No. 97583-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN MANCINI,

Petitioner,

vs.

CITY OF TACOMA,

Respondent.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen Street
Camas, WA 98607
(360) 852-3332

Daniel E. Huntington
WSBA No. 8277
422 Riverside, Suite 1300
Spokane, WA 99201
(509) 455-4201

On behalf of
Washington State Association for Justice
Foundation

I. IDENTITY AND INTEREST OF AMICUS

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in whether, under Washington law, plaintiffs may bring claims for injuries arising out of negligent investigations.

II. INTRODUCTION

Since 1991, Washington courts of appeals have barred common law "negligent investigation" claims in Washington, citing the "chilling effect" such claims may have on investigative activities. While this Court has acknowledged the rule that has developed in the courts of appeals, it has not squarely examined the issue. This case presents the Court with the opportunity to decide whether precluding common law negligent investigation claims is consistent with Washington law, including this Court's recent decision in *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019). Moreover, even if the Court concludes such claims are not cognizable, questions of substantial public interest regarding the scope of this "forbidden tort" remain. This Court should grant review.

III. BACKGROUND

This case arises out of injuries suffered by Kathleen Mancini as a result of the Tacoma Police Department misidentifying her residence as that

of a criminal suspect and raiding her home while she slept. The facts are drawn from the Court of Appeals opinions and the briefing of the parties. *See Mancini v. City of Tacoma,* No. 71044-3-I, 2015 WL 3562229, 188 Wn. App. 1006 (2015) (*Mancini I*); *Mancini v. City of Tacoma,* No. 77531-6-I, 2019 WL 2092698, 8 Wn. App. 2d 1066 (2019), *review pending* (*Mancini II)*; Mancini Pet. for Rev. at 2-5; City Ans. to Pet. for Rev. at 1-4.

Tacoma Police Officer Kenneth Smith received a tip from a confidential informant (CI) that an individual was selling illegal drugs out of Mancini's residence. Smith did not conduct surveillance of the residence or set up a controlled drug buy. Instead, relying on the unsubstantiated tip, Smith led a team of Tacoma police officers into Mancini's apartment while she was sleeping. Dressed in swat gear and carrying guns, the officers shouted "get down" and pushed Mancini to the floor. They ordered her outside wearing only her nightgown, where she waited for 30 minutes in the cold of the January morning. They did this despite their later acknowledgment that they immediately knew they had the wrong location.

Mancini sued the City of Tacoma, the Police Department and the police chief (the City), alleging several theories, including negligence. The City moved for summary judgment. Regarding negligence, it asserted 1) while not pleaded as such, Mancini's negligence claim was barred because it amounted to a negligent investigation claim, and 2) the claim was barred by the public duty doctrine. The trial court granted the City's motion.

Mancini appealed and the Court of Appeals reversed. *See Mancini I,* 2015 WL 3562229, at *1. It framed the key issue as "whether the public duty doctrine immunizes the City from being held liable for the alleged negligence of its officers." *Mancini I,* 2015 WL 3562229, at *6. The court held that doctrine did not bar Mancini's claim because it is inapplicable to claims asserted under the common law. *See id.*, 2015 WL 3562229, at * 7 (citing *Munich v. Skagit Emer. Comm. Ctr.*, 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012) (Chambers, J., concurring)). Regarding the City's assertion that Mancini's negligence claim should be "reformulated" as one of negligent investigation, the court dispensed with the argument in a footnote:

> The City attempts to reformulate Mancini's claim as being one for the nonexistent cause of action of negligent investigation. Mancini is correct in rejecting this reformulation. Mancini does not allege that a negligent investigation led to her being wrongly considered a suspect in a crime. Nor does she allege that a negligent investigation allowed the true criminal to cause her harm.

Id. at 8 n.12. The court remanded the case for trial on the negligence claim. At trial, the City's motions for judgment as a matter of law at the close of the plaintiff's case and at the close of the evidence were denied. The jury returned a verdict for Mancini on her negligence claim for $250,000.

The City again appealed, maintaining that "the evidence adduced at trial showed negligence only during the evidence gathering portion of Officer Smith's investigation." *Mancini II,* 2019 WL 2092698, at *3. This time, the Court of Appeals agreed, holding that as argued, the claim *did* constitute one for negligent investigation. *See id.*, 2019 WL 2092698, at *1. The court recognized Washington law offers little guidance regarding the

parameters of such claims, and also noted "the City did not offer a definition of the forbidden tort." *Id.* at 5. It nonetheless concluded: "Because the evidence of negligence presented at trial related to the evidence gathering aspects of Officer Smith's investigation, and the legal theories advanced were consistent with this view of the evidence, Mancini's negligence claim, as tried, became a noncognizable claim of negligent investigation." *Id.* at 6.

IV. ISSUES PRESENTED

1. Is review warranted under RAP 13.4(b)(1) because Division I's opinion conflicts with this Court's jurisprudence, including its recent decision in *Beltran-Serrano v. City of Tacoma*?

2. Does Mancini's Petition present questions of substantial public interest warranting review under RAP 13.4(b)(4) regarding the existence and scope of a common law negligent investigation claim?

V. ARGUMENT IN SUPPORT OF REVIEW

A. Brief overview of Washington case law precluding claims of negligent investigation.

Re: Court of Appeals Case Law

Washington courts have struggled with whether investigative activities should be protected from tort liability. Early court of appeals opinions barred negligent investigation claims, doing so on the basis of immunity. *See, e.g., Clipse v. Gillis*, 20 Wn. App. 691, 696, 582 P.2d 555 (1978); *see also Moloney v. Tribune Pub. Co.*, 26 Wn. App. 357, 360, 613 P.2d 1179 (1980). Animating these early decisions was concern that tort liability may have a chilling effect on the performance of official duties:

> The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public

> servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended, in some reasonable degree, to those who act improperly, or exceed the authority given.

Clipse, 20 Wn. App. at 694 (citation omitted).

In *Bender v. City of Seattle,* 99 Wn.2d 582, 664 P.2d 492 (1983), this Court disapproved the holdings in *Clipse* and *Moloney*. Reviewing case law following the Legislature's waiver of sovereign immunity, it recognized that basic operational decisions were wholly reachable in tort. The Court rejected the policy arguments advanced in *Clipse* and *Moloney* for immunizing officers from liability for operational decisions, holding that public policy was better served by "[a]ccountability through tort liability." *Bender*, 99 Wn.2d at 590 (brackets added). The Court cited with approval its reasoning in *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974):

> These fears [upon a rationale for personal liability of government officials for discretionary acts] are not founded upon fact, however, if it is the municipality and not the employee who faces liability. The most promising way to correct the abuses, if a community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit.

Bender, 99 Wn.2d at 590 (quoting *King*, 84 Wn.2d at 244).

Despite this Court's rejection in *Bender* of the public policy reasons to extend immunity for investigative acts, these same public policies were soon relied upon by courts of appeals to adopt a rule barring claims for "negligent investigation." One of the first decisions to preclude such a claim was *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991), *as amended,*

824 P.2d 1237, *review denied,* 118 Wn.2d 1028 (1992). Acknowledging that "no Washington case has expressly denied a cause of action for negligent investigation," 824 P.2d at 1238, the court looked to cases from Iowa and New York that barred such claims. Citing the public policy that animated the decisions in *Clipse* and *Moloney*, and had been disapproved by this Court in *Bender*, the court in *Dever* concluded: "The reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement." *Dever*, 824 P.2d at 1238. With little analysis, courts of appeals have relied on *Dever* to broadly bar claims in a variety of contexts. *See, e.g., Fondren v. Klickitat County*, 79 Wn. App. 850, 862-63, 905 P.2d 928 (1995) (law enforcement); *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999) (child abuse investigations); *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999) (employment), *Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013) (professional misconduct).

Re: Washington Supreme Court Case Law

While this Court has held that negligent investigation claims are cognizable under RCW 26.44.050, *see Tyner v. DSHS,* 141 Wn.2d 68, 82, 1 P.3d 1148 (2000), it has not had the opportunity to examine whether negligent investigation claims should be recognized under the common law. In *Ducote v. Dep't of Soc. & Health Serv.*, 167 Wn.2d 697, 222 P.3d 785 (2009), the Court was asked to decide whether, in light of the statutory claim

it recognized in *Tyner,* "stepparents have standing to bring a claim of negligent investigation ... pursuant to RCW 26.44.050." 167 Wn.2d at 700. Before answering the question before it, the Court cited *Pettis v. State, supra,* and acknowledged that court's holding that negligent investigation claims "do not exist under the common law of Washington." *Id.*, 167 Wn.2d at 702. From the way this Court framed the issue, it appears a common law claim was not asserted by the plaintiff in *Ducote*, and the question was not squarely examined. The acknowledgment of the rule stated in *Pettis* was not necessary to this Court's holding regarding the availability of a statutory claim under RCW 26.44.050, and its statement that negligent investigation claims do not exist at common law appears to be dicta.[1]

B. Review is warranted under RAP 13.4(b)(1) because *Mancini II* conflicts with this Court's decision in *Beltran-Serrano.*

Review is warranted if a court of appeals decision conflicts with an opinion of this Court. *See* RAP 13.4(b)(1). *Mancini II* held the negligent acts of law enforcement leading to the unwarranted raid of an innocent person's home were not reachable in tort, because when reformulated, they stated a claim for negligent investigation. As Mancini demonstrates, *see* Pet. for Rev. at 6-12, this conflicts with the analysis in *Beltran-Serrano*.

The issue in *Beltran-Serrano* was whether the steps leading up to the shooting of a mentally ill, Spanish-speaking man -- including the

[1] Dicta is "an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination." *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464, 468 (1954) (citing Black's Law Dictionary, 4th ed., p. 541).

absence of imminent risk posed by the victim and the officer's refusal to wait for a Spanish-speaking officer before interrogating -- were reachable in tort. The Court held a negligence claim could lie, and was predicated on the rule that "[a]t common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others." *Beltran*, 193 Wn.2d at 550 (citing *Restatement Second of Torts* § 281 cmt. e (Am. Law Inst. 1965) (brackets added)). It clarified this duty applies to law enforcement and includes a duty "to refrain from directly causing harm to another through affirmative acts of misfeasance." *Id.*

For purposes of tort liability, there appears to be no principled reason to distinguish negligent conduct leading to the unreasonable use of force, which under *Beltran-Serrano* is reachable in tort, from negligent conduct leading to the unwarranted entry of an innocent person's home, which under *Mancini II* is not. Pursuant to RAP 13.4(b)(1), this Court should grant review to examine whether *Mancini II* conflicts with the principles recognized in *Beltran-Serrano*.

C. *Mancini* raises several important questions regarding the viability and scope of common law negligent investigation claims, warranting review under RAP 13.4(b)(4).

This Court will review decisions of the courts of appeals if the petition presents an issue of substantial public interest. *See* RAP 13.4(b)(4). At least three questions of substantial public interest warrant review here.

First, whether common law negligent investigation claims should be precluded in Washington is a question warranting review. As discussed, it

appears such a rule is inconsistent with *Beltran-Serrano*. *See supra* at § V.B. Moreover, it is questionable whether the cited public policies actually warrant unique protection for investigative acts. *See Bender,* 99 Wn.2d at 590; *King,* 84 Wn.2d at 244; *see also HBH v. State,* 192 Wn.2d 154, 178, 429 P.3d 484 (2018). Review is appropriate to address whether these public policies are actually served by barring negligent investigation claims.[2]

Second, even if the Court concludes negligent investigation claims are not cognizable, it should grant review to clarify the scope of such claims. The Court of Appeals below noted the lack of guidance on this issue:

> Our Supreme Court has yet to explicitly define the scope of that which constitutes a negligent investigation claim. Similarly, no Washington appellate opinion purports to set forth the precise boundaries of this forbidden claim. Indeed, in its briefing to us, the City did not offer a definition of the forbidden tort.

Mancini II, 2019 WL 2092698, at *5. Assuming such claims are barred, how are they defined and what are their outer limits? Do interrogations (such as those undertaken in *Beltran-Serrano)* qualify as investigative acts? And how much of the evidence and argument supporting the claim must rest on investigative acts for the claim to qualify as the "forbidden tort?"[3]

---

[2] In this case, for instance, the City is accused of negligently *failing* to investigate and substantiate information. To the extent courts have denied negligent investigation claims for fear that liability may "impair vigorous prosecution and have a chilling effect upon law enforcement," *see Dever*, 824 P.2d at 1238, an important question exists as to whether that policy is served by shielding investigators from liability.

[3] In other contexts, conduct which could be reformulated as "negligent investigation" has supported recognized negligence claims. *See, e.g., HBH v. State*, 192 Wn.2d 154, 163-68, 429 P.3d 484 (2018) (holding DSHS has a common law duty to protect foster children, which includes ongoing duties of monitoring and

Finally, review is warranted to examine whether an independent, cognizable negligence claim may be extinguished if it is susceptible to being recast as a claim of negligent investigation. In this case, the Court of Appeals examined Mancini's negligence claim and concluded that "as tried, [the claim] became a noncognizable negligent investigation claim." *Mancini II*, 2019 WL 2092698, at *6. The court did not consider whether the evidence and arguments supported a separate, *cognizable* claim (such as the duty recognized in *Beltran-Serrano* under *Restatement (Second) of Torts* § 281). If negligent investigation claims are not cognizable, the Court should nonetheless grant review to address whether the fact that a claim is susceptible to being recast as one for negligent investigation may extinguish a related claim based on the breach of a duty otherwise recognized in tort.

VI. CONCLUSION

The Court should grant the Petition for Review.

DATED this 22nd day of October, 2019.

for Valerie D. McOmie

Daniel E. Huntington

On behalf of WSAJ Foundation

investigation); *Joyce v. State,* 155 Wn.2d 306, n.3, 119 P.3d 825 (2005) (finding a "take charge" duty between a community corrections officer and an offender, which required the officer to investigate the threat posed by the offender throughout the take charge period); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) (finding a duty owed by an employer to foreseeable victims, which gives rise to causes of action for negligent hiring, retention and supervision of employees); *Taggart v. State*, 118 Wn.2d 195, 210-25, 822 P.2d 243 (1992) (finding the State could be liable if crimes committed by parolees resulted from negligence in supervising and investigating parolees).

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2019, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

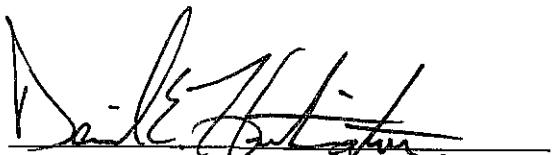
Counsel for Mancini:

Gary Manca
WSBA # 42798
Talmadge/Fitzpatrick
2775 Harbor Ave SW
Third Floor, Suite C
Seattle, WA 98126
gary@tal-fitzlaw.com

Lori Haskell
WSBA # 15779
7511 Greenwood Ave N Ste. 314
Seattle, WA 98103
lori@haskellforjustice.com

Counsel for City of Tacoma:

Jean Homan
WSBA # 27084
Tacoma City Attorney's Office
747 Market St., Suite 1120
Tacoma, WA 98402
jhoman@cityoftacoma.org



Daniel E. Huntington, WSBA #8277
WSAJ Foundation

October 22, 2019 - 2:08 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97583-3
Appellate Court Case Title:	Kathleen Mancini v. City of Tacoma, et al.

The following documents have been uploaded:

- 975833_Letters_Memos_20191022140401SC261338_1480.pdf
  This File Contains:
  Letters/Memos - Other
  The Original File Name was Mancini Final ACM.pdf
- 975833_Motion_20191022140401SC261338_8553.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was Mancini Final Motion.pdf

A copy of the uploaded files will be sent to:

- danhuntington@richter-wimberley.com
- gary@tal-fitzlaw.com
- gcastro@ci.tacoma.wa.us
- haskell@haskellforjustice.com
- jhoman@cityoftacoma.org
- lori@haskellforjustice.com
- matt@tal-fitzlaw.com

Comments:

Attached please find WSAJ Foundation amicus curiae memorandum in support of petition for review (designated above as "letters/memos") and motion for leave to file ACM of WSAJ Foundation (designated above as "motion."

Sender Name: Valerie McOmie - Email: valeriemcomie@gmail.com
Address:
4549 NW ASPEN ST
CAMAS, WA, 98607-8302
Phone: 360-852-3332

Note: The Filing Id is 20191022140401SC261338