97583-3

No. 77531-6-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KATHLEEN MANCINI,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

PETITION FOR REVIEW OF KATHLEEN MANCINI

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

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A. INTRODUCTION

The Court of Appeals decision leaves innocent people without a civil state-law remedy for police officers' negligence in invading private homes. It also creates a broad new rule insulating municipalities from liability for negligence claims "related to the evidence gathering aspects" of any police "investigation." *Mancini v. City of Tacoma*, No. 77531-6-I, slip op. at 9, 11 (2019) ("*Mancini* II"). *See* Appendix.

The police here broke and entered into an innocent person's home, misidentifying her home as a drug dealer's. She then claimed negligence against the City of Tacoma. At trial, the jury was instructed to find for the City if the police had probable cause and stayed within the scope of the search warrant. The jury found against the City. But Division I vacated the verdict. If the police had caught the plaintiff committing a crime, the exclusionary rule would have given her a remedy. Because she was innocent, however, Division I's opinion left her with no remedy.

This Court's review is needed to decide two significant questions of law. Review is needed also to clarify the proper analytical framework for courts to determine whether a police officer was under an actionable duty of care in the aftermath of *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 288 P.3d 328, 336 (2012) and *Beltran-Serrano v. City of Tacoma*, __ Wn.2d __, 442 P.3d 608 (2019).

B. IDENTITY OF PETITIONER

The petitioner is Kathleen Mancini, the respondent below.

C. COURT OF APPEALS DECISION

The Court of Appeals issued an unpublished opinion in Cause No. 77531-6-I on May 13, 2019 and denied reconsideration on July 24, 2019.

D. ISSUES PRESENTED FOR REVIEW

1. What is the proper analytical framework for determining whether a police officer was under a tort-law duty of reasonable care in a case involving police action directed at a specific individual or their home?

2. Do law-enforcement officers in Washington owe a tort-law duty to the individual resident of a private home to exercise reasonable care ensuring that, before breaking and entering into that home, the individual is not engaged in criminal activity in their home or housing evidence of a crime there?

3. Do law-enforcement officers in Washington owe a tort-law duty to the individual resident of a private home, when executing a search warrant, to release that resident from handcuffs when the officers know or, in the exercise of reasonable care, should know that the warrant mistakenly identified the home as the site of criminal activity?

E. STATEMENT OF THE CASE

(1) Factual History

A known drug user approached a Tacoma police officer with a tip. Ex. 103; RP 48. Officer Kenneth Smith had used this drug user as an informant twice before in drug investigations. RP 48. This drug user told Officer Smith that a man named "Matt" was dealing drugs. Officer Smith later figured the man's last name was Logstrom. For the next month, Officer

Smith did not follow up on the tip or apply for a warrant. RP 42-43, 46.

Officer Smith then met again with this drug user, who told him that she saw drugs in Logstrom's apartment in King County. RP 46-48. Officer Smith and a colleague drove out of their jurisdiction, from Pierce County to Federal Way, to view the apartment complex identified by the drug user. RP 47-48, 132. The drug user pointed to one of the units. RP 47-48. The drug user claimed Logstrom was living in the apartment but that it was rented under his mother's name. RP 220, 255.

Officer Smith ran a check on the apartment number and found it was rented under the name Kathleen Mancini. RP 51, 261-62. Officer Smith just assumed that Mancini was Logstrom's mother (she wasn't); Officer Smith did not verify that fact. RP 52-53, 221. In 95% of his drug investigations, Officer Smith attempts a "controlled buy" and surveils to confirm the tipster's report. RP 49-50. He did neither here. RP 58. Still, Officer Smith applied for a search warrant for Mancini's apartment. Ex. 103; CP 177-79.

Mancini was not a drug dealer, but a five-foot-tall, 60-year-old nurse. RP 308, 375, 403, 407. She worked from home on the night shift for Group Health's on-call telephone triage service. RP 368-69, 407. Early one winter morning, Mancini completed her shift and went to bed. RP 369-70. Meanwhile, Tacoma police assembled outside her apartment. Officer Smith was among the officers. Mancini awoke to shaking and sounds that made

her think she was experiencing an earthquake. RP 370. Mancini stepped out of her bedroom. RP 371. A swarm of men rushed towards her pointing guns. RP 371-72. The men wore black and concealed their faces with visors. They screamed at her to get down. RP 371-72. Mancini did not realize they were police officers. RP 373. The men pushed Mancini onto the floor, handcuffed her hands behind her back, and then dragged her outside her home. RP 228-29, 371, 374. The officers kept her in cuffs outside in the winter cold, refusing to allow her to cover herself. RP 230-31, 374-82.

As soon as Officer Smith entered Mancini's apartment, he knew "immediately" they invaded the wrong apartment. Ex. 1; RP 235-36. (Logstrom lived in a different unit in the complex. RP 237.) But Officer Smith and his colleagues did not promptly free Mancini. RP 230-31, 374-88. Instead, they left her in cuffs outside while asking her questions. *Id.*

(2) Procedural History

Mancini brought suit against the City of Tacoma. CP 1-2. The trial court granted summary judgment to the defense, and Mancini appealed. Division I reversed and remanded for trial. *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229 (2015) ("*Mancini* I") (unpublished).

At trial, the City made an oral motion for judgment as a matter of law. RP 486-504. The trial court denied the motion. 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 on the City's affirmative defense that its police officers acted within the scope of a valid search warrant supported by probable cause. CP 519-21; Appendix. The jury decided for Mancini on her claim of negligence, awarding her $250,000, and for the City on her other claims. CP 526-29; Appendix.

On the City's appeal, Division I focused on whether Mancini's claim was for "negligent investigation." *Mancini* II, No. 77531-6-I, slip op. at 8-11. Citing several Court of Appeals opinions, Division I concluded that "Washington common law does not recognize a claim for negligent investigation," especially against police. *Id.* at 8-9 (quotation omitted). Without considering the portion of Mancini's negligence claim based on the police's failure to release Mancini immediately once their mistake was clear, Division I vacated the verdict. Division I then denied reconsideration, even after the newly decided *Beltran-Serrano* was brought to its attention.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court has frequently granted review to provide guidance on the scope of municipal liability for police negligence. *E.g.*, *Beltran-Serrano*, 442 P.3d at 611; *Washburn v. City of Federal Way*, 178 Wn.2d 732, 746, 753, 310 P.3d 1275 (2013); *Robb v. City of Seattle*, 176 Wn.2d 427, 432-33, 295 P.3d 212 (2013). This Court should again, because this case meets the criteria for review. Division I's decision "is in conflict" with this Court's

decisions, RAP 13.4(b)(1), for three main reasons. First, Division I's refusal to recognize a tort-law duty of reasonable care clashes with negligence law. Second, its conclusion ignores this Court's recent opinions on the public-duty doctrine. Third, its decision conflicts with this Court's views on the scope of government liability in light of the legislative waiver of sovereign immunity. Even if Division I's decision were reconcilable with this Court's teachings, review would be warranted because the jury's verdict necessarily raises "a significant question" of constitutional law. RAP 13.4(b)(3). Division I's opinion leaves innocent people in this state without any civil state-law remedy for the careless invasions of their homes by police. On that ground alone, this case "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Whichever way Division I's opinion is sliced, review should be granted.

(1) Division I's Decision Conflicts with Core Principles of Negligence Law Reconfirmed Recently in *Beltran-Serrano*

In both its analysis and its conclusion, Division I's decision conflicts with the core principles of negligence law adopted by this Court, in two ways. First, Division I neither cited nor applied the proper standard for determining whether the defendant in a civil case is under a tort-law duty of reasonable care to the plaintiff. When making that determination, courts are required to weigh "mixed considerations of logic, common sense, justice,

policy, and precedent." *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004) (quotation omitted). Although Division I stated its focus was "on the duty alleged to have been breached," *Mancini* II, No. 77531-6-I, slip op. at 9 n.9, Division I confined the duty question to a footnote. Division I seemed to simply assume a negligence claim was unavailable "[b]ecause the evidence of negligence presented at trial related to the evidence gathering aspects of Officer Smith's investigation." *Id.* at 11. But Division I reached that conclusion without considering common sense, justice, and policy.

Division I did not cite any precedent for whether the police owe a duty of reasonable care when invading a private home. In a string cite, Division I lumped together several Court of Appeals decisions on "negligent investigation." *Mancini* II, No. 77531-6-I, slip op. at 8-9 (collecting cases). But Division I did not consider the distinctions among those decisions or their applicability to a police invasion of a private home. In *Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013), the claim was a botched investigation leading to the suspension of a dental license. *Id.* at 725-26. In *Fondren v. Klickitat County*, 79 Wn. App. 850, 905 P.2d 928 (1995), the claim was for the sheriff's office mishandling an investigation which resulted in the criminal prosecution of the plaintiff. *Id.* at 862-63. In *Fondren*, though, unlike here, the jury's guilty verdict presumptively established probable cause. *Id.* at 856. In *Donaldson v. City of Seattle*, 65

Wn. App. 661, 831 P.2d 1098 (1992), the court held police officers do not have an affirmative duty to initiate a follow-up investigation of a domestic-violence incident. *Id.* at 671. In *Dever v. Fowler*, 63 Wn. App. 35, 39, 816 P.2d 1237 (1991), *amended by,* 824 P.2d 1237 (1992), the court held a fire department investigator was not liable in negligence for identifying the plaintiff as an arsonist. *Id.* at 38-39, 44-45. None of these cases involved a police officer's decision to break into a home or to keep a person in cuffs upon realizing that a search warrant identified the wrong apartment.

Second, Division I's conclusion does not square with the common-law duty of reasonable care that underlies claims of negligence against the police. Not all cases are alike when police officers commit "negligence occurring during the authorized evidence gathering aspects of police work." *Mancini* II, No. 77531-6-I, slip op. at 9. Mancini did not claim damages based on the police's *nonfeasance*—that is, a choice not to commence or continue an investigation, as in *Donaldson*, 65 Wn. App. 661, or the failure to protect her from a third party, as in *Robb*, 176 Wn.2d 427. 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 even after realizing their mistake.

When police officers choose to take affirmative action, they, like anyone else in this state, are under a duty of reasonable care to avoid

creating unreasonable risks of harm to persons and property. The duty is well established in the common law. *See, e.g.*, *Restatement (Second) of Torts* § 302 cmt. a. And in *Beltran-Serrano*, this Court left no doubt that this duty applies to police officers who choose to affirmatively direct their official acts at an individual: "Under Washington common law, the City owes a duty to refrain from causing foreseeable harm in the course of law enforcement interactions with individuals." 442 P.3d at 615. This Court held that the plaintiff could thus claim negligence based on the police officer's affirmative acts leading up to shooting the plaintiff. *Id.* at 610, 615. Division I, by not recognizing here that this duty of care applied both to the police breaking into Mancini's home and to the officers keeping her in cuffs after realizing the error, reached a conclusion that conflicts with the principles reconfirmed in *Beltran-Serrano*.[1] Whatever concern Division I might have had about holding municipalities liable for police negligence, *Beltran-Serrano* rejected that concern: "Washington courts have long recognized the potential for tort liability based on the negligent performance of law enforcement activities." *Id.* at 611 (collecting cases).

Although this Court has no precedent involving identical facts, its

[1] A passage may be read out of context in *Ducote v. State*, 167 Wn.2d 697, 222 P.3d 785 (2009) to mean that the common law never recognizes a negligence claim arising from an official investigation. But *Ducote* concerned only the duty of social workers to stepparents when investigating allegations of child abuse.

prior cases suggest that police have a duty of reasonable care in these circumstances—both leading up to the act of breaking down the door, and upon realizing that they have entered the wrong 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 result would have been different if the plaintiff had included negligence in the complaint. Then, in *Turngren v. King County,* 104 Wn.2d 293, 705 P.2d 258 (1985), this Court rejected the 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. 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. Although this Court declined to reach the plaintiff's negligence claim, *Brutsche* approved § 214 of the *Restatement (Second) of Torts*. *Id.* 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. Of course, Mancini did not claim intentional trespass, but a 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). Under this body of law, a negligence claim was not foreclosed. 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 under *Beltran-Serrano* for negligence leading up to the intentional act of pulling a gun's trigger, the police may be liable for negligence leading up to breaking down a person's door.

Precedent is even stronger in support of recognizing a common-law duty of reasonable care to release Mancini upon Officer 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.

Still, from its own selection of 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* II, 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. Review is proper under RAP 13.4(b)(1).

(2) Division I's Decision Conflicts with the Proper Analysis of Tort-Law Claims Under the Public-Duty Doctrine

Division I's decision conflicts with the proper analysis of common-law tort claims under the public-duty doctrine, as clarified in *Munich* and recently applied in *Beltran-Serrano*. The public-duty doctrine arose from the analytical challenges of applying the Legislature's waiver of sovereign immunity. *See generally, Munich*, 175 Wn.2d at 887-91 (Chambers, J., concurring) (discussing this historical context). The doctrine was never meant to create a judicial backdoor for reinstating sovereign immunity. *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). 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 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). At bottom, the doctrine is

simply a "focusing tool." *Osborn*, 157 Wn.2d at 27 (quotation omitted).

Over time, however, this Court began characterizing the doctrine as a "general rule" foreclosing government liability unless an "exception" applied. *See, e.g.*, *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 853, 133 P.3d 458, 462 (2006); *Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465, 471 (1999). This Court began to speak as though plaintiffs needed to show "a *special* duty of care owed to a particular plaintiff or a limited class of potential plaintiffs." *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) (emphasis added). This evolution neglected the Legislature's directive to impose liability "to the same extent" as if government entities "were a private person or corporation." RCW 4.92.090; RCW 4.96.010.

Corrective action came in *Munich*, and this Court finished the job in its recent opinion in *Beltran-Serrano*. As this Court clarified, the public-duty doctrine is not applied in every case where a civil claim for damages is brought against a government defendant. *Beltran-Serrano*, 442 P.3d at 614; *Munich*, 175 Wn.2d at 91-95 (Chambers, J., concurring opinion signed by five justices). 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*, 442 P.3d at 614. A threshold question must be asked: is the claim based on a well-established common-law duty that applies equally to a

private person or corporation?

Division I may have been tripped up by the police activity at issue. But Mancini's negligence claim was not based on the police's special statutory obligation to investigate crime. Rather, she claimed a breach of the police's common-law duty of reasonable care arising from the police's volitional, affirmative acts. Under *Munich* and *Beltran-Serrano*, Division I should have kept its focus on the common-law duty at issue, not concerned itself with the overlapping official duty. Division I's reasoning conflicts with this Court's analytical framework for the public-duty doctrine, and this Court should grant review to provide further guidance to the bench and bar on how the doctrine applies.

(3) Division I's Opinion Entrenches a De-Facto Immunity for Municipalities for Police Negligence in Conflict with the Legislature's Waiver of Sovereign Immunity

Division I's opinion creates a de-facto immunity in conflict with the Legislature's expressed intent. The Legislature's waiver of immunity for the state and municipalities, enacted in the 1960s and codified at RCW 4.92.090 (the state) and RCW 4.96.010 (municipalities), is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995). The waiver of sovereign immunity is more than just consent to suit. *Kelso*, 63 Wn.2d at 918-19. The Legislature also established the scope of government liability, stating it

should be as broad as if the government entity "were a private person or corporation." RCW 4.92.090; RCW 4.96.010.

By both consenting to suit *and* defining the scope of governmental liability, the Legislature's waiver serves as the foundation for governments' liability for the tortious acts of their officers. This Court has relied repeatedly on that principle. *See, e.g.*, *Beltran-Serrano,* 442 P.3d at 611; *Munich*, 175 Wn.2d at 895; *Oberg v. Department of Natural Resources*, 114 Wn.2d 278, 281, 787 P.2d 918 (1990). Two lessons follow from this principle. First, if a private person or corporation in the same circumstances would be liable under the common law, courts should construe RCW 4.92.090 and RCW 4.96.010 as providing for government liability. Second, the Legislature has spoken on the scope of government liability, and so courts should not hesitate to impose the common-law duties for which the Legislature has thus accepted responsibility. Division I's opinion undermines these aspects of the Legislature's intent.

A new judicial grant of immunity has functionally arisen from Division I's broad new rule. Municipalities are now basically immune from liability for their police officers' "negligence occurring during the authorized evidence gathering aspects of police work." *Mancini* II, No. 77531-6-I, slip op. at 9. It is for the Legislature, not the courts, to retreat from the legislative waiver of sovereign immunity. Where the Legislature

wishes to protect municipalities and individual officers from liability, it knows how to do so, enacting special grants of immunity. *See, e.g.*, RCW 26.44.056(3); RCW 69.50.506(c). Division I failed to embrace the Legislature's acceptance of responsibility for government entities' negligence.

Division I also never asked whether a private person or corporation would be liable in negligence for the same conduct. Its answer should have been yes. For instance, 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.

Division I's analysis and conclusion conflicts with the scope of government waiver of legislative immunity.

(4) Division I's Decision Raises a Significant Question of Constitutional Law Because the Jury Necessarily Found the Police Violated Mancini's Constitutional Rights

Division I's decision raises "a significant question" of constitutional law. RAP 13.4(b)(3). A search 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). A search with a valid warrant becomes unconstitutional if it exceeds the scope of the warrant and no exception (such as the "plain view" doctrine) applies. U.S. Const. amend. IV; Wash. Const. art. I, § 7; *Horton v. California*, 496 U.S. 128, 130, 144, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) (amend. IV); *State v. Morgan*, 193 Wn.2d 365, 371, 440 P.3d 136, 139 (2019) (art. I, § 7).

During closing arguments, the City argued that probable cause supported the warrant, and the City emphasized the jury instruction directing the jury to find for the City 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. Despite the verdict for Mancini, however, the City argued on appeal that the jury must have found probable cause and proper execution of the warrant. Br. of Appellant at 9. But "[t]he 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 police lacked probable cause or exceeded the scope of the warrant, thus violating Mancini's constitutional rights.

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). Our state's exclusionary rule includes "some limited exceptions,"

id., but this Court has rejected the "good faith" exception.[2] *State v. Afana*, 169 Wn.2d 169, 184, 233 P.3d 879 (2010). So, 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 for the violation of her constitutional rights.

But because this was a civil case and Mancini was an innocent person, Division I left her without a remedy. This constitutional concern is a proper consideration under the analysis for a duty of care: "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, 266, 386 P.3d 254 (2016) (quotation omitted). And tort remedies are interwoven with constitutional law. For instance, in *Hudson v. Michigan*, 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. Division I's decision gashes a

[2] By contrast, the Fourth Amendment's exclusionary rule includes a "good faith" exception. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). But "we turn first to our state constitution." *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009) (citation omitted).

hole in this safety net.

It would be odd if the law allowed a criminal defendant to benefit from the exclusion of inculpatory evidence but barred an innocent person from obtaining a remedy. This Court should decide the significant question of whether this incongruous result is acceptable.

(5) This Court Is the Right Body to Decide Whether Innocent People in this State Should Have a Civil State-Law Remedy for the Negligence of Police in These Circumstances

Decision I's decision is worth reviewing also because the issues require a balancing of the significant public interest in law enforcement with the significant public interest in protecting the sanctity of the home. *See* RAP 13.4(b)(4). The City might contend this balancing should be done by the Legislature, but the Legislature has already spoken by approving of government liability under RCW 4.92.090 and RCW 4.96.010. The courts have a proud history of safeguarding the privacy and peace that people find in their homes. The private home has long been treated under the common law as a "castle of defense and asylum." 3 W. Blackstone, Commentaries 288. Consistent with this history, courts often are called upon to adopt rules protecting the "sanctity of the home" against government intrusion. *Kyllo v. United States*, 533 U.S. 27, 37, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

This Court not only shares this history, but also it goes even further in light of the state constitution. In *State v. Ferrier*, 136 Wn.2d 103, 960

P.2d 927, 930 (1998), for example, this Court rejected the federal rule on police "knock and talks" (a police practice of knocking on doors and asking residents for permission to search their home). *Id.* at 114-15. This Court struck a careful balance, allowing the police practice of "knock and talks" to continue but requiring the police to affirmatively notify residents that they have the right to not consent to a police search. *Id.* This Court has deep experience fashioning legal rules that balance the substantial public interests in similar circumstances. *See, e.g.*, *Stalter*, 151 Wn.2d at 157 ("In resolving the case before us, we must delicately balance the need for effective law enforcement against the obvious societal interest in avoiding the incarceration of persons who should not be incarcerated.").

The balancing of these interests should be decided by this Court: "It is ultimately and uniquely the responsibility of this court to determine when duties arise." *Munich*, 175 Wn.2d at 894. Division I believed that it lacked direction from this Court, stating that "[o]ur Supreme Court has yet to explicitly define the scope of that which constitutes a negligent investigation claim." *Id.* Now is the time for this Court's guidance on how to apply tort law in these circumstances.

G. CONCLUSION

For the forgoing reasons, the petition should be granted.

DATED this 23rd day of August, 2019

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

APPENDIX

FILED
5/13/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHLEEN MANCINI, a single woman,

Respondent,

v.

CITY OF TACOMA, a municipal entity and political subdivision of the State of Washington; TACOMA POLICE DEPARTMENT; and RON RAMDSDELL, individually and in his official capacity as chief of Tacoma Police,

Appellant.

DIVISION ONE

No. 77531-6-I

UNPUBLISHED OPINION

FILED: May 13, 2019

DWYER, J. — Following an incident wherein Tacoma police officers raided Kathleen Mancini's home under the mistaken belief that it was home to a suspected drug dealer, Mancini filed a lawsuit against the City of Tacoma asserting several tort claims, including negligence. At trial, the jury found in favor of Mancini on only her negligence claim. On appeal, the City contends that Mancini's negligence claim should not have been submitted to the jury because, as tried, it was a claim for negligent investigation, which is not cognizable in Washington. Because the evidence of negligence adduced at trial (and the theory of negligence urged on the trial court in response to the City's motion to dismiss) concerned negligence committed during the evidence gathering aspects of the police investigation, we conclude that Mancini's negligence claim, as tried, was a claim of negligent investigation, was not cognizable, and should not have

been submitted to the jury. Therefore, we reverse the judgment and remand for dismissal of Mancini's negligence claim.

I

In early December 2010, Officer Kenneth Smith of the Tacoma Police Department was in contact with a confidential informant who told him that an individual named "Matt," a white male approximately 30 years of age, was selling dealer size quantities of methamphetamine. In early January 2011, the confidential informant further claimed to have been inside Matt's apartment at 28625 16th Avenue SW, Apartment B1 in Federal Way, and to have observed Matt selling quantities of methamphetamine.

Officer Smith and his partner drove the confidential informant to the aforementioned location to have the confidential informant identify Matt's apartment in person. The apartment unit was located in an apartment complex with multiple buildings. Upon arriving at the complex, the confidential informant identified both the B1 apartment unit and a vehicle parked in the parking lot of the complex, a black four-door Dodge Charger, as where the informant had observed Matt with dealer size quantities of methamphetamines. The confidential informant further described Matt's apartment to Officer Smith as dirty and gross and explained that Matt had rented the apartment in his mother's name so that no one could figure out where he was.

In addition to having the confidential informant verify the location of Matt's apartment in person, Officer Smith also attempted to verify the confidential informant's information by checking it on several online databases. As a result of

these searches, Officer Smith learned that the apartment identified by the confidential informant was rented by Kathleen Mancini. Officer Smith believed that Mancini was Matt's mother,[1] and decided to obtain a search warrant for the apartment identified by the confidential informant. He did not perform any surveillance on the apartment or the vehicle before seeking a warrant, nor did he attempt to set up a controlled buy, even though he utilized these procedures before seeking a warrant in roughly 95 percent of his cases. In his warrant application, Officer Smith identified Mancini's apartment as the place he sought permission to search in order to discover evidence of Matt's illicit drug activity. A Pierce County superior court judge then signed the warrant authorizing a search of Mancini's apartment.

On January 5, 2011, Officer Smith led a team of armed officers to execute the search warrant at Mancini's apartment at 28625 16th Avenue SW, Apartment B-1. The officers used a battering ram to breach the door to Mancini's apartment, entered the apartment, handcuffed Mancini, and moved her out of the apartment. However, immediately after he entered the apartment, Officer Smith knew that his team was in the wrong apartment because the apartment was "the exact opposite" of how the confidential informant had described Matt's apartment. Matt actually resided in apartment A1, not apartment B1. The confidential informant had misidentified the apartment.

Mancini subsequently filed a lawsuit against the City of Tacoma, the Tacoma Police Department and the chief of the Tacoma Police Department (the

[1] Smith never verified this belief before proceeding to obtain a search warrant.

City). Her complaint pled the following causes of action: negligence, breach of duty to train and supervise, assault and battery, false imprisonment, defamation, false light, invasion of privacy, outrage, violation of RCW 49.60.030,[2] and violations of numerous provisions of the Washington State Constitution. Mancini v. City of Tacoma, No. 71044-3-I, slip op. at 6 (Wash. Ct. App. June 8, 2015) (unpublished), http://www.courts.wa.gov/opinions/pdf/710443.pdf (hereinafter Mancini I). She sought an award of damages resulting from the police raid of her apartment.

The City moved for partial judgment on the pleadings, and the trial court dismissed Mancini's negligent training and supervision claim and her constitutional claims. Mancini I, No. 71044-3-I, slip op. at 6. Subsequently, the City moved for summary judgment on all of Mancini's remaining claims. Mancini I, No. 71044-3-I, slip op. at 9. The trial court granted the motion and Mancini appealed. Mancini I, No. 71044-3-I, slip op. at 10-11.

On appeal, we concluded that dismissal on summary judgment was proper as to her claims of defamation and outrage, but unwarranted as to her remaining claims of negligence, battery, assault, false imprisonment, and invasion of privacy. Mancini I, No. 71044-3-I, slip op. at 11. Pertinently, we concluded that Mancini's negligence claim was not barred by the public duty doctrine, that the City had not established that she alleged a claim for negligence that encompassed only a noncognizable claim of negligent investigation, and that there was sufficient evidence of a genuine dispute of material fact regarding her

[2] Washington Law Against Discrimination, ch. 49.60 RCW.

negligence claim to preclude summary judgment. Mancini I, No. 71044-3-I, slip op. at 18-19 n.12. We remanded the negligence and the four intentional tort claims to the trial court.

At trial, as pertaining to the negligence claim, Mancini presented testimony from Officer Smith and from expert witness former Seattle Police Chief Norm Stamper.

During Officer Smith's testimony, he explained that he conducted surveillance on targeted addresses in 95 percent of his drug investigations, but did not do so here. Similarly, he testified that he did not perform a controlled buy[3] before seeking a warrant to search Mancini's apartment, even though he normally did so in 95 percent of his drug investigations. Officer Smith also testified that he ran database searches on both Matt and the address identified by the confidential informant. The searches revealed that the apartment identified by the informant was rented by Mancini. Officer Smith explained that, at the time, he believed that this information supported, rather than contradicted, the confidential informant's identification because the confidential informant had explained that Matt's apartment was rented in his mother's name and Mancini was approximately the right age and race to have potentially been Matt's mother.

During Chief Stamper's testimony, he testified that it was his expert opinion that Officer Smith should have performed both surveillance and a controlled buy before obtaining a warrant. According to Chief Stamper, Officer

[3] As explained by Chief Stamper, a controlled buy occurs when a confidential informant is provided with marked money, equipped with a wire for audio recording, and sent into a residence to purchase drugs. After leaving the residence, the confidential informant immediately meets with officers to provide them with the drugs and explain the events that occurred.

Smith's mistake was in trusting the information provided by the confidential informant and not verifying that information through proper investigatory steps before relying on it to obtain a warrant.

Following the close of Mancini's case in chief, the City moved for judgment as a matter of law on the negligence claim, asserting that all of the evidence presented on the negligence claim pertained to investigative acts and that negligent investigation was not a cognizable claim in Washington. In response to the motion, Mancini defended her claim by stating:

> There was virtually no police work done here. They put a drug informant in a car, drove her by four identical buildings and said, "Point out which one is where you saw the drugs." That was the extent of the investigation.
>
> . . . .
>
> What is negligence on the part of the officer? The officer admitted that he does surveillance in 95 percent of his cases, and he did none here. They did not attempt a controlled buy. They didn't do anything, and they haven't shown us that they've done anything.
>
> And it certainly is a question that gets to the jury, and the plaintiff has sustained her burden of proof with Chief Stamper's testimony that this should never happen, and that there are many, many ways to have seen to it that it didn't. And he went through where else you could have surveilled. And, sure, Your Honor has seen the picture I have of the parking lot and the entry to the stairs and the parking lot that go down to Ms. Mancini's apartment. If there had been drug activity and they had surveilled that parking lot at all, they would have at least gotten the right building, and they didn't.

The trial court denied the City's motion.[4] After the close of all the evidence, the City renewed its motion on the same ground. The motion was again denied.

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[4] Although the trial court did not state a precise reason for its ruling, it did indicate that it believed that we had ruled in Mancini I that Mancini's claim was not a negligent investigation claim and was following that decision.

The jury returned a verdict in favor of Mancini on her negligence claim, awarding her damages of $250,000, but found against her on each of her intentional tort claims. The City appeals.[5]

II

The City contends that the trial court should have granted its motion for judgment as a matter of law because Mancini failed to establish facts at trial upon which relief could be granted on her negligence claim.[6] This is so, the City asserts, because the evidence adduced at trial established that Mancini's negligence claim, as tried, was a claim for negligent investigation. Specifically, the City asserts that the evidence adduced at trial showed negligence only during the evidence gathering portion of Officer Smith's investigation prior to the filing of the application for a warrant to search Mancini's apartment[7] and that evidence of negligent investigation of criminal activity does not support a cognizable negligence claim against law enforcement in Washington. We agree.

A

When reviewing a trial court's decision to deny a motion for judgment as a matter of law, we apply the same standard as the trial court. Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 915, 792 P.2d 520 (1990). Although not cited to us by the City in its Appellant's Brief, CR 50 provides for the resolution of claims by judgment as a matter of law:

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[5] Mancini does not appeal from the adverse verdicts on the intentional tort claims.

[6] A claim that the opposing party failed to "establish facts upon which relief can be granted" can always be raised on appeal. RAP 2.5(a).

[7] We agree with the City's assertion that any evidence of police wrongdoing occurring during and after the entry to the apartment was material to Mancini's intentional tort claims, not the negligence claim.

> **(a) Judgment as a Matter of Law.**
>
> (1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.
>
> (2) *When Made.* A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

"Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997) (citing Indus. Indem. Co., 114 Wn.2d at 915-16). Evidence is substantial if it would convince "an unprejudiced, thinking mind." Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

"In general, Washington common law does not recognize a claim for negligent investigation because of the potential chilling effect such claims would have on investigations."[8] Janaszak v. State, 173 Wn. App. 703, 725, 297 P.3d

[8] There are two exceptions to this general rule. First, our Supreme Court implied such a cause of action for parents suspected of child abuse and their children in Tyner v. Dep't of Soc. & Health Servs., 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The scope of this claim was then narrowed to negligent investigations resulting in harmful placement decisions. M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 602, 70 P.3d 954 (2003). Second, if an employer is contractually obligated to provide reasons for dismissal to an employee, the employer may be held liable for failing to conduct a reasonable investigation prior to terminating the employee. Lambert v. Morehouse, 68 Wn. App. 500, 505-06, 843 P.2d 1116 (1993). However, when an

723 (2013) (citing Ducote v. Dep't of Soc. & Health Servs., 167 Wn.2d 697, 702, 222 P.3d 785 (2009). In particular, we have declined to recognize a cognizable claim for negligent investigation against law enforcement officials. Fondren v. Klickitat County, 79 Wn. App. 850, 862-63, 905 P.2d 928 (1995); Donaldson v. City of Seattle, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992); Dever v. Fowler, 63 Wn. App. 35, 44-45, 816 P.2d 1237, 824 P.2d 1237 (1991).

Our Supreme Court has yet to explicitly define the scope of that which constitutes a negligent investigation claim. Similarly, no Washington appellate opinion purports to set forth the precise boundaries of this forbidden claim. Indeed, in its briefing to us, the City did not offer a definition of the forbidden tort. When questioned at oral argument as to whether the City was then prepared to offer a definition of the forbidden tort, grounded in the case law, the City indicated that it was not prepared to do so. With all this being said, it is apparent that a negligent investigation claim must encompass, at minimum, assertions of negligence occurring during the authorized evidence gathering aspects of police work.[9]

B

The evidence of negligence adduced by Mancini at trial was directed at establishing negligence during the evidence gathering portion of the police investigation, prior to the service of the warrant to search Mancini's apartment. Officer Smith, while testifying, explained that he performed surveillance and a

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employment relationship is at will, then this exception does not apply. Lambert, 68 Wn. App. at 506.

[9] The focus must be on the duty alleged to have been breached. Where that duty was to "investigate better," in our view, a negligence claim has become a negligent investigation claim.

controlled buy in roughly 95 percent of his drug investigation cases, but did not do so herein. Chief Stamper, Mancini's expert witness, explained that it was bad police work when Officer Smith relied on information provided by a confidential informant without performing necessary steps to verify that information. Specifically, Chief Stamper testified that Officer Smith should have performed surveillance on the apartment and on Matt's vehicle and should have done a controlled buy to confirm that the confidential informant had identified the correct apartment. Chief Stamper explicitly stated that it was his opinion that Officer Smith should have taken additional steps during his investigation to verify the confidential informant's information.

Mancini's argument in response to the City's motion for judgment as a matter of law on her negligence claim makes it plain that her claim, as tried, had become one concerning negligence in the evidence gathering aspects of Officer Smith's investigation.[10] In response to the motion, Mancini explained her claim thusly:

> There was virtually no police work done here. They put a drug informant in a car, drove her by four identical buildings and said, "Point out which one is where you saw the drugs." *That was the extent of the investigation.*
>
> . . . .
>
> What is negligence on the part of the officer? *The officer admitted that he does surveillance in 95 percent of his cases, and he did none here. They did not attempt a controlled buy.* They didn't do anything, and they haven't shown us that they've done anything.
>
> And it certainly is a question that gets to the jury, and the

[10] We review the ruling on the later of the City's two motions for judgment as a matter of law. See Chaney v. Providence Health Care, 176 Wn.2d 727, 731-32, 295 P.3d 728 (2013). In so doing, we consider the entire record—both as to the evidence and the arguments—extant at that time and, thus, presumed to be within the contemplation of the trial judge at the time the challenged ruling was made.

> plaintiff has sustained her burden of proof with Chief Stamper's testimony that this should never happen, and that there are many, many ways to have seen to it that it didn't. *And he went through where else you could have surveilled.* And, sure, Your Honor has seen the picture I have of the parking lot and the entry to the stairs and the parking lot that go down to Ms. Mancini's apartment. *If there had been drug activity and they had surveilled that parking lot at all, they would have at least gotten the right building, and they didn't.*

(Emphasis added.)

Because the evidence of negligence presented at trial related to the evidence gathering aspects of Officer Smith's investigation, and the legal theories advanced were consistent with this view of the evidence, Mancini's negligence claim, as tried, became a noncognizable claim of negligent investigation. Lacking evidence of negligence outside of the evidence gathering aspects of the police investigation, Mancini did not present sufficient evidence at trial to support a claim upon which relief could be granted. The City's motion for judgment as a matter of law was meritorious. The judgment entered on the jury's verdict must be vacated.

III

Although the sufficiency of the evidence analysis set forth in section II entirely governs our decision, to be clear as to the bases for our decision, it is necessary for us to explicate as to the inapplicability of certain arguments advanced by the parties.

A

We first address issues raised by Mancini.

Mancini asserts that the City did not properly preserve its claim of error for appeal. This contention fails for two reasons. First, the record makes clear that, consistent with the requirements of CR 50, the City moved for dismissal both after Mancini rested and at the close of all of the evidence. By so doing, the issue was properly brought to the attention of the trial court, thus preserving the claim of error.

Second, even had the City failed to bring a proper CR 50 motion, a plaintiff's alleged failure to establish facts upon which relief can be properly granted is a claim of error that can be asserted for the first time on appeal. RAP 2.5(a)(2).

Mancini next asserts that our decision in the prior appeal foreclosed the City from asserting its claim in this appeal. Mancini's assertion again fails for several reasons.

In this litigation, we denied the City's request for pretrial dismissal of Mancini's negligence claim. Mancini I, No. 71044-3-I, slip op. at 18. The case was remanded to the trial court. The case was tried. Based on the trial court evidentiary record and the arguments of counsel—both at trial and on appeal—we have ruled that the City is entitled to a dismissal of the claim against it. This procedure has been employed and approved of by our Supreme Court. Roberson v. Perez, 156 Wn. 2d 33, 42-44, 123 P.3d 844 (2005) (analyzing the decisions rendered in Roberson v. Perez, 119 Wn. App. 928, 83 P.3d 1026 (2004), and Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000)). The City was not foreclosed from presenting its claim to us.

Moreover, the City correctly notes that the evidentiary record—and the arguments of counsel—extant at the close of the trial was both fixed and more complete than was the record presented in Mancini I. Our decision is based on the record of the case, as tried.

In arguing that the City is foreclosed from raising the dispositive issue, Mancini evidences a misapprehension concerning the nature of our prior decision. Mancini argues as if we had granted her affirmative relief in Mancini I. But this was not so.

In the prior appeal, only the City sought affirmative relief. As pertaining to the negligence claim, the request was for pretrial dismissal of the claim. We denied the request. Mancini I, No. 71044-3-I, slip op. at 18. That decision restored the parties to the position they occupied prior to the trial court's grant of summary judgment. The decision did not affirmatively grant either party any relief on the negligence claim.

Our decision was guided by several factors. First, the "objective of a summary judgment is to avoid a useless trial," State v. Shanks, 27 Wn. App. 363, 365, 618 P.2d 102 (1980), not to preclude a warranted one. Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). Thus, the burden is on the moving party to establish that a trial would be useless. Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). This the City did not do.

The City asserted that Mancini's negligence claim must have been a forbidden negligent investigation cause of action. But Mancini denied this. In so doing, she correctly pointed out that she had not pleaded the cause of action as

one for negligent investigation. Her denial was strengthened by the fact that all but one of the negligent investigation cases cited to us involved circumstances in which either negligent investigation was explicitly pleaded as a cause of action by the plaintiff or the plaintiff conceded that negligent investigation was, in fact, the claim alleged.[11]

In addition, the City expended no effort to attempt to define exactly what a negligent investigation claim was. Mancini's protestation that she was the master of her own pleadings and that she could not be forced to adopt the City's categorization of her claim as an undefined noncognizable claim, coupled with the fact that she had not, in fact, pleaded the claim as such, had merit. Moreover, the Mancini I briefing appeared to support a claim, premised on the principles underlying the decision in Turngren v. King County, 104 Wn.2d 293, 705 P.2d 258 (1985), that, if adopted by the jury, would render unconsented (having neither actual nor judicial consent) the forced entry into Mancini's home. Nothing in the City's appellate presentation foreclosed this possibility. And we

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[11] The parties cited to several cases discussing the forbidden claim of negligent investigation: M.W. v. Dep't of Social & Health Servs., 149 Wn.2d 589, 70 P.3d 954 (2003); Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000), Laymon v. Dep't of Nat. Res., 99 Wn. App. 518, 994 P.2d 232 (2000); Corbally v. Kennewick Sch. Dist., 94 Wn. App. 736, 973 P.2d 1074 (1999); Fondren v. Klickitat County, 79 Wn. App. 850, 905 P.2d 928 (1995); Donaldson v. City of Seattle, 65 Wn. App. 661, 831 P.2d 1098 (1992); Dever v. Fowler, 63 Wn. App. 35, 816 P.2d 1237, 824 P.2d 1237 (1991). Of these cases, all but Donaldson and Fondren considered explicit claims of negligent investigation. Furthermore, in Fondren, the plaintiffs *conceded* that their negligence claim was, in fact, a negligent investigation claim. And Donaldson involved a negligence claim based on the alleged violation of a limited statutory duty to protect victims of domestic violence, which was not pertinent to Mancini's claim. Thus, none of the case authority cited to us could be described as being "on point." Additionally, our most recent published decisions analyzing the claim of negligent investigation all involved explicitly pleaded claims of negligent investigation. See Janaszak v. State, 173 Wn. App. 703, 712, 725, 297 P.3d 723 (2013); Ducote v. Dep't of Soc. & Health Servs., 144 Wn. App. 531, 533, 186 P.3d 1081 (2008), aff'd, 167 Wn.2d 697, 222 P.3 785 (2009); Lewis v. Whatcom County, 136 Wn. App. 450, 452, 149 P.3d 686 (2006).

did not envision such a claim as lying within the unclear boundaries of a negligent investigation claim.

But, again, our decision granted Mancini no affirmative relief. She retained the obligation to prove her negligence claim without it becoming one for negligent investigation. As set forth in section II, this was not accomplished.

B

We next address several contentions raised by the City.

As previously noted, the City's briefing does not set forth the provisions of CR 50 or discuss case authority applying the rule. It does not set forth the standard for granting such a motion. Instead, arguing from the verdicts rendered by the jury, the City asserts that the trial judge must have been wrong to deny its motion to dismiss. This analytical approach is misguided for several reasons.

First, the City's assignment of error—that the trial court improperly denied its motion for judgment as a matter of law on Mancini's negligence claim—is to a trial court ruling made before Mancini's negligence claim was submitted to the jury. We review that ruling. What the jury did matters not. All action by the jury took place after the challenged ruling was made.

Second, the jury's decisions on Mancini's intentional tort claims could have no bearing on the trial court's application of CR 50 to determine whether Mancini's negligence claim was supported by sufficient evidence to warrant its submission to the jury. The rule is clear that

> [i]f, during a trial by jury, a party has been fully heard *with respect to an issue* and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party *with respect to*

> *that issue*, the court may grant a motion for judgment as a matter of law against the party on any claim.

CR 50(a)(1) (emphasis added). The rule is the same whether utilized to consider one claim amongst many or the only claim in the case. Thus, Mancini's intentional tort claims were irrelevant as to whether Mancini presented sufficient evidence on her negligence claim to avoid judgment as a matter of law.

Third, even were we to consider the City's assertions about inconsistent jury verdicts impacting a ruling made prior to the submission of the case to the jury, the sole relief available when inconsistent jury verdicts have been rendered is a new trial on all causes of action resolved by the inconsistent verdicts. Gosney v. Fireman's Fund Ins. Co., 3 Wn. App. 2d 828, 856, 419 P.3d 447, review denied, 191 Wn.2d 1017 (2018). The City does not request this. Instead, the City asks that we uphold the verdicts on Mancini's intentional tort claims while striking down the verdict on Mancini's negligence claim. Picking and choosing between a jury's inconsistent verdicts is not a task we are empowered to perform.

Finally, the City's contentions regarding inconsistent verdicts fail because the City did not assign error to any trial court rulings related to inconsistent verdicts. It is a long standing rule that appellate courts will "not review the trial court's action as to questions not submitted to it." Timm v. Gilliland, 53 Wn.2d 432, 434, 334 P.2d 539 (1959) (citing Lewis Pac. Dairymen's Ass'n v. Turner, 50 Wn.2d 762, 314 P.2d 625 (1957); Braman v. Kuper, 51 Wn.2d 676, 321 P.2d 275 (1958)). The City's assignments of error address only the trial court's denial of the City's motion for judgment as a matter of law prior to the submission of

Mancini's claims to the jury. Thus, our decision in this matter is based on the analysis of the trial court's denial of the motion for judgment as a matter of law set forth in section II.

IV

As tried, Mancini's negligence claim became one for negligent investigation. Such a cause of action is not cognizable. Accordingly, the judgment entered on the verdict must be vacated.

Reversed with instructions to enter judgment in favor of the City.

We concur:

INSTRUCTION NO. 16

A search warrant issued by a court is entitled to a presumption of validity. In order to overcome that presumption, a party challenging the validity of a warrant must show that the officer who obtained the warrant knowingly withheld material information or misrepresented the facts in order to obtain the warrant.

INSTRUCTION NO. 17

An affidavit is sufficient to establish probable cause for a search if it contains facts which would lead a reasonable person to believe that a crime had occurred and that evidence of the crime could be found at the location to be searched.

INSTRUCTION NO. 18

The general rule is that the police are not liable if an officer acts pursuant to a warrant or other process that is valid. The existence of probable cause to support the warrant is a defense to plaintiff's claims. The existence of probable cause to support the warrant is not a defense to plaintiff's claims, however, if the officers exceeded the scope of the warrant.

If you find that there was probable cause to support the warrant, you should find for the City of Tacoma on plaintiff's claims, unless you find that the officers exceeded the scope of the warrant.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

KATHLEEN MANCINI, a single woman,

Plaintiff,

vs.

CITY OF TACOMA,

Defendant.

NO. 12-2-17651-5 KNT

SPECIAL VERDICT FORM

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

QUESTION 1:

QUESTION 1A: Do you find for plaintiff on her claim for Negligence?

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

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

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

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

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

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

ANSWER: $250,000

Instruction: Continue to question 2A.

ORIGINAL

QUESTION 2:

QUESTION 2A: Do you find for plaintiff on her claim for Invasion of Privacy?

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

Instruction: If you answered 2A "yes", then continue to question 2B.
If you answered 2A "no", then skip to question 3A.

QUESTION 2B: Was the invasion of plaintiff's privacy a proximate cause of injury to plaintiff?

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

Instruction: If you answered 2B "yes", then continue to question 2C.
If you answered 2B "no", then skip to question 3A.

QUESTION 2C: Do you find that the Invasion of Privacy caused plaintiff damages in addition to the amount identified in Question 1C?

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

Instruction: If you answered 2C "yes", then continue to question 2D.
If you answered 2C "no", then skip to question 3A.

QUESTION 2D: What are the amount of additional damages?

ANSWER: $_____

Instruction: Continue to question 3A.

QUESTION 3:

QUESTION 3A: Do you find for plaintiff on her claim for False Imprisonment?

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

Instruction: If you answered 3A "yes", then continue to question 3B.
If you answered 3A "no", then skip to question 4A.

QUESTION 3B: Was the False Imprisonment a proximate cause of injury to plaintiff?

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

Instruction: If you answered 3B "yes", then continue to question 3C.
If you answered 3B "no", then skip to question 4A.

QUESTION 3C: Do you find that the False Imprisonment caused plaintiff damages in addition to the amounts identified in Question 1C and/or Question 2D?

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

Instruction: If you answered 3C "yes", then continue to question 3D.
If you answered 3C "no", then skip to question 4A.

QUESTION 3D: What are the amount of additional damages?

ANSWER: $_____

Instruction: Continue to question 4A.

QUESTION 4:

QUESTION 4A: Do you find for plaintiff on her claim for Assault and Battery?

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

Instruction: If you answered 4A "yes", then continue to question 4B.
If you answered 4A "no", sign and date this verdict form.

QUESTION 4B: Was the Assault and Battery a proximate cause of injury to plaintiff?

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

Instruction: If you answered 4B "yes", then continue to question 4C.
If you answered 4B "no", sign and date this verdict form.

QUESTION 4C: Do you find that the Assault and Battery caused plaintiff damages in addition to the amounts identified in Question 1C, Question 2D and/or Question 3D?

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

Instruction: If you answered 4C "yes", then continue to question 4D.
If you answered 4C "no", sign and date this verdict form.

QUESTION 4D: What are the amount of additional damages?

ANSWER: $_____

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATED this 31 day of August, 2017.

Print Name: Francis Carandang
Presiding Juror

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 77531-6-I to the following:

Jean Homan
Tacoma City Attorney's Office
747 Market St., Suite 1120
Tacoma, WA 98402

Lori Haskell
7511 Greenwood Ave N Ste 314
Seattle, WA 98103

Original E-Filed with:
Court of Appeals, Division I
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: August 23, 2019 at Seattle, Washington.

Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

August 23, 2019 - 1:58 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77531-6
Appellate Court Case Title:	City of Tacoma Appellant v. Kathleen Mancini, Respondent

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