

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2/3/2020 4:01 PM  
BY SUSAN L. CARLSON  
CLERK

No. 97583-3

---

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

KATHLEEN MANCINI,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

---

SUPPLEMENTAL BRIEF OF PETITIONER

---

Lori S. Haskell, WSBA #15779  
7511 Greenwood Ave N Ste 314  
Seattle, WA 98103  
(206) 728-1905

Gary Manca, WSBA #42798  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Attorneys for Petitioner Kathleen Mancini

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-iv
A. INTRODUCTION .....	1
B. STATEMENT OF THE CASE.....	1
(1) <u>Factual History</u> .....	1
(2) <u>Procedural History</u> .....	4
C. ARGUMENT .....	5
(1) <u>“Step Zero” of the Public Duty Doctrine Requires the Court to Determine Not Whether the Government Was Performing a Government Function, But Rather Whether It Was Under a Tort Law Duty to the Same Extent as a Private Person</u> .....	5
(a) <u>Whether the Defendant Was Performing a Government Function Has No Bearing on the Government’s Tort Law Duties of Care</u> .....	6
(b) <u>The Public Duty Doctrine Is an Analytical “Focusing Tool” to Determine Whether a Government Defendant Owed an Actionable Duty of Care, Not a Rule of Non-Liability for Government Functions</u> .....	8
(c) <u>The Threshold Test Is Whether the Government Was Under a Tort Law Duty to the Same Extent as a Private Person</u> .....	9
(2) <u>Police Officers, Like Anyone Acting Affirmatively or Claiming a Legal Privilege to Enter Land, Have a Duty to Use Reasonable Care Against Entering the Wrong Home</u> .....	12

(a)	<u>A Duty of Reasonable Care in These Circumstances Protects the Weighty Private Interests Without Unduly Burdening the Interest in Law Enforcement</u> .....	12
(b)	<u>Precedent Shows that Government Liability Here Would Properly Be Co-Extensive with a Private Person’s Duty of Care in These Circumstances</u> .....	15
(c)	<u>The Overlap Between Police Negligence and the Investigative Function Does Not Render a Negligence Claim “Forbidden”</u> .....	17
(3)	<u>Just as Jailers Must Exercise Reasonable Care to Release People Who Are Unjustifiably Detained, So Too Police Officers Must Use Such Care When Handcuffing a Person in Their Own Home</u> .....	19
E.	CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Beltran-Serrano v. City of Tacoma</i> , 193 Wn.2d 537, 442 P.3d 608 (2019).....	<i>passim</i>
<i>Bender v. City of Seattle</i> , 99 Wn.2d 582, 664 P.2d 492 (1983).....	15, 16
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999).....	9, 12, 15
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008).....	16
<i>Chambers-Castanes v. King Cty.</i> , 100 Wn.2d 275, 669 P.2d 451 (1983).....	11
<i>Cummins v. Lewis Cty.</i> , 156 Wn.2d 844, 133 P.3d 458 (2006).....	9
<i>Donaldson v. City of Seattle</i> , 65 Wn. App. 661, 831 P.2d 1098 (1992).....	18
<i>Evangelical United Brethren Church v. State</i> , 67 Wn.2d 246, 407 P.2d 440 (1965).....	8, 11
<i>H.B.H. v. State</i> , 192 Wn.2d 154, 429 P.3d 484 (2018).....	5, 11
<i>Hagerman v. City of Seattle</i> , 189 Wash. 694, 66 P.2d 1152 (1937), <i>superseded by statute as stated in Kelso v. City of Tacoma</i> , 63 Wn.2d 913, 390 P.2d 2 (1964).....	6, 7
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978).....	8
<i>In re Pers. Restraint of Harvey</i> , 3 Wn. App. 2d 204, 415 P.3d 253 (2018).....	17
<i>J &amp; B Dev. Co. Inc. v. King Cty.</i> , 100 Wn.2d 299, 669 P.2d 468, (1983), <i>overruled on other grounds by Meaney v. Dodd</i> , 111 Wn.2d 174, 759 P.2d 455 (1988).....	9
<i>Kelso v. City of Tacoma</i> , 63 Wn.2d 913, 390 P.2d 2 (1964).....	6, 7, 8
<i>Kilbourn v. City of Seattle</i> , 43 Wn.2d 373, 261 P.2d 407 (1953).....	7
<i>Krings v. City of Bremerton</i> , 22 Wn.2d 220, 155 P.2d 493 (1945), <i>overruled in part by Hutton v. Martin</i> , 41 Wn.2d 780, 252 P.2d 581 (1953).....	6
<i>Mancini v. City of Tacoma</i> , No. 77531-6-I (May 13, 2019).....	<i>passim</i>
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	15
<i>Munich v. Skagit Emergency Commc 'n Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	8, 9, 11
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003).....	10

<i>Osborn v. Mason Cty.</i> , 157 Wn.2d 18, 134 P.3d 197 (2006).....	6, 10
<i>Robb v. City of Seattle</i> , 176 Wn.2d 427, 295 P.3d 212 (2013).....	19
<i>Savage v. State</i> , 127 Wn.2d 434, 899 P.2d 1270 (1995).....	7
<i>Stalter v. State</i> , 151 Wn.2d 148, 86 P.3d 1159 (2004) .....	12, 20
<i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).....	13
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	13
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	13
<i>Sunshine Heifers, LLC v. Wash. State Dep’t of Agr.</i> , 188 Wn. App. 960, 355 P.3d 1204 (2015).....	10
<i>Tufte v. City of Tacoma</i> , 71 Wn.2d 866, 431 P.2d 183 (1967) .....	20
<i>Turngren v. King County</i> , 104 Wn.2d 293, 705 P.2d 258 (1985).....	16
<i>Volk v. DeMeerleer</i> , 187 Wn.2d 241, 386 P.3d 254 (2016) .....	12
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	13
<i>Washburn v. City of Fed. Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013).....	14, 18

Federal Cases

<i>Hudson v. Michigan</i> , 547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006).....	13
--	----

Constitution

U.S. Const. amend. IV; Wash. Const. art. I, § 7 .....	13
---	----

Statutes

RCW 4.92.090 .....	7, 10, 11
RCW 4.96.010 .....	7, 11, 15
RCW 4.96.010(1).....	7, 10

Rules and Regulations

CR 50 .....	5
-------------	---

Other Authorities

<i>Restatement (Second) of Torts</i> § 214 cmt. a .....	16
<i>Restatement (Second) of Torts</i> § 214(1).....	17
<i>Restatement (Second) of Torts</i> § 497 .....	17

A. INTRODUCTION

Police conduct approximately 60,000 military-style raids on private homes in America every year. In some raids, “innocent citizens and family pets have been shot and killed by officers,” says a former police chief. RP 154. In at least two instances, innocent residents “were so terrified ... that they fell dead on the spot, each dying of a heart attack,” says the chief. *Id.* The question presented is whether police owe a duty of reasonable care in tort to avoid raiding the homes of innocent people and, upon realizing their detention of the residents is unjustified, to release them immediately.

B. STATEMENT OF THE CASE

(1) Factual History

A few years ago, a person in the “dope game” approached a City of Tacoma police officer with a tip about a man selling drugs. RP 42, 46-48, 220; Ex. 103. Officer Kenneth Smith drove with this tipster to an apartment complex in Federal Way, King County. RP 46-48, 132. The tipster pointed to a unit and said the man lived there. RP 47-48, 132, 220, 255. Smith also saw a car in the parking lot registered to the man, Matt Logstrom. RP 49, 140. Smith ran a check on the unit but found it was rented under the name Kathleen Mancini. RP 51, 261-62. The tipster claimed the lease was under Logstrom’s mother’s name. RP 220. Smith did not verify Logstrom’s mother was named Mancini; Smith just assumed so. RP 52-53, 220-21.

Logstrom lived in a different unit. RP 237.

Smith wanted to conduct a raid, but he did not follow good policing practices first. According to an expert on law enforcement, police should execute a “controlled buy” before raiding a home to search for evidence of drug dealing. RP 135. A controlled buy and surveillance will “guarantee that the wrong door does not get hit.” RP 132, 135. The expert says, “there is no excuse, literally, no excuse for hitting the wrong door.” RP 102. Smith says his own practice is to perform a “controlled buy” and surveillance in 95% of his drug investigations. RP 49-50. But here he did not do a controlled buy, surveil the residence, or surveil Logstrom’s car to verify which unit in the compact was Logstrom’s. RP 48-49, 58.

Smith acknowledged at trial that he did not attempt a controlled buy because he did not want to “alert King County.” RP 57. The King County Prosecuting Attorney’s Office required law enforcement officers to complete a packet of paperwork before prosecutors would approve a controlled drug buy. RP 57-58. But Smith did not want to comply with that requirement. *Id.* He preferred his “working relationship” with the Pierce County Prosecuting Attorney’s Office, he said. *Id.* Smith presented an application for a search warrant to the Pierce County Superior Court, which issued a warrant Ex. 103; CP 177-79; RP 105.

On an early winter morning, Smith led a team of Tacoma police

officers to Federal Way, where they gathered outside the apartment. They wore tactical gear and were armed with guns and a “breaching tool.” RP 59-60. Inside was not Logstrom, but Mancini, a five-foot tall, 60-year old woman. RP 308, 375, 403, 407. Mancini had raised three kids, put herself through nursing school, and was proudly independent. RP 403. She worked as a nurse for Group Health. RP 368-69, 407.

Tacoma’s military-style police team rammed her door, breaking it off the hinges. RP 388, 443. Mancini awoke. RP 370. Wearing only a nightgown without any underwear, Mancini stepped out of her bedroom. A swarm of men rushed towards her. RP 60, 371-76, 444. They were shouting and pointing guns. *Id.* Mancini did not realize they were police officers at first; the men moved quickly, wore black, and concealed their faces with visors. RP 371-73. The men pushed Mancini onto the floor, handcuffed her behind her back, and then dragged her outside. RP 228-29, 371, 374, 394.

As soon as Smith had first entered Mancini’s apartment, he knew “immediately” that his team of officers had raided the wrong apartment. RP 235-36; Ex. 1. But Smith and his colleagues did not immediately free Mancini. RP 230-31, 374-88. Instead, they left her in handcuffs outside in the winter cold while asking her questions. *Id.* Mancini, standing where all her neighbors could see, “felt humiliated and embarrassed to be out there in my nightgown.” RP 393. Finally, the police released her.

The ordeal was “terrifying” for Mancini. RP 393. Afterwards, she no longer felt safe sleeping in her bedroom, wearing a nightgown, or being in her home alone. RP 396-97. She had crying episodes and flashbacks. RP 402, 404. She asked her son to move in with her, and he did. RP 404. She later received counseling for PTSD. RP 752.

(2) Procedural History

Mancini sued the City of Tacoma. CP 1-2. At trial, Tacoma made an oral motion for judgment as a matter of law on Mancini’s negligence claim. RP 486-504. The trial court denied it. RP 510. The jury was instructed on claims of negligence, invasion of privacy, false imprisonment, and assault and battery. CP 510-17. The jury was instructed also on Tacoma’s affirmative defense that its police officers acted within the scope of a valid search warrant supported by probable cause. CP 519-21. The jury decided for Mancini on her claim of negligence, awarding her \$250,000, and for Tacoma on her other claims. CP 526-29. Tacoma appealed.

Division I held that the Tacoma police were not under a duty of reasonable care in these circumstances. *Mancini v. City of Tacoma*, No. 77531-6-I, slip op. at 9 n.9 (May 13, 2019). The court reasoned that Tacoma was entitled to judgment as a matter of law “[b]ecause the evidence of negligence presented at trial related to the evidence gathering aspects of [a

police] investigation.” *Id.* at 11.<sup>1</sup> The court did not consider Mancini’s theory that the police also negligently failed to release her once their mistake was clear. *See id.* at 9-11.

### C. ARGUMENT

If Tacoma police had serendipitously found that Mancini had committed a different crime, the exclusionary rule would have vindicated her rights in a criminal case. But under Division I’s opinion, an innocent woman like her has no remedy for police negligently raiding her home and then negligently detaining her for too long. Division I is wrong.

- (1) “Step Zero” of the Public Duty Doctrine Requires the Court to Determine Not Whether the Government Was Performing a Government Function, But Rather Whether It Was Under a Tort Law Duty to the Same Extent as a Private Person

Because the police were performing a government function—gathering evidence of a potential crime—Division I seemed to think that the Tacoma was immune from a negligence claim encompassing those official acts. *Mancini*, No. 77531-6-I, slip op. at 9. That analysis does not accord with the legislative waiver of sovereign immunity or the public duty

---

<sup>1</sup> Because this Court is reviewing a motion for judgment as a matter of law under CR 50, this court’s analysis is the same as the trial court’s. Such a motion “should be granted only when, after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party.” *H.B.H. v. State*, 192 Wn.2d 154, 162, 429 P.3d 484 (2018). Because Mancini was the nonmoving party, the evidence and reasonable inferences from the record must be viewed in the light most favorable to Mancini.

doctrine, which is this Court’s “focusing tool” designed to give effect to that waiver. *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quotation omitted). This Court should confirm the proper analytical framework for a tort claim based on government negligence while performing a government function.

(a) Whether the Defendant Was Performing a Government Function Has No Bearing on the Government’s Tort Law Duties of Care

Local governments were once liable for negligence only when performing a proprietary function. They enjoyed sovereign immunity when performing a government function, with some exceptions. *Hagerman v. City of Seattle*, 189 Wash. 694, 698, 66 P.2d 1152, 1154 (1937), *superseded by statute as stated in Kelso v. City of Tacoma*, 63 Wn.2d 913, 918-19, 390 P.2d 2 (1964). So an injured person’s government tort claim usually depended on whether the government employee was furthering a government function or a proprietary function. Courts adopted a test for this determination: “whether the act performed is for the common good of all, that is, for the public, or whether it is for the special benefit or profit of the corporate entity.” *Id.* at 701. Under this test, local governments could not be sued even for negligence in motor vehicle collisions if the government employees were performing a government function, such as serving a public hospital or collecting garbage. *Id.* at 704; *Krings v. City of Bremerton*, 22

Wn.2d 220, 223, 155 P.2d 493, (1945), *overruled in part by Hutton v. Martin*, 41 Wn.2d 780, 252 P.2d 581 (1953). This Court recognized “[t]he hardships and injustices arising from the defense of government immunity,” but cautioned that “any change therein must be sought from the legislature.” *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 376, 385, 261 P.2d 407 (1953) (quoting *Hagerman*, 189 Wn.2d at 698).

In the 1960s, the Legislature abolished sovereign immunity for the state (RCW 4.92.090) and local governments (RCW 4.96.010). This legislation operates as consent to suit, *Kelso*, 63 Wn.2d at 918-19, and also establishes the scope of government liability. Both statutes provide for liability “to the same extent” as if the government entity “were a private person or corporation,” regardless of whether the entity was “acting in a governmental or proprietary capacity.” RCW 4.92.090; RCW 4.96.010(1). These statutes constitute “one of the broadest waivers of sovereign immunity in the country.” *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995). After the Legislature acted, the appropriate test for government’s civil liability was no longer whether the government’s acts furthered a government function or a proprietary function. In circumstances where local governments were once immune, they could now be liable. In *Kelso*, 63 Wn.2d at 914, for example, the City of Tacoma was held liable for one of its police officer’s negligence in crashing his patrol car into a

private citizen. Although the officer was performing a government function, the legislative waiver of immunity controlled. *Id.* at 918-19.

(b) The Public Duty Doctrine Is an Analytical “Focusing Tool” to Determine Whether a Government Defendant Owed an Actionable Duty of Care, Not a Rule of Non-Liability for Government Functions

After *Kelso*, however, this Court wrestled with harder government liability questions. Liability is clear where government acts are “analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation.” *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). But “treating governments the same as private persons or corporations became problematic where statutes and ordinances imposed duties on governments not imposed upon private persons or corporations.” *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J., concurring).

The public duty doctrine emerged as a tool to cut through the thicket. In *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978), this Court recognized that even under the former “traditional rule” of sovereign immunity, exceptions had developed over time to create liability when the government was acting in a government capacity. In *Halvorson*, the Court recognized one such exception: “Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect

a particular and circumscribed class of persons.” 89 Wn.2d at 676. Over time, this “legislative intent” exception and other exceptions to the traditional rule were collected into “the public duty doctrine.” *J & B Dev. Co. Inc. v. King Cty.*, 100 Wn.2d 299, 303, 669 P.2d 468, 471 (1983), *overruled on other grounds by Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988). “The exceptions are (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship.” *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 854 n.7, 133 P.3d 458 (2006) (citation omitted).

The public duty doctrine is not a source of liability or a general rule of non-liability, but rather an analytical “focusing tool.” *Munich*, 175 Wn.2d at 878. The doctrine recognizes that some cases may involve “governmental duties mandated by legislative bodies.” *Id.* at 894. In these instances, the doctrine provides a general rule of thumb: a government entity will not be liable for a breach of a government duty owed to the public at large, as opposed to the plaintiff individually. *Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465 (1999). But the public duty doctrine directs courts to search for an exception to this general rule. The doctrine’s exceptions are “just another way of asking whether the State [or local government] had a duty to the plaintiff.” *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

- (c) The Threshold Test Is Whether the Government Was Under a Tort Law Duty to the Same Extent as a Private Person

Division I made an analytical error that has bedeviled other courts, reverting to the “traditional rule” of non-liability that was abolished by the Legislature.<sup>2</sup> Here, simply because Smith and his colleagues were performing a government function—“the authorized evidence gathering aspects of police work”—Division I held a negligence claim was “forbidden.” *Mancini*, No. 77531-6-I, slip op. at 9. But the waiver of sovereign immunity made clear that a government entity is liable “to the same extent as if it were a private person or corporation,” even if “acting in its governmental ... capacity.” RCW 4.92.090; RCW 4.96.010(1). The public duty doctrine was never meant to create a judicial backdoor for reinstating sovereign immunity. *Osborn*, 157 Wn.2d at 27. Rather, it developed on a case-by-case basis to give effect to the Legislature’s intent to establish government liability without expanding that liability beyond the

---

<sup>2</sup> For example, in *Sunshine Heifers, LLC v. Wash. State Dep’t of Agr.*, 188 Wn. App. 960, 355 P.3d 1204 (2015), the court used the “public duty doctrine” as a functional synonym for traditional sovereign immunity:

[T]he public duty doctrine does not apply when the government is performing a proprietary function, rather than a governmental function. If a government entity is performing a proprietary function, it has an identical duty of care to a private individual or institution engaging in the same activity. ...The public duty doctrine precludes liability for a governmental entity’s governmental functions.

*Id.* at 967-68 (2015) (citations omitted). The court even recycled the same test for determining whether the government was performing a proprietary function. *Id.* at 967. The proprietary versus government function test has enduring vitality in cases on local governments’ taxing authority, *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003), but not government liability in tort.

scope of RCW 4.92.090 and RCW 4.96.010. *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983). Indeed, this Court has admonished against a myopic view of government liability that disregards current law. *See H.B.H.*, 192 Wn.2d at 179-80 (rejecting the State’s argument that it could not be liable in negligence because it was performing “a uniquely government function”).

As this Court clarified in *Munich* and *Beltran-Serrano*, the public duty doctrine is not applied in every case where a tort claim is brought against a government defendant. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608 (2019); *Munich*, 175 Wn.2d at 891-95. Rather, the doctrine’s analytical framework applies only when a claim for damages is based on a public duty—that is, “when special governmental obligations are imposed by statute or ordinance.” *Beltran-Serrano*, 193 Wn.2d at 549. Thus, a threshold question must be asked: is the claim based on an independent common law duty that applies equally to a private person or corporation? That is step zero. If a “comparable” or “analogous” situation in the private sphere would result in a tort duty, then a duty arises for the government entity too. *H.B.H.*, 192 Wn.2d at 180; *Evangelical*, 67 Wn.2d at 253. If the answer is yes, the public duty doctrine does *not* come into play. Only if the court determines that the plaintiff relies on a specialized public duty distinct from a common law duty does the court use the “focusing tool”

of the public duty doctrine to determine whether the plaintiff's claim is cognizable. All the while, the overarching question remains the same: Did the defendant owe a duty of care? *See, e.g., Bishop*, 137 Wn.2d at 530 (“The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff.”).

(2) Police Officers, Like Anyone Acting Affirmatively or Claiming a Legal Privilege to Enter Land, Have a Duty to Use Reasonable Care Against Entering the Wrong Home

Under step zero, the question here is whether municipal police officers have a duty of reasonable care to avoid raiding the home of an innocent person. “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.” *Volk v. DeMeerleer*, 187 Wn.2d 241, 263, 386 P.3d 254 (2016) (quotations omitted). Courts weigh “considerations of logic, common sense, justice, policy, and precedent.” *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (quotation omitted).

(a) A Duty of Reasonable Care in These Circumstances Protects the Weighty Private Interests Without Unduly Burdening the Interest in Law Enforcement

In circumstances like these, a plaintiff's interests weigh strongly in favor of recognizing a tort law duty of care. When police negligence results in the violation of a person's constitutional rights, a civil remedy should be

available. A police search of a private home is unconstitutional if probable cause does not support the warrant. *See* U.S. Const. amend. IV; Wash. Const. art. I, § 7; *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Here, Tacoma emphasized the jury instruction directing the jury to find for Tacoma if the warrant was supported by probable cause and the officers did not exceed the warrant. RP 760-61, 772, 775-83, 789, 792-93; CP 519-21. “The jury is presumed to have followed the court’s instructions.” *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 263, 840 P.2d 860 (1992). So the verdict necessarily means the jury found the police lacked probable cause or exceeded the scope of the warrant.

In criminal cases, Washington’s “constitutionally mandated exclusionary rule provides a remedy for individuals whose rights have been violated.” *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226, 1231 (2009).<sup>3</sup> Thus, if this case had been a criminal prosecution and Mancini had been a criminal engaged in, say, trafficking in stolen goods, our state’s exclusionary rule would have afforded her a remedy. But because this case was civil and Mancini was innocent, she was left with no state-law remedy.

That incongruity in the law should not stand. Tort remedies are interwoven with constitutional law. For instance, in *Hudson v. Michigan*,

---

<sup>3</sup> Washington’s exclusionary rule does not include a “good faith” exception. *State v. Afana*, 169 Wn.2d 169, 184, 233 P.3d 879 (2010).

547 U.S. 586, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006), the U.S. Supreme Court held the federal exclusionary rule does not apply when the police violate the Fourth Amendment's "knock and announce" rule. In so holding, the Court reasoned that "civil liability is an effective deterrent here, as we have assumed it is in other contexts." *Id.* at 598. In other words, civil tort claims remedy constitutional violations where the exclusionary rule does not apply. But Division I's opinion gashes a hole in this safety net. Recognizing government liability for negligence here would encourage constitutional policing. *See Washburn v. City of Fed. Way*, 178 Wn.2d 732, 761, 310 P.3d 1275 (2013) ("The deterrence of unreasonable behavior through tort liability is, after all, one of the guiding principles of the abolition of sovereign immunity.").

A duty of reasonable care would not burden or chill the legitimate exercise of law enforcement functions. In fact, Smith testified that in 95% of his cases, he executes a controlled buy to verify whether an innocent person or a drug dealer is operating out of a home. RP 49-50. No barrier stood in the way of him doing a controlled buy here other than his preference for his "working relationship" with Pierce County. RP 57-58. The situation was not exigent. By Smith's own admission, he did nothing to find out where Logstrom lived for a month after first receiving a tip about the man. RP 42-43, 46. In short, competent evidence showed that exercising

reasonable care would not have imposed an unacceptable burden on Smith.

“[I]f the Legislature wishes to limit liability, it can do so.” *Bishop*, 137 Wn.2d at 531. Until then, however, it has spoken on these circumstances through its imposition of sovereign liability.

(b) Precedent Shows that Government Liability Here Would Be Co-Extensive with a Private Person’s Duty of Care in These Circumstances

The existence of a duty is confirmed by looking to precedent and asking whether government liability here would exceed or would instead be “to the same extent” as if government entities “were a private person or corporation.” RCW 4.96.010. Private persons are under a duty of reasonable care to avoid creating unreasonable risks of harm to persons and property. *See, e.g., 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)). This tort duty applies to police officers who choose to direct their official acts at an individual: “the City owes a duty to refrain from causing foreseeable harm in the course of law enforcement interactions with individuals.” *Beltran-Serrano*, 193 Wn.2d at 552.

Although this Court has no precedent involving identical facts, more cases besides *Beltran-Serrano* suggest that police have a duty of reasonable care leading up to the act of breaking down the door to a private home. In

*Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), this Court held that municipalities are not immune from liability for civil claims based on a careless police investigation. *Id.* at 587-90. Although the plaintiff claimed only malicious prosecution, false arrest, false imprisonment, and libel and slander, nothing in *Bender* suggested the Court would hold municipalities are immune if plaintiffs also claim negligence. Then, in *Turngren v. King County*, 104 Wn.2d 293, 705 P.2d 258 (1985), this Court rejected a local government’s proposed rule that only an intentional tort—malicious prosecution—is available when the police execute a search warrant that lacks probable cause. *Id.* at 302. While this Court has not expressly recognized a duty of reasonable care in these circumstances, it left the door wide open in *Bender* and *Turngren*.

Later, in *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008), this Court held that police officers may be liable for trespass for their intentional acts exceeding the scope of a search warrant. *Id.* at 675, 679. This Court did not reach the plaintiff’s negligence claim, but *Brutsche* approved § 214 of the *Restatement (Second) of Torts*. 164 Wn.2d at 675, 679. That authority, in turn, explains that “[a] privilege to enter land may be unreasonably exercised ... by any negligence in the manner in which the privilege is exercised.” *Restatement (Second) of Torts* § 214 cmt. a. While Mancini did not claim trespass, a general negligence claim is functionally

identical to a trespass claim under § 214(1) based on negligence. *See Restatement (Second) of Torts* § 497 (explaining that negligence principles apply to claims based on injury to the person and property alike).

Private persons have a common law privilege to enter land to remove their chattel that is there without their consent, *In re Pers. Restraint of Harvey*, 3 Wn. App. 2d 204, 217, 415 P.3d 253 (2018), just as police officers have a privilege to enter land when under the authority of a search warrant. It is difficult to imagine a Washington court holding a private person or company free from liability despite negligently entering the wrong home to recover a chattel. The analogous private setting thus strongly supports finding a duty of care here.

Under this body of law, Mancini's negligence claim *was* cognizable. The officers should have exercised reasonable care to ensure that they were not breaking down the door of an innocent person. Just as the police may be liable for negligence leading up to the intentional act of pulling a gun's trigger, *Beltran-Serrano*, 193 Wn.2d at 551-52, the police may be liable for negligence leading up to raiding a home.

(c) The Overlap Between Police Negligence and the Investigative Function Does Not Render a Negligence Claim "Forbidden"

Division I held that Washington law does not "recognize a cognizable claim for negligent investigation against law enforcement

officials.” *Mancini*, No. 77531-6-I, slip op. at 9 (citations omitted). Division I lost sight of the proper analysis of duty under the legislative waiver of immunity, incorrectly focusing on the nature of the police officers’ function. As this Court has recognized, the common law has often imposed “tort liability based on the negligent performance of law enforcement activities.” *Beltran-Serrano*, 193 Wn.2d at 542 (collecting cases). This Court has repeatedly recognized a tort law duty of care arising independently of a police officer’s law enforcement functions. *See, e.g., Id.*, at 542 (duty of care during community caretaking); *Washburn*, 178 Wn.2d at 759 (holding that a police officer serving an antiharassment order under a statutory duty also assumes an independent common law duty of reasonable care to avoid creating a risk of harm to another person through the conduct of a third person). In short, the police’s performance of official duties does not negate their concurrent tort duties of care.

While some cases have rejected negligence claims arising from a botched government investigation, not all cases are alike when police officers commit “negligence occurring during the authorized evidence gathering aspects of police work.” *Mancini*, No. 77531-6-I, slip op. at 9. *Mancini* did not claim negligence based on the police’s *nonfeasance*—that is, a choice not to commence or continue an investigation, as in *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992), or their failure

to protect her from a third party, as in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013). Rather, she claimed damages based on the police’s *misfeasance* after choosing to take affirmative action—the police negligently invading the wrong home and then detaining her long after realizing their mistake.

Still, from its own prior cases, Division I extrapolated a general rule barring negligence claims that include any “assertions of negligence occurring during the authorized evidence gathering aspects of police work.” *Mancini*, No. 77531-6-I, slip op. at 9. The new rule sweeps broadly, as virtually every police action can be characterized as stemming from “evidence gathering,” including the actions in *Beltran-Serrano* that were held sufficient to support a claim for negligence. Division I’s new rule is so broad, in fact, that it freed Tacoma police from using reasonable care to release Mancini immediately. The lower court’s view of police liability would be detrimental to individual constitutional rights, to public trust in the police, and to the analytical principles that must guide the courts in government liability cases.

- (3) Just as Jailers Must Exercise Reasonable Care to Release People Who Are Unjustifiably Detained, So Too Police Officers Must Use Such Care When Handcuffing a Person in Their Own Home

Precedent also strongly supports recognizing a common law duty of

reasonable care to release Mancini upon Smith “immediately” realizing the misidentification. At common law, corrections officers have a well-established duty to release detainees whom the officers know or should know are being held without justification, including due to misidentification. *Stalter*, 151 Wn.2d at 157; *Tufte v. City of Tacoma*, 71 Wn.2d 866, 870-72, 431 P.2d 183 (1967). There is no principled reason for applying this duty in the setting of a jail but not in the setting of a private home, where the interests in liberty and privacy weigh even more strongly in favor of releasing the detainee immediately.

Thus, even if Tacoma police did not have a duty of reasonable care to avoid raiding an innocent person’s home, the jury verdict must be restored based on this separate duty of reasonable care.

#### D. CONCLUSION

This Court has recognized a tort duty of reasonable care where necessary to “delicately balance the need for effective law enforcement against the obvious societal interest in avoiding the incarceration of persons who should not be incarcerated.” *Stalter*, 151 Wn.2d at 157. This case calls for a similar balancing, which the Court should resolve in favor of recognizing a duty of reasonable care. The lower court should be reversed.

DATED this 3<sup>rd</sup> day of February, 2020.

Respectfully submitted,



Gary Manca, WSBA #42798  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Lori S. Haskell, WSBA #15779  
7511 Greenwood Ave N Ste 314  
Seattle, WA 98103  
(206) 728-1905

Attorneys for Petitioner  
Kathleen Mancini

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Supplemental Brief of Petitioner* in Supreme Court Cause No. 97583-3 to the following:

Jean Homan  
Gisel Castro  
Tacoma City Attorney's Office  
747 Market St., Suite 1120  
Tacoma, WA 98402  
jhoman@cityoftacoma.org  
gcastro@ci.tacoma.wa.us

Valerie D. McOmie  
4549 NW Aspen Street  
Camas, WA 98607  
valeriemcomie@gmail.com

Lori Haskell  
7511 Greenwood Ave N Ste 314  
Seattle, WA 98103  
lori@haskellforjustice.com

Daniel E. Huntington  
422 Riverside, Suite 1300  
Spokane, WA 99201  
danhuntington@richter-wimberley.com

Original E-Filed with:  
Supreme Court  
Clerk's Office

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: February 3, 2020 at Seattle, Washington.



---

Sarah Yelle, Legal Assistant  
Talmadge/Fitzpatrick

**TALMADGE/FITZPATRICK**

**February 03, 2020 - 4:01 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97583-3  
**Appellate Court Case Title:** Kathleen Mancini v. City of Tacoma, et al.

**The following documents have been uploaded:**

- 975833\_Briefs\_20200203155949SC552970\_2853.pdf  
This File Contains:  
Briefs - Petitioners Supplemental  
*The Original File Name was Supplemental Brief of Petitioner.pdf*

**A copy of the uploaded files will be sent to:**

- danhuntington@richter-wimberley.com
- gcastro@ci.tacoma.wa.us
- haskell@haskellforjustice.com
- jhoman@cityoftacoma.org
- lori@haskellforjustice.com
- sarah@tal-fitzlaw.com
- valeriemcomie@gmail.com

**Comments:**

Supplemental Brief of Petitioner

---

Sender Name: Sarah Yelle - Email: sarah@tal-fitzlaw.com

**Filing on Behalf of:** Gary Manca - Email: gary@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:  
2775 Harbor Avenue SW  
Third Floor Ste C  
Seattle, WA, 98126  
Phone: (206) 574-6661

**Note: The Filing Id is 20200203155949SC552970**