NO. 97583-3

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals, Division I, No. 77531-6-I

KATHLEEN MANCINI,

Petitioner

v.

CITY OF TACOMA,

Respondent

CITY OF TACOMA'S RESPONSE TO WASHINGTON STATE ASSOCIATION FOR JUSTICE AMICUS CURIAE

WILLIAM C. FOSBRE, City Attorney

JEAN P. HOMAN
WSB# 27084
Attorney for Respondent
Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

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RULES:

Amicus curiae Washington State Association for Justice Foundation argues that review of Mancini v. City of Tacoma, No. 77531-6-I (hereinafter Mancini II) is warranted for two reasons. First, amicus claims that Mancini II conflicts with this Court's decision in Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 442 P.3d 608 (2019). Second, amicus claims that review is warranted under RAP 13.4(b)(4) as there are issues of substantial public interest. As outlined herein, neither provides an appropriate basis for review.

I. Mancini II does not conflict with this Court's decision in Beltran-Serrano.

Amicus argues that given this Court's decision in Beltran-Serrano, there is "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." Brief of Amicus, p. 8. To the contrary, given the issues that this Court addressed in Beltran-Serrano and the analytical underpinnings of that decision, there is no way to equate this Court's analysis in Beltran-Serrano to the issue addressed by Division I in Mancini II.

In Beltran-Serrano, this Court addressed two distinct issues: 1) whether an intentional tort claim foreclosed a negligence claim premised on

the failure to use reasonable care to avoid the use of force (Beltran-Serrano, at p. 544-548); and 2) whether the public duty doctrine nevertheless precluded the claim (Id., at 548-552). This Court characterized the duty as the duty "to avoid unreasonably escalating the encounter to the use of deadly force." Id. at 540. In addressing this issue, this Court identified the specific pre-shooting conduct by the officer who applied deadly force that was potentially actionable in negligence, namely Officer Volk's failure to recognize signs of mental illness, questioning Beltran-Serrano in English, and her decision to pursue him instead of letting him walk away. Beltran-Serrano, 193 Wn.2d at 544-45. This Court reasoned that these actions by Officer Volk escalated the encounter into a deadly force situation. Moreover, this Court's analysis was grounded on the fact that Officer Volk did not have reasonable suspicion or probable cause to believe that Beltran-Serrano had committed a crime, and thus was engaged in a consensual encounter with Officer Volk[1]. Id. at 541.

The issue confronted in Mancini II is easily distinguished from the issues addressed by the Beltran-Serrano court. To begin, unlike Beltran-

[1] The consensual nature of the encounter is critical to understanding the Beltran-Serrano court's analysis. In addressing the second issue – whether the public duty doctrine barred plaintiff's claim – the Court expressly stated that the "statutorily imposed obligation to provide police services, enforce the law and keep the peace"…"have always been, and will continue to be, nonactionable duties owed to the public at large." Beltran-Serrano, 193 Wn.2d at 551-52.

Serrano, Mancini II involved a criminal narcotics investigation, a prototypical police service, undertaken specifically to enforce the law. Moreover, unlike the contact in Beltran-Serrano, the officers' actions in Mancini II were undertaken in conformance with a valid search warrant, issued by the superior court. The case agent in Mancini II presented all of the available information to the superior court and a judge determined that there was probable cause to support issuance of the search warrant and entry into Kathleen Mancini's home.

Finally, and most importantly, in Beltran-Serrano, this Court was not addressing a claim that presented the same public policy concerns that claims of negligent investigation create. As expressly recognized by this Court, allowing a claim for negligent investigation will have a chilling effect on such investigations. Ducote v. Dep't of Soc. & Health Servs., 167 Wn.2d 697, 702, 222 P.3d 785 (2009).

> Our State 'recognizes the central roles which police and prosecutors play in maintaining order in our society and the burdens imposed on each of us as citizens as part of the price for that order.' Our state also recognizes that lawsuits against police officers tend to obstruct justice..... We would distort the balance between society and the individual if we were to allow plaintiffs to bypass the threshold requirement of malicious prosecution in bringing a cause of action for negligent infliction of emotional distress. This would have a chilling effect on police investigation and would give rise to potentially unlimited liability for any type of police activity.

Keates v. City of Vancouver, 73 Wn. App. 257, 268-69, 869 P.2d 88, 94 (1994). See also, Smith v. State, 324 N.W.2d 299, 301-02 (Iowa 1982)(cited by Dever v. Fowler, 63 Wn. App. 35, 44-45, 816 P.2d 1237 (1991)("Although these cases involve different factual situations and arise under a variety of circumstances, they all rely on public policy and the interest of the public in vigorous and fearless investigation of crime for the results reached....The public has a vital stake in the active investigation and prosecution of crime. Police officers and other investigative agents must make quick and important decisions as to the course an investigation shall take. Their judgment will not always be right; but to assure continued vigorous police work, those charged with that duty should not be liable for mere negligence."); Wilson v. O'Neal, 118 So. 2d 101, 105 (Fla. App. 1960)(cited by Smith v. State, *supra*)("On the other hand, law enforcement and the protection of society from crime would likely be adversely affected if law enforcement agents were subject to liability in damages for simple negligence in the performance of their duties if the citizens they charge with crime should not be convicted.").

The issue in Mancini II was whether the acts of conducting surveillance and doing a controlled buy were part of the criminal investigation and if so, whether plaintiff has stated a cognizable claim for negligence. In light of the long-standing rule that such a claim is not

cognizable, including unequivocal statements from this Court, Division I's decision in Mancini II was not a surprise. It is also not a decision that warrants review as there is no conflict.

II. There are no public policy considerations that support granting review in this case.

Amicus argues that there are substantial public policy issues that warrant review under RAP 13.4(b)(4), including whether the chilling effect is grounds to retain the current rule and how such a claim should be defined. As outlined in the preceding section, the rule prohibiting common law negligence claims strikes a balance well- recognized by Washington and shared by other jurisdictions. This case provides the perfect example of how a different rule would undermine and impair law enforcement.

In this case, the officers received information about a large-scale methamphetamine dealer in Federal Way. The case agent investigated the information, and presented it to the superior court. The superior court, finding probable cause to believe that the Mancini apartment was the situs of criminal drug activity, issued a search warrant. In the end, it was discovered that the confidential informant had identified the incorrect apartment. The evidence presented at this trial, by both sides, made it clear that the use of confidential informants is a necessary, critical part of criminal drug investigations. The case agent in this case did his due diligence and

investigated the matter as fully as he could. Once he had taken the information as far as he could, he presented it to the court. If law enforcement can be held liable for negligent investigation based on inaccurate information provided by a CI (even though the officers vetted the information as fully as they could), then law enforcement will stop relying on confidential informants. And that means that law enforcement will stop being able to successfully interdict drug activity, which will harm all of society.

Additionally, amicus's argument that review should be granted so that this Court can define the cause of action is also not well taken. A careful examination of past cases addressing the claim clearly supports the definition announced by Division I in Mancini II. For example, in Donaldson v. Seattle, 65 Wn. App. 661, 671-72, 831 P.2d 1098 (1992), rev. denied, 120 Wn.2d 1031 (1993), the court addressed the negligent investigation claim by discussing the possible scope and type of follow up investigation of alleged domestic violence where police did not have a mandatory duty to arrest at the time of the 911 response. Similarly, in Dever v. Fowler, 63 Wn. App. 35, 39, 816 P.2d 1237 (1991), rev. denied, 118 Wn.2d 1028 (1992), the court addressed a negligent investigation claim based on the alleged failure to conduct thorough or proper interviews, failure to interview certain individuals who possessed exculpatory

information, and failure to investigate what other persons knew and when they knew it. Although they may not have used the same words, it is clear that past cases addressing a claim of negligent investigation concerned "negligence committed during the evidence gathering aspects of the police investigation."

Finally, amicus's argument about the "recasting" of the claim evidences a misapprehension of Division I's opinions in Mancini I and Mancini II. In Mancini I, which was based on the record as developed during summary judgment and on plaintiff's representations about the nature of her negligence claim, Division I declined to characterize the claim as negligent investigation. In Mancini II, however, there was no longer any question about what plaintiff was arguing. At trial, plaintiff argued that the officers were negligent in how they obtained the warrant, and asserted that the officers should have done surveillance and a controlled buy. Both of those acts – surveillance and a controlled buy – were characterized *by plaintiff's expert* as investigatory steps, as part of the criminal narcotics investigation. The name that plaintiff selects for her claim does not define the claim; the evidence and the argument presented a trial does, no matter what plaintiff calls it. See e.g., Boyles v. City of Kennewick 62 Wn. App. 174, 177, 813 P.2d 178(1991) (A party may not recharacterize a claim to gain the benefit of a longer limitations period. It is the factual allegations in

the complaint that determine the applicable statute of limitations). The factual allegations and argument by plaintiff make clear she was asserting a claim for negligent investigation.

III. Conclusion

As outlined herein, there is no basis for review. Mancini II is in accord with long-standing Washington precedence concerning negligent investigation claims and this Court's decision in Beltran-Serrano does not change that conclusion. Further, there are no public policy considerations that would justify review.

For these reasons, the petition for discretionary review should be denied.

DATED this 14 day of November, 2019.

WILLIAM C. FOSBRE, City Attorney

By: */s/ Jean P. Homan*
JEAN P. HOMAN, WSBA #27084
Deputy City Attorney
Attorney for Respondent City of Tacoma

CERTIFICATE OF SERVICE

I hereby certify that I forwarded the foregoing documents to be delivered via email to the following:

Lori S. Haskell
Law Office of Lori S. Haskell
936 North 35th Street, Suite 300
Seattle, WA 98103-8869
lori@haskellforjustice.com

EXECUTED this 14 day of November, 2019, at Tacoma, WA.

/s/Gisel Castro
Gisel Castro, Legal Assistant

TACOMA CITY ATTORNEYS OFFICE

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Comments:

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Address:
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