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

RESPONDENT CITY OF TACOMA'S RESPONSE TO KATHLEEN MANCINI'S PETITION FOR REVIEW

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In an effort to be persuasive, plaintiff's Petition for Discretionary Review paints a picture that is not a fair or accurate representation of the facts underlying this case, or the negligence claim at issue[1]. Plaintiff's hyperbole[2] notwithstanding, the negligence claim in this case stems from a valid search warrant – a warrant supported by probable cause and issued by the Superior Court.

I. Statement of the case

On January 4, 2011, the Pierce County Superior Court issued a controlled substance warrant for 28625 16th Avenue SW, Apartment B-1, *Kathleen Mancini's home*. Exhibit 103 (Complaint for Search Warrant, Apt. B-1); Exhibit 104 (Search Warrant, Apt. B-1). The warrant was obtained as part of a narcotics investigation conducted by the Tacoma Police Department Special Investigations Division (SID) as a result of information

[1] Plaintiff repeatedly refers to the officers "breaking into" Mancini's home and in the statement of the issues, refers to the execution of the warrant as "breaking and entering." These assertions go beyond simply presenting the facts in the most persuasive light possible. As this Court made clear in Brutsche v. City of Kent, 164 Wn.2d 664, 193 P.3d 110 (2008), the existence of a valid warrant creates a privilege to enter the premises for the purposes stated in the warrant. Brutsche, 164 Wn.2d at 675 ("…the privilege to execute an order of a court to do any act on the land 'carries with it the privilege to enter the land for the purposes of executing the order.'"). Law enforcement can be liable in tort, however, if they exceed the scope of the privilege, which was the basis for the plaintiff's intentional tort claims in the instant case. The jury found for the City on all of the intentional tort claims, necessarily finding that the officers had not exceeded the scope of the warrant.

[2]Another example of plaintiff's hyperbole is found in her repeated reference to the confidential informant as a "drug user." While it is true that the confidential informant had a connection to drugs, such is usually true of confidential informants. Law abiding citizens rarely have viable information about criminal activity.

provided by a confidential informant (CI) who had successfully worked with SID officers in the past. Id. See also RP 48:15-24 (prior use of CI); RP 42:10-22 (information from CI); RP 57:6-18 (timing of information and warrant); RP 252:10 – RP 254:23 (information from CI). The CI told officers that the subject of the investigation, Matthew Logstrom, was selling methamphetamine, and that she had observed dealer-size quantities of methamphetamine in his vehicle and his apartment at the Sound View Terrace Apartments. Exhibit 103, p 2 (Mancini 000218); RP 252:10 – RP 254:23. The CI also told Officer Smith that "Matt" did not have anything related to his residence in his name and that he either lived with his mother or his mother rented the apartment for him. RP 220:10-18; RP 255:8-17.

Prior to obtaining the warrant, police vetted the informant's information and learned that Apartment B-1 was rented by Kathleen Mancini, an older white female *who was believed to be Logstrom's mother*. RP 52:9 – 53:1; RP 262:1 – 263:12. Additionally, when the CI directed officers to the apartment complex and pointed out the apartment (B-1), officers found Logstrom's car parked in front of the building where Apartment B-1 was located. RP 255:3 – 257:2. See also Exhibit 112 (photos of Charger taken by police prior to obtaining warrant).

As it turns out, the CI misidentified the apartment. The subject of the investigation, Matthew Logstrom, actually resided in the building next

door, in Apartment A-1. RP 293:20-25. See also Exhibit 1, p 28-29 (Incident No. 110040415.4, pages 6 and 7 of 8); Exhibit 101 (Complaint for Search Warrant, Apt. A-1); Exhibit 102 (Search Warrant, Apt. A-1).

Following Division I's opinion in Mancini v. City of Tacoma, 188 Wn. App. 1006, 2015 WL 3562229 (2015)(hereinafter Mancini I), plaintiff's claims for negligence, assault and battery, false imprisonment and invasion of privacy claims proceeded to trial before a jury in the King County Superior Court. The jury found for the defendant on plaintiff's claims for invasion of privacy, false imprisonment, and assault and battery. CP 526. Plaintiff did not appeal the jury's verdict on these claims.

The jury found for the plaintiff on her claim of negligence. CP 526. At trial, however, plaintiff's theory of liability on the negligence claim was that officers should have done a controlled buy and should have done surveillance before obtaining and executing the search warrant on plaintiff's home. See, e.g., RP 7:19-25[3]; RP 738, lines 14-23[4]. Based on the theory of

[3] During opening statement: "He didn't do any surveillance. He didn't do a controlled buy. And you will hear testimony that those are two things that are very, very important to do in any drug case before you go in front of the judge and you file an affidavit that says, I want a search warrant, and I want a search warrant for a particular apartment. Didn't happen in this case." RP 7:19-25.

[4] During closing argument: "Now, this is the affidavit for the search warrant. Doesn't say anything about any investigation, other than driving the drug informant to the apartment parking lot and that they had his birthdate. They even had a picture of him, and they had some of his criminal history. This is the affidavit that they gave to the judge. It doesn't say a word about anything else they did to ascertain that they were going to the correct address,

liability pursued by plaintiff at trial, Division I concluded that plaintiff's negligence claim was a claim for negligent investigation and therefore, was not cognizable. Mancini v. City of Tacoma, No. 77531-6-I (hereinafter Mancini II). Division I reversed the judgment on the negligence claim and remanded for entry of judgment for the City on plaintiff's negligence claim.

II. Issue presented

> Did Division I err by deciding that plaintiff's negligence claim, as presented at trial, was a negligent investigation claim and thus, not cognizable, where the alleged negligent acts were the police's failure to make a controlled buy and to conduct surveillance prior to obtaining a controlled substance warrant for plaintiff's home.

III. Discretionary Review is not warranted in this case.

Plaintiff argues that discretionary review in this case is appropriate under RAP 13.4(b)(1)(conflict with a decision of the Supreme Court), RAP 13.4(b)(3)(significant constitutional question), and RAP 13.4(b)(4)(issue of substantial public interest). As outlined herein, none of these bases apply in the instant case, and discretionary review is not warranted. Division I's opinion in Mancini II is not a departure from existing law and does not involve any issues of public import that this Court and the appellate courts

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and it doesn't say, gee, we didn't do any surveillance. We didn't do a controlled buy." RP 738:14-23. See also RP 728, lines 11-19: "…their idea of an investigation was to put this woman in a van and drive her through the parking lot of the complex that had four identical buildings. And she just points to – she just points to an apartment and says 'That's it.' And that is pretty much the extent of their investigation because, ladies and gentlemen, I will posit to you that you do not have one shred of evidence that they did anything else, not one, because there's nothing in the incident report."

have not already addressed. While Mancini II provides some refinement of the rule that states that common law claims of negligent investigation are not cognizable in Washington, Mancini II does not plow new ground. Plaintiff's petition for discretionary review should be denied.

A. This Court's analysis in Beltran-Serrano has no application to the instant case.

Plaintiff argues that this Court should grant review because Division I's opinion in Mancini II conflicts with this Court's decision in Beltran-Serrano, 193 Wn.2fd 537, 442 P.3d 608 (2019). Specifically, plaintiff argues that Beltran-Serrano establishes "a duty of reasonable care to avoid creating unreasonable risks of harm to persons and property" and that "this duty applies to police officers who choose to affirmatively direct their official acts at an individual." (emphasis added) Petition for Review, p. 8-9. Plaintiff's argument is premised on a misreading and a misapprehension of this Court's analysis in Beltran-Serrano.

The Beltran-Serrano court's analysis is grounded on the nature of the contact as this Court understood it: "[Officer Volk] did not have reasonable suspicion or probable cause to believe [Beltran-Serrano] was committing a crime." Id. at 541. In other words, a critical component of this Court's analysis in Beltran-Serrano was the fact that this was a consensual contact, and the officer was not acting in the performance of traditional law

enforcement functions. This context is vital to the Court's analysis, as it is the only way to reconcile the duty found to exist with the Court's statement that the statutorily imposed duty to "provide police services, enforce the law, and keep the peace" is owed to the public at large and therefore, not actionable in tort:

> Recognizing such a duty *does not open the door to potential tort liability for a city's statutorily imposed obligation to provide police services, enforce the law, and keep the peace. These statutory duties have always been, and will continue to be, nonactionable duties owed to the public at large.*

(emphasis added) Beltran-Serrano, 193 Wn.2d at 551-52.

In her Petition for Review, plaintiff asserts – without analysis - that "Mancini's negligence claim was not based on the police's special statutory obligation to investigate crime." Petition, p. 14. This assertion makes no sense. In the instant case, officers were investigating a drug dealer (for the purposes of arresting him). As part of this criminal investigation, the officers obtained and executed a search warrant on Mancini's home. There is no rational way to construe this activity as anything other than the City's statutorily imposed duty to "provide police services, enforce the law, and keep the peace" statutorily imposed duty to "provide police services, enforce the law, and keep the peace"." See RCW 35.22.280(35) (2019)("Any city of the first class shall have power:...(35) To provide for

the punishment of all disorderly conduct, and of all practices dangerous to public health or safety, and to make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits, and to provide for the arrest, trial, and punishment of all persons charged with violating any of the ordinances of said city."); Chapter 10.79 RCW (Searches and Seizures). As this Court made clear in Beltran-Serrano, "[t]hese statutory duties have always been, and will continue to be, *nonactionable duties* owed to the public at large."

Moreover, plaintiff's argument ignores a critical component of this Court's analysis in Beltran-Serrano. The duty that this Court found in Beltran-Serrano arose *because of the officer's direct interaction with Beltran-Serrano*:

> *Beltran-Serrano's negligence claims arise out of Officer Volk's direct interaction with him*, not the breach of a generalized public duty. The City therefore owed Beltran-Serrano a duty in tort to exercise reasonable care. Recognizing such a duty does not open the door to potential tort liability for a city's statutorily imposed obligation to provide police services, enforce the law, and keep the peace. These statutory duties have always been, and will continue to be, nonactionable duties owed to the public at large. *In this case, however, the specific tort duty owed to Beltran-Serrano arises from Officer Volk's affirmative interaction with him*. The public duty doctrine does not apply to prevent the City from being found liable in tort.

(emphasis added) Beltran-Serrano, 193 Wn.2d at 551-52. In the instant case, *there are no such direct interaction* between the officers and the plaintiff

prior to the execution of the warrant. The only direct interaction that occurred between the officers and the plaintiff occurred after the warrant was executed, and as outlined in Section III.C, *infra*, this interaction was relevant to plaintiff's intentional tort claims, not her negligence claim.

Contrary to plaintiff's assertions, Mancini II does not conflict with this Court's opinion in Beltran-Serrano. Beltran-Serrano involved a very different circumstance, and addressed a very different claim. Thus, Beltran-Serrano is not a reason to grant discretionary review in this case.

B. Mancini II does not conflict with the public duty doctrine or create a new immunity, but rather, applies a well-established body of law on negligent investigation claims.

In support of her petition, plaintiff argues that Mancini II conflicts with "the proper analysis of common-law tort claims under the public duty doctrine," and that Mancini II "entrenches a de-facto immunity" for police negligence. Petition for Review, p. 12-16. A careful examination of plaintiff's arguments, however, shows that neither of these contentions have merit, as the Mancini II opinion is not based on either the public duty doctrine or an immunity. Further, a careful examination of Mancini II shows that in reaching its decision, Division I simply applied the well-established rule that common law negligent investigation claims against law enforcement are not cognizable in Washington.

To begin, the thrust of plaintiff's argument concerning the public duty doctrine is not entirely clear. See Petition for Review, p. 12-14. Plaintiff's assertion that some courts have treated the public duty doctrine as creating a need to show a "special duty," is both unfounded and irrelevant to Division I's decision in Mancini II. Washington courts have never treated the public duty doctrine as creating a need to show a "special duty" owed by government in order to impose tort liability against a governmental entity. Petition for Review, p. 13. While some courts' analysis of the doctrine has been less than precise, the case law makes it clear that the public duty doctrine is simply a recognition that the waiver of sovereign immunity was intended to expose governments to the *same* liability as private persons, but that some of the duties imposed on governments are unique to governments and not imposed on private persons. Washburn v. City of Federal Way, 178 Wn.2d 732, 310 P.3d 1275 (2013); Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 888-89, 288 P.3d 328 (2012)(Chambers, J., concurring). Thus, the public duty doctrine only applies to those duties unique to government.

More importantly, however, this analysis does not really help the plaintiff in the instant case. Plaintiff asserts that "Division I may have been tripped up by the police activity at issue," but fails to identify what portion of Division I's opinion involved a misapprehension of the public duty

doctrine. Petition for Review, p. 14. This failure is telling, especially since the only place in Mancini II where Division I mentions the public duty doctrine is in discussing Division I's ruling in *Mancini I*:

> On appeal, we concluded that dismissal on summary judgment was proper as to her claims defamation and outrage, but unwarranted as to her remaining claims of negligence, battery, assault, false imprisonment, and invasion of privacy. Mancini I, No. 71044-3-I, slip op. at 11. Pertinently , we concluded that Mancini's negligence claim was not barre by the public duty doctrine, that the City had not established that she alleged a claim for negligence that encompassed only a noncognizable claim of negligent investigation, and there was sufficient evidence of a genuine dispute of material fact regarding her negligence claim to preclude summary judgment. Mancini I, No. 71044-3-I, slip. Op. at 18-19 n. 12.

Mancini II, slip op. at 5-6. This is the only reference in Mancini II to the public duty doctrine, and thus, it is clear that Division I did not rely on the public duty doctrine in reaching its decision in Mancini II.

Instead, in Mancini II, Division I properly focused on the well-developed body of law concerning the viability of negligent investigation claims against law enforcement. This body of law is not grounded in the public duty doctrine. Instead, Washington courts have decided that, for very sound policy reasons, common law claims of negligent investigation against law enforcement are simply not cognizable in this State:

> "In general, Washington common law does not recognize a claim for negligent investigation because of the potential chilling effect such claims would have on

> investigations." *Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013) (citing *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009). In particular, we have declined to recognize a cognizable claim for negligent investigation against law enforcement officials. *Fondren v. Klickitat County*, 79 Wn. App. 850, 862-63, 905 P.2d 928 (1995); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992); *Dever v. Fowler*, 63 Wn. App. 35, 44-45, 816 P.2d 1237, 824 P.2d 1237 (1991).

Mancini II, slip op. at 10-11[5]. The policy reasons supporting this rule remain today and support Division I's ruling in Mancini II.

Similarly, Mancini II was not decided based on an immunity. Contrary to plaintiff's claims, Mancini II does not create "[a] new judicial grant of immunity," nor does Mancini II issue a "broad new rule" that deprives citizens of a tort remedy. Petition for Review, p. 15. As outlined

[5] See also Keates v. City of Vancouver, 73 Wn. App. 257, 268-69, 869 P.2d 88, 94 (1994) ("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."); Dever v. Fowler, 63 Wn. App. 35, 44-45, 816 P.2d 1237 (1991)("Furthermore, although no Washington case has expressly denied a cause of action for negligent investigation, other jurisdictions have held that no such actions exists."); Smith v. State, 324 N.W.2d 299, 301-02 (Iowa 1982)(cited by Dever v. Fowler, *supra*)("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.").

above, Mancini II simply applies a rule that was first stated in Dever in 1991, and confirmed many times since, including by this Court in Ducote v. Dep't of Soc. & Health Servs., 167 Wn.2d 697, 702, 222 P.3d 785, 787 (2009)("…[negligent investigation] claims also do not exist under common law in Washington."). Moreover, Division I's conclusion that a negligence claim based on "the evidence gathering phase of a police investigation" is not novel and is in accord with how other courts have implicitly defined this claim. See, e.g., Donaldson v. Seattle, 65 Wn. App. 661, 671-72, 831 P.2d 1098 (1992), rev. denied, 120 Wn.2d 1031 (1993)(discussing 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); Dever v. Fowler, 63 Wn. App. 35, 39, 816 P.2d 1237 (1991), rev. denied, 118 Wn.2d 1028 (1992)(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).

Since at least 1991, Washington courts have expressly held that tort claims against law enforcement cannot be premised on how the police conduct a criminal investigation[6]. This limitation on the scope of liability is

[6] A narrow exception to this rule is the statutory duty to conduct investigations into allegations of child abuse or neglect under RCW 26.44.050, which is not at issue in this case.

not new, nor does it deprive citizens of a tort remedy under appropriate circumstances. Turngren v. King County, 104 Wn.2d 293, 705 P.2d 258 (1985), and Bender v. Seattle, 99 Wn.2d 582, 664 P.2d 491 (1983). are perfect examples of situations where allegedly wrongful conduct by the police give rise to tort claims for false arrest, malicious prosecution, assault or battery. But a plaintiff cannot pursue a negligence claim based on the investigatory steps taken by police to gather evidence of criminal activity. For very sound policy reasons, Washington does not recognize such a claim.

C. This case does not involve *any* questions of constitutional law.

Plaintiff argues that because the jury found for the plaintiff on her negligence claim, the jury also necessarily found that the police lacked probable cause or exceeded the scope of the warrant. This argument is without merit and ignores the jury's verdict on all of the intentional tort claims.

As outlined in the City's briefing in Division I, all of the conduct that plaintiff identified as a basis for her negligence claim was either part of the investigatory process (defined by Division I in Mancini II as the evidence gathering aspects of the police investigation) or is intentional conduct that served as the basis for her intentional tort claims. See Respondent's Brief, p. 41. For example, in her Mancini II briefing, plaintiff

argued to Division I that the jury's verdict on the negligence claim could have been based on any of the following: failure to timely act on CI's tip; failure to conduct surveillance; failure to conduct a controlled buy; failing to vet information provided by CI; failing to observe cardinal rule of relying on CI; failing to verify whether Mancini and Logstrom were connected in any way; and failing to alert King County of the operation. All of these actions are, on their face, part of the criminal investigatory process.

Conversely, the remaining conduct that plaintiff identified in her briefing to Division I as a possible basis for the jury's verdict on the negligence claim (failing to stop warrant service "immediately;" forcing Mancini to the ground; failing to halt protective sweep; forcing Mancini to stand outside; handcuffing Mancini; keeping Mancini in handcuffs after knowing they were in the wrong apartment; and failing to provide Mancini "aid" after shattering her door) are all intentional acts which were offered as the basis for her intentional torts (assault and battery, false arrest, invasion of privacy). The jury found for the City of Tacoma on all of the intentional tort claims, which necessarily meant that the jury concluded both

that the warrant was supported by probable cause and that the officers did not exceed the scope of the warrant[7].

In Mancini II, Division I confirmed that all of the conduct that occurred after the execution of the warrant supported plaintiff's intentional tort claims, and not the negligence claim. Mancini II, slip op. at p. 9 n. 7 ("We agree with the City's assertion that any evidence of police wrongdoing occurring during and after the entry to the apartment was material to Mancini's intentional tort claims, not the negligence claim."). In her petition for review, plaintiff does not address the Court's conclusion on this point and does not explain why this conclusion is wrong.

Consideration of plaintiff's argument in light of basic tort principles highlights the flaw in plaintiff's analysis. This Court has defined negligence as "an *unintentional* breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred."

[7]On plaintiff's false imprisonment claim, the jury was instructed that a false imprisonment occurs when police deprive a person of their liberty or otherwise restrain the person without lawful authority. CP 515 (Instruction No. 12). See Bender v. Seattle, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). The jury was also instructed that officers may detain a resident of a house when executing a valid search warrant, and that the detention in conjunction with the warrant may be unreasonable if unnecessarily prolonged or if it involves an undue invasion of privacy. CP 518 (Instruction No. 15). See Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L.Ed.2d 340 (1981); Franklin v. Foxworth, 31 F.3d 873 (9th Cir. 1994). Additionally, the jury was instructed on the standard for probable cause and on the standard for overcoming the warrant's presumption of validity. CP 519 (Instruction No. 16); CP 520 (Instruction No. 17). See Bender, 99 Wn.2d at 591-92. Finally, the jury was instructed that if they found that there was probable cause to support the warrant, but also found that the officers exceeded the scope of the warrant, they should find for the plaintiff on her claims. CP 521 (Instruction 18). See also RP 649:24 – 652:15 (court's discussion of Instruction No. 18).

(emphasis added) Ullrich v. Columbia & Cowlitz R. Co., 189 Wash. 668, 672, 66 P.2d 853 (1937). See also Burr v. Clark, 30 Wn.2d 149, 155-56, 190 P.2d 769 (1948) (same); Grange Ins. Ass'n v. Roberts, 179 Wn. App. 739, 769, 320 P.3d 77 (2013), rev. denied, 180 Wn.2d 1026 (2014)("In order to state a cause of action for negligence it is necessary to allege facts which would warrant a finding that the defendant has committed an unintentional breach of a legal duty and that such a breach was a proximate cause of the harm.").

In contrast, liability for an intentional tort requires a volitional act undertaken with the knowledge and substantial certainty that reasonably to be expected consequences would follow. Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 681-84, 709 P.2d 782 (1985) (citing Garratt v. Dailey, 46 Wn.2d 197, 279 P.2d 1091 (1955)).

> The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. The defendant may be liable although he has meant nothing more than a good-natured practical joke . . .
>
> . . .
>
> Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. . . . The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends

> it. The practical application of this principle has meant that where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it.

Id. at 682-83 (citing W. Prosser, Torts § 8, at 31-32 (4th ed. 1971)). See also State Farm Fire & Cas. Co. v. Justus, 199 Wn. App. 435, 451-55, 398 P.3d 1258, rev. denied, 189 Wn.2d 1026 (2017) (definition of intentional conduct (meaning the actor desired to bring about the consequences of his volitional acts because he knew or was substantially certain the result would occur) as compared to definition of negligent conduct (meaning the actor's volitional actions merely caused an unreasonable risk of harm)).

This Court's analysis Brutsche v. City of Kent, 164 Wn.2d 664, 193 P.3d 110 (2008) is dispositive of plaintiff's claim that the conduct that occurred during the execution of the warrant could serve as a basis for the negligence claim. Brutsche involved the execution of a search warrant on a suspected methamphetamine lab. Officers used a battering ram on several doors to gain entry, and in so doing, caused physical damage to the door and door jam. Id. at 667. Mr. Brutsche brought suit against the City of Kent for negligence, trespass and a taking of property without just compensation, arguing that he offered to give the officers keys to these doors and that the officers had a duty to avoid unnecessary damage in executing the warrant. Id. In support of his claim, Mr. Brutsche relied up Goldsby v. Stewart, 158

Wash. 39, 290 P. 422 (1930), in which this Court held that "officers have a duty to conduct a search in a reasonable manner and to avoid unnecessary damage to the property of third parties." Brutsche, 164 Wn.2d at 671. In analyzing this statement in Goldsby and the Restatement (Second) of Torts (1965), the Brutsche court concluded Goldsby supported Brutsche's trespass claim, but not his negligence claim. Id. at 673 ("Therefore, under Goldsby, if officers executing a search warrant unnecessarily damage the property while conducting their search, that is, if they damage the property to a greater extent than is consistent with a thorough investigation, they exceed the privilege to be on the land and liability in trespass can result."). The Brutsche court then noted that while the conduct necessary to support a trespass claim under §214(l) of the Restatement can be either intentional or negligent, in this case, the conduct giving rise to the damage "was intentional because the law enforcement officers intentionally and deliberately used battering rams to breach doors." Id. at 674-75.

The Brutsche analysis is equally applicable to the instant case. The allegedly wrongful conduct that plaintiff claims would support a negligence claim (searching the apartment knowing it was the wrong apartment, using excessive force with plaintiff, detaining plaintiff knowing that she was not the subject of the investigation) is all intentional conduct. This conduct was

the basis for the intentional tort claims on which the jury found for the City[8], as Division I correctly determined.

There is simply no way to create a constitutional issue out of the negligence claim in this case. The jury's verdict on the negligence claim does not, and cannot, mean that the jury found a Fourth Amendment violation in this case. Because this matter does not involve any constitutional issues, RAP 13.4(b)(3) is not a basis for discretionary review of Division I's opinion.

IV. Conclusion

As outlined herein, there is no basis for discretionary review of Division I's opinion in Mancini II. Mancini II is not in conflict with Beltran-Serrano, or any other case from this Court or any appellate court. Instead,

[8] Because the basis for the city's appeal is the plaintiff's failure to establish facts upon which relief can be granted, the appellate court can look to the entirety of the record in addressing the appeal, including events that occurred after the close of evidence and the City's CR 50 motion. As noted by Division I, "…even had the City failed to bring a proper CR 50 motion, a plaintiff's alleged failure to establish facts upon which relief can be properly granted is a claim of error that can be asserted for the first time on appeal." Mancini II, slip op. at 14-15. If the court would have been able to entertain the City's appeal, even in the absence of a CR 50 motion, such an appeal would, of necessity, have encompassed the entire trial court record, as there would have been no CR 50 motion to serve as a cutoff point. Consequently, in this case, the Court can take note that during closing argument, plaintiff expressly stated that the negligence claim was based on the police's action in *obtaining* the warrant, not on the execution of the warrant. RP 736:14 – 737:1 (Plaintiff's Closing). See also CP 564 (excerpt from plaintiff's closing PowerPoint presentation – "Negligence in Obtaining Warrant"); CP 569 ("Negligence in Obtaining Warrant – Tacoma Police Cut Corners and It Stripped Kathleen Mancini of Her Sense of Safety").

in Mancini II, Division I simply looked at the theory of liability and evidence presented by the plaintiff at trial in support of her negligence claim, and very rightly identified her claim as negligent investigation. Washington law has long held that such a claim is not cognizable and Division I's application of this rule does not create new law or deprive any plaintiff of a tort remedy that previously existed.

There is no basis to revisit Division I's analysis, and therefore, plaintiff's petition for discretionary review should be denied.

RESPECTFULLY SUBMITTED this 20th day of September, 2019.

WILLIAM C. FOSBRE, City Attorney

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CERTIFICATE OF SERVICE

I hereby certify that I forwarded the foregoing documents: RESPONDENT'S RESPONSE BRIEF to be delivered via email to the following:

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EXECUTED this 20th day of September, 2019, at Tacoma, WA.

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TACOMA CITY ATTORNEYS OFFICE

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