

FILED
Court of Appeals
Division I
State of Washington
8/31/2018 4:19 PM

NO. 77531-6-I

No. 97583-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF TACOMA,

Appellant

v.

KATHLEEN MANCINI,

Respondent

APPELLANT'S REPLY BRIEF

WILLIAM C. FOSBRE, City Attorney

JEAN P. HOMAN
WSB# 27084
Attorney for Appellant

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591-5885

TABLE OF CONTENTS

I.	<u>PLAINTIFF’S WAIVER ARGUMENTS HAVE NO MERIT</u>	1-5
II.	<u>CONTRARY TO PLAINTIFF’S ASSERTION, WASHINGTON LAW DOES NOT MAKE A DISTINCTION BETWEEN A NEGLIGENT INVESTIGATION CLAIM AND A NEGLIGENCE CLAIMS FOR THE “FAILURE TO CORROBORATE INFORMATION”</u>	5-12
III.	<u>ALL EVIDENCE ADDUCED BY PLAINTIFF AT TRIAL ON THE NEGLIGENCE CLAIM WAS DIRECTED AT THE INVESTIGATION LEADING UP TO THE ISSUANCE OF THE SEARCH WARRANT</u>	12-18
IV.	<u>THE INSTANT APPEAL IS NOT FRIVOLOUS</u>	18-20

TABLE OF AUTHORITIES

Table of Cases:

<u>Bender v. Seattle</u> , 99 Wn.2d 582, 664 P.2d 492 (1983).....	5,6,7,8,9,10
<u>In re Det. of Rushton</u> , 190 Wn. App. 358, 372, 359 P.3d 935 (2015).....	3
<u>Peasley v. Puget Sound Tug & Barge Co.</u> , 13, Wn.2d 485, 499-500, 125 P.2d 681 (1942).....	7,10
<u>Roberson v. Perez</u> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	4,5
<u>State v. Chenoweth</u> , 160 Wn.2d 454, 158 P.3d 595 (2007).....	14,15
<u>Streater v. White</u> , 26 Wn. App. 430, 434-45, 613 P.2d 187 (1980).....	19
<u>Turngren v. King County</u> , 104 Wn.2d 293, 705 P.2d 258 (1985).....	5,9,10,11
<u>Washburn v. City of Fed. Way</u> , 178 Wn.2d 732, 747, 310 P.3d 1275 (2013).....	3,11,12

STATUTES:

RCW 10.14.010.....	11
--------------------	----

I. Plaintiff's waiver arguments have no merit.

As a preliminary matter, Plaintiff argues that the City has waived its right to challenge the jury's verdict on her negligence claim because 1) the City did not present the issue of negligent investigation to the jury (Respondent's Brief, p. 33-35; p. 39-41); and 2) the City did not assign error to the jury instruction for negligence in the context of the instant appeal (Respondent's Brief, p. 35-36);. The Plaintiff claims that, by doing these things, the City invited the error and consequently, waived its right to challenge the jury's verdict. Plaintiff's argument is contrary to law and has no merit.

First, the City continually and repeatedly objected to the negligence claim being submitted to the jury. For example, in the City's trial brief, the City expressly stated that "[t]he defendants recognize that the Court of Appeal's opinion is the law of the case. However, in order to avoid waiver and preserve these issues for further appellate review (if necessary), the defendants will not be proposing jury instructions for the negligence claim and will continue to lodge appropriate objections until it becomes apparent that further objections would be futile." CP 477. Then, at the close of Plaintiff's case-in-chief, the Defendants moved for a directed verdict on Plaintiff's negligence claim on the grounds that it was based solely on the alleged defects in the officer's investigation leading up to the issuance of

the search warrant (a negligent investigation claim), and as such, it was not cognizable. RP 486-495. See, e.g., RP 486, lines 12-13 (“To the extent Plaintiff’s claim is premised upon the idea that the officers didn’t do specific or different investigatory steps, it’s not cognizable.”); RP 494, lines 17-20 (“Their entire negligence claim is premised on the idea that you should have done other things and more things while investigating. That’s not cognizable in this state.”); RP 495, lines 7-14 (“No. What I’m saying with respect to this particular motion for directed verdict, is setting aside the issue of probable cause, their whole negligence claim boils down to negligent investigation. Probable cause notwithstanding, you can’t sue the police for negligent investigation. The probable cause is a separate issue. That is a defense to the intentional torts. But the negligence claim is a negligent investigation.”).

Further, defense counsel’s discussion with the trial court about the jury instructions left no doubt about the City’s position:

THE COURT: 4, negligence, 10.01.

MS. HOMAN: That was not part of the agreed set. It is an accurate statement of the WPI. The defense has its standing objections to the negligence claim, so I can’t agree to this, but I recognize it is an accurate statement of the WPI.

THE COURT: I appreciate that. What I’m going to take that to mean is that you object to the whole theory of the law as the plaintiff and the Court have ruled that it would be, but

you're indicating that this is otherwise not objectionable. So your objection for the record is noted, and I will give 10.01.

Instruction No. 5, 10.02, ordinary care.

MS. HOMAN: Same.

THE COURT: And the same ruling.

RP 558, lines 7-21. The City articulated, both in its pleadings and during colloquy with the court, that it's objection to the negligence claim was that the claim was not cognizable under Washington law; the trial court expressly acknowledged this objection. This is sufficient to preserve the issue for appeal. Washburn v. City of Fed. Way, 178 Wn.2d 732, 747, 310 P.3d 1275 (2013)("So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review.").

Moreover, the nature of the City's objection to the negligence claim necessarily dictated that the City not argue that theory of liability to the jury, nor include such a claim in the jury instructions or the verdict form. The City's objection was, given the evidence adduced at trial, *that plaintiff had failed to state a claim upon which relief could be granted*. Under those circumstances, why would the City then ask the court to instruct the jury on negligent investigation or include the claim in the verdict form? Doing so would have been contrary to law and would have been inviting error. See In re Det. of Rushton, 190 Wn. App. 358, 372, 359 P.3d 935 (2015)("Under

the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal.”).

Finally, Plaintiff’s arguments concerning waiver are contrary to established Supreme Court precedence, as explained by the Supreme Court in Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005).

The Court of Appeals held that the County could argue the failure to establish facts upon which relief can be granted for the first time on appeal. We agree and have previously so held:

In our opinion, this particular statutory limitation on the class of persons entitled to a civil cause of action for age discrimination operates to define the specific facts upon which relief may be predicated. A party may raise failure to establish facts upon which relief can be granted for the first time in the appellate court. RAP 2.5(a)(2). Respondent is thus not precluded from raising appellant's failure to establish he is within the protected class.

Gross v. City of Lynnwood, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978). We have consistently stated that a new issue can be raised on appeal "when the question raised affects the right to maintain the action." *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (quoting *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621, 465 P.2d 657 (1970)); see also *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993).

Roberson v. Perez, 156 Wn.2d at 40.

This issue is not new. The City’s objection, and the basis therefore, was asserted repeatedly, and acknowledged by the trial court. But even if

the City had not previously lodged its objections, the failure to establish facts upon which relief can be granted can be raised for the first time on appeal, as expressly recognized by the Court of Appeals and affirmed by the Supreme Court in Roberson. For these reasons, plaintiff's waiver arguments have no merit.

II. Contrary to plaintiff's assertion, Washington law does not make a distinction between a negligent investigation claim and a negligence claim for the "failure to corroborate information."

Plaintiff argues that Washington law distinguishes between claims of negligent investigation and negligent failure to corroborate information in the context of a search warrant. Respondent's Brief, p. 26 – 30. In support of this argument, plaintiff relies upon Turngren v. King County, 104 Wn.2d 293, 705 P.2d 258 (1985) and Bender v. Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983), going to so far as to assert that Turngren is "eerily similar" to the case at bar. A careful examination of these cases, however, demonstrates that plaintiff's reliance is misplaced.

As a preliminary matter, *it is critical to note that neither Bender nor Turngren involved a claim of negligence*. In both cases, all of the tort claims asserted against the defendants were intentional torts.

In Bender, the plaintiff asserted claims for false arrest, false imprisonment, malicious prosecution and libel/slander against the City of

Seattle. These claims stemmed from a criminal prosecution instituted against the plaintiff, Stanley Bender, for grand larceny by possession which was ultimately dismissed when the State's key witness refused to testify. The civil cause was submitted to the jury on all theories, which returned an unsegregated verdict in favor of the plaintiff. Plaintiff's "primary contention was that a full disclosure of all known information and a proper investigation by the police would have persuaded the prosecution not to file criminal charges because of a lack of probable cause." Bender, 99 Wn.2d at 586. The existence or absence of probable cause was an element of both the false arrest/imprisonment claim and the malicious prosecution claim.

In analyzing the issue of probable cause, the Washington Supreme Court first noted that "[i]n an action for false arrest the general rule is that an officer is not liable if he makes an arrest under a warrant or process which is valid on its face, even though there are facts within his knowledge which would render it void as a matter of law." Id. at 591. The court found that the situation presented in the Bender case was different, however, insofar as the officer making the arrest was the same officer who had presented information to obtain the warrant:

A different situation is presented, however, when the same officer provides information to obtain the warrant and then also executes the warrant. When one officer serves both functions, he is not merely directed to fulfill the order of the court; *he is in a position to control the flow of*

information to the magistrate upon which probable cause determinations are made. We see no distinction between an officer who makes an invalid, warrantless arrest and one who knowingly withholds facts in order to obtain a warrant. No policy is served by extending the nonliability rule of *Pallett* and *Cavitt* in false arrest cases when an officer simply interposes a magistrate between himself and the arrested individual. *When the same officer seeks the warrant and executes it, he should not be allowed to "cleanse" the transaction by supplying only those facts favorable to the issuance of a warrant.* The exception we now announce to the general nonliability rule of *Pallett* and *Cavitt* only prevents an officer from asserting the facial validity of a warrant as an absolute defense to a false arrest or false imprisonment action. *The officer can still establish a defense to such an action by proving, to the satisfaction of the jury, the existence of probable cause to arrest under the circumstances.*

(emphasis added) Bender, 99 Wn.2d at 592.

Later in the case, the Bender court expanded on its analysis of probable cause in the context of proving malice as an element of plaintiff's malicious prosecution claim. The Bender court noted that malice and want of probable cause are the gist of an action for malicious prosecution. Citing to Peasley v. Puget Sound Tug & Barge Co., 13, Wn.2d 485, 499-500, 125 P.2d 681 (1942), the Bender court laid out the test for determining probable cause or the lack thereof:

If it clearly appears that the defendant, before instituting criminal proceedings against the plaintiff, made to the prosecuting attorney a full and fair disclosure, in good faith, of all the material facts known to him, and that the prosecuting attorney thereupon preferred a criminal charge and caused the arrest of the accused, probable cause is

thereby established as a matter of law and operates as a complete defense to a subsequent action by the accused. And the same rule prevails where such disclosure was made to a competent practicing attorney, and the criminal prosecution was instituted upon his advice. . . .

A corollary to this rule is that if any issue of fact exists, under all the evidence, as to whether or not the prosecuting witness did fully and truthfully communicate to the prosecuting attorney, or to his own legal counsel, all the facts and circumstances within his knowledge, then such issue of fact must be submitted to the jury with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable cause must then be determined by the jury.

(italics in original; underline added for emphasis) Bender, 99 Wn.2d at 593-94.

In applying these standards, the Bender court then outlined the evidence which created a material question of fact as to “whether the officers, in good faith, made a full and fair disclosure of all material facts known to them.” Id. at 595. The court found that the officers failed to apprise the prosecutor that the officers had been unable to find evidence of prior transactions, as claimed by the confidential informant, and therefore, were unable to substantiate the confidential informant’s reliability. “Since [the confidential informant’s] credibility was critical to the case, Detective Vanderlaan’s failure to disclose information bearing on Johnson’s credibility created a question of fact for the jury.” Id. at 596. Moreover, there was testimony presented to the jury from the chief deputy prosecutor

who stated that had he been given the additional information withheld from the prosecutor's office, he (the prosecutor) would not have filed the case. Thus, the reason the question of probable cause was submitted to the jury in Bender was because there was a material question of fact as to whether the officers had withheld material information which would have negated probable cause¹.

The Turngren court, relying on Bender, then applied the same "falsity/material omission" analysis in addressing the issue of probable cause in the context of civil claim. Like Bender, the plaintiff's in Turngren had asserted a number of intentional torts (malicious prosecution, false arrest, false imprisonment, libel and slander) stemming from the execution of a search warrant obtained using information from a confidential informant. In Turngren, police obtained a search warrant for the Turngren's home, looking for unlawful weapons, hand grenades and a pipe bomb. Prior to obtaining the warrant, a citizen turned in a stolen weapon that the citizen had purchased from the CI and when he did so, the citizen told the officers that the CI was a liar and could not be trusted. Then, in investigating the information provided by the CI, the officers learned facts that contradicted

¹As outlined in the City's opening memorandum, Plaintiff's expert, Mr. Stamper, was careful in his testimony to make clear that he was not claiming the officer's affidavit in support of the warrant was untruthful. RP 180:17-19 ("Q: Are you saying you have knowledge of facts to suggest that Officer Smith was not truthful in his affidavit? A: Let me be very clear. I do not.").

the CI's information. Specifically, the CI had told officers that the home was occupied by three young males, one of whom was described as a Hell's Angel warlord named "Keith." Turngren, 104 Wn.2d at 298. The officer's investigation revealed, however, that the house in question and the car parked outside the house were owned by an Elmer Turngren, and his wife Elizabeth, a former employee of the Kirkland Police Department. The officers failed to include the information about the Turngrens (which directly contradicted the CI) in the warrant affidavit. Moreover, the officer who swore out the affidavit misrepresented the informant's track record, thereby misrepresenting the informant's reliability.

As to the Turngren's *false arrest* claim (which had been dismissed on summary judgment), the Supreme Court noted that "[h]ere, petitioners have alleged that two of the defendant officers *deliberately conveyed false information to the magistrate in order to obtain the search warrant*. If petitioners can prove this allegation at trial, respondents could be held liable for false imprisonment under *Bender*." (emphasis added) Id. at 304-05. Similarly, again citing the Bender court, the Turngren court noted "a prima facie case as to the absence of probable cause exists *if there are factual issues regarding a lack of full disclosure of material facts to the prosecutor*." (emphasis added) Id. at 305. See also id., citing Peasley ("This language in *Peasley* makes it unmistakably clear that if a factual issue as to

probable cause or malice exists, the question must be submitted to the jury.”).

Thus, contrary to Plaintiff’s claim, in Turngren, the Supreme Court did not rule that “King County police were negligent based upon their reliance on a Confidential Informant with little or no verification of facts provided by that CI.” Respondent’s Brief, p. 28. In fact, in Turngren, the Supreme Court did not address the issue of negligence – at all – ***because the plaintiff in Turngren did not assert a negligence claim.*** The Turngren court did not permit a common law negligence claim against the defendant officers and Turngren does not stand for the proposition that Washington law distinguishes between “negligent investigation” and “negligence in failing to verify information.” Respondent’s Brief, p. 28. “Negligence in failing to verify information” developed by police in the context of a criminal investigation is negligent investigation. And that is a claim that Washington law unquestionably does not permit².

²Plaintiff also claims the “applicability of common law negligence and the duty of ordinary care to police officers in carrying out official duties was upheld in Washburn v. City of Federal Way, 178 W.2d 732, 310 P.3d 1275 (2013).” Response Brief, p. 36 n. 35. This assertion is a gross misrepresentation of the Washburn court’s analysis and holding. In addition to addressing the preservation and Rule 50 motion issues, the Washburn court addressed whether the trial court properly denied Federal Way’s motion for summary judgment and Rule 50 motions. Federal Way had moved for summary judgment and for a directed verdict under Rule 50, arguing that plaintiff’s negligence claim was not cognizable under the public duty doctrine. The Supreme Court disagreed, and affirmed the trial court rulings. The basis for the Supreme Court’s decision, however, was not a common law negligence duty. Instead, the Washburn court concluded that the legislative intent exception to the public duty doctrine applied under the facts of that case, that RCW 10.14.010 created a specific legislative duty that would support plaintiff’s negligence claim

III. All evidence adduced by plaintiff at trial on the negligence claim was directed at the investigation leading up to the issuance of the search warrant.

In her response, Plaintiff argues that she did not plead a negligent investigation claim and that the City continues to mischaracterize her claim. Plaintiff's argument, however, is belied by the evidence she adduced at trial and the arguments she repeats in the context of the instant appeal.

For example, Plaintiff asserts that the officers failed "to follow proper protocol and procedure for drug raids." Respondent's Brief, p. 16. In support of this assertion, Plaintiff argues that "surveillance and controlled buys are the most common type of investigative tools utilized in finding and arresting suspected drug dealers." (emphasis added) *Id.* There is no question that the use of controlled buys and surveillance is part of the criminal investigative process, and Plaintiff concedes as much when referring such tactics as "investigative tools." Moreover, as outlined in the City's opening brief, Plaintiff's expert at trial also testified that controlled buys and surveillance are part of the investigation:

Q And it's been your opinion that the officer should have done a controlled buy. Correct?

in that case. Washburn, 178 Wn.2d at 754 – 756. Additionally, the Washburn court found a separate basis for a duty under Section 302B of the Restatement (Second) of Torts. *Id.* at p. 756-758. Under Section 302B, a party has a duty to act to avoid exposing another to the foreseeable conduct of a *third party*. As such, Section 302B has no application in the context of the instant case.

A Yes.

Q And that would be part of a narcotics investigation.

A Yes.

Q And they should have done additional surveillance.

A Yes.

Q And that would be part of a narcotics investigation.

A Correct.

Q So your opinion is that they should have done different and more investigatory steps in investigating the crime at issue. Right?

A Yes.

RP 201:6-18. Referring to these investigatory steps as “protocol” and “procedure” does not change the fact that the alleged negligent conduct in this case was how the investigation was conducted and that the alleged negligence in the investigation resulted in Mancini’s apartment as being viewed as the situs of criminal narcotics activity.

Similarly, as she did in the trial court, Plaintiff argues on appeal that the officers were negligent because they “hit the wrong door.” Respondent’s Brief, p. 18. This argument is misleading and implies that the officers served the search warrant on a location other than the location for which it was obtained. That is not the case. The officers obtained a search warrant for Mancini’s apartment. The officers executed the search warrant

on Mancini's apartment. What Plaintiff means when she argues the police "hit the wrong door" is that they obtained and executed a search warrant on a residence that was ultimately determined *to be unconnected to the criminal activity under investigation*. In other words, Plaintiff is arguing that a negligent investigation led to the issuance of a valid search warrant (supported by probable cause) for her residence, even though her residence was not the site of the criminal activity. This theory of liability is exactly what the Supreme Court addressed (and rejected) in State v. Chenoweth, 160 Wn.2d 454, 158 P.3d 595 (2007):

But what makes a negligence standard "unworkable" is that it is inherently inconsistent with the concept of probable cause and with the warrant process.

A tolerance for factual inaccuracy is inherent to the concept of probable cause. Probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial. *A negligence standard goes too far in requiring police to assure the accuracy of the information presented* and is inconsistent with the concept of probable cause, which requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found. In evaluating whether probable cause supports the search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward. *The fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true*. Probable cause requires more than suspicion or conjecture, but it does not require certainty.

(emphasis added; internal citations omitted) State v. Chenoweth, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007).

Plaintiff argues that Chenoweth has no application to the instant case, because it is a criminal case. This distinction, however, is irrelevant. The Chenoweth court addressed the standard of care that applies to an officer's investigation leading to the development of probable cause to support a search warrant. That is the same issue at play in the instant case, simply in the context of plaintiff's civil claims.

In her response brief, Plaintiff identifies the evidence of negligent conduct that she contends she presented in support of her negligence claim. See Respondent's Brief, p. 41. All of the conduct that Plaintiff identifies, however, is either part of the investigatory process or subsumed by the claims on which the City prevailed.

For example, the first six items in Plaintiff's list (failure to timely act on CI's tip³; failure to conduct surveillance⁴; failure to conduct a controlled buy⁵; failing to vet information provided by CI; failing to observe

³As Officer Smith testified, he could not take action on the information provided by the CI in December of 2010, as it was insufficient to establish probable cause to support a search warrant. RP 252, lines 12-24.

⁴ Surveillance was identified by Plaintiff's expert as an investigatory step. RP 201:6-18.

⁵ Also identified by Plaintiff's expert as an investigatory step. RP 201:6-18.

cardinal rule of relying on CI; failing to verify whether Mancini and Logstrom were connected in any way⁶; and failing to alert King County of the operation⁷) are all, on their face, part of the criminal investigatory process. Consequently, to the extent Plaintiff's negligence claim was based on any of this conduct, it is a negligent investigation claim and is not cognizable.

Conversely, the remaining items on Plaintiff's list (failing to stop warrant service "immediately;" forcing Mancini to the ground; failing to halt protective sweep⁸; forcing Mancini to stand outside; handcuffing Mancini; keeping Mancini in handcuffs after knowing they were in the wrong apartment; and failing to provide Mancini "aid" after shattering her door) were all considered, and rejected, by the jury in the context of Plaintiff's intentional torts. As outlined in the City's opening memorandum, by finding for the City on all of the intentional torts, the jury necessarily found that the

⁶As Officer Smith testified, the CI had told him that Logstrom's apartment was likely in his mother's name, and Mancini was of the right age group to be his mother. After reviewing available sources of information, Officer Smith concluded that Mancini was likely Logstrom's mother. RP 52:12 – 53:1. See also RP 262:14 – 263:12; RP 267:16 – 268:18; RP 461:4-10.

⁷As Officer Smith testified, one of the reasons he chose to pursue a narcotics possession warrant, as opposed to a warrant based on sales, was because a warrant based on the sale of drugs would have increased the chances that his CI's identity would be prematurely revealed by the King County Prosecutor's Office. RP 278-280; RP 309.

⁸ Plaintiff continues to argue, in the face of all evidence to the contrary, that the officers searched her apartment. At trial, all of the evidence was that the officers did not engage in an actual search of the apartment, but instead, conducted only a protective sweep. See, e.g., RP 451-453.

search warrant was supported by probable cause and that the officers had not exceeded the scope of the warrant. See Appellant’s Opening Brief, p. 9-13. See also CP 518 (Instruction 15 – “A detention conducted in connection with a search may be unreasonable if it is unnecessarily prolonged, or it involves an undue invasion of privacy.”); CP 521 (Instruction No. 18 – “The general rule is that the police are not liable if an officer acts pursuant to a warrant or other process that is valid. The existence of probable cause to support the warrant is a defense to plaintiff’s claims. The existence of probable cause to support the warrant is not a defense to plaintiff’s claims, however, if the officers exceeded the scope of the warrant. If you find that there was probable cause to support the warrant, you should find for the City of Tacoma on plaintiff’s claims, unless you find that the officer’s exceeded the scope of the warrant.”).

The evidence and argument presented at trial left no doubt as to the basis for Plaintiff’s negligence claim. Throughout the trial, plaintiff consistently argued that *the City was negligent because officers did not do an adequate investigation* before obtaining the search warrant for the Mancini residence. See, e.g., RP 4:23; RP 5:16-18; RP 7-8 (Plaintiff’s Opening Statement); RP 49:6 to 50:9; RP 216:16-25; RP 221:23 – 222:8 (questioning of Officer Smith); RP 201:6-18 (testimony of Plaintiff’s expert); RP 727:1-22; P 728:7-19; RP 736:14 – 737:1 (Plaintiff’s Closing).

See also CP 564 (excerpt from plaintiff's closing PowerPoint presentation – “Negligence in Obtaining Warrant”); CP 569 (“Negligence in Obtaining Warrant – Tacoma Police Cut Corners and It Stripped Kathleen Mancini of Her Sense of Safety”).

This is not a claim that entitled Plaintiff to relief.

IV. The instant appeal is not frivolous.

In her response, Plaintiff seeks fees and costs on appeal, arguing that the instant appeal is frivolous and being pursued solely for the purposes of delay. The gist of Plaintiff's argument is that this Court has already determined, in Mancini I, that Plaintiff's negligence claim was not a claim for negligent investigation. As outlined in the City's opening brief, however, the record developed on summary judgment was incomplete, while the record developed at trial left clearly established that Plaintiff's negligence claim was one of negligent investigation. On this basis alone, Plaintiff's request for fees and costs must be denied.

As outlined above, a party can always pursue an appeal on the grounds that the evidence plaintiff adduced at trial failed to establish a claim upon which relief can be granted. The legal sufficiency of a claim is simply not frivolous. Moreover, Plaintiff has failed to offer reasoned analysis to support her claim for fees and costs.

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 434-45, 613 P.2d 187 (1980). The City has provided a reasoned argument, and has provided the Court with long standing authority to support its appeal. The City has a right to challenge the legal sufficiency of Plaintiff's negligence claim. As such, the instant appeal does not meet the high bar of "frivolous" under RAP 18.9.

DATED this 31 day of August, 2018.

WILLIAM C. FOSBRE, City Attorney

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

CERTIFICATE OF SERVICE

I hereby certify that I forwarded the foregoing documents:
APPELLANT’S BRIEF to be delivered by ABC Legal Messenger to the
following:

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

EXECUTED this 31 day of August, 2018, at Tacoma, WA.

/s/Gisel Castro

Gisel Castro, Legal Assistant

TACOMA CITY ATTORNEYS OFFICE

August 31, 2018 - 4:19 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77531-6
Appellate Court Case Title: City of Tacoma Appellant v. Kathleen Mancini, Respondent
Superior Court Case Number: 12-2-17651-5

The following documents have been uploaded:

- 775316_Briefs_20180831161739D1614135_4999.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was reply brief-final.pdf

A copy of the uploaded files will be sent to:

- haskell@haskellforjustice.com
- lori@haskellforjustice.com

Comments:

Sender Name: Jean Homan - Email: jhoman@cityoftacoma.org

Address:

747 MARKET ST # 1120

TACOMA, WA, 98402-3701

Phone: 253-591-5629

Note: The Filing Id is 20180831161739D1614135