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No. 97583-3

SUPREME COURT
OF THE STATE OF WASHINGTON

KATHLEEN MANCINI,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

PETITIONER'S ANSWER TO BRIEF OF *AMICI CURIAE*
WASHINGTON STATE ASSOCIATION OF COUNTIES,
WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE
CHIEFS, AND THE WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS

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A. INTRODUCTION

The City of Tacoma’s *amici curiae* Washington State Association of Counties, *et al.* (collectively, “WSAC”) warn gravely that the jury’s verdict, if upheld, would “radically shift” the law, upsetting the law’s existing balance “to the general detriment of all of society.” Br. of *Amici* WSAC at 19. By WSAC’s logic, the public is better off if Tacoma police officers can skip the practices that they already employ in 95% of similar cases, for no better reason than a dislike for how the King County Prosecutor’s Office supervises “controlled buys.” By WSAC’s logic, public safety depends on municipal police officers being free to venture out of their jurisdictions to raid the homes of people suspected to be engaged in a non-violent crime. By WSAC’s logic, the jury’s verdict in this case results in newfound scrutiny of police officers by civil juries, even though police applications for warrants are already constrained by Washington tort law and by federal civil rights law—all under standards that ultimately have much in common with a duty of reasonable care. It is not so.

B. ARGUMENT IN ANSWER TO *AMICI*

(1) Tacoma’s *Amici*’s Constitutional Arguments Fail for the Same Reasons that WAPA’s Do

WSAC makes the same constitutional arguments based on *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007) as does *amicus curiae* Washington Association of Prosecuting Attorneys (“WAPA”). These

arguments fail for the same reason that WAPA's constitutional arguments fail. *See* Pet'r's Ans. to Br. of *Amicus* WAPA at 1-9, 11-20.

WSAC, like WAPA, appears to conflate challenges to the *adequacy* of the record presented to the magistrate, with challenges to the *accuracy* and *completeness* of that record. If a criminal defendant alleges that the material information is inaccurate or incomplete, then *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) and *Chenoweth*, 160 Wn.2d 454 come into play. But if a criminal defendant alleges that the record was inadequate to support a finding of probable cause, even if accurately and completely conveyed by the affiant, then *Franks* and *Chenoweth* have no bearing on the issue. Were it otherwise, a magistrate's determination of probable cause would be dispositive and beyond challenge. Surely WSAC does not take that position—a sharp break from the law. *See, e.g., State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002) (reviewing a search warrant to determine whether the magistrate's finding of probable cause was an abuse of discretion); *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994) (same).

(2) Tacoma's *Amici* Misapprehend the Public Duty Doctrine's Application Here, Confirming the Imperative that this Court Clarify the Proper Analysis

WSAC's understanding of the public duty doctrine conflicts with this Court's decisions. As this Court has said, the public duty doctrine is not

a rule of non-liability: “the public duty doctrine does not—cannot—provide immunity from liability.” *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). Instead, the public duty doctrine is a “focusing tool” whose “exceptions” are used to “determine whether a duty is owed.” *Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465 (1999). “Saying an exception applies is simply shorthand for saying the governmental entity owes a duty to the plaintiff.” *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 754, 310 P.3d 1275 (2013) (citing *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992)). Indeed, as this Court made clear in *Washburn*, “the true question in a negligence suit against a governmental entity is whether the entity owed a duty to the plaintiff, not whether an exception to the public duty doctrine applies it.” *Id.*; see also, *Ehrhart v. King Cty.*, ___ Wn.2d ___, P.3d ___, 2020 WL 1649891 at *4 (2020) (“The public duty doctrine guides a court’s analysis of whether a duty exists that can sustain a claim against the government in tort.”).

But before employing this focusing tool to assist in the duty analysis, the Court starts at a “step zero,” as petitioner coins it here: The duty question begins with an inquiry whether the plaintiff’s claim rests on a common-law duty of care. If so, the public-duty doctrine need not be taken out of the toolbox. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608 (2019); *Munich v. Skagit Emergency Commc’n Ctr.*, 175 Wn.2d 871,

891-95, 288 P.3d 328 (2012) (Chambers, J., concurring).

But WSAC construes the public duty doctrine as a rule of non-liability. Specifically, WSAC makes the breathtaking claim that police are not liable, even if they are negligent, if they are performing a government function “pursuant to a statutory duty that is owed to all and not owed to a specific individual.” Br. of *Amici* WSAC at 13 (citing RCW 35.22.280(35)). WSAC incorrectly relies on *Stansfield v. Douglas County*, 107 Wn. App. 1, 27 P.3d 205 (2001). In *Stansfield*, the Court of Appeals did not hold that an overlapping statutory duty could negate a common-law duty of care. Instead, the Court first held that the plaintiff did *not* have a common-law cause of action. *Id.* at 12-13. Then, and only then, did the Court use the public duty doctrine’s “exceptions” to determine whether the government defendant owed an actionable statutory duty to the plaintiff. *Id.* at 13-14.

To see the fundamental flaw in WSAC’s understanding of government liability, this Court need look no further than the Legislature’s sovereign immunity waiver, which allows government liability even if the government defendant was “acting in its governmental ... capacity.” RCW 4.92.090; RCW 4.96.010(1). As the Legislature made clear, a government defendant can no longer claim immunity simply because it was performing a government function under statutory authority. This point has been reiterated again and again, but it has not yet sunken in the for the various

government entities represented by WSAC. *See, e.g., Beltran-Serrano*, 193 Wn.2d at 543 (“Washington courts have long recognized the potential for tort liability based on the negligent performance of law enforcement activities.” (collecting cases)); *H.B.H. v. State*, 192 Wn.2d 154, 179-80, 429 P.3d 484 (2018) (“For tort liability to attach, the State does not necessarily have to be doing something that a private party does.”). This Court should clarify—yet again—that a common-law duty of care to the individual plaintiff may arise independently from the government defendant’s statutory duties to the public as a whole. This is nothing new; it has been this way since the waiver of sovereign immunity. *See, e.g., Kelso v. City of Tacoma*, 63 Wn.2d 913, 914, 918-19, 390 P.2d 2 (1964) (holding that the legislative waiver of sovereign immunity made a municipality liable for its police officer’s negligence in driving a patrol vehicle while on duty).

Earlier this month, this Court gave a helpful clarification of the public duty doctrine in *Ehrhart*, __ Wn.2d __, 2020 WL 1649891 at *3-4. But this Court should confirm again, as five justices did in *Munich*, 175 Wn.2d at 894, “that the public duty doctrine applies to governmental duties mandated by legislative bodies and not common law duties owed by every private and public entity alike.” As observed in *Munich*, this Court has no precedent “where a common law duty was limited solely because of a public duty analysis.” *Id.* at 891. Thus, before wading into the doctrine and its

exceptions, a simpler question may be asked: Did the government defendant owe a common-law duty of care to the plaintiff?

(3) A Tort Law Duty of Reasonable Care in These Circumstances Should Be Recognized

(a) Mancini's Claim Is Based on the General Tort Duty Described in *Beltran-Serrano* and Other Cases

WSAC argues that Mancini “fails to allege a common-law duty.” Br. of *Amici* WSAC at 19. That is false. Mancini’s claim rests not on a negligent breach of a statutory duty, but on a well-established tort-law duty of care owed to her individually and independently of law-enforcement officers’ statutory duties:

At common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others. *Restatement (Second) of Torts* § 281 cmt. e (Am. Law Inst. 1965) explains that “the duty established by law to refrain from the negligent conduct is established in order to protect the other from the risk of having his interest invaded by harm resulting from one or more of this limited number of hazards.” This duty applies in the context of law enforcement and encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance.

Beltran-Serrano, 193 Wn.2d at 550; *see also, Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011) (“[A]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” (internal quotation marks and brackets omitted)).

While WSAC is right that the facts of *Beltran-Serrano* are literally different, WSAC offers no principled reason for why that common-law duty of care should not apply in these circumstances. In *Beltran-Serrano*, this Court did not fashion a tort-law duty especially for police officers' interactions with the mentally ill. 193 Wn.2d at 540, 550. Instead, this Court simply applied general tort principles. *Id.* at 550. WSAC protests, however, that a duty of care did not attach because Tacoma police did not have any interactions with Mancini personally until they broke into her home. Br. of *Amici* WSAC at 16 (citing CP 2-8).

But Tacoma police *did* commit “affirmative acts of misfeasance.” *Beltran-Serrano*, 193 Wn.2d at 550. Before Tacoma police sought a warrant, they viewed Mancini’s apartment from the outside and attempted to ascertain who lived there. RP 46-49, 51, 132, 220, 255, 261-62. Tacoma police then brought the information they had to a Pierce County Superior Court judge, and the police identified Mancini’s address on the affidavit for the search warrant. Ex. 103; CP 177-79; RP 105. As in *Beltran-Serrano*, Mancini’s negligence claim is based on the police conduct “leading up to” the intentional act—here, breaking down Mancini’s front door. 193 Wn.2d at 544. Just as the plaintiff there did not allege “negligent intentional shooting,” *id.* at 545, Mancini did not allege a negligent police raid. Instead, she alleges negligence “in the series of actions leading up to” the Tacoma

SWAT team standing outside Mancini’s door that cold winter morning. *Id.* *Munich* further confirms the Tacoma officer’s duty of care: “duties imposed by common law are owed to all those foreseeably harmed by the breach of the duty.” 175 Wn.2d at 891. The Tacoma police were relying on a tip from a known drug user, and she had been in the suspected drug dealer’s apartment once—at night, for a New Year’s Eve party, when narcotics would have been flowing. Tacoma police’s own preliminary inquiry showed that a Kathleen Mancini—not a name they were expecting—lived there. RP 46-48, 52-53, 134, 209, 221. On these facts, Mancini was certainly within the scope of a duty of care at that point, because who would be “foreseeably harmed.” *Munich*, 175 Wn.2d at 891.

(b) A Duty of Reasonable Care Strikes the Right Balance Between the Interests at Stake

The sky would not fall. The questions presented do not ask this Court to decide whether municipalities are strictly liable for the mistakes of their police officers, or whether precedents on article I, section 7 must be revisited. Instead, the questions presented are solely whether the police officers are under a civil tort duty to exercise *reasonable* care to avoid raiding the home of an innocent person who is not the target of a criminal investigation, and to avoid an unreasonably prolonged detention of such a person whose home was mistakenly raided. *See* Pet. for Rev. at 2.

Recognizing a tort law duty of reasonable care in these circumstances would not chill legitimate and careful law enforcement activities. Instead, such a duty would chill only careless police actions. *Cf. Malley v. Briggs*, 475 U.S. 335, 345, 106 S. Ct. 1092, 1098, 89 L. Ed. 2d 271 (1986) (rejecting absolute immunity for police officers who apply for warrants because the “objective reasonableness” standard “provides ample protection to all but the plainly incompetent”). This duty would deter conduct that wastes scarce police resources and endangers innocent people in their own homes.

To be sure, law enforcement officers perform a crucial public service that is rightly celebrated, and their daily acts of courage make this state a safer place. But this is a country of laws. And this Court has long recognized, the value of police “accountability through tort liability.” *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983). While police officers must be empowered to solve crime and protect the public, innocent people must be protected from military-style police raids that could have been avoided, or at least mitigated, with just a bit more care.

While WSAC insists that the jury’s verdict creates a whole new world, the law governing police conduct would not be significantly changed if the verdict were upheld. Under federal law, police officers already face civil liability for damages under 42 U.S.C. § 1983 for obtaining a warrant

“where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.” *Malley*, 475 U.S. at 345. And under state tort law, police officers already face liability for recklessly obtaining a warrant without probable cause. *Turngren v. King County*, 104 Wn.2d 293, 307-09, 705 P.2d 258 (1985). WSAC has not produced any data—whether anecdotes or studies—to show that these standards, or a reasonable care standard under state negligence law, unduly harm the public interest in law enforcement.

Although WSAC hopes to spook the reader into thinking a reasonable care standard would saddle the police and the public with unbearable costs, Mancini suggested only that Tacoma police should have done in her case what they do—by their own admission—in 95% of their cases like this one. RP 49-50. At trial, the officers could not give any good reason why they were unable to perform a controlled buy (law-enforcement officers in King County are presumably able to investigate drug crimes without dodging the King County Prosecutor’s Office in the way that the Tacoma police did here) or to surveil the apartment (if Tacoma police had enough time to pile two officers into a vehicle to drive up to Federal Way, they had enough time to watch for signs of drug dealing out of Mancini’s apartment). RP 57-58. Indeed, Mancini’s expert on police practices stated: “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.” RP 134. Thus, reasonable care was only the slightest of extra burden. All that Mancini suggests is that the police should not become careless. *See Washburn*, 178 Wn.2d at 761 (“The deterrence of unreasonable behavior through tort liability is, after all, one of the guiding principles of the abolition of sovereign immunity.”).

Contrary to WSAC’s arguments, the U.S. Supreme Court in *Malley* recognized the value of imposing some measure of liability:

We do not believe that the [objective reasonableness] standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present. True, an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer’s request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.”

Malley, 475 U.S. at 343-44. While *Malley* was a decision about qualified immunity, it adopted a “standard of objective reasonableness,” *id.* at 344, which bears close similarity to a duty of reasonable care under the totality of the circumstances.

The reasonable care standard is inherently flexible. Mancini does not argue that the police should take these additional steps in all cases. But here, there was no evidence that the police confronted any exigency, faced any personal danger to themselves or others, were in hot pursuit, or sought out the perpetrator of a violent crime. Indeed, the outcome of this case—the suspect’s apartment was later found and searched, but he was never charged—demonstrates the insignificance of the public interest served by the police action here. CP 347-48; RP 723, 792. But on the other side of the scale, an innocent person faced the horror of a military-style raid that seemed, from her vantage point that morning, no different than an armed home invasion. RP 60, 371-76, 444.

If Tacoma police had simply exercised reasonable care instead of trying to avoid King County Prosecutor’s scrutiny, the officers would have successfully obtained a search warrant for the suspected drug dealer’s home. In the process, they would have prevented the traumatization of Mancini, and avoided the misallocation of police resources to the raid.

(c) This Case Is Not Controlled by Court’s Decision in *Ducote* or by the Line of Court of Appeals Cases that Globs Together Various “Negligent Investigation” Claims

WSAC mashes together several unrelated cases under the label of “negligent investigation” and claims that they dispose of this case. But one

of those cases, *Rodriguez v. Perez*, 99 Wn. App. 439, 450, 994 P.2d 874 (2000), *undercuts* WSAC’s argument that tort-law duties are harmful to investigations:

Holding law enforcement agencies to a standard of negligence in child abuse investigations should not have the effect of chilling those investigations. Rather, such a standard will encourage careful, thorough investigations, which support the public policy of protecting children from child abuse while at the same time preventing unwarranted interference in the parent-child relationship.

Id. at 450-51. Of course, the Court of Appeals did say that a common-law claim for negligent investigation generally is not available, but only because the duty owed would not be “owed to a particular class of persons.” *Id.* at 443. Here, obviously, Tacoma police directed its conduct at an identifiable individual and her home, giving rise to a tort-law duty of care. Mancini was not merely a member of the undifferentiated public.

The only Supreme Court case that WSAC cites on so-called negligent investigations, *Ducote v. State*, 167 Wn.2d 697, 222 P.3d 785 (2009), stated in passing that “a claim for negligent investigation ... do[es] not exist under common law in Washington.” *Id.* at 702. But WSAC’s reliance on *Ducote* is misplaced, for two reasons. First, its statement on the common law is a throw-away dictum. The issue presented was a *statutory* claim, not a *common law* claim. Specifically, the Court decided “[w]hether a stepparent may bring a claim for negligent investigation under RCW

26.44.050.” *Id.* at 701. The statement about the common law was part of a short background discussion that was unnecessary to the case’s disposition. *See id.* at 702. Second, *Ducote* did not involve a police raid of a home or detention of a person—the core interests protected by tort law. Instead, *Ducote* involved a stepparent who asserted that a DSHS investigation of child abuse allegations interfered with his relationship with his stepchild. *Id.* at 703-04. Given these peculiarities of *Ducote*, this Court’s opinion cannot be read as a general pronouncement applicable whenever a negligence claim has the slightest connection to a government investigation.

WSAC’s litany of other Court of Appeals cases fares no better. In *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88 (1994), Division II confronted not a police raid of a home, but a plaintiff’s claim of negligent infliction of emotional distress. *Id.* at 267-68. In *Pettis v. State*, 98 Wn. App. 553, 990 P.2d 453 (1999), the plaintiff was a childcare worker who claimed emotional distress and argued that DSHS owed a duty to her in the course of investigating child abuse. *Id.* at 558. In *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991), *as amended*, 824 P.2d 1237 (1992), the target of a criminal arson investigation complained that a fire department official had been negligent in concluding that he had committed arson. *Id.* at 38. But Mancini was not the target of a criminal investigation; she had nothing to do with Matthew Logstrom. In *Corbally v. Kennewick Sch. Dist.*, 94 Wn.

App. 736, 973 P.2d 1074 (1999), a teacher sued a school district for negligence after he was fired following the discovery on school grounds of his sexually explicit drawings as well as student complaints of sexual harassment. *Id.* at 738-39. Here again, Mancini was not the target of the investigation, and she seeks tort law’s protection not of an employment contract, but of a core interest under tort law—the sanctity of the home. In *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992), the plaintiff did not claim that police misfeasance—an affirmative act—harmed her. *Id.* at 671. Rather, she claimed damages based purely on police nonfeasance—the failure to act to protect her. *Id.* Here, by contrast, the negligence verdict was supported by evidence that police misfeasance had created an unreasonable risk of harm to Mancini’s home and person.

As this discussion of cases should show, WSAC’s patchwork of cases sheds little light on the duty question here. As Division I observed in *Rodriguez*, “we cannot rely upon other investigation contexts, which demonstrate the general rule, to provide the answer to the question raised here.” 99 Wn. App. at 445. WSAC’s mantra of “negligent investigation” glosses over the correct analysis for a tort-law duty question. This Court does not make decisions based on such a broad category of undifferentiated government conduct and amalgamated plaintiffs’ interests. Instead, as with any duty question, this Court must carefully weigh the particularized

“considerations of public policy” and “plaintiff’s interests” to determine whether those interests “are entitled to legal protection against the defendant’s conduct.” *Volk v. DeMeerleer*, 187 Wn.2d 241, 263, 386 P.3d 254 (2016) (quotations omitted). This Court’s decision requires it to survey all the applicable “considerations of logic, common sense, justice, policy, and precedent.” *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (quotation omitted). In short, WSAC cannot defeat the jury’s judgment here with such disparate cases.

(4) WSAC’s Position Has No Bearing on Mancini’s Additional Negligence Theory Based on Tacoma Police Officers’ Unreasonably Long Detention of Her

As with WAPA’s *amicus* brief, even if WSAC were right that Tacoma could not be held liable for its police officers’ negligence leading up to the raid, this Court should still reverse the Court of Appeals and reinstate the jury’s verdict for Mancini. *See* Pet’r’s Ans. to Br. of *Amicus* WAPA at 17-20. The jury verdict must be restored based on the separate duty of reasonable care to promptly release a person whom police realize has been detained without justification. *See id.*

C. CONCLUSION

Tacoma officers owed Mancini an actionable common-law duty of care. Such a duty of care is compatible with this Court’s precedents, and is even mandated by them. A reasonable care standard would further guard

against incompetent and careless policing, conserving scarce police resources, and protecting innocent persons, all while giving police the opportunity to act more swiftly when the circumstances warrant. The Court of Appeals should be reversed, and the jury's verdict against Tacoma reinstated.

DATED this 24th day of April, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Petitioner's Answer to Brief of Amici Curiae Washington State Association of Counties, Washington Association of Sheriffs and Police Chiefs, and the Washington State Association of Municipal Attorneys* in Supreme Court Cause No. 97583-3 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 24, 2020 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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