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NO. 97583-3

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

KATHLEEN MANCINI, Petitioner

v.

CITY OF TACOMA, ET. AL., Respondent

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**CITY OF TACOMA'S  
ANSWER TO BRIEF OF AMICUS CURIAE  
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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## I. INTRODUCTION

Amicus Curiae American Civil Liberties Union of Washington's (hereinafter "ACLU") brief leaves the impression that, unless this Court creates a new cause of action for negligent investigation, law enforcement will run amok, unfettered, and citizens are powerless, left without any remedy. Nothing could be farther from the truth. As outlined herein, the warrant process – which was strictly followed by the police here - provides the quintessential check on unfettered law enforcement action. Further, long-standing intentional torts provide plaintiffs with redress for overreaching police conduct. Thus, while the ACLU is critical of the Tacoma Police Department's investigation at issue, it is important to note Amicus does not: 1) dispute police had probable cause for a search and obtained a lawful warrant from a neutral magistrate for the entry in question; nor 2) cite any record showing this warrant was improperly based on "material falsehoods or omissions made recklessly or intentionally." *Compare* ACLU Brief at 6-17 with *State v. Chenoweth*, 160 Wn.2d 454, 478-9, 158 P.3d 595 (2007). Likewise, Amicus does not refute that the jury rejected all of Plaintiff Kathleen Mancini's intentional tort claims. *Compare* ACLU Brief at 6-17 with CP 526-28 (jury verdict form states no invasion of privacy, false imprisonment, assault or battery was found).

The ACLU argues the Court of Appeals should have refused to enforce

long settled precedent – reaffirmed by this Court just two months ago – holding alleged negligent investigations are not cognizable torts. Amicus’ position is contrary to decades of well-reasoned case law, public policy, and *stare decisis*. This Court should continue to reject such claims.

## II. ANALYSIS

### A. LONG SETTLED PRECEDENT HOLDS REJECTING NEGLIGENT INVESTIGATION TORT IS ESSENTIAL TO PUBLIC SAFETY

The ACLU urges an unprecedented change in Washington law, a change that would require this Court to overturn more than 30 years of precedent. Amicus argues such a change is necessary because “[t]ort liability is essential to motivate governments to adopt policies and procedures that prevent what happened here<sup>1</sup> and is an important avenue of redress for Ms. Mancini.” ACLU Br. 8 (emphasis added). Though “[t]ort liability properly restrains governmental misconduct, ... too much of a good thing usually becomes a bad thing, and tort liability is no exception”, such that “well-tailored” limits on governmental liability “*are no less essential* than a measure of liability itself.” See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J.

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<sup>1</sup> This Court already has held the test of probable cause includes a “tolerance for factual inaccuracy” because “[p]robable cause may be based on hearsay, a confidential informant’s tip, and other unscrutinized evidence that would be inadmissible at trial.” *State v. Chenoweth*, 160 Wn.2d 454, 475, 158 P.3d 595 (2007). Thus, the negligent standard advocated by the ACLU has already been rejected by this Court in the warrant context.

Const. L. 797, 870 (2007)(emphasis added).

Contrary to the ACLU's assertion, it is well settled that under the proper facts, there *can* be "tort liability" for *intentional* acts of law enforcement leading up to police entry into a home and an arrest -- even when, *as here*, such is done under a lawful warrant supported by probable cause. *See e.g. Brutsche v. City of Kent*, 164 Wn.2d 664, 675-76, 193 P.3d 110 (2008) (holding trespass was the proper cause of action against city for damages resulting from use of battering ram to enter home under a search warrant but "declin[ing] to address the negligence claim" because "actions of the officers in breaching the doors on [plaintiff's ] property were intentional, not accidental"); *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983)(holding no sovereign immunity on claims against police for false arrest and imprisonment, malicious prosecution, libel and slander).<sup>2</sup> Indeed, Mancini's claims for invasion of privacy, assault, battery and false imprisonment *were* litigated *and soundly rejected by the jury*. CP 526-28.

The issue in this case then is not, as the ACLU misstates, whether "tort liability" is available "to motivate governments" or if there was a *tort* "avenue of redress for Ms. Mancini." *See* ACLU Br. 8. Rather, the issue is

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<sup>2</sup> Amicus erroneously cites *Bender* - among other things, *see infra*. at 17, 19, as holding that "[n]egligence tort law is an essential way to provide people redress and motivate the government to prevent and correct abuses." ACLU Br. 6-7. In fact, *Bender* involved no *negligence* claim but only addressed immunity from *intentional* torts. *See Bender, supra*.

whether several decades of well-reasoned precedent should be reversed and a new, previously disallowed cause of action for negligent investigation should be created. Compare e.g. *Wrigley v. State*, 195 Wn.2d 65, 76, 455 P.3d 1138 (2020) (“To *balance*” societal interests “in the context of investigations, we have not recognized a general tort claim of negligent investigation” but recognized only a “narrow exception” concerning child abuse – but since this “statutory duty to investigate was never triggered, we do not evaluate the sufficiency of *any* investigation that DSHS performed.” (emphasis added)); *Ducote v. State, Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009)(negligent investigation claims “do not exist under common law in Washington” because of “the chilling effect such claims would have on investigations.”)(citing *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999); *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999)); *M.W. v. Dept. of Social and Health Services*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) (“Our courts have not recognized a general tort claim for negligent investigation.”); *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988) (no liability for failure to discover cattle were infected by disease when only duty was to public); *Laymon v. Department of Natural Resources*, 99 Wn.App. 518, 530, 994 P.2d 232 (2000) (“A claim of negligent investigation will not lie against police officers.”); *Rodriguez v. Perez*, 99 Wn.App. 439, 434, 994 P.2d 874 (2000)

(“a claim for negligent investigation does not exist under the common law because there is no duty owed to a particular class of persons.”); *Fondren v. Klickitat Cty*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) (“A claim for negligent investigation is not cognizable under Washington law.”); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992) (“Washington does not recognize the tort of negligent investigation.”)

Washington’s more than 30-year-line of unbroken precedent holds only claims for *intentional* torts – not *negligent investigations* – are available when suing over law enforcement investigations because such “strike[s] the appropriate balance between the public's right to have a criminal apprehended and the suspect's right to be free from injury.” *Keates v. City of Vancouver*, 73 Wn. App. 257, 266–68, 869 P.2d 88 (1994)(rejecting negligence claim for police investigation since no duty was owed and the “utility of the investigative conduct, ... vastly outweighs the risk of harm.”) (citing *Hanson v. Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 496–97, 125 P.2d 681 (1942)). Thus, precedent has considered both the rights of those suspected of crime *as well as* “the central roles which police and prosecutors play in maintaining order in our society and the burdens imposed on each of us as citizens as part of the price for that order.” *Keates*, 73 Wn. App. at 267 (quoting *Hanson*, 121 Wn.2d at 568 (Utter, J., dissenting) citing, F. Harper,

F. James, and O. Grey, 1 The Law of Torts § 4.2 at 407–08 (2d ed. 1986)).

Balancing the rights of suspects and the right of the public to apprehend criminals has led courts to reject a negligent investigation cause of action because the “public has a vital stake in the active investigation and prosecution of crime[.]” Moreover,

Police officers and other investigative agents must make quick and important decisions as to the course an investigation shall take. Their judgment will not always be right; but to assure continued vigorous police work, those charged with that duty *should not be liable for mere negligence.*

*Smith v. State*, 324 N.W.2d 299, 301 (Iowa 1982)(cited with approval in *Dever v. Fowler*, 63 Wn. App. 35, 45, 816 P.2d 1237 (1991), *rev. denied*, 118 Wn.2d 1028 (1992))(emphasis added). Imposing a duty to investigate:

... would be completely open-ended as to priority, duration and intensity. Would it entail ignoring other calls for a domestic violence response, ignoring other reported crimes, ignoring response to a report of an injury traffic accident? How long does such duty continue? .... Merely to state such obvious practical problems is to demonstrate the extraordinary difficulty that would follow in attempting to implement any such mandatory duty ....

*Donaldson*, 65 Wn.App. at 671–72. In short, a tort of negligent investigation would “impair vigorous prosecution and have a chilling effect upon law enforcement” as well as “give rise to potentially unlimited liability for any type of police activity.” *Keates*, 73 Wn. App. at 269 (*citing Dever*, 63 Wn. App. at 44–45); *see also Stansfield v. Douglas Cty.*, 107 Wn. App. 1, 12–13, 27 P.3d 205 (2001); *Corbally*, 94 Wn. App. at 740.

For sound policy reasons, Washington Courts have balanced the competing public interests of society and the individual and consistently found those claiming to have been wronged by law enforcement investigations may recover for the commission of intentional torts, but that it is essential to public safety that claims for *negligent investigation* should not be an *additional* tort cause of action. *See also* WSAC *et al.* Amici Br. 4-7. Those same policy reasons continue to hold true today.

**B. DECADES OF PRECEDENT CONSTRUING THE WAIVER OF SOVEREIGN IMMUNITY IS NOT “INTERFERENCE,” BUT FULFILLMENT OF JUDICIARY’S CONSTITUTIONAL ROLE**

The ACLU asserts our Courts’ rejection of a common law *negligent investigation* tort constitutes “*judicial interference* with the Washington Legislature’s Constitutional authority to waive sovereign immunity” because “this Court has made clear that under such waiver, a governmental actor is liable to the same extent as if it were a private party or corporation, RCW 4.92.090, 4.96.010.” ACLU Br. 8, 11 (emphasis added). Amicus then criticizes long standing precedent and scolds that the “role of the courts is to uphold, not overturn this legislative determination.” *Id.* at 11. This argument misstates the role of the courts, the intent of the Legislature, and the applicability of precedent protecting *both* governmental *and* private actors equally from negligent investigation claims.

First, the ACLU’s discussion of the waiver of sovereign immunity (see

p. 8-10) focuses on the doctrine of discretionary immunity, which has no application to the instant case. As noted by this Court recently in *Ehrhart v. King County*, No. 96464-5, 2020 Wash. LEXIS 235, \*10-16, while “the discretionary immunity doctrine emerged in response to Washington’s waiver of its sovereign immunity in the 1960s,” discretionary immunity is grounded in the separation of powers between co-equal branches of government. *Id.* at \*15 (citing *King v. City of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974)) (“Immunity for ‘discretionary’ activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.”). This case does not involve a policy decision made by a coordinate branch of government, and thus the doctrine of discretionary immunity has no bearing on it.

Second, because the “separation of powers doctrine preserves the constitutional division between the three branches of government,” it is “the function of the legislature to set policy and to draft and enact laws” but “it is ultimately *for the courts to construe the law.*” *State v. Elmore*, 154 Wn. App. 885, 905, 228 P3d. 760, *rev. denied*, 169 Wn.2d 1018 (2010)(citing *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn.App. 609, 615 n. 2, 694 P.2d 697 (1985))(emphasis added). Thus, precedent construing the waiver of sovereign immunity is not “judicial interference,” but the fulfillment of the judiciary’s Constitutional role.

Third, both the express language of the statutory waiver and its construction by our Courts refute the ACLU's assumption the Legislature intended no limit to the type of tort suits brought against government. *See e.g.* ACLU Br. 12-13. This Court has noted that the statute waiving sovereign immunity "is not as broad as it possibly could have been written," and "does not render the state liable for every harm that may flow from governmental action, or constitute the state a surety for every governmental enterprise involving an element of risk," but instead provides "government is rendered liable for damages *only when* such damages arise out of 'tortious conduct to the same extent as if it were a private person or corporation.'"<sup>3</sup> *See Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965)(emphasis added); *see also Bodin v. City of Stanwood*, 130 Wn.2d 726, 740, 927 P.2d 240, 248 (1996). Thus, "RCW 4.96.010 *does not*

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<sup>3</sup> As this Court explained in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013), while the waiver of sovereign immunity makes governments liable to the same extent as private persons, "governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law." For these uniquely governmental duties imposed by statute or ordinance, "the public duty doctrine comes into play" and "courts must determine whether governments owe those duties to an individual or the public as a whole." *Ehrhart*, at \*12 (citing *Munich v. Skagit Emergency Com-mc'ns Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J., concurring)). The City's "statutorily imposed obligations to provide police services, enforce the law, and keep the peace ... have always been, and will continue to be nonactionable duties owed to the public at large." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 552, 442 P.3d 608 (2019). There is no question the obligation to enforce narcotics laws and obtain search warrants as part of narcotics investigations are unique government duties that are not imposed on private persons. *See, e.g., City of Seattle v. Montana*, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996)(first class cities authorized to preserve public peace and good order)(citing WASH. CONST., art. XI, §11; RCW 35.22.2980(35)). *See also* Chapter 10.79 RCW (Searches and Seizures).

*create any new causes of action, imposes no new duties, and brings into being no new liability; it merely removes the defense of sovereign immunity” because its “intent ... was to permit a cause of action in tort if a duty could be established, just the same as with a private person.”* (emphasis added) *Garnett v. City of Bellevue*, 59 Wn. App. 281, 285, 796 P.2d 782 (1990). For this reason, “one must *first establish the existence of a duty and then apply* RCW 4.96.010 to insure that, *having established the duty*, claimants may proceed in tort against municipalities to the same extent as if the municipality were a private person.” *Id.* (emphasis added). *See also Donohoe v. State of Washington*, 135 Wn. App. 824, 832, 142 P.3d 654 (2006)(if plaintiff “could show a waiver of sovereign immunity, *it would then need to show that the State owed, and breached, a specific duty.*” (emphasis added)).

The statutory waiver of RCW 4.96.010 therefore has no application here because Plaintiff cannot “first establish the existence of a duty” to investigate that would be “just the same as with a private person.” Indeed, for almost thirty years our state has held that – just as there is no “cause of action for negligent investigation in the context of an allegedly defective prosecutorial investigation” – so too “tort liability for negligent investigation is *equally inappropriate*” for a *private* person or corporation. *See Lambert v. Morehouse*, 68 Wn. App. 500, 504-05, 843 P.2d 1116 (1993) (holding in

private employment action that “Washington courts have not and should not recognize a cause of action for negligent investigation”); *see also Hanson v. Boeing Co.*, 2015 WL 6449312, at \*3 n. 1 (W.D. Wash. 2015)(dismissing negligence claim in private action because “[n]egligent failure to investigate is not a cause of action under Washington law.”) Almost all “other jurisdictions have ‘uniformly rejected such claims.’” *Lambert, id.*; *see also e.g. Russ v. State Employees Fed. Credit Union*, 298 A.D.2d 791, 750 N.Y.S.2d 658 (N.Y. App. Div. 2002)(credit union which reported suspected theft to police could not be held liable to subsequently acquitted suspect because negligent investigation is not actionable claim); *Bui v. St. Paul Mercury Ins. Co.*, 981 F.2d 209, 210 (5th Cir. 1993)(action for insurance company “negligently investigat[ing] their claim” was dismissed because it “was not a party to the contract and, . . . owed no duty to [plaintiffs] under Texas law.”); *Brody v. Ruby*, 267 N.W.2d 902, 906 (Iowa 1978)(no liability “for negligently failing to investigate the facts and circumstances surrounding the medical malpractice claim before filing suit” against plaintiff doctor).

Lastly, contrary to the ACLU’s assertion, *see* ACLU Br. 13, legislative history confirms the Legislature *did not* intend RCW 4.96.010’s waiver of sovereign immunity to make local governments liable for negligent investigation. By the time RCW 4.96.010 was first revised in 1993, *see* 1993 Wash. Legis. Serv. Ch. 449 (H.B. 1218), our Courts had for several years

held that “Washington does not recognize the tort of negligent investigation” in suits against government. *Donaldson*, 65 Wn. App. at 671; *see e.g. also Honcoop*, 111 Wn.2d at 188; *Dever*, 63 Wn. App. at 44-45. Nevertheless, the Legislature did nothing in its 1993 revision to change its operative language to address governmental negligent investigations. By the next amendment in 2001, *see* 2001 Wash. Legis. Serv. Ch. 119 (H.B. 1530), additional precedent continued to confirm that “a claim for negligent investigation does not exist under the common law because there is no duty owed to a particular class of persons.” *Rodriguez*, 99 Wn. App. at 434; *see also Laymon*, 99 Wn. App. at 530; *Corbally*, 94 Wn. App. at 740; *Fondren*, 79 Wn. App. at 862. Indeed, the statute was last amended in 2011, 2011 Wash. Legis. Serv. Ch. 258 (S.H.B. 1332), *eight years* after this Court again confirmed that “[o]ur courts have not recognized a general tort claim for negligent investigation.” *M.W.*, 149 Wn.2d at 601. Nevertheless, on no occasion did the Legislature change RCW 4.96.010’s operative language or indicate disagreement with the decades-long precedent rejecting a negligent investigation tort.

As a matter of law, the Court will “presume that the legislature knows the existing state of the case law in the areas in which it legislates.” *See Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 811, 123 P.3d 88 (2005). Thus, “the legislature's silence with regard to civil causes

of action” prior to its amendment of its legislation “implies legislative acquiescence ....” *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 545 n. 5, 374 P.3d 121 (2016). *See also City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009)(“[b]y not modifying the PRA's definition of agency to include the judiciary, the legislature has implicitly assented to our holding ... that the PRA does not apply to the judiciary and judicial records.”); *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006) (“If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval”); *Matter of Hastings' Estate*, 88 Wn.2d 788, 798, 567 P.2d 200 (1977)(“When the legislature reenacts a statute which has been construed by the highest court of the state and does not amend it, it is assumed that the legislature intended to incorporate the judicial construction in the absence of compelling reason why such an assumption should not be made.”). Thirty years of Legislative silence speaks volumes.

C. ABSENCE OF “NEGLIGENT INVESTIGATION” TORT IS NOT “NEW” OR AN “IMMUNITY;” IT IS THE ABSENCE OF A DUTY

The ACLU argues “there is no basis for creation of a *new immunity* for negligence ‘related to evidence gathering activities’” because: “Notwithstanding the lack of any basis for distinguishing among torts or judicially creating *immunities*, and *Bender*’s rejection of *immunity* for *negligence involving investigations*, ... a series of *court of appeals cases* have singled out

injuries arising out of negligence in investigations as a ‘forbidden tort.’”  
ACLU Br. 11-14. In nearly every respect, this misstates the law.

First, the rule regarding the absence of a duty for investigations is not “new” and thus, did not need to be “created.” Rather, as previously shown, the absence of such a common law duty for both governmental and private entities was recognized long ago. *See e.g. Honcoop*, 111 Wn.2d at 188, 194 (“State owed *no actionable duty* to the dairy operators arising out of the brucellosis program” of cattle inspections because “[w]here the liability of a governmental entity is at issue, we have employed the ‘public duty doctrine’ to determine whether the duty is one owed to a nebulous public or whether that duty is owed to a particular individual”); *Rodriguez*, 99 Wn. App. at 434 (“a claim for negligent investigation does not exist under the common law because *there is no duty* owed to a particular class of persons.”)(emphasis added); *Lambert*, 68 Wn. App. at 504-05 (in addressing “whether the employer *owed a duty* to conduct a reasonable investigation prior to discharge,” the “Washington courts *have not and should not recognize a cause of action for negligent investigation.*” (emphasis added)).

Second, it also mischaracterizes precedent to claim it was only “a series of court of appeals cases” that established the absence of such a duty. *This Court, on multiple occasions, has also held that no such duty exists. See e.g. Wrigley*, 195 Wn.2d at 76 (“we have not recognized a general tort claim of

negligent investigation”); *M.W.*, 149 Wn.2d at 601 (“Our courts have not recognized a general tort claim for negligent investigation); *Ducote*, 167 Wn.2d at 702; *Honcoop*, 111 Wn.2d at 188.<sup>4</sup>

Third, the ACLU cites no case characterizing the absence of a common law “negligent investigation” tort as an “immunity.” That is hardly surprising, given that the cases addressing the proposed claim define it as the absence of a duty. *See e.g. id.* Further, the ACLU’s characterization of the long-standing rule (that negligent investigation claims are not cognizable) as an immunity makes little sense, given the definition of “immunity.” “Immunity is consistently characterized as an exemption from liability.” *Dep’t of Transp. v. Mullen Trucking 2005, Ltd.*, 194 Wn.2d 526, 542, 451 P.3d 312 (2019)(Wiggins, J., dissenting)(citing *Frost v. City of Walla Walla*, 106 Wn.2d 669, 724 P.2d 1017 (1986)(statute providing only the “no liability [may be] imposed granted immunity); Black’s Law Dictionary 898 (11<sup>th</sup> ed. 2019)(defining “immunity” as “[a]ny exemption *from a duty, liability or service of process*” (emphasis added)). This Court has stated that

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<sup>4</sup> The ACLU claims “[n]one of the cases adopting the forbidden tort concept, however, tie it to the public duty doctrine.” ACLU Br. 13. If Amicus means that our Courts have never rejected a “negligent investigation” claim under both the common law and public duty doctrine, it is mistaken. *See Donohoe*, 135 Wn.App. at 852; *Pettis*, 98 Wn.App. at 558, 563.

“[w]hether a duty does or does not exist is irrelevant if a defendant is immune for reasons of public policy.” *Babcock v. State*, 116 Wn.2d 596, 641, 809 P.2d 143 (1991). Thus, the absence of a *duty* is *different* from the presence of an *immunity*. *Accord Donohoe*, 135 Wn. App. at 832 (when a plaintiff “could show a *waiver of sovereign immunity*, it would *then need to show* that the State owed, and breached, a *specific duty*.”)(emphasis added); *Garnett*, 59 Wn. App. at 285 (“one must *first establish the existence of a duty* and *then* apply RCW 4.96.010 [i.e. sovereign immunity] to insure that, *having established the duty*, claimants may proceed in tort against municipalities to the same extent as if the municipality were a private person” (emphasis added)).

Moreover, the claim “*Bender*[] reject[ed] *immunity* for *negligence* involving investigations” is erroneous because it did not involve a negligence claim but only *intentional torts*. *See generally* 99 Wn.2d 582. Indeed, any “argument that *Bender* created a cause of action for negligent investigation is meritless” because at best it only “overruled portions of two Court of Appeals decisions that extended the doctrine of discretionary governmental *immunity* to public officers performing their duties.” *Dever*, 63 Wn.App. at 44-45 (citing 99 Wn.2d at 589-90) (emphasis added).

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D. THIS COURT HOLDS A NEGLIGENCE STANDARD IS “UNWORKABLE” IN CONTEXT OF THE WARRANT PROCESS

The ACLU next argues that the existence of a warrant does not confer immunity, because of the allegation of “negligence in unduly detaining and questioning Ms. Mancini after the entry” and because of the “City’s negligence in deciding to invade the wrong apartment.” ACLU Br. 14-15. This assertion ignores the jury’s verdict (*see* Appellant’s Reply, p. 15-16) and the evidence adduced at trial (*see id.* at 17-18). Moreover, this argument flies in the face of this Court’s pronouncements on the warrant process. *See e.g. State v. Chenoweth*, 160 Wn.2d 4564, 158 P.3d 595 (2007). Indeed, the same policy concerns that preclude a tort of “negligent investigation” have caused Courts in criminal cases to likewise reject a negligence standard as “unworkable” for analyzing entries pursuant to a warrant. *See Chenoweth*, 160 Wn.2d at 473 (negligence standard is “unworkable” because it is “inherently inconsistent with the concept of probable cause and the warrant process.”). *See also e.g. Franks v. Delaware*, 438 U.S. 154, 177 (1978 (“[a]llegations of negligence or innocent mistake are insufficient” to invalidate a search warrant.”); *United States v. Carmichael*, 489 F.2d 983, 989 (7th Cir. 1973) (“If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed.”)

(emphasis added)); *State v. Seagull*, 95 Wn.2d at 908 (same); *State v. Goodlow*, 11 Wn. App. 533, 523 P.2d 1204 (1974) (evidence that “an undisclosed informant to the affiant police officer was false or materially inaccurate” was properly disallowed because an “affidavit need only establish probable cause” since it “is only the probability of criminal activity ... which represents the standard of probable cause.”).

Finally, though the ACLU asks this Court to reverse thirty years of precedent, it makes no mention of *stare decisis* and its requirement that precedent be followed unless it “has *been shown* to be incorrect *and* harmful,” or “the legal underpinnings of our precedent have changed or disappeared altogether.” *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 728-730, 381 P.3d 32 (2016)(quoting *W.G. Clark Constr. Co. v. P. NW Reg’l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)) (emphasis added). Having nowhere acknowledged this required showing, neither Mancini nor this Amicus attempts to make it. In contrast, it has been shown that the long standing *rejection* of a negligent investigation cause of action is *not* “incorrect and harmful,” and that “the legal underpinnings” of that precedent has neither “changed [n]or disappeared altogether” – especially for allegations of negligence leading to the issuance of a valid search warrant. *See discussion supra.* at 4-7, 18-19; WAPA Amicus Br.

E. INTENTIONAL FALSEHOOD OR OMISSION THAT OVERCOMES VALIDITY OF A WARRANT IS NOT AT ISSUE

Finally, the ACLU oddly asserts “the existence of a warrant does not confer *immunity*<sup>5</sup>” and that *Bender*, 99 Wn.2d at 594, and *Turngren v. King County*, 104 Wn.2d 293, 306, 705 P.2d 258 (1985), “held that in a civil action where the police, in applying for a warrant, fail to make full disclosure of what they know and should have known, the warrant confers no *immunity*.” ACLU Br. 14-15 (emphasis added). However, as noted above, “immunity” for *intentional torts* is not a basis for our Courts’ precedent rejecting a “*negligent investigation*” tort. *See discussion supra.* at 16-19. Further, and in any case, Mancini’s own expert testified that police obtaining the warrant at issue *neither* made a deliberate falsehood *nor* failed to disclose material information. *See* RP 117, 180.

Amicus lastly notes the jury was instructed “that a party challenging a warrant must show that the officer who obtained the warrant knowingly withheld material information or misrepresented the facts in order to obtain the warrant” and yet it still “found for Ms. Mancini.” ACLU Br. 15. Such

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<sup>5</sup> In this context, Amicus ACLU argues that “when a policeman ‘kicks in the wrong door,’” they are liable in tort, just as a private actor would be. ACLU Br. 14. This ignores the single most important fact of this case – *the officers had a valid search warrant for Kathleen Mancini’s home, a warrant based on probable cause and issued by the superior court.* While a private person is not permitted to enter another’s home without consent, law enforcement – *when in possession of a valid search warrant for that home* – is so permitted, as the entry is privileged. *See Brutsche*, 164 Wn.2d at 673-74.

“knowing” misconduct is the test for an *intentional* tort, and it has been shown there was *neither evidence nor a finding* of such a tort. The *one* finding favoring Mancini instead was on “negligence,” and resulted from the jury being improperly instructed on “negligence” and told there was “*negligence* in obtaining warrant.” CP 510, 526-29, 561, 564, 569.<sup>6</sup>

### III. CONCLUSION

For the reasons stated herein, this Court should reject the arguments made by Amicus ACLU and should affirm Division I’s opinion.

DATED this   24   day of April, 2020.

WILLIAM C. FOSBRE, City Attorney

s/ Jean Homan

JEAN P. HOMAN, WSBA #27084

Deputy City Attorney

Attorney for Respondent City of Tacoma

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<sup>6</sup> The ACLU also summarily asserts “there was negligence in unduly detaining and questioning Ms. Mancini *after the entry*.” See ACLU Br. 14 (emphasis added). Instead, Mancini actually argued there was “negligence in *obtaining warrant*,” CP 564, 569 (emphasis added), while the acts alleged *after* entry, CP 2-3, “were intentional, not accidental.” *Brutsche*, 164 Wn.2d at 679. All such intentional torts were rejected. CP 527-28.

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