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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.

APPELLANT'S REPLY BRIEF

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

Lori S. Haskell, WSBA #15779
936 N 34th St. Suite 300
Seattle, WA 98103
(206) 816-6603
Attorney for Appellant

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A. Issues Presented For Reply

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6. Whether the Failure of the Trial Court to Specifically Apply a *Burnet* Analysis On the Record Is Fatal To the Sanction of Striking Ms. Mancini's Medical Testimony.

B. Reply To Respondent's Statement Re: Evidence.

The Respondents attempt to paint the Tacoma Police Officers involved in this case as diligent fails. The facts demonstrate they chose to rely solely on the identification by a CI (Confidential Informant) who was inexperienced and so unreliable she has never been used again. (CP 333)

The Respondents recite a long history about "Matt" the person they actually sought but offer only a cursory review of what they actually did to determine if Matt lived at the address of Kathleen Mancini. The Tacoma police apparently did not look for an address associated with "Matt's" registered vehicle, did no research to determine the name of Matt's mother and do not claim to have even discussed the subject of whether Matt lived with his mother during their interactions with the CI.

In fact, the sole investigation that the Tacoma police performed was to drive an admitted drug user, who had participated in only two other cases, past the apartment complex where Kathleen Mancini lived and ask her to point out where she had seen drugs. Respondents admit that in 95% of their cases they perform a controlled buy as well as surveillance on the suspect's residence to corroborate the appropriate address. (CP 336) Respondents deliberately withheld this information from the judge issuing the warrant. They failed to disclose the information regarding the address was unsubstantiated and that they had relied solely on the account of a drug user to identify the address. [1]

C. Argument In Reply

1. This Is Not A Negligent Investigation Claim and Negligent Investigation Was Never Pled. The Tacoma Police Correctly

[1] In fact, the warrant application appears to deliberately mislead the issuing judge. It recites in detail previously using this CI to make a controlled buy yet fails to reveal that no such corroboration was utilized in this matter. (CP 688)

Identified the Person They Intended to Arrest. However, They Were Negligent In Failing To Follow Established Protocol To Ensure They Were Entering The Appropriate Residence.

The defense attempts to mislead this court by stating that "the trial court dismissed plaintiff's negligent investigation claim" on a motion for partial summary judgment. [Respondent's brief P 15] That is impossible. The plaintiff never made a negligent investigation claim so obviously it cannot be dismissed. (CP 1-9) The claim before the trial court, one of negligence in carrying out a procedure to assure ***the subject identified in the investigation*** is the same subject whose home they entered.
The Tacoma Police admit they violated their own protocols for identifying the correct residence prior to unleashing a SWAT team which broke down Kathleen Mancini's door. As a result, Ms. Mancini asserts that the Tacoma Police were negligent in carrying out their duties. Ms. Mancini bases her negligence claim on failure to properly identify the residence of the person the police were actually seeking. This resulted in a drug raid on the wrong apartment.

In fact the defendants admit they have established protocols for identifying the correct abode prior to requesting a search warrant and failed to implement those protocols. One such protocol is surveillance of the suspected residence. A second is observing a CI (Confidential Informant) go into the residence and make a controlled buy. Those

protocols are in place to prevent exactly what happened here—hitting the wrong door. The officer in charge admits that his SWAT unit failed to substantiate information. Such failure is negligence on the part of the defendants.

Negligence is established by three factors: (1) duty; (2) breach and (3) damage.[2] All three are present here and all three are applicable to the Tacoma Police. The defendant cannot escape simple negligence by claiming that it cannot be held accountable for its own negligent actions.

The defense cites multiple cases involving negligent investigation and attempts to pigeonhole Kathleen Mancini's claims in a failed attempt to convince this court uphold the dismissal of those claims. First, there is no record that the trial court found this to be a case of negligent investigation. (CP 84-86) Secondly, the defendant lists a series of 'negligent investigation' cases which are easily distinguishable from the instant matter. By citing irrelevant cases the defendant fails in its attempt to mask a key distinguishing factor: The Tacoma Police conducted an appropriate investigation to identify the drug dealer they sought to arrest. The negligence committed was failing to identify the correct address. By their own admission, defendants abandoned well-established protocols in

[2] *Pedroza v. Bryant,* 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

preparing and proceeding with a drug raid. The defendants were negligent in obtaining and carrying out the service of the search warrant.

2. <u>Not A Single Negligent Investigation Case Cited By the Defense Is Consistent With the Facts in This Matter.</u>

The defendants cite multiple negligent investigation cases, none of which is on all fours with the facts in the matter before this court. The legal theory underpinning the fact that negligent investigation is not a viable cause of action for law enforcement officers is simple: We cannot hamstring law enforcement in identifying perpetrators of criminal acts by having the threat of "negligent investigation" hanging over their heads. That would expose law enforcement officers to potential claims any time a criminal defendant is arrested and acquitted or charges are dismissed.

Each and every case cited by the defendants is distinguishable. *M.W. v. Dept. of Social And Health Services,* 149 Wn.2d 589, 70 P.3d 954 (2003) establishes that negligent investigation can only be applied in a narrow group of cases that involve RCW 26.44.050 which applies to DSHS investigations. *Laymon v. Department of Natural Resources*, 99 Wn. App. 518, 994 P.2d 232 (2000) involved a failed construction project due to misidentifying a nest as an eagle's nest. *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000) involves negligent investigation under the specific statutory exception referred to above; *Corbally v. Kennewick*

School District, 94 Wn. App. 736, 973 P.2d 1074 (1999) concluded that there is no negligent investigation cause of action for a school teacher suing the school district where he teaches; *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992). *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991) arose from an arson investigation which identified a specific individual as responsible for an arson who was later cleared of any wrongdoing.

In *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995) the plaintiff was acquitted of second degree murder. Again, this case emphasizes that negligent investigation is not a viable cause of action against law enforcement officers. None of these cases is applicable to the fact pattern before this court.

3. <u>The Defense Attempts To Create A Scenario Where A Citizen Has No Recourse When the Police Are Negligent In Carrying Out Duties.</u>

If law enforcement officers are not held accountable when they ignore protocol and negligently carry out their duties then there is absolutely no incentive to ensure that arrests are carried out appropriately. Without such accountability, there is no reason to develop departmental protocols or substantiate information. In the world the defense urges this court to create, ordinary citizens would have no recourse when officers fail

to take the steps necessary to prevent harm caused by their negligent actions.

An important distinction in the facts before this court is that if Tacoma Police had identified Kathleen Mancini as the drug dealer, arrested her and she was then exonerated, Ms. Mancini would not be able to pursue a claim under Washington law. However, that is not the scenario before this court and the distinction is significant. In the instant matter the investigation had been completed. It was how the warrant was obtained that creates Kathleen Mancini's cause of action which is one for negligence as opposed to negligent investigation.

4. <u>The Tacoma Police Owed A Duty of Care to Kathleen Mancini When They Obtained a Warrant To Search Her Apartment. This Duty of Care is Part of Common Law Negligence and Municipalities Are Liable for Common Law Negligence.</u>

The defendants misstate the law when they assert that common law negligence does not apply to traditional government functions and misconstrue the exhaustive analysis contained in the concurrence in *Munich v. Skagit Emergency Communications Center,* 175 Wn. 2d 871, 288 P.3d 328 (2012). The defense strains to extrapolate that *Munich* focuses on premises liability which grossly misstates that opinion. In tracing the history of the public duty doctrine, Justice Chambers stated, "This court has never held that a government did not have a common law

duty solely because of the public duty doctrine". *Munich* at 886. Pursuant to statute, governmental entities are liable for damages arising out of tortious conduct. *RCW 4.92.090.*

The defendants wrongly focus on the public duty doctrine to shield the Tacoma Police from negligent acts. That reliance is misplaced. "In fact, the public duty doctrine is simply a tool used to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business. *Munich* at 885.

5. Whether The Tacoma Police Were Negligent is a Question of Fact Properly Reserved for the Trier of Fact. Dismissing the Negligence Claim on Summary Judgment Was Improper. The Public Duty Doctrine Does Not Shield Defendants From Responsibility for Negligent Conduct.

This appeal arises from grant of a summary judgment by the trial court. Therefore, the issue on appeal is whether genuine issues of material fact exist regarding the causes of action dismissed as a result of the trial court's sweeping dismissal of all of the plaintiff's tort claims. The primary question is whether the acts of the Tacoma Police rise to the level of negligence. Thus, it is for the trier of fact to analyze the traditional factors of duty, breach and injury. The trial court improperly denied Kathleen Mancini's right to have her causes of action decided by a jury. Furthermore, the trial court provided no guidance regarding what it relied upon in granting summary judgment. (CP 84-86)

The defense seizes on the issue of the public duty doctrine. However, to stretch that doctrine to the point that law enforcement has no accountability for its own negligence misinterprets the public duty doctrine. That doctrine is not a shield against any and all negligent acts committed by the government. The public duty doctrine applies when there is a duty to enforce specific statutes. The public duty doctrine does not apply in a fact setting that involves common law negligence. The Respondents misinterpret this key fact: Police officers are still accountable for committing common law negligence. Thus, Kathleen Mancini does not have to prove a 'special relationship' between herself and the arresting officers.

Turngren v. King County, 104 Wn. 2d 293, 705 P.2d258 (1985) is instructive on the issue of liability. In *Turngren,* as in the instant matter, the same police officer obtained a search warrant and carried out that warrant. The informant, Smith, provided the police with false information. Based upon this information, the lead officer obtained a search warrant and a SWAT team raided a house with no connection to the firearms and weapons being sought. In its opinion, our supreme court wrote:

> Instead of obtaining independent corroboration of Smith's claims, the officers simply obtained repeated descriptions from Smith of what he saw in the house. The

> minimal investigation conducted revealed facts which contradicted Smith's claims…

Id. at 298.

Turngren relied in part on *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983). In that case, the opinion emphasized that liability may attach if the same officer "provides information to obtain the warrant and then also executes the warrant." The court reasoned that when one officer controls both functions, he is not merely fulfilling an order but is controlling the flow of information. That is precisely what officer in charge, Kenneth Smith did in the instant matter. (CP 311) Furthermore, the *Turngren* court took a dim view of the failure to substantiate information prior to applying for a search warrant noting that,

> ….the detectives obtained minimal independent corroboration of the informant's story. Prior to applying for the warrant, the detectives verified that someone named "Keith" lived in the *Turngren* residence, but no further independent investigation of the material facts was made.

Turngren at 308.

Here, as in *Turngren*, the same officer interviewed the confidential informant, drove her by the Mancini apartment, applied for the search warrant and led the raid. There is no indication that the officer informed the court that his drug unit failed to conduct any surveillance, failed to conduct a controlled buy and failed to conduct any corroboration that the

warrant identified the correct address. Even the dissent in *Turngren* concedes,

> There is no immunity from tort liability when the same police officer provides unreliable information or withholds material information to obtain a search warrant and then also executes the warrant…if there is a genuine issue about providing unreliable information or withholding material information, a jury question exists.

Turngren at 313 citing *Bender v. Seattle*, *supra*.

Thus both the *Turngren* and *Bender* opinions distinguish the non-existent tort of "negligent investigation" as it pertains to a citizen arrested as opposed to the duty to verify salient facts before breaking down the door of an innocent citizen and restraining her at gunpoint.

6. <u>Genuine Issues of Material Fact Exist Regarding Whether or Not The Intrusion Into Kathleen Mancini's Home Violated Her Privacy. A Negligently Obtained and Executed Warrant Does Not Shield the Defendants From Liability.</u>

Respondent's brief inaccurately reasons that since the Tacoma Police had a warrant to search Kathleen Mancini's apartment there can be no colorable invasion of privacy claim. This reliance is misplaced. As Ms. Mancini sets forth above, the defendants cannot rely upon a negligently obtained warrant to escape liability for their actions and failure to substantiate information. First, the defendant obtained a warrant by withholding salient information from the issuing judge. That failure to be resulted in defendants "hitting the wrong door" and busting into Kathleen

Mancini's apartment. That act is an intrusion and a matter for the trier of fact to determine if it violated Kathleen Mancini's privacy. The existence of a search warrant does not preclude an invasion of privacy claim and the respondents cite no cases with similar facts to uphold that sweeping assertion.

Secondly, genuine issues of material fact exist as to whether or not the officers "sweep" of Ms. Mancini's apartment further violated her right to privacy. The officers admit they "immediately" realized they were in the wrong apartment. After this immediate realization, the SWAT team conducted a search of Kathleen Mancini's premises. The parties offered dramatically differing accounts of the length and extent of that search. Ms. Mancini states that the officers were in her apartment for at least 30 minutes and gave a detailed description of items in her home that had been disturbed when she was allowed to re-enter. On the other hand, the SWAT team members, while admitting there was a sweep of the premises, state they were in the apartment for approximately "two minutes". Dr. Stamper provided sworn testimony that a sweep could not be conducted in the time described by the officers.

These are genuine issues of material fact properly reserved for the trier of fact regarding whether or not Kathleen Mancini had a reasonable expectation of privacy in her own home. It has been held that, "...a

warrantless search of a home qualifies as a physical intrusion into a place where the plaintiff has secluded himself." (citing RESTATEMENT § 652B)); *Younker v. Douglas County* 178 Wash.App. 793, 799, 327 P.3d 1243 (2014). The defendants entered Ms. Mancini's home with an invalid warrant. She was asleep in her own home at the time of the raid, a place that has traditionally been held sacred in our jurisprudence in evaluating the expectation of privacy. The right of privacy is considered sacred. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Kathleen Mancini had a reasonable expectation of privacy that was violated—by the Tacoma Police battering her door down in the first place and secondly by remaining on the premises and searching her apartment after acknowledging they were in the wrong apartment.

7. Genuine Issues of Material Fact Exist Regarding Whether or Not Kathleen Mancini Was Falsely Imprisoned And Therefore It Was Improper to Dismiss This Cause of Action on Summary Judgment.

Throughout its brief, the Respondent ignores the applicable standard in this matter and that is whether genuine issues of material fact exist. In particular this failure is fatal to Respondent's defense regarding the claim of false imprisonment. The Incident Report filed by the officers who carried out this raid states they "immediately" knew they were in the wrong apartment due to the description the confidential informant had

given them. SWAT team members still forced Kathleen Mancini face down, pointed guns at her and handcuffed her.

The testimony of the officers and Kathleen Mancini sharply diverge at that point. The officers claim they looked around, knew they were in the wrong house and took the handcuffs off Kathleen Mancini within approximately 1 minute.[3] (CP 703-704) However, Ms. Mancini is adamant that she was handcuffed for more than 30 minutes, made to stand in a particular spot outside her apartment door and taken in handcuffs to the parking lot which adjoins her apartment. Ms. Mancini's expert, Norm Stamper, states that the account given by the officers is inconsistent with immediately releasing Ms. Mancini. (CP 249) He also questions the defendants' timeline, pointing out that it is highly unusual that the Incident Report omits the time that the SWAT team went to Matt Logstrom's residence. (CP 249-250) These two opposing accounts create genuine issues of material fact regarding what actually occurred during this raid. Consequently it was improper to dismiss this case as a matter of law.

Furthermore, the Tacoma Police officers maintain that while Kathleen Mancini was lying face down with guns pointed at her they somehow managed to handcuff her so that her hands were in front of her

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[3] The Incident Report omits a number of details including that Ms. Mancini's home was entered with a battering ram or that she was handcuffed at any time. (CP 293)

an assertion, as Dr. Stamper states, "defies common sense". (CP 251) The defendants maintain that Ms. Mancini could not have suffered any injuries to her shoulders because her hands were not cuffed behind her back. Respondents admit that handcuffing a drug suspect in this manner would be highly unusual and against protocol. (CP 334) A jury should be allowed to apply common sense to these questions.

8. Assault and Battery Is a Question of Fact for the Trier of Fact Because the Issue Is Whether Or Not The Conduct Was Reasonable. The Issue of Reasonableness Under The Circumstances of this Case Is an Issue of Fact and Cannot Be Dismissed as an Issue of Law.

The respondent deliberately ignores Kathleen Mancini's testimony regarding her treatment at the hands of the Tacoma Police. The Tacoma SWAT team surrounded a 5 foot tall, 62 year old woman wearing only a nightgown, shoved her to the floor, pointed guns at her and handcuffed her. They did so despite their own admission that they "immediately' knew they were in the wrong apartment. Ms. Mancini posed no threat and offered no resistance. Whether or not the force used on Kathleen Mancini was reasonable is a question of fact for the trier of fact.[4] Under these

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[4] Directly contravening the account presented by respondents, Kathleen Mancini testified at deposition that she was forcefully pushed to the ground:

A. I just recall them saying, "Get to the floor," and pushing me down to the floor and putting handcuffs on me. They said, "Get to the floor. Get to the floor."

circumstances there is no standard by which the court can dismiss this claim as a matter of law.

9. **Parading Kathleen Mancini Through Her Parking Lot In Handcuffs Is A Defamatory Act.**

Defamation requires proof of four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *LaMon v. Butler,* 112 Wash.2d 193, 197, 770 P.2d 1027, *cert. denied,* 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989). *Maison de France v. Mais Quil, Inc.,* 126 Wn.App. 34, 45, 108 P.3d 787 (2005) (citing *Ward v. Painters' Local 300,* 41 Wn.2d 859, 252 P.2d 253 (1953)). According to the defendants the SWAT team determined that Kathleen Mancini was not the person they were seeking when they forced her up a flight of stairs into the parking lot of her apartment complex. Ms. Mancini was fully visible to passersby as she stood handcuffed, barefoot and in her nightgown. (CP 350; 622, 624, 629-630; 633)

"A defamatory communication usually has been defined as one which tends to hold the plaintiff up to hatred, contempt or ridicule or cause him to be shunned or avoided." *Kimmerle v. New York Evening Journal,*

Q. It was characterized as you were touched to encourage you to go to the floor. Is that an accurate description?
A. No, I would say more like pushed. It wasn't a gentle touch. It was scary. It was very scary.
Q. Was it forceful?
A. Yes.
[Deposition of Kathleen Mancini, CP 345-346]

262 N.Y. 99, 186 N.E. 217 (1933). It is well established that a defamatory statement does not have to be verbal. *Peck v. Tribune Co.*, 214 U.S. 185 (1909). Defamation can be "communicated by the sense of sight" or even gestures. *Bennett v. Norban*, 396 Ps. 94, 151 a.2d 476 (1959). "This element of communication is given the technical name of publication but this does not mean that it must be printed or written; it may be oral, or conveyed by means of gestures…." Prosser, *Restatement of Torts* 5th Ed.

Respondents paraded Kathleen Mancini, handcuffed and in her nightgown, into a parking lot in full view of a major thoroughfare and the adjoining apartment buildings and condominiums. Such an act is publication just as surely as if police disseminated a photo of this scene.

10. <u>Kathleen Mancini Is Entitled To Have the Trier of Fact Examine The Elements of the Tort of Outrage Relative To The Events She Experienced as Perpetrated by the Tacoma Police.</u>

The elements of the Tort of Outrage have been previously set forth. The respondents fail to cite any case where this cause of action can be dismissed on summary judgment under circumstances similar to those experienced by Kathleen Mancini. In addition to being handcuffed, having guns pointed at her and police ransacking her apartment, the defendants forced Ms. Mancini to stand barefoot outside of her apartment and marched her through a parking lot handcuffed and in her nightgown.

The issue before this court is whether reasonable minds could reach but one conclusion as to whether the actions of the Tacoma Police were extreme, outrageous, recklessly inflicted emotional distress and caused the plaintiff emotional distress. These are not questions of law but are questions of fact. The dismissal of Ms. Mancini's Tort of Outrage claim was improper.

11. **There Were No Medical Experts In This Case and Therefore Striking All of Plaintiff's Medical Testimony For Failure to Provide Expert Opinions Was An Abuse of Discretion.**

Experts are defined as witnesses who will offer opinions at trial "acquired or developed anticipation of litigation." CR 26(b)(5). Kathleen Mancini was not offering any medical testimony that had been developed in anticipation of litigation. None of her treating health care providers had been retained for the purpose of trial. Because a witness, such as a treating doctor, has opinions based upon his or her training does not bootstrap that opinion into an expert opinion. Respondents repeatedly refer to plaintiff counsel's "willful" violation of the Rules regarding witness disclosure. However, at no time does the Respondent address the threshold question of whether or not the plaintiff's treating health care providers are, in fact, experts.

In its responsive briefing, the City of Tacoma states, without citing any authority, that "opinion testimony from treating healthcare providers

constitutes expert testimony". However, the Respondent fails to cite a single case where that is the applicable standard under Washington law. *Harris v. Groth,* 99 Wn. 438, 663 P.2d 113 (1983), cited by the defense, stands for the proposition that many observable medical conditions do not require expert testimony. To adopt the Respondent's position, if someone with a medical degree states that the plaintiff's arm is broken then that is an expert opinion. To apply Respondent's reasoning there can never be a health care provider who is not an expert. If a health care provider diagnoses a head cold then that is an expert opinion requiring expert witness disclosure.

In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. 5A K. Tegland, Wash.Prac., *Evidence* § 300 (1982). Medical facts in particular must be proven by expert testimony unless they are "observable by [a layperson's] senses and describable without medical training". *Bennett v. Department of Labor & Indus.,* 95 Wash.2d 531, 533, 627 P.2d 104 (1981). In the instant manner, the plaintiff's shoulders were strained from being handcuffed. This fits the type of injury describable without medical training.

Harris v. Groth, supra., examines the standard of care in a medical malpractice lawsuit. The opinion in no way addresses witness disclosures

or what constitutes a medical expert in a case with garden variety personal injury issues. Next, the respondent relies upon *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P. 3d 177 (2003). This case is inapposite from this matter in that the parties in *Conrad* were attempting to reconstruct how a patient in an assisted living facility broke her leg when the patient herself could not testify regarding the matter. That case also has absolutely nothing to do with expert witness disclosure.

Next, the defense relies upon *Thiel v. Dept. of Labor & Indus.*, 56 Wn. 2d 259, 352 P.2d 185 (1960). *Thiel,* a toxic tort case, is not controlling in this matter as it required expert testimony to establish a causal link between exposure to aluminum and heart and liver damage. *Thiel* does not address expert witness disclosure or distinguish what constitutes treating provider testimony from expert testimony. *Fabrique v. Choice Hotels Int'l Inc.*, 144 Wn. App. 675, 183 P.2d 1118 (2008) likewise deals with causation and whether or not the plaintiff provided the court with sufficient testimony linking salmonella exposure and psoriatic arthritis.

The respondent fails to cite a single case where the proposed testimony of a treating health care provider instantly becomes "expert" testimony. The respondent fails to cite a single case where a witness disclosure must set forth every detail of testimony that will be offered by a

health care provider or risk having that testimony stricken. The respondent fails to cite a single case that affirms striking the testimony of treating health care provider because the witness list fails to summarize it as proposed expert testimony.

12. <u>The Supplemental Witness List Satisfied The Requirements of a Witness List . The Trial Court Erred In Striking Mancini's Medical Testimony.</u>

Witness lists were developed in King County for the purpose of eliminating "trial by ambush" so both sides have information to prepare their case. The respondent's argument fails because the City of Tacoma cannot reasonably argue that it was not prepared to go to trial on a case where the injuries were strained shoulders and PTSD about which Ms. Mancini had been completely forthcoming. Those injuries were disclosed in interrogatory responses and deposition. The trial court's ruling perverts the reasoning which underlies the rules regarding witness disclosure. The ruling emphasizes form over substance and punishes the plaintiff because the trial court, for reasons it failed to articulate, disapproved the form of the plaintiff's witness lists.

The Supplemental Witness Disclosure states that the treating doctor will testify as to injuries sustained in the incident and the treatment he recommended for those injuries and that he will testify as to causation.

Likewise the disclosure of the massage therapist states that she will testify regarding her treatment for injuries sustained in the incident at issue. Since a massage therapist is not allowed to diagnose, the Supplemental Witness List covered the expected testimony. Finally, the Supplemental Witness Disclosure states that the counselor has a background treating PTSD and that she treated Kathleen Mancini for PTSD "and the reasons therefore". It also states that the counselor will testify as to causation and what Kathleen Mancini reported to her. Plaintiff's counsel is not required to provide the defense a word for word regurgitation of the expert's expected testimony.

13. <u>The Trial Court Erred When It Struck Plaintiff's Medical Testimony Without Appropriately Considering and Providing an Analysis of All Three Factors As Required In *Burnet*.</u>

Should this court find that Kathleen Mancini's treating physician, massage therapist and counselor were all experts <u>and</u> that her Supplemental Witness List did not satisfy the requirements of such a Witness List as set forth in KCLR 26(k) does not bring this inquiry to an end. The trial court struck all the plaintiff's medical testimony and took that drastic action without a proper *Burne*t analysis. (CP 81-83) *Burnet v. Spokane Ambulance*, 131 Wn. 2d 484, 933 P. 2d 1036 (1997) and its progeny require a court to analyze three distinct factors on the record: (1) Willfulness, (2) Substantial Prejudice; and (3) Consideration of a lesser

sanction. The court must articulate its analysis of all three factors. Simply stating, as the court did here, that the factors have been considered is inadequate.

> Findings regarding the *Burnet* factors must be made on the record. *Id.* A trial court may make the *Burnet* findings on the record orally or in writing. *See Blair v. TA–Seattle E. No. 176,* 171 Wash.2d 342, 348–49, 254 P.3d 797 (2011) (noting that the trial court did not make *Burnet* findings on the record where it did not engage in a colloquy with counsel or hear oral argument and did not include the findings in the written order). Thus, where an order excluding a witness is entered without oral argument or a colloquy on the record, findings on the *Burnet* factors must be made in the order itself or in some contemporaneous recorded finding. *Id.* at 349, 254 P.3d 797 (rejecting the argument that "the record below speaks for itself" and thus obviates the need for the trial court to explain its reasons on the record).

Teter v. Deck, 174 Wash.2d 207, 217, 274 P.3d 336 (2012.)

Our supreme court recently upheld the requirement of a thorough *Burnet* analysis on the record and careful consideration of each factor. *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013). Here the trial court merely provided a conclusory statement that it had "considered the *Burnet* factors" but gave no further insight into its decision to impose the harshest sanction available. Each factor must be specifically analyzed by the trial court prior to striking witnesses. The trial court erred when it failed to include such an analysis.

In reviewing the cases regarding witness disclosure and the sanction of barring testimony the issue inevitably is failure to disclose the witness. Here, all three medical witnesses were timely disclosed in interrogatory responses, again in deposition, in the Witness Disclosure and in the Supplemental Witness Disclosure. Willfulness is deliberately withholding the identity of a witness or the substance of the witness's testimony. There was no willful disobeyence of a court order here. The plaintiff fulfilled all the requirements of Witness Disclosures. If Kathleen Mancini worded her witness disclosure in a manner that the trial found unsatisfactory that does not equate with a willfully disregarded a discovery order. "....*Burnet* 's willfulness prong would serve no purpose "if willfulness follows necessarily from the violation of a discovery order." *Blair* II, 171 Wash.2d at 350 n. 3, 254 P.3d 797. Something more is needed." *Jones* at 345.

Furthermore the trial court ignored the lack of prejudice to the defense. It knew the claimed injuries were PTSD as well as bilateral shoulder strain from being handcuffed. Witness lists appropriately disclosed the non-expert, treating health care providers and summarized their expected testimony. At no time did the trial court provide any analysis of lesser sanctions. Furthermore, it articulated no prejudice to the defendants. Pursuant to *Jones v. City of Seattle*, prejudice must be

considered with "specificity". Thus, under *Burnet* and its progeny the trial court abused its discretion in striking Ms. Mancini's medical testimony.

CONCLUSION

All causes of action brought by Kathleen Mancini were improperly dismissed by the trial judge and should be reinstated. Genuine issues of material fact exist in every tort alleged by Kathleen Mancini and must be resolved by a jury. Procedurally the trial judge abused his discretion in striking the testimony of Ms. Mancini's treating providers, failing to distinguish between treating medical providers and experts, failing to articulate a *Burnet* analysis and ordering the plaintiff to conduct and pay for the defendant's discovery. That Order for plaintiff's counsel to pay more than $715 for records and provide them free of charge to the defendants remains outstanding. This court should strike that Order and remand all causes of actions for trial on the merits; as well as issue appropriate instructions allowing the testimony of Ms. Mancini's treating health care providers.

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 Appellant's Reply 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
Jean Homan Tacoma City Attorney Civil Division 747 Market St Rm 1120 Tacoma, WA 98402	[X] U.S. Mail [ ] Hand Delivery [ ] email: JHOMAN@ci.tacoma.wa.us [ ] ABC Legal Services

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