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NO. 97583-3

**SUPREME COURT OF THE
STATE OF WASHINGTON**

KATHLEEN MANCINI, Petitioner

v.

CITY OF TACOMA, ET. AL., Respondent

**RESPONDENT CITY OF TACOMA'S COMBINED ANSWER TO
AMICI BRIEFS OF WASHINGTON ASSOCIATION OF PROSE-
CUTING ATTORNEYS, AND OF WASHINGTON STATE ASSOCI-
ATION OF COUNTIES, WASHINGTON ASSOCIATION OF
SHERIFFS AND POLICE CHIEFS, AND WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS**

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I. INTRODUCTION

The City of Tacoma concurs with the legal analysis of both Amicus Washington Association of Prosecuting Attorneys (hereinafter “WAPA”) and Amici Washington State Association of Counties, Washington Association of Sheriffs and Police Chiefs, and Washington State Association of Municipal Attorneys (hereinafter “WSAC et al.”) in opposing Plaintiff Kathleen Mancini’s efforts to reverse the Court of Appeals decision in this case. The City submits this combined Answer to those amici briefs to emphasize and more fully develop specific issues raised in those briefs that the City has not had the opportunity elsewhere to fully discuss.

II. ANALYSIS

A. PRECEDENT AND PUBLIC DUTY DOCTRINE “FOCUSING TOOL” CONFIRM NO COMMON LAW DUTY WAS OWED

Among other things, the brief of Amici WSAC *et al.* responds to Plaintiff Mancini’s claim that police should be liable for alleged negligent investigations because under the common law there can be a duty to perform reasonably once an “affirmative act” is taken. *Compare* WSAC Br. 11-13 *with* Pet. For Disc. Rev. 8-9. As WSAC *et. al.* correctly notes, not only was there no alleged negligent “affirmative act” here, but “police are not liable *even when they do take negligent affirmative acts* if they do so pursuant to a statutory duty that is *owed to all and not owed to a specific individual.*” *See* WSAC

Br. 12-13 (emphasis added). Indeed, as shown below, this Court has repeatedly rejected negligence claims alleging “affirmative acts” – including those taken during investigations – when those acts are taken pursuant to a duty owed to the public and not to the individual.

Thus, in *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 849, 861, 133 P.3d 458 (2006), a county “dispatched a Centralia police officer *to conduct an investigation*” in response to an emergency call but the officer only went to the location from which the call had originated and not to the address where the reported heart attack had taken place. (Emphasis added). Despite the suit having alleged negligence in the officer’s affirmative investigative acts, this Court dismissed the claim brought by the family of the deceased heart attack victim because the “county was merely carrying out responsibilities it generally owed to the public” and thus “*no common law duty was owed* to [decedent] individually or as a member of a particular class under these circumstances.” *Id.* (emphasis added). Likewise, in *Ehrhart v. King Cty.*, _ Wn.2d ___, 2020 WL 1649891, at *1–2 (Apr. 2, 2020), a County in response to a report of a hospitalization for a contagious hantavirus “assigned a public health nurse *to conduct an investigation*” who “determined there were no other likely exposures and so a health advisory was not warranted.” (emphasis added). Despite the allegation the public health officer “negligently handled”

the investigation and contributed to a later hantavirus death, this Court affirmed dismissal of the negligence action because such was a “duty to the public as a whole” and not an “individual tort duty to” plaintiff. *Id.* Again, in *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 759 P.2d 447 (1988), this Court held “no duty is owed by local government to a claimant alleging ... *negligent inspection*” because “no liability may be imposed for a public official's negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).’” *Id.* at 163 (emphasis added)(quoting *J & B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304, 669 P.2d 468(1983), overruled by 111 Wn.2d 174 (1988); *Chambers–Castanes v. King Cy.*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983); 18 E. McQuillin, *Municipal Corporations* § 53.04b (3d ed. 1984)).

Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 442 P.3d 608 (2019) is this Court’s most recent acknowledgment that affirmative acts in performance of a public duty do not create police liability. There, unlike here, the plaintiff’s “*negligence* claims arise out of [an officer’s] *direct interaction with him*, not the breach of a *generalized public duty*” and the “City therefore owed Beltran-Serrano a duty in tort to exercise reasonable care.” *Id.* at 551 (emphasis added). Thus, “the *specific tort duty* owed to [plaintiff] arises from

[the officer's] *affirmative interaction with him*" and not just because the officer took an affirmative act. *Id.* at 552. Indeed, this Court was careful to make clear "such a duty *does not open the door to potential tort liability* for a city's statutorily imposed obligation to provide *police services, enforce the law, and keep the peace*" because "[t]hese statutory duties *have always been, and will continue to be, nonactionable duties* owed to the public at large." *Id.* at 51–52. It further explained the reason for this is that "governments, unlike private persons, are tasked with *duties that are not actionable duties within the meaning of tort law,*" *id.* at 549 (citing *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013)), and the "central purpose behind the public duty doctrine is to ensure that *governments do not bear greater tort liability than private actors.*" *Id.* (citing *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012)(Chambers, concurring).¹

¹ As this Court previously explained in *Munich* -- where "the County owed a statutory duty to the general public, under RCW 36.28.010, to preserve the peace and arrest those who disturb it" and "[p]rivate persons *are not required by statute or ordinance to ... maintain the peace and dignity* of the state of Washington," *see* 175 Wn.2d at 878 – the "goal should be to fulfill the legislature's intent to make governments accountable *to the same degree as private individuals and corporations, but also to ensure that governments have no greater liability than others*" because "some governmental functions are *not meaningfully analogous to anything a private person or corporation might do.*" *Id.* at 894-95 (Chambers, J. concurring)(citing *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 252-53, 407 P.2d 440 (1965)). Likewise, in *Chambers-Castanes*, 100 Wn.2d at 284, this Court similarly noted that though "in the broad sense" our "law enforcement agencies have a statutory duty to provide police protection (*see* RCW 36.28.010 requiring that the sheriff and deputies '[s]hall keep and preserve the peace' and 'arrest ... all persons who break the peace, or attempt to break it') and ... have a common law duty to provide such protection,' ... we have consistently held that absent a clear legislative intent or clearly enunciated policy to the contrary, these duties are owed to the public at large and are *unenforceable as to individual members of the public.*" (citations omitted)(emphasis added).

Because the “[a]brogation of the doctrine of sovereign immunity did not create duties where none existed before” but “merely permitted suits against governmental entities that were previously immune from suit,” then “unless legislation or judicially created exceptions create a duty, where none existed before, *liability will not attach.*” *Chambers-Castanes*, 100 Wn.2d at 288. Liability therefor also will not attach here since: 1) the “statutorily imposed obligation to provide police services, enforce the law, and keep the peace ... have always been ... nonactionable duties owed to the public at large;” 2) no duty to an individual for a criminal investigation that goes beyond obtaining probable cause has “existed before;” and 3) no “legislation or judicially created exceptions create a duty.”

Though this Court in numerous contexts has rejected a common law duty based solely on acts undertaken pursuant to a duty owed only the public,²

² See, e.g., *Sheikh v. Choe*, 156 Wn.2d 441, 444, 448, 128 P.3d 574, 576 (2006) (claim against State for “negligent placement” of youths who assaulted plaintiff was dismissed because government was “not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general”)(*citing Taylor*, 111 Wn.2d at 163)) (emphasis added); *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 782, 785, 30 P.3d 1261 (2001) (rejecting claim “Fire Chief negligently failed to effectively use personnel and equipment once they were dispatched” because “no liability may be imposed for a public official's negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)’”)(*citing Beal v. City of Seattle*, 134 Wn.2d 769, 784, 954 P.2d 237 (1998)(*citing Taylor*, 111 Wn.2d at 163, 759 P.2d 447; *Chambers–Castanes v. King County*, 100 Wn.2d 275, 285, 669 P.2d 451 (1983)) (emphasis added); *Hartley v. State*, 103 Wn.2d 768, 785, 698 P.2d 77 (1985) (state not liable for fatal car accident after State improperly reinstated license despite driver’s numerous arrests for DWI because, though the intent of the statutory duty “is to deny the use of the State's highways to drivers who flout the laws, the class of persons thus protected is the public in

such is especially necessary in the context of law enforcement investigations. This is so because: “Everything law enforcement undertakes conceivably might have some impact on a particular family or individual” and if a “broad view of ‘duty by undertaking’ were the law, ... [e]very unsolved crime could then theoretically give rise to a cause of action by the victim or a deceased victim's relatives for negligent investigation.” See *Vasquez v. State*, 220 Ariz. 304, 206 P.3d 753, 762 (Ariz. Ct. App. 2008). See also *Hogue v. City of Phoenix*, 240 Ariz. 277, 281, 378 P.3d 720, 724 (Ariz. Ct. App. 2016)(same). As this Court and our Courts of Appeal have repeatedly noted, the effect of such unprecedented exposure to claims of alleged negligent law enforcement investigations would “give rise to potentially unlimited liability for any type of police activity,” and as a result “impair vigorous prosecution and have a chilling effect upon law enforcement” as well. See, e.g., *Keates v. City of Vancouver*, 73 Wn. App. 257, 269, 869 P.2d 88 (1994); see also *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

general.”); *Phillips v. King Cty.*, 136 Wn.2d 946, 963, 968 P.2d 871, 875–76 (1998) (dismissing negligence claim because “the public duty doctrine as it applies to land use regulation also militates against finding municipal liability based only on approval of private development.”); *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (rejecting claim county “negligent in issuing a permit that was not valid and one that could not have been valid under any conditions” since “for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general”)(citing *Bailey v. Forks*, 108 Wn. 2d 262, 265, 737 P.2d 1257 (1987)).

in Washington” because of “the chilling effect such claims would have on investigations.”).

The Amici brief of WSAC *et al.* also responds to Plaintiff’s assertion that though our Courts use “the ‘focusing tool’ of the public duty doctrine to determine whether the plaintiff’s claim is cognizable,” the public duty doctrine does not apply if the duty owed is a common law duty imposed on governments and private persons alike. *Compare* WSAC *et al.* Br. 18-19 *with* P’s Supp. Br. 11-12. As WSAC *et al.* properly observes, however, Plaintiff neither shows a common law duty *nor* “attempt[s] to show any exception to the public duty doctrine applies.” *See* WSAC *et al.* Br. at 7-15, 19. It should be noted Mancini also is mistaken to claim the public duty doctrine has no role in analyzing the absence of a common law duty.

It has that role because the “public duty doctrine stands for a basic tenet of common law: ‘A cause of action for negligence will not lie unless the defendant owes a duty of care to [the] plaintiff,’” and thus it requires that “[t]o establish a duty in tort against a governmental entity, a plaintiff must show that the duty breached was owed to an individual and was not merely a general obligation owed to the public.” *Ehrhart, supra.* at *3-4 (citing *Chambers-Castanes*, 100 Wn.2d at 284; *Morgan v. State*, 71 Wn. 2d 826, 430 P.2d 947 (1967); *Beltran-Serrano*, 193 Wn.2d at 549; *Babcock*, 144 Wn.2d at 785 (plurality opinion)). The doctrine in fact “developed from tort principles of the

common law,” and predates the Legislature’s 1967 waiver of sovereign immunity. See *Ehrhart, supra* at *5 (citing *Evangelical*, 67 Wn.2d at 253). Thus it is helpful in analyzing the common law also because it “reminds us that a public entity—like any other defendant—is liable for negligence *only* if it has a *statutory or common law duty of care*,” it “*indicate[s] when a statutory or common law duty exists*,” and “helps us distinguish proper legal duties from mere hortatory ‘duties.’” See *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27–28, 134 P.3d 197 (2006).

So, too, the application of the public duty doctrine here is further confirmation that the proposed duty Plaintiff argues should be owed to her is instead a “mere hortatory ‘dut[y].’” This is so because her claim is founded on a “duty to the general public, under RCW 36.28.010³, to preserve the peace and arrest those who disturb it” which “[p]rivate persons are not required by statute or ordinance” to do, and thus is “not meaningfully analogous to anything a private person or corporation might do.” See *Munich*, 175 Wn.2d at 878, 894-95 (citing *Evangelical*, 67 Wn.2d at 252-53) (Chambers, J., concurring).

³ Because *Munich* involved County deputies, this Court cited to RCW 36.28.010, the statute that imposes an obligation on counties to enforce the law and provide police services. For first class cities, like the City of Tacoma, the statutory corollary is RCW 35.22.280(34) and (35), which impose an obligation on first class cities to enforce the law and provide police services for the benefit of the public.

Thus, even without considering the policy concerns that especially reject negligence claims in the context of law enforcement investigations, the duty that plaintiff urges the Court to create in this case is contrary to decades of this Court's jurisprudence.

B. PUBLIC POLICY CONTINUES TO SUPPORT THE REJECTION OF A NEGLIGENT INVESTIGATION TORT

The briefs of Amici WSAC *et al.* and of Amicus WAPA demonstrate that the precedent of this Court, our Courts of Appeals, the Courts of other states, and United States Supreme Court all refute Plaintiff's assertion that creating an unprecedented negligent investigation cause of action somehow "would not burden or chill the legitimate exercise of law enforcement functions." Compare WSAC *et. al* Br. 2-18, WAPA Br. 9-18 with Pet. Supp. Br. 14. Likewise, the public policies that form the basis for rejecting a negligence test for investigations as "unworkable" in the criminal context would not go away by imposing a negligence test for investigations in civil suits. *See, e.g., State v. Chenoweth*, 160 Wn.2d 456, 473, 158 P.3d 595 (2007) (negligence standard is "unworkable" because it is "inherently inconsistent with the concept of probable cause and the warrant process"); *Franks v. Delaware*, 438 U.S. 154, 177, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)("[a]llegations of negligence or innocent mistake are insufficient" to invalidate a search warrant."); *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.”) (*citing State v. Patterson*, 83 Wn.2d 49, 55, 515 P.2d 496 (1973)); *Lahm v. Farrington*, 166 N.H. 146, 90 A.3d 620, 626 (2014) (“probable cause represents an accommodation between the ‘opposing interests’ of police officers and criminal suspects, ... the same interests that we must balance here” and supports rejecting a claim that “something beyond probable cause—the ‘reasonable investigation’ [Plaintiff] demands —” is a required common law duty).

The vital importance of acknowledging the significant harm Plaintiff’s proposed new negligent investigation tort would cause such long standing public safety policies is essential in properly analyzing Plaintiff’s request to create a new duty. As this Court held, when rejecting a claim the government owed a duty to individuals, rather than to the public in general:

The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a “plaintiff’s interests are entitled to legal protection against the defendant’s conduct.” W. Prosser, *Torts* § 53, at 357; see *Haslund v. Seattle*, 86 Wn.2d 607, 611 n. 2, 547 P.2d 1221 (1976). The existence of a duty is a question of law. *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984). Several policy considerations compel our conclusion

Taylor, 111 Wn.2d at 168. See also e.g. *Sheikh*, 156 Wn.2d at 453 (“public policy considerations weigh strongly in favor of concluding that DSHS owes no duty to protect the public from the criminal acts of dependent children.”); *Hartley*, 103 Wn.2d at 785 (“Public policy considerations also dictate against liability in this case” because if duty existed “government would be open to unlimited liability”)

Indeed, when the Court has candidly admitted to having "imposed [a] duty without evaluating relevant public policy considerations," it has properly reversed itself after its "weighing of public policy considerations." See *Taylor*, 111 Wn.2d at 168 (five years after its earlier limitation of the public duty doctrine “we find no alternative but to overrule *J & B Dev. Co.*”). Such a risk arises when – as here - a Plaintiff proposes new governmental duty to the individual that “impose[s] too great a responsibility on government” See *Meaney*, 111 Wn.2d at 179. Though the City and its Amici have identified the harm such a sea change in the law would have, see e.g. Tacoma’s Answer to WSJA Br.; WSAC et al. Br.; WAPA Br., Plaintiff and her amici have refused to analyze the decades of legal analysis by this and other Courts whose balancing of interests has led to the long standing rejection of a negligent investigation tort.

Thus, this Court’s conclusion in *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 881–82, 969 P.2d 10 (1998) is equally applicable here: where a Plaintiff

“does not discuss how the public duty doctrine would affect the adoption of such a new duty, nor does she discuss how it would affect long-established ... principles,” and her “argument for a new tort duty under the circumstances of this case risks opening the door to potentially unlimited liability,” her “request for such a major change in the law is better addressed to the Legislature.”

C. CREATION OF A NEGLIGENCE DUTY FOR POLICE INVESTIGATIONS WOULD CREATE AN IRRECONCILABLE CONFLICT BETWEEN CRIMINAL AND TORT LAW, WITH HARMFUL CONSEQUENCES FOR THE PUBLIC

As outlined in Amicus WAPA’s brief, criminal law establishes an officer’s duty with respect to criminal investigations, such as the one at issue in this case. WAPA Bf. 13-19. In Washington, an officer seeking permission to lawfully enter/search a private home must comply with not only Fourth Amendment requirements, but also with Washington’s court rules and statutes, all of which have, at their core, the requirement that a neutral magistrate find sufficient evidence to establish probable cause. It is beyond dispute that Officer Smith satisfied all constitutional and statutory requirements in this case. The officer presented a complaint for a search warrant to the superior court for Kathleen Mancini’s home⁴. Ex. 103. An experienced superior court

⁴ The officer presented the search warrant in person and was available to answer any questions that the court may have had. RP 281-82. Moreover, as pointed out by WAPA, the crime for which the warrant was sought was “Unlawful Possession of a Controlled Substance with intent to deliver, METHAMPHETAMINE, 69.50.401.” Ex. 103 at 1. This crime does not

judge reviewed the complaint/affidavit and determined that there was sufficient evidence to establish probable cause and to issue the warrant. *Id.* Further, the warrant was executed on the location for which it was issued – *Kathleen Mancini's residence*. At trial, plaintiff was given an opportunity to challenge the validity of the warrant⁵ and the jury was given an opportunity to find that the warrant was not supported by probable cause⁶. See Appellant's Opening Br. (Mancini II), p. 9-13. After hearing all of the evidence, the jury concluded that the officers had met the warrant requirements and were lawfully permitted to enter Kathleen Mancini's apartment.

have, as an essential element, evidence of delivery or sale, so all evidence offered by plaintiff at trial about the absence of a controlled buy was irrelevant to the crime under investigation. Thus, while Chief Stamper testified that, in his opinion, the officers should have done a controlled buy before obtaining the warrant, the controlled buy was superfluous and irrelevant to the crime under investigation.

⁵ RP 180:17-181:8 (“Q. Are you saying that you have knowledge of facts to suggest that Officer Smith was not truthful in his affidavit? A. Let me be very clear. I do not. Q. Okay, and in fact – I think you still have the binder sitting in your lap there, Chief. Exhibit 103 is the application in search of the search warrant for B1, which is Ms. Mancini's apartment. Ms. Haskell asked you whether or not you would have expected to see all of the various databases that Officer Smith looked at to verify the CI's information in the warrant affidavit. Is that correct? A. Yes. Q. But the absence of that information, does it change – strike that. *Additional information would have only made the probable cause stronger, not weaker. Right?* A. *Yes.*)(emphasis added)

⁶ The jury was instructed on the elements of false arrest (CP 515, Inst. 12), and advised that police may detain persons pursuant to a valid warrant for a reasonable period of time (CP 518, Inst. 15). The jury was instructed on assault/battery (CP 517, Inst. 14) and advised that the use of force employed during execution of the warrant must be reasonable to be lawful. Further, the jury was instructed on the standard for probable cause (CP 519, Inst. 16) and on the standard for overcoming the warrant's presumption of validity (CP 520, Inst. 17). By finding for the defense on all intentional tort claims, the jury necessarily concluded that the warrant was supported by probable cause (thereby giving police lawful authority to enter, search, and temporarily detain plaintiff). The jury also necessarily concluded that the officers did not exceed the scope of the warrant. CP 521 (Inst. 18).

Despite the officer's unquestionable compliance with constitutional and statutorily requirements for a lawful entry/search of Mancini's home, plaintiff urges this Court to impose a tort duty that has been uniformly rejected by this Court, and others. The policy considerations underlying the rule barring common law negligent investigation claims in Washington has been addressed in other briefing. What has not been fully addressed, however, is the current congruity between the criminal standards and the tort standards at play in this case and the dangers inherent in diverging those standards.

Plaintiff Mancini argues that the absence of an individualized duty with regard to criminal investigations leaves her (an innocent person) without a remedy and that for that reason, this Court should impose an additional duty on law enforcement (a duty owed to the individual, as opposed to the public) when evidence of criminal activity is not found upon execution of a valid warrant. As outlined in WAPA's brief, "[a] search warrant ... is good or bad when granted and does not change its character by what is found when the warrant is issued." WAPA Br., p. 11. Further, evidence obtained pursuant to a warrant may be excluded "if factual inaccuracies or omissions in the application are (a) material and (b) made in reckless disregard for the truth." *Id.* at p. 13 (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595

(2007)). Although WAPA discusses these principles in the context of Washington criminal law, these same principles are evident in this Court's jurisprudence defining the availability of tort remedies in cases involving search warrants. In *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985) and *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), addressed when law enforcement can be liable in tort for the execution of a facially valid search warrant. A careful examination of these cases demonstrate that tort liability in those cases turned on the same "falsity/material omission" analysis employed by the courts in *Franks* and *Chenoweth*.

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

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

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

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

The *Bender* court then expanded on its analysis of probable cause in the context of proving malice as an element of plaintiff's malicious prosecution claim, and laid out the test for determining probable cause or the lack thereof:

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

(italics in original) *Bender*, 99 Wn.2d at 593-94.

In applying these standards, the *Bender* court then identified the evidence that created a material question of fact as to “whether the officers, in good faith, made a full and fair disclosure of all material facts known to them.” *Id.* at 595. The Court found that the officers failed to apprise the prosecutor that the officers had been unable to find evidence of prior transactions, as claimed by the confidential informant, and therefore, were unable to substantiate the confidential informant's reliability. “Since [the confidential informant's] credibility was critical to the case, Detective Vanderlaan's failure to disclose information bearing on Johnson's credibility created a question of fact for the jury.” *Id.* at 596. Moreover, there was testimony presented to the jury from the chief deputy prosecutor who stated that had he been given the additional information withheld from the prosecutors, he (the prosecutor) would not

have filed the case. Thus, the reason the question of probable cause was submitted to the jury in *Bender* because there was a material question of fact as to whether the officers had withheld material information which would have negated probable cause.

The *Turngren* court, relying on *Bender*, then applied the same “falsity/material omission” analysis in addressing the issue of probable cause in the context of civil claim. Like *Bender*, the plaintiffs in *Turngren* had asserted a number of intentional torts (malicious prosecution, false arrest, false imprisonment, libel and slander) stemming from the execution of a search warrant obtained using information from a confidential informant. In *Turngren*, police obtained a search warrant for the Turngren’s home, looking for unlawful weapons, hand grenades and a pipe bomb. Prior to obtaining the warrant, a citizen turned in a stolen weapon that the citizen had purchased from the CI and when he did so, the citizen told the officers that the CI was a liar and could not be trusted. Then, in investigating the information provided by the CI, the officers learned facts that contradicted the CI’s information. Specifically, the CI had told officers that the home was occupied by three young males, one of whom was described as a Hell’s Angel warlord named “Keith.” *Turngren*, 104 Wn.2d at 298. The officer’s investigation revealed, however, that the house in question and the car parked outside the house were owned by an Elmer Turngren, and his wife Elizabeth, a former employee of

the Kirkland Police Department. The officers failed to include the information about the Turngrens (which directly contradicted the CI) in the warrant affidavit. Moreover, the officer who swore out the affidavit misrepresented the informant's track record, thereby misrepresenting that informant's reliability.

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

Thus, contrary to the position urged by plaintiff and Amicus WSAJ, this Court has already held the standard determining the validity of a warrant is the same in both the criminal and tort contexts. Moreover, as this Court made clear in *Bender* and *Turngren*, tort liability against law enforcement is only available *in the absence of a valid search warrant*. If the search warrant is valid – *if officers comply with all of the constitutional and statutory require-*

ments, as the officers did in this case – there can be no tort liability. A contrary outcome is unthinkable, and unworkable. If law enforcement agencies could be subjected to tort liability, even when their officers’ conduct is lawful due to compliance with all statutory and constitutional requirements, how can agencies adopt appropriate policies and procedures? How can they predict when lawful behavior will create tort liability and when it will not? In such an instance, law enforcement will simply forego investigations based on confidential informants, investigations based on anything less than “perfect evidence.” Given that criminal investigations rarely, if ever, involve “perfect evidence,” the resulting failure enforce the laws and keep the peace will have decidedly harmful consequences to the very public the police are charged with serving.

III. CONCLUSION

For these reasons, the City urges this Court to adopt the reasoning offered by WSAC *et al.* and WAPA, and affirm Division I’s opinion.

DATED this 24th day of April, 2020.

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CERTIFICATE OF SERVICE

On April 24, 2020, I hereby certify that I electronically filed the foregoing RESPONDENT CITY OF TACOMA'S COMBINED ANSWER TO WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS AND WASHINGTON STATE ASSOCIATION OF COUNTIES, WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS, AND WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AMICI BRIEFS with the Clerk of the Court, which will send notification of such filing to the following:

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