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No. 97583-3

NO. 77531-6-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF TACOMA,

Appellant

v.

KATHLEEN MANCINI

Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

On August 31, 2017 a King County jury returned a verdict in favor of Kathleen Mancini finding Tacoma Police officers acted negligently in raiding her home.¹ For the second time this court is reviewing the case of *Mancini v. City of Tacoma*. In the first case, Kathleen Mancini appealed the dismissal of her claims pursuant to a CR 56 motion. In June of 2015 this court, in a 3-0 opinion, reinstated the bulk of her claims.² In the first appeal, appellant City of Tacoma relied on the theory that Kathleen Mancini was asserting a “negligent investigation” cause of action. Ms. Mancini neither pled nor argued that theory. In an unpublished opinion, this court soundly rejected appellant’s negligent investigation argument, dispensing with it in a footnote.³

After this court reversed grant of summary judgment and remanded the case for trial, *Mancini v. City of Tacoma* was heard by a King County Superior Court jury. That jury returned a finding of negligence, awarding Kathleen Mancini \$250,000. The verdict was based

¹ The Tacoma Police were outside their jurisdiction, having conducted the raid in Federal Way.

² *Mancini v. City of Tacoma*, 71044-3 Wash. Ct. App. Div. I (2015). Ms. Mancini’s case was remanded on claims of Negligence, False Imprisonment, Invasion of Privacy and Assault and Battery.

³ See *Mancini v. City of Tacoma*, 71044-3. This court rejected the City’s position in the first appeal as an attempt “to reformulate Mancini’s claim as being one for the nonexistent cause of action of negligent investigation.” n.12

upon the conduct of eight Tacoma Police officers⁴ who, using a battering ram, shattered the door of Ms. Mancini's apartment, wrongfully raided her residence, handcuffed Kathleen Mancini at gunpoint and forced her to stand barefoot outside of her apartment on a cold January morning dressed only in her nightgown.

Tacoma Police conducted two searches of Ms. Mancini's apartment despite knowing they were on the wrong premises. The unit continued to hold Ms. Mancini in custody while trying to restore order to the closets and cupboard they had searched. All 8 officers then abandoned Kathleen Mancini in her doorless residence and proceeded to an adjacent apartment building to arrest the suspect they were seeking.

II. RESPONSE TO STATEMENT OF THE CASE

A. Factual Overview

Kathleen Mancini was 62 years old at the time of the events that form the basis of this action. She is a registered nurse and worked out of her home performing telephone triage for Group Health patients on the night shift. (RP 368:18-20; RP 370:6-8) After completing her shift in the early morning hours of January 5, 2011 Kathleen went to bed only to be

⁴ Colloquially, this unit is known as a SWAT team, employing rifles, specially equipped vans, helmets, visors, and dressed in what is generally recognized as SWAT garb. However, during trial, the lead officer testified that the unit is not a SWAT team but instead is known as a "Special Investigations Unit".

awakened just before 10:00 a.m. by what she thought was an earthquake.
(RP 370:10-16)

Ms. Mancini stepped out of her bedroom to a swarm of men dressed in black with visors obscuring their faces rushing toward her pointing guns and screaming at her to get down. (RP 371:8-13; RP 372:22-16) They threw her to the ground face down and handcuffed Kathleen with her hands behind her back. (RP 228:9-11; RP 229:7-8) They then dragged the 5'2" woman out of her home and forced her to stand outside her apartment door, refusing to allow her to put on a pair of slippers that sat nearby or any kind of wrap to put over her nightgown. (RP 230:14-15; RP 231:1-3; RP 374:6-18; RP 377:4-9) The shaking that awakened Kathleen Mancini and she had thought was an earthquake was the Tacoma Police swinging a battering ram through her front door. They did so with enough force to splinter the door and rip away the surrounding wallboard. (CP 324-328) (RP 388:12-20) Kathleen had no idea what was happening or why. All she knew was that a group of men had broken down her door and were pointing guns at her. They kept shoving the picture of a man in her face and screaming, "Where is he? Where is he!" (RP 378: 22-25; RP 379:1-2) She did not recognize the man in the photo. The lead officer in this wrongful raid was Kenneth Smith [Smith] and he

had a search warrant for a suspected drug dealer named Matt Logstrom.

[Logstrom]

Smith was in charge of the investigation that led to this raid and was in charge of the raid. He developed the case, was the sole member of his unit working with the Confidential Informant (CI) who was providing information, applied for the search warrant, conducted the pre-raid briefing and assembled his team on arrival at the Sound View Terrace Apartments. (RP 352 19-23; RP 217:11-13) This was considered “Officer Smith’s investigation.” (RP 343 19-20; RP 344 7-8) Directly after this wrongful raid, officers filed a 34-page Incident Report.⁵ (CP 334-362) In it Smith unequivocally stated that officers knew “immediately” they were on the wrong premises.

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.

(CP 347)

While handcuffing Kathleen Mancini at gunpoint, forcing her to stand outside clothed only in her nightgown and twice searching her apartment, Tacoma Police Officers knew they were on the wrong premises. The police kept Kathleen Mancini handcuffed while they

⁵ In 34 pages, three sentences reference Mancini.

searched her apartment, going through closets, cupboards and opening her fireplace screen to look up the chimney. (RP 470:4-6; RP 348: 22-25- RP 349 1-9)⁶

Eventually, Tacoma Police officers took Mancini up two flights of stairs to the parking lot of her building and asked her if she owned a black Dodge Charger parked on the blacktop. (RP 379:10-25)⁷ Kathleen stated she did not know who owned the Charger but that the parking stall where the car sat belonged to the adjacent building.⁸ (RP 383: 10-12) The situation then quickly changed. The officers took Ms. Mancini back to the door of her apartment. Finally, they removed Ms. Mancini's handcuffs and proceeded to the building where the suspect actually resided. (RP 385:1-25; RP 386:1-13) Smith testified that none of the officers ever returned to Kathleen Mancini's apartment or offered her any assistance. (RP 238:25 RP 239:1-7)

Ms. Mancini, who had always been very independent, now cannot live alone and sleeps in a running suit. Police officers and other

⁶ Appellant again relies on semantics, attempting to differentiate a "search" from a "sweep" and admits to conducting two "sweeps". (RP 359:1-16)

⁷ Ms. Mancini was forced to walk up to the parking lot still clad only in her nightgown, handcuffed and denied any form of footwear. (RP 375:25; 381:22-25; 382:1-4)

⁸ The Charger was parked in front of building "A". Kathleen Mancini lived in Building "B". Appellant's claim that the car was parked in front of Mancini's building is incorrect. (RP 379: 22-25)

uniformed personnel trigger PTSD flashbacks. (RP 403:10-11; RP 404:11-20)

Smith had a Confidential Informant (CI) who was “in the dope game”. (RP 48:12-14) She had only worked with the Tacoma Police on two prior occasions.⁹ (RP 48:15-16) On December 4, 2010 the CI informed Smith that a man named “Matt” was selling drugs. Smith identified the suspect as Logstrom, who had 9 felony convictions. Despite being the lead officer on the case, throughout the month of December Smith did nothing to act on this information.¹⁰

Q. And you got a tip from an informant regarding Logstrom a month before you broke down—your unit broke down Kathleen Mancini’s door. Is that correct?

A. It was approximately a month.

Q. All right. And you didn’t apply for a search warrant for Kathleen Mancini’s apartment until January 4. Isn’t that right?

A. Correct.

Q. And you had known since early December, almost exactly 30 days, that Matthew Logstrom was dealing drugs. That’s what the informant had told you?

A. Yes, but we didn’t have a location as where he lived.

Q. And during the month that elapsed between when you got this original tip, you didn’t do anything to look for Matthew Logstrom did you?

A. Correct. We did not.

(RP 42:10-25; RP 43:1; RP 46:13-15)

⁹ Tacoma Police have never used the CI again. (RP 22:23-25)

¹⁰ In addition to his name and access to all information associated with his criminal history, Smith had the make, model and plates of Logstrom’s car.

In the month after receiving the initial tip from his CI, lead Officer Kenneth Smith made no attempt to verify any information. (RP 46:13-15) On January 4, 2011 he met with the CI a second time and she told Smith she had seen drugs in Logstrom's apartment. (RP 46:16-RP 47:8) Smith made arrangements to drive the CI to the apartment where she had observed dealer size quantities of drugs on New Year's Eve. Smith, accompanied by another member of the Special Investigations Unit, put the CI in a van and drove to the Sound View Terrace apartments which consist of 4 identical buildings. (RP 48:8-11; RP 132:10-12) The two officers drove the van through the parking lot and had the CI point to the apartment where she had seen the drugs. (RP 47:19-25- RP 48:1-7)¹¹ Smith's fellow officer briefly walked around back to scout the layout. He was casing the wrong building.

The CI claimed that Logstrom was living in an apartment rented in his mother's name. Tacoma Police did not verify that claim and admitted simply proceeding on the "assumption" that Mancini was Logstrom's mother. (RP 52: 21-23; RP 53:1)¹² Without ever attempting to establish a link between Mancini and Logstrom the officers returned to Tacoma and

¹¹ It is physically impossible to see Mancini's apartment from the parking lot as it is on a level below where residents park their vehicles. (CP 423-424) These pictures show Kathleen Mancini standing on the stairs which lead down two flights to her apartment door.

¹² When asked why he did not know the name of Logstrom's mother, Smith testified, "Because I just didn't know it." (RP 221:5-17)

Smith filed an affidavit seeking a search warrant for Mancini's apartment. (CP 177-179) Drug dealer Logstrom resided in an entirely different building. Armed with a search warrant for Logstrom's residence but with the address of Kathleen Mancini's apartment, Smith gathered his team and on the morning of January 5, 2011 eight SWAT team officers lined up outside Kathleen Mancini's apartment as she lay sleeping. (RP 223:7-20) They shattered her front door and poured into her apartment with weapons drawn.

While handcuffing Kathleen Mancini at gunpoint, forcing her to stand outside clothed only in her nightgown and twice searching her apartment, Tacoma Police Officers knew they were on the wrong premises. This is established in appellant's own Incident Report. Logstrom, on the other hand, was allowed to quietly sit on his couch during the time Smith returned to Tacoma to obtain a warrant for the correct address. (CP 348) Logstrom was then taken to the Tacoma police station where he was released later that same day. No charges were ever filed.

B. Procedural History

After this Court remanded Kathleen Mancini's case back to the trial court for a decision on the merits Mancini proceeded on four remaining causes of action. In a 12-0 verdict, the jury found the City of

Tacoma liable for Negligence and awarded Kathleen Mancini \$250,000.

(CP 526-529)

Special Verdict Form

We, the jury make the following answers to questions submitted by the court:

Question 1A: Do you find for the plaintiff on her claim of Negligence?

ANSWER: Yes (Write "yes" or "no")

Instruction: If you answered 1A "yes" then continue to question 1B.
If you answered 1A "no", then skip to question 2A

Question 1B: Was the defendant's Negligence a proximate cause of injury to plaintiff?

ANSWER: Yes (Write "yes" or "no")

Instruction: If you answered 1B "yes" then continue to question 1C.
If you answered 1B "no", then skip to question 2A

Question 1C: What did you find to be plaintiff's amount of damages as a result of defendant's Negligence?

ANSWER: \$250,000

(CP 526)

One of Ms. Mancini's causes of action was Negligence. At no time did Ms. Mancini plead negligent investigation. (CP 1-9) It is a separate and distinct tort. Neither party offered a jury instruction on

negligent investigation, argued negligent investigation in closing or moved to amend the pleadings at the conclusion of the case to add it as a cause of action.

For the second time, Kathleen Mancini comes to this court with a cause of action grounded in negligence and for the second time appellant asserts that Ms. Mancini's claim is for negligent investigation.¹³ The negligence claims in this case are based upon the failure of the Tacoma Police to carry out the duties of law enforcement in a professional and prudent manner, including exercising due diligence in appropriately obtaining and serving a search warrant.¹⁴

C. Tacoma Police Invade Wrong Home

Tacoma Police conduct surveillance in 95% of cases of this nature. (RP 49:19-22 RP 461:1-3) However, Smith admitted he did no surveillance in this case. (RP 49:6-8). Although Tacoma police identified Logstrom's car, and had a picture of him, they conducted no surveillance on the parking lot to ascertain what apartment he was leaving or entering. (RP 216:1-15 RP 217:1-10) Smith also testified that it is typical procedure to perform a controlled buy in this situation. (RP 49:23-RP 50:6)

¹³ Appellant attempts to reframe this issue as one of probable cause, an attempt which fails. The action before this court is negligence which is an entirely separate factual and legal issue.

¹⁴ Appellant argues that since the jury did not find it responsible for committing intentional torts it is cleared of wrongdoing. This argument is nonsensical and ignores the legal underpinnings of negligence.

However a controlled buy was never performed . Smith did not run a check on any telephone lines registered to the address he had wrongfully identified after driving the CI through the Sound View Terrace Apartments.¹⁵ (RP 50:13-15) He did not check voter registration. (RP 50:16-21) Appellant failed to do something as simple as look up Kathleen Mancini on Facebook—her Home Page, which she began in 2009, contains a wealth of information. (Supplemental RP 6:17-25-7:13; Ex. 37, 38) Smith admitted that “Facebook is common for almost—for literally every investigation I’ve ever ran...” (RP 266:2-3). Checking Facebook is part of his “checklist”. Despite this assertion he could not recall whether he checked Facebook for Kathleen Mancini. (RP 50:10-12)

Officer Smith claimed he ran an Accurint search on Kathleen Mancini’s address.¹⁶ An Accurint search provides a history of who has been associated with the address, the length of time an individual has been linked to the address, identifies utility accounts and a host of other background information including any person or persons who have been associated with a particular address over the last several years. (RP 51:3-

¹⁵ In response to questioning, Smith stated: “I don’t know how that landline thing works.” (RP 54:12-18)

¹⁶ Smith testified: “I don’t have an independent recollection of typing her name into Accurint and doing all that information, but as a general rule, I do that for each person I contact. (RP 315:8-12)

12). Appellant failed to produce that report at trial.¹⁷ Matthew Logstrom was not associated in any way with Kathleen Mancini's address. (RP 51:13-17) Smith testified even though he performed an Accurant search on Kathleen Mancini's address, he had no idea how long she had resided there, information typically contained in such a report. (RP 53:10-25)

Smith knew Logstrom had multiple felony convictions, had been incarcerated and he had his mug shot.¹⁸ However, Smith never identified the name of Logstrom's mother, yet proceeded under the false assumption that Kathleen Mancini was Logstrom's mother. (RP 52:12-25 RP 53:1)¹⁹ Tacoma Police never verified any connection whatsoever between Mancini and Logstrom. Despite continually referring to the CI as "confidential and reliable" as well as signing an affidavit that the CI's information was dependable the appellant has never used that CI again. (RP 56:23-25 RP 57-6)²⁰ Smith wrote and signed under oath the affidavit requesting a search warrant for the address of Kathleen Mancini's apartment. (CP 177-180) He did so despite having no information that

¹⁷ Although appellant asserts the officers ran Kathleen Mancini's address through an Accurant search, they did not maintain that evidence. (RP 219:6-25; 271) If this evidence in fact existed, appellant destroyed it despite the fact the raid had been bungled. (RP 219:21-25; RP 220:1-7). Inexplicably, Smith did retain the license plate search. (RP 269:21-25)

¹⁸ Smith agreed "there's a lot of information on [someone with 9 felonies] in the system because he's probably been in jail." (RP 52:2-5)

¹⁹ Smith admitted that Logstrom's name did not appear when he ran Mancini's address through Accurant. (RP 51:13-17; RP 53:11-29)

²⁰ Smith testified that the CI was fired. (RP 57:1-3)

Logstrom was in any way associated with Mancini's address.²¹ On the witness stand, Smith testified that the only information contained in that affidavit were facts provided to him by the CI:

Q. Other than relying on information that you got from the confidential informant, is there anything in that affidavit that shows you did more investigation as to who lived in the Mancini apartment?

A. No ma'am.

(RP 214:7-11)

Appellant's policy and procedure manual directs, "Information received from an informant should be checked for accuracy." (RP 212 13-25-RP 213:1-4; Ex. 118) After performing no police work in this matter for more than 30 days Smith drove the CI to Mancini's apartment complex on January 3, 2012, wrote and applied for an affidavit on January 4, 2012 and raided the wrong residence on January 5, 2012. (RP 57:6-15).

Although out of their jurisdiction, Tacoma police did not alert King County that they were conducting a raid in part because King County requires confirming paperwork. (RP 57:19-24 RP 58:1-21) The Incident Report in this matter records no times when activities occurred other than

²¹ Appellant claims officers "checked the lease" on Mancini's apartment and "learned it was rented to a middle aged white female." (Appellant's brief, page 4) This is just one example of appellant's false statements. There was no such testimony and appellant's cite to the record demonstrates there was no such testimony. In fact, **when questioned about the lease, Smith testified, "That would not be something I have access to."** (RP 215:20-22)

when the unit left Tacoma and arrived at the apartment complex. (RP 59:14-10).

Ms. Mancini lived in Hawaii and maintains strong ties to the islands. The jury inquired as to whether Smith or his fellow officers had explored when Logstrom was born in relation to when Kathleen Mancini moved to the mainland.

THE COURT: Could you have checked if Matt ever lived or was born in Hawaii? If Matt wasn't born in Hawaii, would that raise any flags, especially if Ms. Mancini was in Hawaii on Matt's birthdate?

THE WITNESS: Yes. That would have been a red flag if she was there on his birthdate and his birthdate—and his birth certificate was from Washington; that would have been a red flag.

(RP 313:2-11)

Kathleen Mancini testified that she moved to the mainland in 1998. (RP 368 1-5) Her Facebook page is full of references to Hawaii. (Ex. 37-38) Of course, appellant knew Logstrom's date of birth—he was born in 1983. (CP 334-362)

Although Smith claims he conducted a pre-operational briefing none of the officers could testify regarding any information ostensibly covered. (RP 365:14-17; Supplemental RP 24:16-23) They could not recall whether the layout of the apartment was addressed at the pre-operational briefing. (RP 462: 19-22)

D. The Investigation Performed In This Matter Identified The Drug Dealer, His Car and Criminal Background.

Before Tacoma Police took a battering ram to the door of Kathleen Mancini's apartment they had already performed their investigation.

Tacoma police identified the person dealing drugs, had his name, criminal history, knew the car he drove and even had a picture of the suspect.

Police knew Logstrom was residing in the Sound View Terrace apartments. They knew what drugs Logstrom was dealing. Through the CI, Smith had a description of the interior of Logstrom's apartment. (RP 254:8-10) Tacoma Police had the suspect's complete criminal history. Succinctly, they knew Logstrom and had access to a wealth of data associated with this low tier criminal.

Smith was the CI's sole contact within the department. Smith drove the CI to the Federal Way apartment complex, drafted the affidavit for the search warrant and obtained the warrant. He acted as the gatekeeper of all information in this case, controlled the flow of information, decided the timing of the raid and conducted the pre-raid briefing. Smith directed the raid in every way and considered himself in charge of the raid. Eight officers lined up in a pre-determined sequence Smith directed and he assigned each team member a specific duty. By his

own account Smith “immediately” knew that his unit was in the wrong apartment when they crossed the threshold.

E. Failure To Follow Proper Protocol and Procedure for Drug Raids

Surveillance and controlled buys are the most common type of investigative tools utilized in finding and arresting suspected drug dealers. No surveillance of any kind was conducted in this case. The second most commonly employed investigative tool is a “controlled buy”. An informant is wired and provided money with recorded serial numbers. Officers clandestinely observe the CI enter the abode where drug dealing is suspected, drugs are purchased and the informant returns to the police with the drugs. Audio of the transaction is recorded via wire.

Appellant essentially offers no explanation for the complete absence of these critical tools which are a central part of due diligence for police officers prior to applying for a search warrant. As for why he waited a month between receiving the original tip and taking any action, Smith offered a series of excuses claiming he could not conduct surveillance because team members were busy with the holiday season and several members of his unit engage in hunting at that time of year.

(RP 43:7-11; RP 46:2-11)

According to Smith the failure to conduct a controlled buy was because he does not trust the King County police or King County prosecutors. (RP 57:16-25; RP 58:1-21) If the Tacoma Police performed a controlled buy in King County they were obligated to alert King County authorities. Due to his distrust of King County Smith did not want his King County counterparts to know he was planning to conduct a raid in their jurisdiction.

F. Appellant's Claims of Due Diligence Are Not Persuasive

Appellant contends officers examined "several databases" but could extract no information on Kathleen Mancini or her apartment. Kathleen Mancini produced her Facebook page which she has been publishing since 2009 and it contains information on her and her background. Had Tacoma Police identified land lines associated with the address they would have found two telephone lines: One was Kathleen Mancini's private telephone and the second was registered to Group Health Cooperative.²² (Supplemental RP 13:15-25; 14:1) Due to HIPPA guidelines Kathleen Mancini was required to have a dedicated, secure phone line registered to her employer. Had appellants checked for any licensing information, they would have discovered that Kathleen Mancini is a licensed nurse in the state of Washington.

²² Now known as Kaiser Permanente

At the time of this raid, Kathleen Mancini had been renting her apartment for 6 years and lived alone. Tacoma Police failed to check with the apartment manager which could have been done the morning of the raid without alerting any residents. They failed to check the registered name for any utility accounts connected with the address. (RP 54:1-11)

G. Expert Testimony Addressing Proper Police Procedure In Order to Avoid “Hitting the Wrong Door.”

Appellant did not produce a single independent witness to testify whether Tacoma Police exercised due diligence with regard to this wrongful raid or the events leading up to it. All of the witnesses who testified on behalf of the appellant were officers involved in raiding the wrong residence. In sharp contrast, Kathleen Mancini called former Seattle Police Chief Dr. Norm Stamper who reviewed this case extensively and offered his opinions.²³ In Dr. Stamper’s opinion appellants essentially failed to conduct any police work prior to this raid. In his vernacular, what occurred in this case is known as “hitting the wrong door.” Dr. Stamper offered an unequivocal opinion that police should never, under any circumstances, break down the wrong door.

²³ Dr. Stamper is the former chief of the Seattle Police Department, has written two books on police procedures and community interactions, speaks nationally on police protocol and is considered an authority in this area. He has written numerous articles and given over 500 talks regarding policing and police procedures. (RP 89:24-25; RP 90:1-25; RP 91:1-25; RP 92:1-11; RP 93:10; CP 307-316)

My position is there is no excuse, literally, no excuse for hitting the wrong door. That sounds like a very high standard, but if we've done our homework, we will know who is behind that door and whether or not the suspect we're looking for resides at that residence.

(RP 102: 20-25)

Service of a search warrant on a potential drug dealer who is thought to have weapons on the premises is known as a "high risk warrant". Particular procedures are followed which have been developed to deliberately disorient and frighten any occupants on the premises. This provides the police an element of surprise and allows them to immediately take control of the premises and subdue and restrain any individuals in the residence. It is a frightening and traumatizing event. Performed improperly, service of a high risk warrant can—and has—caused the deaths of innocent citizens. Dr. Stamper has interacted with victims of these types of raids; they are terrorizing and traumatizing. (RP 103:5-15)

According to Dr. Stamper, the first rule of police work in this area is to never rely on the Confidential Informant. Information provided by a CI must be independently corroborated.

The incident report makes it clear that the officer relied—from the point of view of this incident, this one document—exclusively on a confidential informant. One of the most basic rules of police work is you never trust a CI.

(RP 131:12-16; 133: 5-25)

Dr. Stamper reviewed the affidavit filed by Smith which was the basis for issuing a search warrant.²⁴

Q Do you see anywhere in that affidavit where the Tacoma Police relied upon anything other than information from the confidential informant—

A. No I don't.

Q. –and the car plates?

A. That's correct.

Q. And you don't see in there any other types of investigation.

A. That is correct.

Q. All right. And having been a police officer what kind of police work is that to you?

A. It's incomplete and, arguably, the kind of police work that leads to very bad decisions, very bad choices, and very bad outcomes.

Q. Does the affidavit show in any way...anything else that was done to vet the information that the confidential informant had given officer Smith?

A. No, it does not.

(RP 140:24-141-18) (CP 177-179)

According to Dr. Stamper, surveillance is the tool most often employed by police officers to pinpoint drug activity:

If they had sat on Ms. Mancini's apartment, they would have known within a pretty short period of time that there was no narcotics trafficking going on out of that apartment.

And believe me, five minutes of experience tells a beat cop an answer to this question. If you work narcotics, you know that one of the best ways to gauge drug activity is to watch for it. And if you see it, that simply adds to

²⁴ Once again appellant misstates the record. (Appellant's brief p 15, fn. 4.) At no time did Dr. Stamper "concede" that inclusion of the details of a background search "only served to strengthen probable cause." Additionally, appellant's inclusion of remarks made by the judge, outside the presence of the jury, regarding search warrants is not evidence and reference to those remarks is inappropriate.

your justification for doing what you're planning to do. So they didn't do that.

(RP 134: 7-16)

Dr. Stamper also described a controlled buy and testified that "In probably 95 percent of all drug raid cases, the confidential informant has been sent into the unit..." (RP 134: 19-21). A CI in that situation is put through a particular procedure and is observed entering and exiting the residence where drug activity is suspected. (RP 135: 1-19) "So it's a very systematic process that is intended to guarantee that the wrong door does not get hit." (RP 135: 20-21)

Appellant mischaracterizes Dr. Stamper's testimony, asserting that he conceded that Tacoma Police followed standard police procedure during this raid. Dr. Stamper did agree that proper procedure had been followed if the police had been in the correct location and lawfully detaining a suspect on the premises. (RP 174 19-177:11) In that scenario, police burst onto premises quickly, using the element of surprise, charge toward occupants and get them on the ground and handcuffed from behind immediately and at gunpoint. (RP 98:24-25; RP 99: 1-4; 23-25; RP 100:1-10; RP 147: 23-25; RP 148:1-20) This is precisely what happened to Kathleen Mancini. However, she was not a suspect, had no ties to the suspect and was asleep in her own home. Tacoma Police failed to follow

proper procedure to ascertain the correct residence and used high risk warrant tactics on an innocent citizen.

Dr. Stamper found numerous instances where the Incident Report in this matter does not conform to acceptable police procedure. For instance, there are no times written in the Incident Report other than the time of the pre-raid briefing and the unit's arrival at the apartment complex. (RP 142 8-19; CP 334-362)²⁵ The manner in which a raid is conducted is of grave importance because there can be grave consequences. Innocent people and family pets have been shot and killed. The experience is so terrifying for the residents that people have died of heart attacks during such raids. (RP 154:16-24)

III. AUTHORITIES AND ARGUMENT

A. Standard for Review

1. **A Motion for Dismissal As A Matter of Law Is Based Upon the Substantial Evidence Standard of Review As Well As Abuse of Discretion. The Trial Court Properly Denied That Motion.**

²⁵ Times expected to be recorded in the Incident Report would include time of the breach of Mancini's door, time she was handcuffed, time she was released from custody and the time recorded when the unit left the Mancini residence and arrived at Logstrom's apartment. As for recording when Kathleen Mancini was detained and handcuffed Stamper testified: "In every police department I'm aware of it's required. It's mandatory." (RP 143:12-13) Typical protocol is to assign an officer to record times. (RP 145: 2-19)

Appellant moved the trial court for dismissal of Kathleen Mancini's claims as a matter of law and the trial judge properly denied that motion.²⁶ The decision to grant or deny a CR 50 Motion for Judgment as a Matter of Law is a decision within the sound discretion of the trial judge after hearing all the evidence. "When reviewing decisions granting or denying a judgment as a matter of law, we apply the same standard as the trial court." *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party." *Id. at 271-272; Schmidt v. Coogan* 162 Wn.2d 488, 173 P.3d 273 (2007). Such a decision will not be overturned on appellate review unless it can be determined that the trial judge's decision was unreasonable. "We will reverse a trial court's discretionary decision only if it is manifestly unreasonable, or exercised on untenable grounds or

²⁶ Dismissal as a matter of law is brought pursuant to CR 50(a) although appellant failed to cite that Rule at trial or in its moving brief. CR 50(a) reads:

(1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for a judgment as a matter of law against the party on any claim....that cannot under the controlling law be maintained without a favorable finding on that issue....A motion for judgment as a matter of law shall state the specific ground therefore.

for untenable reasons.” *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The legal standard for a CR 50 motion is that all of the evidence presented is construed in favor of the nonmoving party and courts follow the substantial evidence test.

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997).

"Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest." *State v. Hall*, 74 Wash.2d 726, 727, 446 P.2d 323 (1968).

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001); *See: Corey v. Pierce County*, 154 Wn. App. 752, 225 P.3d 367 (2010).

The trial court properly ruled that there were no grounds to grant Judgment as a Matter of Law.

B. This Court Previously Rejected Appellant’s Argument Regarding Negligent Investigation, Ruling It Was A Failed “Attempt to Reformulate” Mancini’s Claim and “Off the Mark”. That Opinion Is The Law of the Case.

This Court has already issued an opinion rejecting the identical argument appellant raises here. In *Mancini v. City of Tacoma*, 71044-3

(Wash. Ct. of App. 2015) this Court ruled that negligent investigation does not apply to the facts of this case.²⁷ The facts underlying this claim did not change as a result of the trial.²⁸ Therefore, pursuant to RAP 2.5(c)(2) the original opinion is the law of the case and cannot be disturbed absent a showing of one of three exceptions including a manifest error affecting a constitutional right. No such error exists here. Therefore, pursuant to RAP 2.5(c)(2) and supporting case law that opinion became the law of the case. Absent an intervening change in the law, appellant is precluded from successfully raising that theory a second time.

In *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005) appellant asserted a claim of negligent investigation which was ultimately rejected. Appellant reasserted negligent investigation after issuance of an opinion in a companion case. As part of its analysis the opinion reviewed the doctrine of ‘the law of the case’:

Law of the case is a doctrine that derives from both RAP 2.5(c)(2) and common law. This multifaceted doctrine means different

²⁷ Appellant attempts to argue a theory of negligent investigation. In *Mancini I* this court examined the same essential facts presented here and dispensed with that theory in a footnote: “The City attempts to reformulate Mancini’s claim as being one for the nonexistent cause of action of negligent investigation. Mancini is correct in rejecting this reformulation. Mancini does not allege that a negligent investigation led to her being wrongly considered a suspect in a crime. Nor does she allege that a negligent investigation allowed the true criminal to cause her harm. The City’s attempt to reformulate her claim is off the mark.” n.12.

²⁸ Appellant misstates RAP 2.5(c)(2) which allows this Court to revisit the law of the case based upon other appellate decisions. There have been no other appellate decisions since *Mancini I* which alter this court’s previous ruling regarding negligent investigation.

things in different circumstances, *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), and is often confused with other closely related doctrines, including collateral estoppel, res judicata, and stare decisis.

In its most common form, the law of the case doctrine stands for the proposition that *once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation*. *Id.* (citing 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: JUDGMENTS § 380, at 55-56 (4th ed. 1986))...In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. *See* 5 AM. JUR. 2D *Appellate Review* § 605 (1995).

Id. at 41. [Emphasis added]

In the instant matter this court is reviewing the identical facts considered in the original appeal regarding the applicability of negligent investigation. The doctrine of the law of the case continues to be robust. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 283 P.3d 567 (2012);²⁹ *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998).

C. Washington Law Distinguishes Between Negligent Investigation and Negligently Failing to Corroborate Information. Negligent Investigation Is a Narrowly Applied Doctrine. In This Case Common Law Negligence Resulted In The Issuance of A Faulty Search Warrant.

Appellant asks this court to adopt a cause of action it has previously rejected. Appellant strains to add a veneer of professionalism to the actions of the Tacoma police officers involved in this wrongful raid.

²⁹ *Aff'd, Washburn v. City of Federal Way*, 178 Wn.2d 732, 210 P.3d 1275 (1982).

That layer of professionalism is nonexistent. It did not exist at the time of the first appeal and no evidence or testimony was introduced at trial to change that. The Tacoma police unit involved in this raid categorically failed to exercise an appropriate level of professional diligence prior to breaking down the door of an innocent citizen and terrorizing her. In fact, the Tacoma police officers continued to terrorize Kathleen Mancini even after—based on the Incident Report they authored—those same police officers knew they were in the wrong apartment.

Appellant's attempts 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 who was inexperienced and so unreliable she has never been used again. In fact, the only police work performed in this matter prior to the wrongful raid was to drive an admitted drug user past an apartment complex with 4 identical buildings and ask the CI to point to the apartment where she had seen drugs. Smith, the lead officer, admitted that in 95% of the department's drug cases, his unit performs a controlled buy as well as surveillance to corroborate information. He deliberately withheld from the issuing judge the fact that

the CI's information had not been corroborated. He failed to disclose that he had relied solely on the account of a drug user to identify the address.³⁰

1. Washington Holds Law Enforcement Accountable For Common Law Negligence In Failing To Verify Information Particularly When The Lead Officer Controls The Flow of Information Concerning A Raid.

Appellant ignores a key fact: The law holds police officers liable for common law negligence.³¹ This appeal is another failed attempt to bootstrap this case into one of negligent investigation—enlisting semantics for the sole purpose of defeating Kathleen Mancini's claims. However, the concept of finding law enforcement culpable for a wrongful raid has already been established by our supreme court.

Turngren v. King County, 104 Wn.2d 293, 705 P.2d258 (1985) is eerily reminiscent of the case before this court. In *Turngren*, our supreme court ruled 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.³² In *Turngren*, as in the instant matter, the same police officer obtained a search warrant and carried out that warrant. The

³⁰ 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 177-180)

³¹ The original opinion in this matter emphasizes that common law negligence applies to police officers.

³² It is instructive that at no point does the supreme court in *Turngren* mislabel the actions of the involved law enforcement officers "negligent investigation".

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...

Turngren 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 Kenneth Smith did in the instant matter. 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 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*, 99 Wn. 2d 582, 664 P.2d 492 (1983).

Thus both the *Turngren* and *Bender* opinions distinguish the non-existent tort of “negligent investigation” as it pertains to one harmed by a raid of the wrong premises as opposed to the duty to verify salient facts before breaking down the door of an innocent citizen. Failure to corroborate information is common law negligence.

2. Appellant Failed to Raise Negligent Investigation At Trial and Cannot Do So On Appeal.

As it did in the first appeal, the City of Tacoma waited until the appellate stage to raise its theory of negligent investigation. Appellant did not assert that argument at trial and did not request any form of instruction

regarding negligent investigation. Therefore, the City of Tacoma has waived the issue. The situation presently before this court is analogous to *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P. 2d 1030 (1982) where appellants waited until the case was before the appellate court to raise a defense of negligence per se:

Petitioners did not raise the theory of negligence per se either in their pleadings or in argument to the trial court. This particular theory of recovery was first raised at the Court of Appeals. This is too late. The general rule in this state is that, except as to issues of manifest error affecting a constitutional right, we will not consider an issue or theory raised for the first time on appeal. *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973); *Dawson v. Troxel*, 17 Wn. App. 129, 131, 561 P.2d 694 (1977). Since petitioners' negligence per se theory was not raised in a timely fashion at the trial court, it falls squarely within the above rule. We therefore do not reach or decide the merits of petitioners' theory of negligence per se.

Id. at 440.

Here, the City of Tacoma waited until an adverse jury verdict to resurrect its previous theory of negligent investigation. Thus the matter was not considered by the trial court and no instructions regarding this narrowly applied tort were considered by the trial judge or the jury. Pursuant to RAP 2.5(a) and well-established case law appellant is prevented from raising the theory of negligent investigation based on the failure to assert or preserve that theory at trial.

D. Appellant Waived the Right to Raise Negligent Investigation As A Defense Based Upon the Doctrine of Invited Error.

In front of the jury, appellant did not raise the issue of negligent investigation. It was briefly referenced outside the presence of the jury during appellant's Motion for Directed Verdict. At trial appellant proposed no instruction regarding negligent investigation, did not raise it as a defense or request a limiting instruction. "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989). Appellant now comes before this court for the second time attempting to use negligent investigation as a shield. The law requires the appellant to propose appropriate instructions. Therefore, appellant had an obligation to request a jury instruction defining negligent investigation along with an instruction that it would be a defense to Kathleen Mancini's claims.

Appellant offered no such instruction.

Pursuant to the doctrine of invited error, appellant waived negligent investigation as a defense.

Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds in *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). This court will deem an error waived if the party asserting such error materially contributed thereto. *Id.* at 511.

In Re KR, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Appellant made a tactical decision during trial to attempt to reframe this case as one of probable cause and the trial judge provided appellant's proposed instructions on probable cause. (CP 520-521) Appellant virtually lay in the weeds and waited until this appeal to raise negligent investigation. By doing so, appellant waived the right to argue negligent investigation. RAP 2.5(a).

1. Appellant Claims Negligent Investigation is Dispositive in This Matter Yet Never Argued That Theory To the Jury. It Was Only Raised in Colloquy As Part of a Failed Motion for Directed Verdict.

Appellant made a Motion for Directed Verdict on all of Kathleen Mancini's Claims. (RP 473-504) That motion was denied in its entirety.³³ During oral argument on the defense motion, counsel for the City of Tacoma for the first time in this trial proposed the theory that Mancini's negligence claim was actually a negligent investigation claim.

MS. HOMAN: Their allegation is that different and more investigatory steps would have resulted in them not considering her apartment as the situs of criminal activity. There's no question that they believed criminal activity was occurring in Mancini's apartment. 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.

³³ Initially the trial judge granted the motion to dismiss Ms. Mancini's Invasion of Privacy Claim but reversed that ruling and reinstated the cause of action.

She might have causes of action for intentional torts, but negligent investigation, which is what this is—you were negligent in how you investigated. You were negligent in just driving the CI past—you know, it's all tied to negligent investigation.

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 different issue. That is a defense to the intentional torts. But the negligence claim is a negligent investigation.

THE COURT: And the Court of Appeals in your opinion, did not deal with that.

MS. HOMAN: Not directly. They sidestepped it.....
So in this case, I think I have appropriately preserved the issue. You should decide the issue on negligence. *As to the question of negligent investigation, as to the intentional torts, the jury can be instructed that the existence of probable cause is a complete defense.*

(RP 494-495) [Emphasis added]

The record is devoid of any further discussion of negligent investigation. It was never pled, a jury instruction was never proposed and the theory was never argued to the jury. Negligent investigation was not asserted as a defense. Appellant attempts to construct an argument that Mancini was actually asserting a cause of action for negligent investigation by counting the number of times counsel for the plaintiff uttered the word "investigation". At

no time did the appellant request a limiting instruction. At no time did counsel for appellant lodge an objection to use of the term “investigation” or maintain that it was inapplicable. Negligent investigation is a cause of action separate and distinct from negligence. At no time was it argued to the jury If a party does not request an instruction it cannot complain about the lack of such instruction.

Thus, Brown comes before this court in much the same position as did the defendant in *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976), and our response to Brown's claim should be the same as our response in *Kroll*: "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." *Kroll*, at 843

State v. Scott, 110 Wn.2d 682, 686, 757 P. 2d 492 (1988).

Appellant's failure to request any jury instruction addressing negligent investigation is fatal to its appeal.

2. Appellant Has Not Objected to Jury Instructions In Its Appeal. Therefore, Appellant Has Waived Its Right To Raise Any Objection to The Court's Instructions Regarding Negligence and Ordinary Care.

The Appellant does not raise a challenge to any of the court's jury instructions on appeal. The trial court gave the jury the standard instruction for Negligence as well as the standard

instruction for Ordinary Care.³⁴ (CP 510-511) Although the City of Tacoma did challenge the Negligence and Ordinary Care Instructions at trial, that challenge is legally insufficient. Appellant is legally bound to raise the issue of instructions again as part of its appeal and must assign error to it.

No assignments of error being directed to any of the instructions, they became the law of the case on this appeal, and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rule of law laid down in the charge.

Noland v. Dep't of Labor & Indus., 43 Wn.2d 599, 590, 262 P.2d 765 (1953).

Therefore, this case must be decided on the common law theory of negligence set forth in WPI 10.01. That is what the jury relied upon and is the basis for its verdict.³⁵

E. The Verdict Form In This Matter Asked The Jury Whether Tacoma Police Were Negligent and the Jury Said “Yes”. Appellant Accepted the Verdict Form by Failing To Raise an

³⁴ Negligence is the failure to use ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. WPI 10.01

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances. WPI 10.02

³⁵ 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 Wn.2d 732, 310 P. 3d 1275 (2013).

Objection. Furthermore, the Jurors Were Polled, Confirming Their Finding That the Tacoma Police Were Negligent.

The trial judge created the Special Verdict form after much discussion regarding jury instructions.³⁶ Just as a party must lodge an objection on the record to jury instructions, if there is disagreement on the Verdict Form, that objection must be raised at the time. Appellant did not raise any objection to the Verdict Form.

The jury is presumed to have followed the court's instructions. *Bordynoski v. Bergner*, 97 Wn.2d 335, 342, 644 P.2d 1173 (1982). The jury, by its special verdict, did not accept defendant's argument. It is not our function to substitute our evaluation of the evidence.

Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 263, 840 P.2d 860 (1992).

Furthermore, neither the Verdict Form nor the instructions asked the jury to specify what behavior it found negligent. Therefore the City of Tacoma is prevented from asserting that the appropriate cause of action was negligent investigation as opposed to common law negligence. Unless appellant can show that the Special Verdict form misstated the law or prejudiced it in some manner, the form used in this case will be considered proper.

³⁶ The form was created and approved following extensive discussion amongst the court and both parties. (RP 689:20-22)

We do not find that the special verdict form here contained a clear misstatement of the law that could have misled the jury in a prejudicial manner. Instruction 5 defined when there would be liability. The special verdict form asked the jury to determine whether liability had been proved, i.e., whether the plaintiffs had shown by competent evidence that any of the applications was a cause of harm to any of the plaintiffs. Question 1 in the special verdict form did not require the jury to find that a single application drifted and caused particular damage, but allowed the jury to consider whether an application caused any part of any damage to any plaintiffs' plants.

Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Similarly, the jury in this case was asked whether defendant was negligent as opposed to identifying specific acts of negligence.

Furthermore, the jury was polled in open court regarding its verdict. (RP 816:6-25; RP 817:1) This further bolsters upholding the findings of this jury. "...The polling of the jury in open court validated the verdict. *Hamilton v. Snyder*, 182 Wash. 688, 48 P.2d 245 (1935). Thus the issue of the negligence of the Tacoma Police has been fully litigated and should not be disturbed on appeal.

The City of Tacoma made strategic decisions regarding how it would try its case and the manner in which it was presented to the jury. After the jury found in favor of Kathleen Mancini, the City of Tacoma cannot now insist that the case should have been decided on a tort that was never pled, never presented to the jury,

never included in jury instructions and entirely absent from the Special Verdict Form. In considering the Special Verdict Form, “[N]either a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury...” *Blue Chelan, Inc. v. Department of Labor & Indus.*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984).

F. The Law Gives Great Deference To The Jury’s Finding of Negligence.

The jurors in this matter sat through days of testimony and listened to multiple Tacoma Police Officers describe the events leading up to and including the wrongful raid on Kathleen Mancini’s apartment as well as the painful and traumatizing aftermath of that raid. The jury returned a finding of negligence and there were many different acts to choose from including the failure to follow established department protocols and procedures. Appellant comes to this court requesting that it substitute its judgment for that of the jury. Such a request is improper.

Negligence is a fact based question and thus is reserved for the trier of fact:

Whether one charged with negligence has exercised reasonable care is ordinarily a question of fact for the trier of fact. *Gordon v. Deer Park School Dist. No. 414*, 71 Wash.2d 119, 122, 426 P.2d 824 (1967). The question for the jury was what a reasonable person would do “under the same or similar circumstances.” *Keeton et al.* § 32, at 175

(quoting Restatement (Second) of Torts § 283). The reasonable person standard "must make proper allowance for the risk apparent to the actor...." *Id.* at 174. As noted, the alternative courses of action available and the expedience of the course chosen must be considered.

Bodin v. City of Stanwood, 130 Wn. 2d 726, 735-736, 927 P.2d 240

(1996).

A party's chosen trial strategy is insufficient to override the findings of the jury.

In ordering a new trial, the Court of Appeals held that the issue of negligence of the defendant should be removed from the jury's consideration. The theory upon which this determination was based appears to have been that an attempt to prove both negligence and inadequacy of warning may tend to confuse the jury, to the disadvantage of the plaintiff. Having in mind that *it is generally the prerogative of the parties to determine their own trial strategy*, we prefer to rest our concurrence in the holding upon another and, we believe, firmer ground. *The issue of the negligence of the defendant has been fully litigated and presented to the jury under proper instructions. No reason has been shown to disturb the verdict with respect to that question*, and since the issue of strict liability does not involve proof of negligence of the defendant, there is no occasion to retry the issue.

Little v. PPG Industries, 92 Wn. 2d 118, 126, 594 P.2d 911 (1979).

[Emphasis added]

It is error to present an appeal based upon a tort that was never pled and raise a defense that was never presented to the jury.

1. **Tacoma Police Failed To Request A Verdict Form That Included Negligent Investigation Or One Requiring the Jury**

**To Identify What Acts Committed By the Tacoma Police
Formed The Basis of the Finding of Negligence.**

The jury was not limited to finding that the sole negligence committed by the Tacoma Police was in failing to adequately “investigate” the CI’s identification of the apartment where she had observed drugs.

In fact, Mancini presented evidence that the Tacoma Police were negligent in a myriad of ways:

- Failing to timely act upon the CI’s original tip;
- Failing to conduct surveillance;
- Failing to conduct a controlled buy;
- Failing to vet information provided by a CI;
- Failing to observe the cardinal rule of relying on a CI;
- Failing to verify whether Mancini and Logstrom were connected in any way;
- Failing to alert King County of planned raid outside jurisdiction;
- Failing to halt the raid when “immediately” becoming aware officers were in the wrong apartment;
- Forcing Mancini to the ground at gunpoint after acknowledging its unit knew it was in the wrong apartment;
- Failing to halt searches of Mancini’s apartment knowing officers raided the wrong residence;
- Forcing Mancini to stand barefoot and clothed only in her nightgown outside her front door after acknowledging its unit broke down wrong door;
- Handcuffing Mancini when officers knew they were in the wrong apartment;
- Keeping Mancini handcuffed and in custody after acknowledging they were in the wrong apartment;
- Failing to provide Mancini any aid after shattering her door.

Which of these acts formed the basis for the jury returning a finding of negligence? Which of these acts demonstrated a failure of

ordinary care in the eyes of the jury? Counsel for the City of Tacoma did not object to the Verdict Form or offer a Verdict Form that requested the jurors to specify the acts it found negligent. Any claimed error has been waived.

Appellant asks this court to assume that the only act to which the jury assigned negligence was the failure of the Tacoma Police to ascertain the correct address before signing a sworn affidavit and obtaining a search warrant. However, the jury considered the totality of evidence.

2. **This Is Not A Negligent Investigation Claim and Negligent Investigation Was Never Pled. The Tacoma Police Correctly Identified the Suspect Who Officers Sought to Arrest. Appellant's Argument Is Simply One of Semantics.**

For the second time appellant attempts to mislead this court by characterizing respondent's claim as one for "negligent investigation". For the second time, the City of Tacoma is playing a word game in the hope of assigning a different name to the negligence of its police officers in an effort to shield itself from liability. The cause of action presented to the jury was a claim for negligence based on the failure of ordinary care. That claim flowed from the negligence committed by the officers in failing to follow basic police procedure to assure *the subject identified in the investigation* was the same subject whose home they entered. There were multiple acts in which appellant failed to exercise ordinary care.

The most egregious is failure to establish any link between Mancini and Logstrom. Officers failed to verify the address where the subject lived and substantiate it as the same address listed on the affidavit filed with the court in order to *obtain a search warrant for the premises where the subject of the investigation resided.*

Negligence is established by three factors: (1) duty; (2) breach and (3) damage.³⁷ All three are present here and all three are applicable to the Tacoma Police. Appellant cannot escape simple negligence by labeling it as a different tort and asserting a defense to a cause of action never pled and never tried.

Appellant cites multiple cases involving negligent investigation in a failed attempt to undermine this verdict. First, the record is bare of any argument regarding negligent investigation.³⁸ Secondly, appellant lists a series of ‘negligent investigation’ cases all of which are distinguishable from the instant matter. By citing irrelevant cases the appellant fails to mask a key distinguishing factor: The Tacoma Police conducted a sloppy investigation to identify a drug dealer it sought to arrest.

3. Each Negligent Investigation Case Cited By the Defense Is Distinguishable From the Facts in The Instant Matter.

³⁷ *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

³⁸ During a colloquy regarding a directed verdict appellant mentioned negligent investigation. There was never any argument regarding the applicability of the separate and distinct tort of negligent investigation.

Negligent investigation as a cause of action is narrowly applied. Primarily it has been raised as the result of an individual harming another when the state has the authority to monitor that person's actions. The bulk of law addressing negligent investigation has arisen in conjunction with decisions regarding minors in state care. It is typically triggered by grant of state authority via statute.

Appellant cites a series of negligent investigation cases, none of which apply to the facts before this court. Each and every case cited by the appellant is distinguishable. Many of those cases address children exposed to harm as the result of inadequate DSHS investigations. These investigations, carried out under the authority granted the state pursuant to RCW 26.44, resulted in wrongful removal of a child from the family home or placement in a home which exposed minors in the care of the state to danger. Thus the line of negligent investigation cases relied upon by the appellant is extremely narrow and controlled by statute.³⁹ As such, the precedent established in the cases cited by appellant is in no way analogous to the actions of the Tacoma Police in the instant matter.

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

³⁹Appellant concedes in its briefing that this case does not involve the statute typically associated with negligent investigation.

applied in a narrow group of cases that involve RCW 26.44.050 which applies to DSHS investigations. *Roberson v. Perez, supra*; also involves negligent investigation in the context of DSHS placements pursuant to RCW 26.44. *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) interprets duties under the Domestic Violence Protection Act. *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.

Appellant cites *Keates v. City of Vancouver*, 73 Wn.App. 257, 869 P.2d 88 (1994) which does involve allegation of misconduct during a criminal investigation. However, *Keates* is not about negligent investigation nor is negligent investigation analyzed or even mentioned in the opinion. *Keates* was an action for negligent infliction of emotional distress brought by a husband questioned in his wife's murder. Furthermore, unlike Mancini, the plaintiff in *Keates* was the *subject* of a criminal investigation. The analysis leaves no doubt that police officers can be held liable for negligence in carrying out their duties:

We hold, therefore, that police officers owe no duty to use reasonable care to avoid inadvertent infliction of emotional distress *on the subjects of criminal investigations*. This does not mean that plaintiffs may not obtain emotional distress damages as compensation for the officer's breach of some other duty.

Id. at 269. [Emphasis added]

Similarly, appellant's reliance on *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007) is misplaced. That case, a criminal matter, addresses the circumstances surrounding obtaining a search warrant in the context of suppression of evidence gathered under the auspices of that search warrant. Distinguishing *Chenoweth* further is the analysis that the search warrant in question was applied for and obtained under circumstances demanding that law enforcement move quickly to prevent

the destruction of evidence. *Brutsche v. Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008) is also inapplicable because the cause of action was trespass.⁴⁰

As this court wrote in its original opinion, Mancini was neither the subject of an investigation or harmed by someone under state authority and control. It was the Tacoma police—the entity charged with protecting citizens—that harmed Kathleen Mancini.⁴¹

G. Appellant Proposed And The Court Instructed The Jury Regarding the Definition of Probable Cause. The Court Also Gave An Instruction Proposed By the City of Tacoma That A Finding of Probable Cause Was A Bar To All of Kathleen Mancini's Claims.

The touchstone of jury instructions is that the parties are allowed to argue their theories of the case to the jury. ‘Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.’” *Hue v. Farmboy Spray Co.*, *supra.* at 92, quoting *Adcox v. Children's Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 36, 864 P.2d 921(1993); *Farm Crop Energy, Inc. v. Old National Bank of Washington*, 109 Wn.2d 923, 933, 750 P.2d 231 (1988).

⁴⁰ “Mr. Brutsche also asserted a negligence claim, but in his petition for review and supplemental brief in this court he relies entirely on *Goldsby* as controlling precedent on his negligence claim. Because *Goldsby* is, as explained, a trespass case, and because the actions of the officers in breaching the doors on Brutsche's property were intentional, not accidental, we decline to address the negligence claim.” *Id.* at 679.

⁴¹ Appellant's argument that police are not accountable because they had a valid warrant fails. The warrant—issued to search the premises of Logstrom—wrongly identified Kathleen Mancini's address.

The trial court provided jurors with instructions on probable cause offering it as a defense to Kathleen Mancini's claims as well as instructing the jury that a search warrant carries with it a presumption of validity. Therefore, the jury in this case was given instructions designed to shield Tacoma Police from liability.⁴² Appellant had ample opportunity to argue its theory of the case.

A party cannot sit back and fail to offer jury instructions on its theory of the case, fail to object to the Verdict Form and fail to raise what it now asserts is the dispositive issue. *Mancini I* established that this is an issue of negligence—not negligent investigation—and that opinion should not be disturbed on appeal.

H. This Court Previously Ruled That Negligent Investigation Does Not Apply To This Case. This Appeal is Frivolous and Costs Should Be Awarded.

This court soundly rejected application of the theory of negligent investigation to the facts of this case in the previous appeal. Those facts have not changed. Pursuant to RAP 2.5(c)(2) a prior appellate court decision is only revisited based upon the law at the time of the later review. Appellant cites no change in the law as it pertains to negligent investigation and, arguably, appellant failed to appropriately raise the theory at the trial court. No facts emerged at trial which impacted the

⁴² Appellant cites no authority for the proposition that a finding of probable cause shields a municipality from all liability.

application of negligent investigation to this case, a legal theory previously dispensed with in a footnote. Appellant's claim is frivolous.

RAP 18.9(a)(5) provides: "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." Costs and fees may be awarded under such circumstances particularly when the appeal is filed for purposes of delay. *Streater v. White*, 26 Wn.App. 430, 613 P.2d 187 (1980).⁴³ The only possible purpose of this appeal was to delay justice for Kathleen Mancini. The appellant fails to set forth any legal basis upon which this court could overrule its previous holding.⁴⁴ Appellant's goal of delay is further underscored by its deliberate omission in ordering key testimony. Appellant failed to order crucial portions of Ms. Mancini's testimony as well as testimony from one of the key officers at the scene. These purposeful omissions caused a 45-day delay while respondent obtained the missing transcription.

⁴³ The opinion sets forth a 5-part test to determine a frivolous appeal: "(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. See *Jordan, Imposition of Terms and Compensatory Damages in Frivolous Appeals*, Wash.State Bar News, May 1980, at 46. *Id.* at 435.

⁴⁴ "This appeal has occurred because the Department of Retirement Systems would not accept our previous decision." *Boyles v. Dept. of Retirement Systems*, 105 Wn.2d 499, 507, 716 P2d 869 (1986).

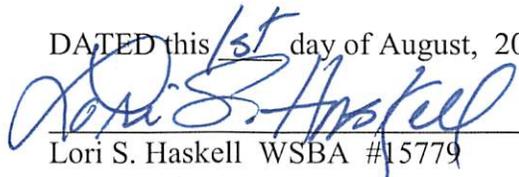
This appeal asserts a defense previously ruled baseless. The respondent is entitled to sanctions as well as costs incurred in having to respond to a frivolous appeal. Pursuant to RAP 14.1 and RAP 14.2 Kathleen Mancini is entitled to an award of costs on this appeal. This includes the items enumerated in RAP 14.3 for reasonable expenses, including reproducing her brief and copies of clerk's papers as well as transcription costs. Under RAP 14.3 and RCW 4.84.080 Mancini is entitled to an award of the statutory attorney fee.

IV. CONCLUSION

Appellant made a tactical decision not to argue negligent investigation at trial. Negligent investigation did not apply to this case at the time of the first appeal and it does not apply now. The theory was never argued to the jury. It is well settled that raising an issue for the first time on appeal violates basic procedure and thus it will not be considered.

This court should uphold the appellate court decision issued the first time it considered *Mancini v. Tacoma* and uphold the jury's verdict. This appeal should be denied with costs and appropriate fees awarded to Kathleen Mancini.

DATED this 1st day of August, 2018.



Lori S. Haskell WSBA #15779
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2018, I caused a true and correct copy of Respondent's Appellate brief to be served in the manner indicated below:

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I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 1st day of August, 2018 at Seattle, Washington.


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