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NO. 71044-3-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

KATHLEEN MANCINI,

Appellant,

v.

CITY OF TACOMA, ET AL,

Respondents.

AMENDED APPELLANT'S BRIEF

King County Superior Court Case No. 12-2-17651-5

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I. ASSIGNMENTS OF ERROR

1. Whether the trial court erred in granting summary judgment and dismissing Kathleen Mancini's claim of negligence.

2. Whether the trial court erred in granting summary judgment and dismissing Kathleen Mancini's claim of false imprisonment.

3. Whether the trial court erred in granting summary judgment and dismissing Kathleen Mancini's claim of violation of her right to privacy.

4. Whether the trial court erred in granting summary judgment and dismissing Kathleen Mancini's claim of Tort of Outrage.

5. Whether it was an abuse of judicial discretion for the trial court to enter an Order limiting Kathleen Mancini's ability to present medical opinions at trial.

6. Whether it was an abuse of judicial discretion for the trial court to enter an Order directing Kathleen Mancini to gather medical records for the defendants and provide those same medical records at no cost to the defendants.

II. ISSUES PRESENTED

1. Whether a question of fact exists properly reserved for the trier of fact whether a police department commits common law negligence when officers break down the door of the wrong apartment after obtaining a search warrant for that apartment without performing any checks to assure that officers are acting on

accurate information and the department waited a month to act after being tipped off about possible drug sales.

2. Whether a question of fact exists properly reserved for the trier of fact and therefore the trial court erred in dismissing Kathleen Mancini's claim of false imprisonment when there is competing testimony regarding how long Ms. Mancini was handcuffed after police officers admit they realized they were in the wrong apartment and had handcuffed an innocent woman.

3. Whether a question of fact exists properly reserved for the trier of fact whether or not the defendants' actions defamed Kathleen Mancini and therefore it was improper for a trial court to dismiss her defamation claim on summary judgment.

4. Whether a question of fact exists properly reserved for the trier of fact whether the nature and extent of the defendants' actions meet the criteria for Tort of Outrage and therefore it was improper for the trial court to dismiss that claim.

5. Whether it was an abuse of discretion for the trial judge to strike medical opinion testimony based on a purported failure of Kathleen Mancini to disclose medical expert opinions when all of the medical witnesses are treating health care providers, the plaintiff timely satisfied the requirements of KCLR 26(k), did not retain any medical experts, timely filed her witness disclosure as well as a Supplemental Witness Disclosure and the Defendants were not prejudiced in any manner.

6. Whether it is an abuse of discretion for a trial court to order Kathleen Mancini to obtain irrelevant medical records for the defendants, expend her own funds to gather those irrelevant medical records, then provide them to the defendants at no charge particularly when the defendants refused to cooperate in the signing of medical stipulations which would have allowed the defense access to the medical records and instead defendants' elected to conduct records depositions.

III. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

On a cold January morning, Tacoma Police used a battering ram to break down the front door of Kathleen Mancini's apartment with enough force to blow it off its hinges and destroy the surrounding wallboard. (CP 362-365; 270-275) It was 9:30 a.m. on the morning of January 5, 2011 and Ms. Mancini, who is employed as a nurse and works the night shift, was startled out of a sound sleep. Thinking there had been an earthquake she climbed out of bed and rounded the corner from her bedroom into a hallway. A swarm of Tacoma Police officers dressed in SWAT gear, complete with helmets and visors, confronted Kathleen with their guns drawn. They shouted "Get down! Get down!" and pushed her face down onto the floor. While she was face down on the floor, the officers

handcuffed Ms. Mancini and forcibly led her to the entrance of her Federal Way apartment.[1] (CP 263-269; 585; 620)

The officers took Ms. Mancini onto the front landing where they forced her to stand for approximately 30 minutes. (CP 592; 595; 597-598) In sharp contrast, the Tacoma police state that Ms. Mancini was handcuffed but "immediately released". (CP 682) During this entire time Ms. Mancini is adamant that her hands were cuffed behind her back. The defendants contend that she was handcuffed her with her hands in front of her even though she was lying on her stomach, face down when the officers handcuffed her. Suspects in high risk raids are typically handcuffed "with hands behind them, double locked." (CP 334) Kathleen Mancini was barefoot and wearing only her nightgown throughout this entire encounter. (CP 570-571) Ms. Mancini had asked if she could don bedroom slippers placed near the front door, a request that was refused. While Ms. Mancini stood outside handcuffed, Tacoma Police officers went through her apartment. They removed clothing from hangers in a closet. The officers moved a bed in Ms. Mancini's guest room. They disturbed a number of religious icons belonging to her deceased mother which were sitting on a bedside table. They also went through kitchen cabinets and searched her fireplace, leaving the doors standing open. (CP 263-269; 606-612)

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[1] Ms. Mancini was 63 years old at the time. She stands approximately 5 feet tall.

The incident report filed by the officers tells an entirely different story regarding the "encounter" with Kathleen Mancini:

> After entry was made, I contacted a female at the front hallway/door area who was identified as Kathleen Mancini. I immediately observed that the inside of the apartment was not as the confidential and reliable informant had described. I asked Mancini about the Dodge Charger parked in front of her apartment and she told me that it belonged to male [sic] that lived as [sic] apartment #A1, which was just north of this building. I showed Mancini a photo of Matthew Logstrom and she could not confirm who he was but stated that he was not related to her apartment. Mancini's apartment was not searched and she was immediately released. I left a business card with case number and requested that she contact me about the damages to the door and door frame.

Incident Report (CP 293)

During this time, Tacoma Police Officers repeatedly shoved a picture of a white male in Ms. Mancini's face shouting, "Where is he? Where is he?" She had no idea who the person in the picture was, why the police were in her apartment or why she was handcuffed and forced to stand outside her apartment. (CP 596-597) Eventually, the officers led Kathleen, who was still handcuffed, up two flights of stairs to the parking lot of her building. They pointed to a Black Dodge Charger sitting in the parking lot and asked, "Is that your car?"[2] Ms. Mancini, was humiliated standing barefoot and in her nightgown in the parking lot which is very visible. (CP 349-351; 369-371) She told the officers that the row where the Dodge Charger sat belonged to the building next door. Kathleen

[2] According to the account asserted by defendants, the officers detained Ms. Mancini at her front door briefly and from there pointed to the black Dodge Charger in the parking lot. However, Ms. Mancini's front landing sits well below the parking lot and foliage blocks the view of parked cars. Therefore, the officers' account is physically impossible. (CP 373-374)

lives in a complex with 4 separate buildings and resides in Building B. She indicated that the owner of the Charger likely lived in Building A. (CP 597)

At that point, the Tacoma Police Officers took Ms. Mancini, who was still handcuffed and barefoot, back to the breezeway outside her front door. She was still visible to passersby from an adjacent major thoroughfare. (CP 622-623) Several officers again entered her apartment. Eventually they emerged and she was finally released. (CP 267-268) Only then did Officer Kenneth Smith, who was in charge of this raid, explain they were seeking a man named "Matt" who was wanted in connection with selling drugs.

According to their own account, after the officers released Ms. Mancini they went to Building A and knocked on the door of the apartment which corresponded with the location of Ms. Mancini's unit in Building B.[3] (CP 293) A man answered the door and officers asked him to step outside. Matt Logstrom, the man they had been seeking all along, quietly complied. There was no shouting or screaming and no pointing of guns. The police did not force Logstrom to lie face down and they did not handcuff him. Nor did they force him to stand outside. (CP 351-352; 293-294)

In fact, while Officer Smith, returned to Tacoma and obtained a search warrant for the correct apartment, Matt Logstrom was allowed to sit quietly and undisturbed on his living room couch. (CP 294) Eventually Officer Smith returned with the correct warrant. As part of its defense the Tacoma Police

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[3] On January 2, 2011 Tacoma Police obtained a search warrant for 28652 16th Ave. S. #B1, Federal Way, in King County which is the address of the Mancini residence. On January 5, 2011, Tacoma police obtained a search warrant for the premises at 28617 16th Ave. S. Apartment #A1 which was the residence of Matthew Logstrom, the man eventually taken into custody.

asserted that their rough handling of Kathleen Mancini was necessary because they had information that "Matt" had guns on the premises. However, when actually confronting the true subject of their "raid" those same officers did not draw weapons, physically confront or forcibly detain Matthew Logstrom.

According to Officer Smith, he had received a tip a month earlier, on December 4, 2010, from a confidential informant [CI] that drugs were being sold out of Matt's apartment. (CP 311) In the intervening month, Tacoma Police Officers conducted no surveillance and made no attempt to perform a "controlled buy". (CP 321) Both surveillance and controlled buys are typical protocol in situations involving service of a warrant for drug dealing. In pursuit of this case, the Tacoma police officers left their jurisdiction and entered King County. Officer Smith testified that he did not perform a controlled buy because he did not want to deal with King County prosecutors. (CP 314-320; 330) He believes they are not trustworthy. (CP 315)

A month passed and the CI then reported that she had been in the residence on or about New Year's Eve for a "party" and had seen quantities of drugs indicating that "Matt" was still dealing. At no time have the defendants articulated any reason for their failure to follow up on the original tip. Instead, on January 2, 2011, they simply drove the CI by Ms. Mancini's apartment complex where she pointed to Kathleen's front door and identified it as the location where she had seen drugs. Acting on this information along with having electronically searched a few data bases, Officer Kenneth Smith sought a warrant to search the premises corresponding with Mancini's address. (CP 321-322; 324)

At no time did the Tacoma police put Ms. Mancini's apartment under surveillance to try and observe drug traffic even though that is typical protocol.[4] At no time did the Tacoma Police perform a "controlled buy" in order to ascertain whether or not they were preparing to raid the correct apartment.[5] In his deposition, Officer Smith admitted that these are procedures that the Tacoma Police Department typically follows. (CP 324-326; 336) Thus, the Tacoma Police deviated from their own procedures on this particular raid.

Former Seattle Police Chief Norm Stamper's opinions were offered via declaration. (CP 224-262) Dr. Stamper refers to this incident as "hitting the wrong door." He is unequivocal that hitting the wrong door should never happen. According to Dr. Stamper relying exclusively on a confidential informant violates a core principle of police work. (CP 246) When serving a high risk warrant of this nature, the officers should first put the house under surveillance and also conduct a "controlled buy". (CP 247-248) Dr. Stamper testified that he has had experience with residents of premises where the police have hit the wrong door and it has a profound impact on whoever is living in the abode when it is wrongfully raided. (CP 248-249) In Dr. Stamper's opinion the Tacoma police were in Ms. Mancini's residence much longer that they admit and "conducted much more than a simple sweep." (CP 249)

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[4] .Q: So is it unusual in this circumstance to not do any surveillance?
A: Yes. (CP 325)

[5] A "controlled buy" is sending an informant into the suspect residence to make a drug purchase. The informant is under strict surveillance and often wired. If the informant emerges with drugs, the surveillance team can safely assume they have identified the appropriate residence.

Dr. Stamper notes that the incident report does not state the time of either the forced entry or when officers actually contacted the person for whom they were looking. He refers to the incident report as "highly unusual". (CP 249-250) Furthermore, Dr. Stamper takes issue with the insistence by the Tacoma police that Ms. Mancini was only briefly handcuffed with her hands in front of her. (CP 251) The defendants simultaneously claim that they did a sweep of the Mancini apartment before removing her handcuffs and that the handcuffs were removed "immediately". In Dr. Stamper's opinion the defendants could not have done a sweep of the Mancini apartment as quickly as they claim. (CP 249) Ms. Mancini asserts that the Tacoma police handcuffed her with her hands behind her back so tightly that she suffered bilateral shoulder strain and required massage therapy. Defendants claim they handcuffed Kathleen with her hands in front of her.

Kathleen Mancini saw her primary care physician at Group Health Cooperative for a single visit and followed his instructions pursuing a brief course of massage therapy for her shoulders. (CP 62) As a result of this incident, Kathleen Mancini developed PTSD and saw a counselor to assist her in dealing with symptoms of that condition. CP 163, 66-67) Her health plan only covered 3 therapy visits so that was the extent of the psychological help she sought. (CP 71)

2. Procedural Issues

The trial court issued two rulings with which Kathleen Mancini takes issue. First, the trial court ruled that the plaintiff had not properly identified witnesses who would provide medical testimony. (CP 29-30;; 106-107) Ms.

Mancini responded by referencing her properly filed Witness List and interrogatory responses as well as explaining that her health care witnesses were treating providers as opposed to experts retained in anticipation of litigation. (CP 51-55; 28) After the first such ruling, Ms. Mancini filed a Supplemental Witness Disclosure. (CP 141-145) The defense again moved to have Ms. Mancini's "medical opinion testimony stricken" protesting that it might have to take depositions in order to ascertain what the testimony of the treating providers might be. The trial court entered an order that the plaintiff could not offer any medical opinions at trial. (CP 81-83)

Ms. Mancini filed a Motion for Reconsideration based on the fact that the trial court did not appear to distinguish between expert witnesses and treating health care providers. (CP 96-105) Ms. Mancini had not retained any medical experts. She only saw 3 treating health care providers in connection with this incident and all three were fully disclosed to the defendant in interrogatory responses, (CP 51-55) Plaintiff's Possible Witness Disclosure (71-77) and Plaintiff's Supplemental Witness Disclosure. (CP 141-145) The trial court ruled that the information provided was somehow insufficient. (CP 81-83, 79)

The trial court also ordered Kathleen Mancini to gather her own medical records, pay the costs of gathering those records and then copy and provide those records to the defense at no expense. (CP 79-80) Just obtaining the Group Health medical records at the behest of the defendants carried a price tag of

$715.32. (CP 125) Ms. Mancini had been a patient of Group Health Cooperative for 11 years and only a single visit to her primary care provider was relevant to this case. The defense insisted that it needed all of Ms. Mancini's medical records despite the fact that all but one visit was irrelevant. Apparently, counsel for Group Health found that defendants' medical records subpoena was deficient. There is no evidence that the defense attempted to work out a solution with Group Health Counsel.

Instead, the defendants moved the court to order Ms. Mancini to obtain her own medical records on their behalf. The court ordered Ms. Mancini to collect all of her records from the 3 treating providers and deliver them to the defendant. The trial court ordered that the defendants did not have to compensate Ms. Mancini for copying or shipping costs. Again plaintiff's counsel moved for Reconsideration to no avail. (CP 32-37; 79-80)

In making its ruling, the trial court was dismissive of a salient fact. Ms. Mancini had offered medical stipulations to the defense in exchange for copies of any medical records gathered and agreed to pay copying charges. (CP 13) Defense counsel refused the terms of the stipulations.[6] (CP 14-15) Ms. Mancini's counsel suggested that defendants download the records to a disk and

[6] City of Tacoma theorized that it somehow "constitutes an unconstitutional gift of public funds" to provide a copy of Ms. Mancini's records even though plaintiff's counsel offered to pay 10 cents a page for those copies or in the alternative the defense could simply download them to a disk and provide the records to the plaintiff at no copying charge. [See CP 13-16]

provide the disk to the plaintiff. (CP 16) Defendants also rejected that offer. The defendants then proceeded to gather records through records depositions and Ms. Mancini did not oppose those records depositions or interfere in the gathering of the records in any manner. Counsel for Group Health objected to the defendant's medical records subpoena. Rather than work out a solution, the defense went to the trial court. The Honorable James Cayce ordered Ms. Mancini to gather every record sought by the defense, (even those it had already gathered) copy all records and ship them to the defense at her own expense. (CP 79-80)

IV. A Trial Court Commits Error As A Matter of Law When It Grants Summary Judgment In A Case Where Genuine Issues of Material Fact Exist. Pursuant to CR 56 Every Inference Is To Be Construed In Favor of Kathleen Mancini. The Trial Court Improperly Entered Summary Judgment In Favor of Defendants On Each and Every Cause of Action.

Summary Judgment is appropriate where there are no issues of material fact. CR 56(c). "...the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case. *Weeks v. Chief of Washington State Patrol*, 96 Wn. 2d 893, 895-96, 639 P.2d 732 (1982). A defendant in a civil action is only entitled to summary judgment if he can show that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim. *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To survive a motion for summary judgment a nonmoving party must set forth specific facts showing that a genuine issue exists. *Young,* 112 Wn.2d at 225–26. Only when reasonable minds could reach but one conclusion, can questions

of fact be determined as a matter of law. *Cornerstone Equipment Leasing, Inc. v. MacLeod,* 159 Wn.App. 899, 902, 247 P.3d 790 (2011).

Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." CR 56(c). All facts and all reasonable inferences from those facts are construed in a light most favorable to the nonmoving party. *Lakey v. Puget Sound Energy, Inc.,* 176 Wn.2d 909, 922, 296 P.3d 860 (2013). A genuine issue of material fact exists when reasonable minds could disagree about the facts controlling the outcome of litigation. *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Here, Kathleen Mancini raises genuine issues of material fact regarding the conduct of the defendants, how long she was detained, where she was detained and the manner in which she was handcuffed.

V. The Tacoma Police Involved In the Wrongful Raid of Ms. Mancini's Residence Were Negligent and Violated Well Accepted Standards of Police Investigation Which Led to a Raid On The Wrong Residence. Whether the Defendants Were Negligent Is A Question of Fact Properly Reserved for a Jury.

The raid on the Mancini residence is known as a high risk warrant due to the fact that officers had information that Matthew Logstrom was a drug dealer, had a felony record and had an expectation of finding weapons on the premises. The techniques used in a high risk raid are designed to startle, frighten and cause the inhabitants confusion to the point that police can enter the premises and

immediately control the situation. (CP 248) In this case, the police entered the wrong residence.

Former Seattle Police Chief Norm Stamper reviewed this matter in detail on behalf of the plaintiff. It is Dr. Stamper's opinion that there is absolutely no excuse for "hitting the wrong door" in this type of raid. In his opinion, wrong door raids are the result of the inappropriate utilization of informants, and failure to conduct controlled buys and utilize other well established protocols. (CP 187-195) In this case the Tacoma Police failed to follow basic procedures for obtaining reliable information and thus sought an invalid search warrant. The failures of the Tacoma Police Department include but are not limited to:

(1) Officers should never rely on the word of an informant. In this instance the Tacoma Police relied solely on the word of a CI who herself was involved in drug trade;

(2) The necessity of making controlled buys and strictly following procedures for controlled buys. These include, but are not limited to: Driving the CI to the location (using a van with darkened windows so that the CI will not be exposed if necessary; Provide the CI with marked money; Wire the CI with recording devices; Observe the CI enter the targeted location; Maintain constant surveillance on the targeted location as the CI enters and exists; Conduct a Post-Buy debriefing and search of the informant; Obtain physical descriptions of the inside of the location and persons on the property.

(3) Failing to conduct any surveillance. The Tacoma Police had information that Logstrom was dealing drugs from his apartment a month prior to hitting the Mancini residence. During that month the Tacoma Police did nothing

to determine Logstrom's residence. By his own admission Officer Smith met with the CI on December 4, 2010 and she told him "she was in contact with a subject named "Matt" who could sell dealer size quantities of methamphetamine and marijuana." Officer Smith admits that neither he or anyone on his team conducted any investigation during the intervening month.

A. **The Public Duty Doctrine Does Not Shield A Municipality From Common Law Negligence.**

The city of Tacoma has argued that it is insulated from any negligence in this matter because the four exceptions to the public duty doctrine do not apply. This reliance is misplaced.

> Some view it as providing some sort of broad limit on all governmental duties so that governments are never liable unless one of the four exceptions to the public duty applies, thus largely eliminating duties based on the foreseeability of avoidable harm to a victim. In fact, the public duty doctrine is simply a tool we use to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business.
>
> Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. This court has never held that a government did not have a common law duty solely because of the public duty doctrine.

Munich v. Skagit Emergency Communication Center, 175 Wn.2d 871, 885-886, 299 P.3d 328 (2012).

In his concurrence in *Munich*, Justice Chambers undertook an exhaustive review of the public duty doctrine, concluding, "...our research reveals no cases

where a common law duty was limited solely because of a public duty analysis." *Id.* at 891.

> "The distinction between mandated duties and common law duties is important because duties imposed by common law are owed to all those foreseeably harmed by the breach of the duty. *See Christen v. Lee,* 113 Wash.2d 479, 491–92, 780 P.2d 1307 (1989). In contrast, under the public duty doctrine analysis, unless there is a duty to enforce legislation, the duty is generally owed only to those with whom the government has a special relationship. This distinction is illustrated in *Oberg,* 114 Wash.2d 278, 787 P.2d 918.

Munich at 891.

Therefore, pursuant to a correct analysis, the common law duties of government entities are not circumscribed by those citizens who have a 'special relationship' with that entity pursuant to a statute, code or ordinance. To do so would violate an essential legislative maxim that governments are liable "to the same extent as private persons or corporations" as codified in RCW 4.92.090[7]; RCW 4.96.010(1)[8].

Because government entities are subject to common law negligence, the instant matter is appropriately analyzed as any other

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[7] The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[8] All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

negligence question: By applying the elements of duty, breach, proximate cause and resulting injury. *Ruff v. King County*, 125 Wn. 2d 697, 887 P.2d 886 (1995). Arguably, the Tacoma police owed a duty to Ms. Mancini as a member of the public the officers are sworn to protect and serve. Certainly, when they sought a search warrant for the Mancini premises, the defendants owed Kathleen Mancini a duty. That duty was to follow established procedure and ascertain that they were preparing to raid the correct residence. The Tacoma Police breached that duty. That breach of duty proximately caused Kathleen Mancini to suffer damages.

Recently, a municipality was held liable when a police officer negligently served an anti-harassment order. *Washburn v. City of Federal Way*, 169 Wash.App. 588, 283 P.3d 567 (2012). In that case, a Federal Way police officer served an anti-harassment order without fully reviewing it. Therefore, he did not realize that the servee needed an interpreter or that the claimant was in fear of violent acts. He ignored the fact that when he served a man who answered the door, a woman was visible in the background. And he ignored the fact that the respondent was to stay 500 feet away from the claimant.

The officer simply handed the paperwork to the respondent and left the premises. Shortly thereafter, the respondent fatally stabbed the woman the officer had seen on the premises. She was the claimant who had

applied for the anti-harassment order fearing that the respondent would become violent. That opinion concluded that the anti-harassment order had been served negligently and found the city of Federal Way liable under the theory of common law negligence.

Foreseeability must also be established and therefore a pivotal question in the instant matter is whether or not Kathleen Mancini was among those who could be foreseeably harmed by carrying out a high risk raid in a negligent fashion. The answer to that question is clearly in the affirmative. The Tacoma police were negligent in their duties in multiple ways and after obtaining an incorrect warrant to search her house, Kathleen Mancini was a foreseeable victim.

B. Ms. Mancini Asserts that the Tacoma Police Were Negligent In Ignoring Established Procedures and Protocols For Locating the Appropriate Residence of a Drug Seller. Dr. Norm Stamper Agrees, Concluding That Hitting the Wrong Door Is Never Justifiable.

The basis of the negligence claims Ms. Mancini is asserting against the defendants is a failure on the part of the Tacoma Police to follow basic policies and procedures which have been developed to prevent the situation that occurred here. This includes failure to follow its own protocols. Dr. Stamper, relying on his years of experience and training, is adamant that "hitting the wrong door" in and of itself is indicative of negligence.

C. <u>The Defendants Violated Well Established Police Procedures, As Well As The Protocols Established by The Tacoma Police Department In Negligently Preparing to Serve and Then Negligently Serving This Warrant</u>.

Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf. Where the employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable. *Kuehn v. White,* 24 Wash.App. 274, 277, 600 P.2d 679 (1979). Whether or not the employer has any particular relationship to the victim of the employee's negligence or intentional wrongdoing, the scope of employment limits the employer's vicarious liability. However, the scope of employment is not a limit on an employer's liability for a breach of its own duty of care. *Niece v. Elmview Group Home,* 131 Wn. 2d 39, 48, 929 P.2d 420 (1997).

"If an employee conducts negligent acts outside the scope of employment, the employer may be liable for negligent supervision."; *Gilliam v. Dep't of Soc. & Health Servs.,* 89 Wash.App. 569, 584–585, 950 P.2d 20 (1998). "When an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising the employee."; *Briggs v. Nova Servs.,* 135 Wash.App. 955, 966–67, 147 P.3d 616 (2006), *aff'd,* 166 Wn. 2d 794, 213 P.3d 910 (2009); *Rodriguez v. Perez,* 99 Wash. App. 439, 451, 994 P.2d 874 (2000).

> Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior." *Scott v. Blanchet High Sch.,* 50 Wash.App. 37, 43, 747 P.2d 1124 (1987) (quoting 53 Am.Jur.2d *Master and Servant* § 422 (1970)), *review denied,* 110 Wash.2d 1016 (1988).

Niece v. Elmview Group Home, 131 Wn. 2d 39, 48, 929 P.2d 420 (1997).

As established in the Declaration of Norm Stamper, failure to follow established procedures such as surveillance and a controlled buy under tightly strict circumstances is required prior to service of a high risk warrant to avoid 'hitting the wrong door'. Tacoma police failed to perform a controlled buy, failed to conduct any surveillance and relied exclusively on a Confidential Informant. These failures raise genuine issues of material fact regarding whether such conduct rises to the level of negligence by ignoring well established protocol. These failures also raise genuine issues of material fact in evaluating negligent supervision and training of officers in the Tacoma Police Department. And that is a question for a jury to decide.

VI. Qualified Immunity Does Not Shield Defendants When Obtaining a Search Warrant Based Upon False Information Resulting From Failure to Follow Established Procedures. Furthermore, Remaining

on Kathleen Mancini's Premises Crosses the Line Between Mistake and Affirmative Misconduct.

There was no probable cause to search Kathleen Mancini's residence. Officers had the address of the wrong residence due to their failure to conduct a professional investigation and adhere to common and accepted police procedures in preparing to conduct a high risk residential raid. Material fact questions exist as to how long the Tacoma officers stayed on the premises, whether they conducted a search after "immediately" realizing they were in the wrong residence and how long they continued to keep Kathleen Mancini in custody. Ms. Mancini factually contradicts the version of events stated by Officer Smith. Thus, genuine issues of material fact exist regarding the conduct of the officers.

The doctrine of qualified immunity does not extend to a search after the officers "immediately realize" they have hit the wrong door.

> Qualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the wrong residence. A decision by [police] to remain in a residence after they realize they are in the wrong house crosses the line between a reasonable mistake and affirmative misconduct that traditionally sets the boundaries of qualified immunity.

Simmons v. City of Paris, 378 f. 3d 476, 481 (5th Cir. 2004).

Turning to the common law doctrine of qualified immunity, the doctrine applies when an officer "(1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) *acts reasonably.*" (Emphasis added.) *Guffey v. State,* 103 Wash.2d 144, 152, 690 P.2d 1163 (1984), 103 Wash.2d 144, 152, 690 P.2d 1163; *Gurno v. Town of LaConner,* 65 Wash.App. 218, 227, 828 P.2d 49 (1992).

VII. Kathleen Mancini Had A Reasonable Expectation of Privacy When She Was In Her Own Home and Had Committed No Crime. It Was Improper To Dismiss Her Invasion of Privacy Claim As a Matter Of Law.

Invasion of Privacy is a tort that incorporates four separate and distinct types of interests: intrusion, disclosure, false light and appropriation. Prosser *Torts* 808 (4th ed. 1971). Thus, the test for invasion of privacy involving intrusion is, "whether the plaintiff had a reasonable expectation of privacy at the time" of the intrusion. *Jeffers v. City of Seattle*, 23 W. App 301, 316, 597 P.2d 899 (1979). There is no question that Kathleen Mancini had a reasonable expectation of privacy in her own home. Ms. Mancini was sound asleep and minding her own business at the time that Tacoma Police Officers broke down her front door and entered her apartment. In *Eddy v. Moore, Acting Chief of Police*, 5 Wash. App. 334, 487 P.2d 211 (1971) this court stated, "There is a right in equity to protect a person from such an invasion of private rights." *Id.* at 336.

The right of one to be free from intrusion into one's own home is, essentially, as old as our country. It springs from the 'zones of privacy' emanating from the Bill of Rights and in this case, specifically the Fourth Amendment which explicitly affirms the 'right of the people to be secure in their persons, houses, papers and effects'. "The right of privacy [is] older than the Bill of Rights." *Eddy* at 339.

> It is woven into our legal heritage that privacy is a sacred right.
>
> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the

> concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,-it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

These same principles remain true today. At no time has the Invasion of Privacy tort been altered to allow the police wrongful entry to the home of an innocent citizen.

VIII Genuine Issues of Material Fact Exist Regarding Whether Or Not Kathleen Mancini Was Detained After Tacoma Police Officers Should Have Reasonably Known She Was Not Associated With the Felon They Were Seeking. It Was Improper To Dismiss Her Claim of False Imprisonment.

The touchstone of examining facts for purposes of summary judgment is essentially looking at the facts at issue through a prism asking, "Could reasonable minds disagree on what actually happened?" Here, the length of time Kathleen Mancini was detained and whether or not that was reasonable or forms the basis of a false imprisonment claim is a question for the trier of fact. At no time did the trial judge indicate any examination of the facts related to the false imprisonment cause of action.

Generally, the tort of false imprisonment is misusing authority to restrain another's freedom of movement.

> The restraint upon the plaintiff's freedom may also be imposed by the assertion of legal authority. If the plaintiff submits, *or if there is even a momentary taking into the custody of the law*, there is an arrest; and if it is without proper legal authority, it is a false arrest, and so false imprisonment.

Prosser and Keeton *On Torts*, 50-51 (5th ed.) 1984. (Emphasis supplied) While the police enjoy a qualified immunity, that qualified immunity does not stretch beyond what is reasonable. In this case, the Tacoma Police officers continued to detain Kathleen Mancini past the point where it was reasonable to assume that there were any grounds to detain her. (CP 293; 264-267)

Even a jail is liable for false imprisonment if it holds an individual taken into custody by the police and turned over to jailers when a person is held for an unreasonable time after there is a duty to release the individual. *Tufte v. City of Tacoma,* 71 Wn. 2d 866, 872, 431 P.2d 183 (1967). *Tufte* is analogous to the instant matter. In that case Mr. Tufte was jailed because Tacoma police officers believed he was driving while intoxicated. However, their assumptions were invalid. Tufte was diabetic and suffering from insulin shock. Multiple factors indicated that Tufte was not intoxicated and therefore should not have been detained. That decision holds that authorities cannot ignore evidence which establishes that continued confinement of an individual is unjustified.

A false arrest occurs when a person with actual or pretended legal authority to arrest unlawfully restrains or imprisons another person. *Jacques v. Sharp,* 83 Wash.App. 532, 536, 922 P.2d 145 (1996). The gist of false arrest and false imprisonment are evaluated pursuant to the same factual elements: The unlawful violation of a person's right of personal liberty. *Heckart v. City of Yakima,* 42 Wash.App. 38, 39, 708 P.2d 407 (1985).

Ms. Mancini has described being restrained long after officers admit they knew they were on the wrong premises and had custody of an individual who had no connection to the felon they were seeking. Kathleen Mancini estimates she was handcuffed for thirty minutes. (CP 268) Under circumstances such as these, defendants cannot invoke qualified immunity.

> It is available in cases where the officer makes an arrest under a facially valid warrant or process even if there are facts within his knowledge that would render it void as a matter of law; however, it is not available to an officer who provides incomplete information used to obtain the warrant. *Guffey v. State,* 103 Wash.2d 144, 150, 690 P.2d 1163 (1984), *overruled on other grounds by Savage v. State,* 127 Wash.2d 434, 899 P.2d 1270 (1995); *and see Tyner v. Dep't of Soc. & Health Servs.,* 141 Wash.2d 68, 84, 1 P.3d 1148 (2000) (citing *Bender,* 99 Wash.2d at 592, 664 P.2d 492). When the same officer seeks a warrant and executes it, she cannot assert the facial validity of a warrant as an absolute defense to a false arrest or false imprisonment action, although she can still establish a defense to the action by proving the existence of probable cause to arrest. *Bender,* 99 Wash.2d at 592, 664 P.2d 492.

Youker v. Douglas County 162 Wash.App. 448, 465, 258 P.3d 60 (2011).

Here, the Tacoma Police admit they immediately knew they were in the wrong apartment. Genuine issues of material fact exist regarding how long Kathleen Mancini was restrained. The conflicting accounts of the Tacoma Police officers and Ms. Mancini create issues of material fact regarding the length of time Kathleen Mancini was confined and the manner in which she was confined. Pursuant to CR 56, all inferences are to be construed against the nonmoving party. Even in the officer's version of events Kathleen Mancini continued to be held against her will after the handcuffs were removed. During the entire time she was

forced to stand outside her front door, Officer Shipp was with Ms. Mancini. His presence made it clear she was not free to leave. Ms. Mancini's confinement continued until the Tacoma Police left her premises.

IX. **The Defendants Defamed Kathleen Mancini by Publicly Communicating She Had Been Involved In Criminal Activity, Which They Knew to Be False.**

The four elements of defamation are: falsity, an unprivileged communication, fault, and damages." *LaMon v. Butler,* 112 Wash.2d 193, 197, 770 P.2d 1027 (1989). Where the plaintiff is a private figure only negligence must be shown to establish fault. Forcing Kathleen Mancini to stand in public handcuffed as if she were a criminal establishes falsity. There is no privilege attached to this communication. Liability falls squarely on the Tacoma police. Ms. Mancini's Declaration and medical records establish that damage occurred.

A communication can take many forms. Restatement (Second) of Torts§ 563 (1965): "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." The comment implies that a matter may be communicated by some method other than spoken or written words. *See* § 562 comment a. By forcing Kathleen Mancini to stand outside her doorway and parading her around handcuffed in her parking lot in full view of a busy thoroughfare and neighboring apartments, the Tacoma Police defamed Ms. Mancini. They knew she had committed no wrongdoing.

A key to establishing defamation under these circumstances is a showing of negligence on the part of the officers. *McKinney v. City of Tukwila*, 103

Wash.App. 391, 13 P.3d 631 (2000). Kathleen Mancini can establish negligence for reasons stated above. However, on summary judgment, the plaintiff must only establish a genuine issue of material fact. Do to the nature of the publication, Ms. Mancini has established issues of material fact.

X. Due To Kathleen Mancini's Size and Complete Lack of Resistance, As Well As The Officers Knowing They Had Hit The Wrong Door, Treatment of Ms. Mancini Including Keeping Her In Handcuffs Is Assault & Battery

Kathleen Mancini offered no resistance to the Tacoma Police officers who burst into her home. Despite this fact, the officers dragged her out her front door and kept her handcuffed for 30 minutes. The defendants admit that they "immediately" knew they were in the wrong apartment. A battery is "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." Prosser and Keeton *On Torts* § 9, at 39 (5th ed.1984). An assault is any act of such a nature that causes apprehension of a battery. *See* Keeton § 10, at 43. Once the officers knew that they had the wrong person in custody, continuing to keep her handcuffed and restrained constituted assault and battery under the well accepted definition of those terms.

The courts will not "armchair quarterback" an officer's split second decisions. However here, by their own admission, the Tacoma police "immediately" knew they were in the wrong place. Ms. Mancini's assertion that

she was kept in custody for 30 minutes creates genuine issue of material fact regarding whether her treatment by the officers constitutes assault and battery.

> We analyze whether police officers used excessive force by an "objective reasonableness" standard. *Graham,* 490 U.S. at 395–97, 109 S.Ct. 1865; *Garner,* 471 U.S. at 7–9, 105 S.Ct. 1694. We evaluate the conduct from the point of view of reasonable officers on the scene, in light of the facts and circumstances confronting them…..
>
> The conclusion that conduct was reasonable depends on: (1) the severity of the underlying offense; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest. *Graham,* 490 U.S. at 396, 109 S.Ct. 1865.

Estate of Lee ex rel. Lee v. City of Spokane 101 Wash.App. 158, 167, 2 P.3d 979 (2000).

Here, there was no underlying offense, Ms. Mancini posed no threat whatsoever to the officers and provided absolutely no resistance. Whether the officers acted reasonably in this situation is a question of fact and should be reserved for the trier of fact.

XI <u>Genuine Issues of Material Fact Exist Regarding TheApplicability of the Tort of Outrage. Pursuant to the Applicable Summary Judgment Standard It Was Error To DismissThis Claim And It Should Also Be Reserved For the Trier of Fact.</u>

To establish a tort of outrage claim, a plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff. *Dicomes v. State,* 113

Wash.2d 612, 630, 782 P.2d 1002 (1989) (citing *Rice v. Janovich,* 109 Wash.2d 48, 61, 742 P.2d 1230 (1987)). In *Grimsby v. Samson,* 85 Wn.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975), The requirements of these three elements were set forth in In *Grimsby v. Samson,* 85 Wash.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975):

(1) the emotional distress must be inflicted intentionally or recklessly; mere negligence is not enough;

(2) Second, the conduct of the defendant must be *outrageous and extreme....* Liability exists "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;

(3) the conduct must result in *severe emotional distress* to the plaintiff ;

(4) Fourth, the plaintiff must be *present at the time of such conduct.*

Grimsby, 85 Wash.2d at 59-60, 530 P.2d 291 (citing Restatement (Second) of Torts § 46 (1965) and comments thereto).

Applying the facts of this case to the elements of the Tort of Outrage demonstrates that Kathleen Mancini has a cognizable claim of outrage. First, the officers had a full month to determine the correct location and did nothing to seek appropriate information. Secondly, emotional distress was inflicted recklessly

because the officers admit they "immediately" knew they were in the wrong apartment.

The actions of the officers in handcuffing Kathleen Mancini for thirty minutes, forcing her to stand outside barefoot and in her nightgown and refusing to release her even after determining that they were in the wrong apartment is extreme in degree and violates the bounds of common decency. The defendants recklessly inflicted emotional stress. This type of forced entry is meant to leave the inhabitants "terrorized and traumatized". That is the point of this type of "shock and awe" entry serving high risk warrants. (CP 248-249) Finally, the act of deliberately taking Kathleen Mancini up into the parking lot of her apartment complex and parading her around handcuffed, with bare feet on a January morning dressed only in a nightgown was extremely humiliating for Ms. Mancini and any reasonable person would know that.

In sharp contrast, when the same officers went to the correct address they knocked on the door and allowed the resident (who was in fact the felon they were seeking) to calmly open his door. There was no screaming, shouting or pointing weapons. Matthew Logstrom was not thrown face down on the ground. The same officers who kept Kathleen Mancini standing outside in her nightgown allowed the actual drug dealer, Matthew Logstrom, to sit on his couch while waiting for officers to obtain the correct search warrant. Finally, the conduct of the officers caused Ms. Mancini extreme emotional distress which is evident from the records of the therapist she turned to for help. (CP 358-360) The element of needing to be present is not in question.

The more facts that are revealed in this matter the more the Tort of Outrage is applicable. Whether the elements of the Tort of Outrage are satisfied is a community standard. As such, our community, represented by a jury of Ms. Mancini's peers, are the people uniquely qualified to comment on the Tort of Outrage and this cause of action is properly reserved for a jury.

XII. The Trial Judge Abused His Discretion When He Ruled That Kathleen Mancini Would Be Prevented From Presenting Medical Opinions At Trial Through the Testimony of Her Treating Health Care Providers. The Plaintiff Disclosed Sufficient Information Regarding Treating Medical Providers In Her Witness Lists.

Abuse of judicial discretion has been the subject of many scholarly articles and is a concept that does not fit into a neat package. *Bouvier's Dictionary* defines judicial discretion as, "The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the care are controlled by the personal judgment of the court." In *Coggle v. Snow*, 56 Wash. App 499, 784 P.2d 554 (1990) this court analyzed the meaning of "judicial discretion" and sought to disabuse commentators of the notion that it is based on the "reasonable man" standard. Coggle concluded that, "The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *Id.* at 507.

State ex rel. Carroll v. Junker, 79 Wn. 2d 12, 482 P.2d 775 (1971) addressed the subject of judicial discretion noting that it emphatically is not the "reasonable man" standard.

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously…

Junker at 506-507.

Coggle v Snow, supra., distills the concept: "The primary consideration in the trial court's decision [on a CR 56(f) motion for continuance] should have been justice." *Coggle* at 508. In that case the plaintiff had just obtained new counsel who had signed on a week after the summary judgment motion had been filed. Coggle's new counsel moved for a continuance, identifying evidence he intended to seek and explaining declarations that would rebut the defense expert's opinions. The trial court denied the motion, however this court gave an insightful example of abuse of judicial discretion.

> Snow has not argued that he would have suffered prejudice if the court had granted a continuance, nor do we perceive any prejudice. We cannot discern a tenable ground or reason for the trial court' decision. We hold that the trial court improperly exercised its discretion in denying the motion for continuance.

Coggle at 508.

In the instant matter the trial court made two rulings in which it abused its discretion. In a ruling on naming witnesses, the trial judge ordered that Kathleen

Mancini's treating health care providers could not offer an opinion at trial. This ruling was made despite the fact the Ms. Mancini had been timely in her witness disclosures and the court did not appear to take into account CR 26(b)(7) or the plaintiff's diligence in disclosing her treating health care providers. Thus his decision was made on untenable grounds for untenable reasons.

A. Treating Health Care Providers Are Not Considered Experts Because They Have Not Developed Opinions In Anticipation of Litigation.

In essence, the defendant proposed to the trial court that it adopt a rule which converts all treating health care providers into "expert" witnesses. That is not the law in this jurisdiction and has never been the law in this jurisdiction.

First, CR 26(b) controls this issue and there are two separate categories for Experts (b)(5) and Treating Health Care Providers (b)(7). Experts are those witnesses who have "*acquired or developed opinions in anticipation of litigation.*" CR 26(b)(5). (Emphasis added) The controlling case is *Peters v. Ballard,* 58 Wash. App. 921, 795 P.2d 1158 (1990). In that case the court ruled that a treating physician is not an expert even when he was designated an expert.

> Although Peters originally designated him as an expert and Dr. Kranz considered himself an expert, that alone is insufficient to qualify him as an expert under CR 26(4). Dr. Kranz' knowledge and opinions were derived from his role as Peters' subsequent treating physician, not in anticipation of litigation or for trial. Accordingly, Dr. Kranz should be treated as any other witness.
>
> *Id.* at 930.

Even when an expert is identified as such, the court may treat the expert as a fact witness. The designation is dependent upon the parameters of the expected testimony.

> A witness who would otherwise qualify as an expert but who was not retained in anticipation of litigation and instead will be testifying on the basis of personal involvement in the case at hand, is often termed a fact expert or an occurrence expert, also sometimes called an actor or viewer or non-CR26 (b)(4) expert. Treating physicians are a common example.
>
> For CR 26 purposes, the test for whether a witness is an expert witness or a fact witness is whether the facts or opinions possessed by the expert were obtained for the specific purpose of preparing for litigation. The mere designation by a party is not controlling. *Peters v. Ballard*, 58 Wn. App. 921 (Div. 1 1990)
>
> For instance, because an expert who was not going to be called was actually testifying as a fact witness, his notes were discoverable. *In Re Aqui*, 84 Wash. App. 88, 100, 929 P.2d 436 (1996).

Tegland, WA *Handbook of Courtroom Evidence,* sec. 39.5 (2013 ed.)

Kathleen Mancini did not retain any expert physician or health care provider. She timely provided the defendants with the contact information for her treating health care providers in interrogatories and her witness list. What the defense proposes is an attempt to obtain the observations of health care providers in advance and, apparently, skip taking depositions.[9] As a practical matter, some plaintiffs see a dozen or more health care providers. The rule the defense is asking this court to adopt is that every professional who came in contact with

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Kathleen Mancini regarding the incident at issue would instantly be converted into an expert.

This could include: emergency medical personnel, the emergency room physician and other personnel who initially treated the plaintiff, every physical therapist that the plaintiff ever saw, the chiropractor that the plaintiff may have seen one time, each and every physician, physician's assistant or nurse that the plaintiff sees at any given clinic—the list goes on. If the health care provider overlooked sharing an observation or opinion with plaintiff's counsel in preparing the Witness Disclosures, then the plaintiff would face sanctions for improperly repeating that health care provider's observations. In addition, this approach ignores CR26(b)(7) the rule that specifically addresses the role of treating health care providers as opposed to experts.

Defense counsel complained that she "should not be required to bear the burden and expense of depositions to obtain information…." Depositions are a common discovery tool. What defense counsel is asking is that the plaintiff interpret what her health care providers tell her, interpret her own medical records and the defense proposes to rely on her interpretation instead of taking depositions. The plaintiff should not bear the burden of providing information in lieu of a deposition. In the instant matter the three health care providers—a treating physician, a massage therapist and an PTSD counselor were all timely disclosed along with the appropriate contact information.

The trial Court struck any opinion testimony that the plaintiff might

solicit from her health care providers. This means the treating therapist could not testify that Ms. Mancini has PTSD or that it is the result of this incident. That therapist was disclosed in interrogatories, the first witness list as well as a Supplemental Witness list. In order to strike witnesses the trial court is obligated to conduct a *Burnett* analysis of considering lesser sanctions. *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 933 P.2d 1036 (1997). This requires a meaningful analysis, not the court simply stating that it has considered *Burnet*. *Jones v. City of Seattle*, 179, Wn. 2d 322, 314 P.3d 380 (2013). The court must conduct a three pronged analysis that includes willfulness, prejudice and lesser sanctions. Writing on line in an Order unaccompanied by oral argument that *Burnet* has been considered does not satisfy the *Burnet* test. (In *Jones v. Seattle* the supreme court noted the trial judge had conducted 9 colloquies on the subject of witness exclusion.)

Any claim by the defense that it was prejudiced in any way by the plaintiff's witness disclosures is hollow when the defendants never attempted to depose the treating health care providers. The testimony of the three treating health care providers should proceed on two grounds: (1) The testimony of treating health care providers is not expert testimony; and (2) Even if this court believes that the three providers are experts, the plaintiff has met the requirements of KLCR 26(k)(3)(C).

Kathleen Mancini has been completely forthcoming about her injuries. She stated in her interrogatories that she had bilateral shoulder strain from being handcuffed as well as PTSD as a result of this incident. She first named her health care providers in interrogatories and testified at length regarding her injuries and health care at her deposition on August 6, 2012. In an abundance of caution, the plaintiff named these same treating providers a second time in the Supplemental Witness Disclosure which was filed in an abundance of caution.

B. <u>The Testimony of the 3 Treating Health Care Providers Named By Ms. Mancini Is Not Expert Testimony Pursuant to Washington Law.</u>

The defense confuses the state court rule and the federal court rule. Disclosure under the federal rule is governed by FRCP 26(E)(2):

> *Disclosure of Expert Testimony.*
>
> (A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

However, under the Washington court rule 26(b) experts and treating health care providers are treated differently. CR 26(b)(5)(A-C) addresses discovery and disclosure of experts. CR 26(b)(7) addresses Discovery From Treating Health Care Providers, thereby distinguishing experts from treating doctors and other health care providers. In fact, under Washington law, medical testimony is not required at all unless "an injury involves obscure medical factors

that would require an ordinary lay person to speculate or conjecture in making a finding." *Bruns v. PACCAR*, Inc. 77 Wn. App. 201, 214, 890 P.2d 469 (1995). The key is the "nature of the injury" and expert medical testimony is not necessary to prove a causal relationship between an event and a subsequent condition when the matter is within the ordinary lay person's knowledge. *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 245, 722 P.2d 819 (1986).

The rule that the defense urges this court to adopt is that every single medical provider is an expert witness as opposed to a treating health care provider. This is an incorrect interpretation of the state rule. Criteria for distinguishing expert medical witnesses from treating health care providers is well established pursuant to Washington case law. Furthermore, the plain language of CR 26(b) regarding experts makes it clear that treating health care providers are not considered experts because experts are retained specifically to acquire or develop opinions in anticipation of litigation. None of the 3 health care providers who treated Kathleen Mancini fits that description.

C. Kathleen Mancini Disclosed Her Treating Health Care Providers As Experts In An Abundance of Caution. She Provided Their Anticipated Testimony And Is Not Required To Repeat That Anticipated Testimony Word For Word.

Kathleen Mancini provided the defendants with the anticipated testimony of her 3 health care providers as expert testimony in an abundance of caution. She provided the defense with that anticipated testimony and satisfied the

requirements set forth in KLCR 26(k)(3)(C) which requires a "summary of the expert's opinions". Should this court rule that every treating health care provider be treated as an expert then Ms. Mancini has also met the requirements of the expert witness disclosure.

The so-called 'expert' witness disclosure describes the anticipated testimony of the 3 treating providers summed up as:[10]

> Dr. Quick will testify as to how he applied his medical knowledge to his examination of Kathleen Mancini shortly after the events described in plaintiff's Complaint. Dr. Quick will testify as to.....what injuries she sustained...causation and whether or not those injuries are consistent with being handcuffed..... his observations of Kathleen Mancini...his diagnosis...and why in his medical opinion Ms. Mancini needed further care....Dr. Quick will testify as to the reasonableness and necessity of Group Health's treatment and accompanying bills.....

Massage therapists cannot diagnose. Therefore, the anticipated testimony of the massage therapist is described as:

> ....will testifies [sic] to her background and training...describe the treatment of injuries [for Kathleen Mancini] ...and may testify as to the reasonableness and necessity of her bills....

And finally, Elizabeth Daniels, the Licensed Mental Health Counselor:

> ....will describe....her background in treating PTSD....her diagnosis of Ms. Mancini as having PTSD and the reasons therefore. She will testify as to causation and the relationship between the events described in plaintiff's Complaint and Ms. Mancini's emotional state....the reasonableness and necessity of her treatment and the accompanying medical bills.....

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[10] The anticipated testimony has been distilled for the court but is contained in its entirety in the Supplemental Witness Disclosure. (CP 141-145)

Put simply, the plaintiff satisfied KCLR 26 and is not required to provide anything beyond the boundaries of that rule. Finally, the purpose of expert witness disclosure was enunciated in *Lancaster v. Perry*, 127 W. App. 826, 113 P.3d 1(2005):

> The purpose of the case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion. Allowing disclosures to be made in the manner suggested by Perry, in the absence of good cause that is not present here, would frustrate the purpose of the scheduling rules.

Ms. Mancini satisfied all requirements of witness disclosures under state and local rules. Furthermore, the purpose of the case schedule is to prevent 'trial by ambush' so that all parties have adequate time to prepare. The trial court provided the defense an extra 45 days to add to its expert witness disclosure even though defendants could not articulate any actual prejudice. The essence of the discovery rules and witness disclosures is so that no party is prejudiced in putting on their case. The defense has suffered no prejudice in preparing its case.

XIII The Trial Court Abused Its Discretion When It Ordered Ms. Mancini to Collect 11 years of Group Health Records At a cost of $715.23 and Provide Them Free of Charge To the Defense. This Is An Access To Justice Issue With Far Reaching Implications.

The trial judge also abused his discretion when he ordered Kathleen Mancini to pay for irrelevant Group Health records and give them to the defense

free of charge. This was essentially a sanction, apparently because the defendants were having difficulty crafting an appropriate subpoena to obtain Ms. Mancini's medical records. Our courts are mandated to make Access to Justice a priority. Forcing a plaintiff to shoulder the financial burden of the defendants' discovery strikes at the very heart of Access To Justice.

The trial judge specifically ordered Ms. Mancini to perform discovery on behalf of the defendant and absorb that cost. Plaintiff's counsel provided the trial court with the proposed invoice demonstrating that the Group Health records alone would cost Ms. Mancini $715.23. (CP 125) Plaintiff's counsel would never squander her client's financial resources in such an inappropriate manner by ordering irrelevant records. Only one doctor visit was relevant. However, the court ordered Ms. Mancini's counsel to obtain frivolous records at her client's expense.

The plaintiff should not have to bear that financial burden simply because the defense counsel would not cooperate in signing the medical stipulation and wanted to rummage through Ms. Mancini's entire Group Health medical history. Furthermore, the plaintiff should not have to pay to provide counseling records that had already been provided to counsel to the defendants.

In reality, the trial court ordered the plaintiff to conduct discovery on behalf of the defendant and pay for that discovery. There is no court rule granting a trial judge to compel a litigant to gather her own records and turn them over to

the defendants for free. In fact, CR 1 states the Civil Rules "shall be construed and administered to secure the just, speedy, and *inexpensive* determination of every action." [emphasis added] If allowed to stand, this ruling severely and negatively impacts access to justice. For instance, if a trial judge rules that a pro se litigant has pay for records just because the defendant wants to look through them, it will have a chilling effect on an ordinary citizen's ability to pursue a case.

Essentially, the trial judge shifted the burden for discovery onto the plaintiff. This is a slippery slope and could be devastating to pro se litigants. If the plaintiff has to obtain all the medical records that the defense wants to review—whether relevant or irrelevant—shifting the burden of obtaining and paying for the records will have a sharp and negative impact on our mandate of access to justice. Rulings of this nature shut the doors to the courthouse for ordinary citizens who under our system of law are granted access to our courts.

A. The Plaintiff Should Not Bear The Substantial Financial Burden of Gathering Medical Records on Behalf of Defendants. Defense Counsel Refused To Cooperate With Conditions of A Medical Stipulation And Misrepresented To the Court That Defendants Had Been Unable To Obtain Certain Records.

The trial court ordered Kathleen Mancini to collect all of her medical records from three separate health care providers and give them to the defense. This was despite the fact that the defense counsel was already in possession of the records of therapist Elizabeth Daniels. (CP 121) Counsel for defendant

misrepresented to the trial court that she had been unable to obtain the records of therapist Elizabeth Daniels.

The plaintiff offered to provide medical stipulations to the defense under certain conditions. (CP 13) One of those conditions was that defendants provide copies of everything gathered at a cost of 10 cents per page. The defendant refused, under a novel theory that this would somehow be unconstitutional because the statutory fee is higher than 10 cents per page.[11] (CP 14-15) In an attempt to cooperate with defendants, plaintiff's counsel suggested that the defense download all of the records to a disk and provide the disk to plaintiff's counsel. (CP 13; 16) The defense still refused. Having rebuffed efforts at cooperating, the defense proceeded without executed medical stipulations and went about gathering records from the three health care providers involved by utilizing records depositions. The plaintiff did not interfere in any way with the production of medical records via these records depositions.

B. <u>The Trial Court Abused Its Discretion In Ordering Kathleen Mancini To Conduct Discovery on Behalf of the Defendants And Further Abused Its Discretion if Ordering Her to Pay the Cost of that Discovery.</u>

The defense sought 11 years of Group Health records, even though Kathleen Mancini testified in her deposition that she saw her primary care provider one time for the injuries she sustained at the hands of the Tacoma Police.

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[11] That argument is a red herring since the defense could have taken the records to a copy center and had them reproduced for less than 10 cents a page. Furthermore the condition of requesting copies in this manner is a common practice.

CR 26(b)(1) governs in this instance. That rule states, "Parties may obtain discovery regarding any matter, not privilege, which is *relevant to the subject matter involved in the pending action…..*" The defendants were trying to obtain every single health care record generated with regard to Kathleen Mancini over the last 11 years. Ms. Mancini's injury claims were a bilateral shoulder strain and PTSD. She has no history of shoulder problems or mental health issues. In this instance the trial court ordered the plaintiff to obtain and pay for irrelevant discovery on behalf of the defendant.

Counsel for Group Health apparently found the defendants' subpoena deficient in some manner and would not release the records. Rather than attempt to work out a satisfactory subpoena, the defendants made a motion to the trial court requesting an Order that Kathleen Mancini gather the records and provide them to the defense. Plaintiff's counsel vigorously opposed the motion.

The trial judge specifically ordered Ms. Mancini to absorb the cost of the defendants' discovery. Plaintiff's counsel provided the trial court with the invoice demonstrating that the Group Health records alone would cost Ms. Mancini $715.23. (CP 125) The plaintiff should not have to bear that financial burden simply because the defense counsel would not cooperate in signing the medical stipulation and wanted to rummage through Ms. Mancini's entire Group Health medical history. Furthermore, the plaintiff should not have to pay to provide counseling records that had already been provided to counsel to the defendants.

The purpose of discovery is to prepare a case for trial. *Rhinehart v. Seattle Times, Company*, 98 Wn.2d 226, 654 P.2d 673 (1982). Furthermore, "...the trial court exercises a broad discretion to manage the discovery process in a fashion that will implement the goal of full disclosure of relevant information and at the same time afford participants protection against harmful side effects." 4 J. Moore, *Federal Practice* Sec. 26.67 at 26-487 (2d ed. 1982). Being ordered to obtain records on behalf of the defendant and then shoulder the accompanying financial burden created a harmful side effect for the plaintiff.

The trial judge abused his discretion in ordering Kathleen Mancini to obtain and pay for her medical records. Abuse of discretion was analyzed in *T.S., M.S., K.S. v. Boy Scouts of America*, 157 Wn.2d 416, 128 P. 3d 1053 (2006).

> *Standard of Review.* An appellate court reviews a trial court's discovery order for an abuse of discretion. *John Doe v. Puget Sound Blood Ctr.,* 117 Wash.2d 772, 778, 819 P.2d 370 (1991). Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *State ex rel. Clark v. Hogan,* 49 Wash.2d 457, 462, 303 P.2d 290 (1956). An appellate court will find an abuse of discretion only "on a clear showing" that the court's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich,* 149 Wash.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is " 'manifestly unreasonable' " if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable

> person would take.' " *Id.* (quoting *State v. Lewis,* 115 Wash.2d 294, 298–99, 797 P.2d 1141 (1990)).

Id. at 423-424.

Pursuant to CR 26(c) "the trial court has the power to craft discovery orders that permit a variety of restrictions, when *for good cause shown, justice* requires [an order] to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." *Doe v. Puget Sound Blood Center*, 117 Wn. 2d 772, 777, 819 P.2d 370 (1992). (Italics in original) While plaintiff's objection did not rest on CR 26(c) surely the admonishment not to unduly burden a litigant applies in discovery beyond the issue of protective orders. Furthermore, CR 26(b)(7) plainly states:

> *Discovery from Treating Health Care Providers.* ***The party seeking discovery*** from a treating health care provider ***shall pay*** a reasonable fee for the reasonable time spent in responding to the discovery. (emphasis added)

Ms. Mancini was not the person seeking discovery and should not have been ordered to pay for the defendants' discovery. The trial court created an order which unduly burdened the plaintiff. The trial judge had an opportunity to revisit the ruling and denied Kathleen Mancini's Motion for Reconsideration on the issue. (CP 32-35; 79-80)

It is not unusual for defendants to adopt the posture that they need to review nearly every medical record ever generated on an injured plaintiff. Many

such requests can be challenged on the basis of relevancy pursuant to CR 26(b)(1). However, the twist of having the plaintiff assume the financial burden for the defendants to rummage through irrelevant medical history is unduly burdensome. These records contain 11 years of gynecological history—and Kathleen Mancini was claiming strained shoulders and PTSD. It was an undue burden and an abuse of discretion for the trial court to order Ms. Mancini to gather irrelevant medical records on behalf of the defense and then make her pay for them. It was the responsibility of the defendants to work with counsel for Group Health to craft a subpoena and gather the records—and pay for them—through the procedural device of a records deposition

XIV. Remand, Request for Different Trial Judge And Attorneys Fees

This case should be remanded for trial. Granting summary judgment in this matter on any of the causes of action was error as a matter of law. Applying the CR 56 standard, multiple genuine issues of material fact exist in this case.

This court has the authority to remand a case to a different trial judge when it is clear that the original trial judge has pre-determined the outcome. *See State v. Sledge*, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997); *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995). The trial judge abused his discretion in his rulings limiting medical testimony and ordering the plaintiff to

conduct discovery for the defendant while also bearing the costs. He made both decisions on untenable grounds for untenable reasons.

Appellants' counsel requests attorneys fees and costs pursuant to RAP 18.1.

Conclusion

Applying the CR 56 standard, multiple genuine issues of material fact exist in this case. These include how long the Tacoma police were in Ms. Mancini's apartment, the amount of time she was handcuffed and how visible she was to passersby. The order granting of summary judgment should be stricken and this case remanded for trial for trial on the merits.

Furthermore, the order directing the plaintiff to gather all of her medical records on behalf of the defendant and absorb the copying and shipping costs should be stricken. That order was an abuse of discretion by the trial judge. The order preventing the plaintiff from presenting any opinion testimony through her treating health care providers should also be stricken. The plaintiff properly provided a Witness list identifying her treating health care providers. The judge abused his discretion and wrongly concluded that the information provided by the plaintiff was insufficient.

Kathleen Mancini deserves her day in court and a fair trial.

Respectfully submitted this 6th day of November, 2014.

Lori S. Haskell WSBA #15779
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2014, I caused a true and correct copy of Amended Appellant's Brief be served in the manner indicated below:

Court of Appeals, Division 1 One Union Square 600 University St Seattle, WA 98101-1176	[ ] U.S. Mail [ ] Hand Delivery [ ] emailed [X] ABC Legal Services
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I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 7th day of November, 2014 at Seattle, Washington.

Carol Erbeck
Legal Assistant to Lori S. Haskell

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