discussed above, Plaintiff has identified
22 reasons to question Dr. Peles’ opinion that Brown lost sight of Butler for the last 56.4
23 seconds of the pursuit. And Plaintiff offers an expert opinion that directly contradicts
24 Dr. Peles. *See* 109-4 at 8 (“the occupants of both the Brown vehicle and the Hirayama
25 vehicle would have been able to see Sgt. Butler’s emergency lights on the same stretch
26 leading up to the accident”). This evidence creates a dispute of fact as to whether Brown
27 was able to see Butler’s lights in the last minute before the accident.

1 Moreover, even if Brown was unable to see Butler's lights for 56.4 seconds,
2 Defendant has not established that this would entitled it to judgment as a matter of law.
3 At this point in the pursuit Butler had followed Brown at maximum speed with his lights
4 and siren activated for approximately 24 miles. Whether a one-minute interruption in the
5 pursuit would have caused Brown to relax and conclude that the pursuit was over is itself
6 a question of fact that must be resolved at trial.

7 **D. Conduct of Other Officers.**

8 Defendant notes that Plaintiff's expert criticizes only Butler's conduct, and asks
9 the Court to "grant summary judgment on Plaintiffs' allegations in the Amended
10 Complaint stated against all other officers." Doc. 92 at 2 n.1. Defendant cites paragraphs
11 of Plaintiff's complaint which name Officers Yellow, Yazzie, Tsosie, Todecheenee,
12 Sombrero, and Billison. *See id.*; Doc. 59, ¶ 39. Defendant also identifies these officers
13 in its statement of fact and asserts that Plaintiff's expert has no criticism of their conduct.
14 Doc. 93, ¶ 57. Plaintiff admits that her expert has no opinion on the conduct of these
15 officers. Doc, 107, ¶ 57.

16 In responding to the motion for summary judgment, however, Plaintiff presents
17 evidence that Officer Yellow was part of the high-speed pursuit of Brown that allegedly
18 led to the accident, and that she pursued with her lights and siren activated. *See*
19 Docs. 107, ¶¶ 105-106; 108 at 3, 7. Plaintiff's expert opines that this high-speed pursuit
20 caused the accident. This evidence raises a question of fact on whether Officer Yellow's
21 conduct caused or contributed to the accident, as discussed above.

22 But Plaintiff responds with no evidence suggesting that Officers Yazzie, Tsosie,
23 Todecheenee, Sombrero, or Billison were negligent, or that their actions caused the
24 accident. The Court will enter summary judgment on the portion of Plaintiff's claims
25 based on the conduct of these officers. *See* Rule 56(a) (summary judgment may be
26 entered on "part of each claim"); *Celotex*, 477 U.S. at 322.

1 **E. Damages.**

2 Defendant seeks summary judgment on the alleged economic losses associated
3 with the wrongful death claims asserted in Counts One and Two. Doc. 92 at 14-15.
4 Arizona law permits a “fair and just” recovery in a wrongful death action, “which may
5 include the decedent’s prospective earning capacity; the loss of companionship, comfort,
6 and guidance caused by the death; and the survivor’s emotional suffering, but not the
7 decedent’s own pain and suffering.” *Walsh v. Advanced Cardiac Specialists Chartered*,
8 273 P.3d 645, 648 (Ariz. 2012); *see also* A.R.S. § 12-613; *Krause v. Cty. of Mohave*, No.
9 CV-17-08185-PCT-JJT, 2018 WL 1729343, at *2 n.2 (D. Ariz. Apr. 10, 2018);
10 *Coulbourn v. Air & Liquid Sys. Corp.*, No. CV-13-08141-PCT-SRB, 2016 WL 5921255,
11 at *2 (D. Ariz. Jan. 6, 2016). Plaintiff has presented an expert opinion regarding the
12 prospective earning capacity of R.H.’s now-deceased father. *See* Doc. 114-1.

13 Defendant contends that Plaintiff’s economic loss evidence is insufficient because
14 it focuses on the lost income potential of R.H.’s father. Doc. 92 at 14-15. Defendant
15 asserts that R.H. “may only recover the value of the economic support her father would
16 have provided her [until] she reached majority less what she is currently receiving.” *Id.*
17 at 15. But this claim is not necessarily supported by the authorities Defendant cites. The
18 recommended jury instructions permit recovery of “[t]he income and services that have
19 already been lost as a result of the death, and that are reasonably probable to be lost in the
20 future.” Revised Ariz. Jury Instructions (Civil), 6th, Personal Injury Damages 3 (July
21 2013). And *Gandy v. United States*, 437 F. Supp. 2d 1085 (D. Ariz. 2006), addressed a
22 plaintiff’s attempt to secure the decedent’s prospective earning capacity on two separate
23 claims: a survival action under A.R.S. § 14-3110 and a wrongful death action under
24 A.R.S. § 12-611. *Id.* at 1086. Reasoning that the decedent’s loss of future income
25 “is recoverable under Arizona’s wrongful death statute,” *Gandy* limited recovery for the
26 separate survival claim to the decedent’s lost income between her injury and death. *Id.*
27 at 1088-89 (citation omitted). The court did so “to protect against potential double
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1 recovery.” *Id.* at 1089. Defendant cites no case that limits economic loss damages in the
2 way Defendant asserts. The Court will deny summary judgment on this issue.³

3 Defendant also seeks summary judgment on Count Three, arguing that R.H.
4 cannot recover damages for the wrongful death of her brother, Yuki Hirayama. Doc. 92
5 at 16. Because Yuki has no surviving parents, spouse, or children, his estate is the only
6 permissible plaintiff in a wrongful death claim. *See* A.R.S. § 12-612(A). Plaintiff
7 complies with this requirement. Count Three is a wrongful death action brought by
8 Plaintiff as administrator of Yuki’s estate and on behalf of the estate. Doc. 59 ¶¶ 56-62.
9 The claim is not brought on behalf of R.H. *Id.*

10 **V. Motions to Strike.**

11 Plaintiff filed motions to strike two declarations offered in support of Defendant’s
12 summary judgment motion, contending that Defendant failed to disclose Charles
13 Addington or Geoffrey Alpert as witnesses. Docs. 104, 105.⁴ The Court will deny these
14 motions as moot as these declarations had no effect on the Court’s ruling.

15 **IT IS ORDERED:**

- 16 1. Defendant’s motion for summary judgment (Doc. 92) is **granted in part**
17 **and denied in part.** All five causes of action remain in the case, but the
18 Court grants summary judgment to Defendant on the part of each count
19 based on (1) negligent failure to establish and enforce effective pursuit
20 policies, (2) negligent failure to train and supervise, and (3) actions of
21 Officers Yazzie, Tsosie, Todecheenee, Sombrero, or Billison.
22 2. Plaintiff’s motion to exclude testimony of Dr. Peles (Doc. 106) is **denied.**
23 3. Plaintiff’s motions to strike declarations (Docs. 104, 105) are **denied.**

24
25 ³ The Court notes, however, that this issue warrants further discussion and
26 possibly briefing in connection with the proposed conclusions of law. It seems highly
27 unlikely that R.H. would have received all of the income her father earned had the
28 accident not occurred, and that her actual losses are limited to the portion of his income
that he would have devoted to her support. Because there will be no jury, the Court and
the parties can explore this issue more fully at trial, but experts will be limited to the
opinions they properly disclosed during discovery.

⁴ Plaintiff did not comply with Local Rule 7.2(m)(2).

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4. The Court will hold a telephone conference with the parties to set the trial and final pretrial conference dates on **September 24, 2018 at 4:30 p.m.** Counsel for Plaintiff shall initiate the call to include counsel for all parties and the Court. If a dial-in number is to be used, counsel for Plaintiff shall circulate the dial-in information no later than September 21, 2018 at 12:00 noon.

Dated this 17th day of September, 2018.



David G. Campbell
Senior United States District Judge