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No. 95062-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person, individually, and BIANCA BELTRAN as guardian *ad litem* of the person and estate of CESAR BELTRAN-SERRANO,

Appellants,

v.

CITY OF TACOMA, a political subdivision of the State of Washington,

Respondent.

APPELLANTS' CONSOLIDATED ANSWER TO BRIEF OF AMICI CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, WASHINGTON CITIES INSURANCE AUTHORITY AND WASHINGTON COUNTIES RISK POOL

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A. INTRODUCTION

This case involves the interaction between a City of Tacoma ("City") police officer and a seemingly homeless, older, mentally ill Hispanic man, Cesar Beltran-Serrano, that needlessly escalated to the officer's unreasonable employment of deadly force against him. The officer did not have probable cause to arrest Beltran-Serrano for any alleged wrongdoing; rather, the officer's interaction was seemingly a part of her community caretaker function. For a variety of reasons, the trial court concluded that an officer in Washington owes no duty in common law negligence to refrain from the unreasonable use of deadly force.

In their amici curiae briefs, the Washington State Association of Municipal Attorneys ("WSAMA"), Washington Cities Insurance Authority and Washington Counties Risk Pool (collectively, "Insurers") argue that this Court should decline to recognize a common law duty that will allow juries to look at the totality of circumstances to decide whether an officer's ultimate use of deadly force was unreasonable. Instead of arguing about why such a duty contravenes law, justice, common sense, policy, and precedent, amici argue that this Court should defer to the Legislature and other states that have declined to, or have not yet found, such a common law duty. They also argue that Beltran-Serrano's

arguments in favor of finding a duty are simply a litigation tactic designed to allow him to prevail.

This Court has the final say as to what the common law is in Washington. It need not wait for other entities to make its decision. Just as this Court can defer to the Legislature, this Court can act, and if the Legislature disagrees, the common law can be abolished. This Court can and should exercise its own independent analytical judgment.

This Court should also reject cynical arguments that victims of the unreasonable use of deadly force are nothing more than avaricious and lazy litigants who are trying to "get around" legal defenses. This case has identified a serious deficiency in the common law that needs to be remedied in order to increase public safety. This Court should rule to remedy that deficiency.

B. STATEMENT OF THE CASE[1]

On June 29, 2013, Tacoma Police Officer Michel Volk was working swing shift and driving north on Portland Avenue in Tacoma. CP 364. She saw a man wandering aimlessly on the corner of an intersection.

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[1] Beltran-Serrano's claim was dismissed as a matter of law on summary judgment. Amici do not dispute Beltran-Serrano's statement of the case, WSAMA br. at 2-3, Insurers' br. at 1, but nonetheless urge this Court to focus on facts they deem helpful to their arguments. However, in its *de novo* review here, this Court takes the facts, and reasonable inferences from those facts, in a light most favorable to Beltran-Serrano. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Id. Volk decided to park her patrol vehicle near the man and educate him about panhandling laws, but did not have reasonable suspicion or probable cause that the man was committing a crime. CP 381. She approached the man, and observed him digging in a hole for no apparent reason. CP 393-95. She also observed that the man had poor hygiene and appeared homeless. *Id*. The man then lifted an old bottle out of the hole, took a swig of an orange liquid, and put the bottle back. CP 365, 400. Volk began to talk to the man. CP 400. He looked at her blankly and continued to dig. *Id*. Volk then asked the man if he understood English, and he shook his head, indicating "no." *Id*. Volk radioed for a Spanish speaking officer, Jake Gutierrez. CP 524. Gutierrez was nearby, between less than one and a half minute away with sirens on. CP 411-12.

After determining the man did not understand her, and before Gutierrez arrived, Volk moved closer to him and interrogated him in English. CP 440. The man became scared, confused, and attempted to get away from her. CP 415. He started to cross the intersection of E. 28th Street and Portland Avenue. CP 432, 446. Volk chased Beltran-Serrano across the street. CP 415-16. In an attempt to stop him, she used her taser on his back as he was moving away from her. CP 400-01. The taser did not have its desired effect and Beltran-Serrano was still standing. CP 400-01, 451. Beltran-Serrano turned away from Volk and continued to try to

get away from her. CP 415, 432. Volk panicked and immediately threw her taser to the ground, pulled out her Glock 45 and fired four shots into Beltran-Serrano's right arm, his buttocks, his torso, and across his left forearm into his upper left back. CP 458. The shooting occurred within 37 seconds of Volk's call for back-up. CP 396.

Beltran-Serrano was severely injured by the shooting. CP 97-239. Although no eye witnesses corroborated Volk's version of events, the Tacoma Police charged Beltran-Serrano with assault in the second degree and obstructing a law enforcement officer; those charges were ultimately dismissed. CP 337-38.

Beltran-Serrano, through his guardian *ad litem*, filed the present action in the Pierce County Superior Court against the City. CP 1-27, 73-79. The City moved for partial summary judgment. CP 240-94.

Beltran-Serrano provided the trial court substantial expert testimony from well-qualified experts like police practices expert Susan Peters, former Bellevue Police Chief Donald Van Blaricom, and ballistics expert, Matthew Noedel, indicating that Volk breached a duty of care to Beltran-Serrano. CP 369-90, 453-84. Chief Van Blaricom testified that Volk provoked a violent confrontation by needlessly escalating a simple informative talk with a citizen into a deadly force situation. CP 381. She did not have reasonable suspicion or probable cause to suspect Beltran-

Serrano had committed any crime. CP 381.

Peters testified consistently with Van Blaricom's opinions, CP 475, 477, 480, emphasizing that Volk's use of deadly force was unreasonable, unnecessary, and excessive, CP 477, and that Volk failed to use reasonable alternatives to deadly force. CP 480. Noedel's testimony, based on an exhaustive ballistics evaluation, was that Beltran-Serrano could not have been shot while moving his torso in a threatening manner, as Volk claimed. CP 459.

Multiple witnesses testified that there was no assault or altercation on the street corner. CP 415, 431-32. Also, a Washington State Patrol trooper appeared at the scene of Volk's altercation with Beltran-Serrano. Trooper Rushton's dashcam video likewise did not depict an altercation or assault on the corner. CP 502.

Volk had no legal justification to pursue Beltran-Serrano when he chose to walk away from her, CP 505,[2] yet Volk escalated the confrontation. CP 380. She knew that an officer who spoke Spanish was a mere few minutes away but chose not to wait. CP 377. Volk yelled commands in English at Beltran-Serrano, and then became aggravated and agitated that he was not listening to her, despite knowing that he did not

[2] Chief Van Blaricom opined that even if Beltran-Serrano had hit Volk on the street corner, the officer was still under no duty or obligation to pursue him, and indeed should not have done so since back-up was on the way. CP 506.

understand English. CP 400. Instead of letting him leave, Volk chased after Beltran-Serrano and tasered him in the back as he fled. She admitted "he was no longer, in my mind, he was no longer a threat to me at that point cause his back was to me; so I put my, I holstered my firearm, pulled out my ECT, discharged it." CP 400. But when the unjustified tasering did not have its intended effect, Volk then shot Beltran-Serrano four times in the torso, buttocks, and arm as he was moving backward and away from her. CP 404, 458.

Volk's actions were contrary to Tacoma Police Department policies and training on police encounters with mentally ill individuals.[3] The symptoms of Beltran-Serrano's mental illness were readily apparent to Volk by her own admissions; she observed his poor hygiene, his confusion or inability to understand her, and his behavior of digging in a hole on the side of the road and drinking out of a bottle in the hole. CP 393-95. This behavior did not seem normal to Volk. CP 395. Volk also noted that the taser may not have affected Beltran-Serrano due to his apparent mental instability. CP 404. A reasonable police officer would have been alerted that Beltran-Serrano was at least potentially suffering

[3] Tacoma police officers are trained to identify symptoms of mental illness among subjects they choose to interact with. CP 475, 486-91. Specifically, officers learn that a person with schizophrenia may demonstrate neglect of basic hygiene, a "blunted" emotion expression, disordered thinking, and delusions. CP 490.

from mental illness and acted accordingly, as Volk's colleague, Officer Loretta Cool, testified. CP 494.[4]

Van Blaricom concluded that Volk should have appreciated that Beltran-Serrano was mentally ill. CP 378. Peters explained that Volk's interactions with Beltran-Serrano were inconsistent with her training and Tacoma policy, and needlessly escalated the situation. CP 475-77. Volk showed no awareness that her uniform and marked police car might frighten him; instead, she crowded Beltran-Serrano closely and questioned him forcefully; Volk was not even aware she had done this. CP 477. She rushed the interaction instead of exhibiting "extreme patience" when she continued to interrogate Beltran-Serrano in English – even though a Spanish-speaking officer was at most five minutes away. CP 476-77. Peters opined that "[h]ad Officer Volk continued to stand back…remain patient and wait for Officer Gutierrez to arrive, more likely than not, a different outcome in this case would have occurred." CP 477. Critically, Volk was unaware of a majority of the procedures guiding law enforcement interactions with mentally ill subjects. CP 475-77.

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[4] The training protocol for Tacoma officers is that if a mental illness is even suspected, an officer should engage that individual in a specific manner, including: remaining calm and not overreacting, showing concern and understanding, exhibiting patience, while being aware a uniform might frighten them, listening, and telling the individual what was going to be done, and not maintaining direct eye contact. CP 491. These modified behaviors are important in order to prevent a situation from escalating, to calm the subject down, and to handle the situation. CP 496-97.

C. ARGUMENT

(1) This Court Should Not Be Distracted by Word Games and Straw Man Arguments

WSAMA first claims that Beltran-Serrano "conflates the concept of duty and immunity" and that this somehow harms this Court's ability to assess the issues. WSAMA br. at 3-5. It claims that municipalities are not responsible for officers' unreasonable use of deadly force because they have no legal duty,[5] not because officers are "immune" in the statutory sense.

WSAMA is playing word games. Whether the issue is failure to impose any duty or statutory immunity, the result is the same: unaccountability. Using the term "immunity" in this colloquial sense – a legal lack of accountability – does not hinder this Court's analysis.

However, WSAMA's immunity argument raises an interesting issue: if there were such a strong public interest in shielding officers from accountability for the unreasonable use of deadly force, why has the Legislature not immunized them in statute? Instead, the accountability has remained, albeit in a disjointed system of common law and statutory concepts.

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[5] The trial court found that officers and municipalities have no duty, which is why this case is before the Court. Amici's position places police in a different category from almost every other profession, including doctors, lawyers, accountants, and the like, who are liable when their negligent acts result in harm.

WSAMA then sets up a straw man argument that Beltran-Serrano advocates for an "actionable duty to reasonably investigate allegations of criminal behavior." WSAMA br. at 5-10. WSAMA discusses various cases rejecting negligent investigation claims, arguing that such claims can only be created by statute. *Id.* The Insurers also raise this argument in their brief. Insurers' br. at 4-5, 7-8.

The issue, and the claim here, is not for negligent investigation. It is for the unreasonable use of police deadly force given the totality of the circumstances. Beltran-Serrano is asking that Washington, like other states, recognize that if a police officer negligently creates a situation where deadly force is used, and if absent the negligence deadly force would not have been used, then a jury should be able to decide whether the government is liable for the injuries. *See Grudt v. City of Los Angeles*, 2 Cal. 3d 575, 587, 468 P.2d 825, 831, 86 Cal. Rptr. 465, 471 (1970).

WSAMA asserts that a claim for battery will suffice in this case, and presumably in all police deadly force cases to come, but relegates the argument to a footnote. WSAMA br. at 6 n.1. It claims that in a battery case, the City would be able to raise the defense that Officer Volk's actions were "reasonably necessary,"[6] and that if Beltran-Serrano's facts

[6] The attempt to claim that this defense would not exist in the negligence context is patently false. The defense to a negligence claim is always that the conduct was reasonable or within the standard of care. The difference between negligence claims

are true, he should easily win on this claim. *Id.* WSAMA cites *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001) in support of this proposition.

WSAMA's contention that a battery claim should be sufficient here, particularly its reliance on *Guijosa*, is misguided. First, *Guijosa* is not a police deadly force case, but an unlawful detention case where the shopkeeper's privilege statute was invoked. *Guijosa*, 101 Wn. App. at 788. The "reasonably necessary" test is a defense in the shopkeeper's privilege statute, not battery laws. *Id.* If the jury decided the shopkeeper had reasonably detained the plaintiff, the shopkeeper's privilege law provided a complete defense to the civil action. The jury decided the detention was reasonable, therefore the shopkeeper prevailed. *Id. Guijosa* does not stand for the proposition that "reasonable necessity" is a defense to battery. It is not a defense to a battery claim that the battery was "reasonably necessary."

WSAMA might be suggesting something similar to self-defense, which does evaluate the reasonableness of the defendant's fear of harm,[7]

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and assault and battery claim that WSAMA appears to want to make is that the standard in a negligence claim is an objective standard while in the intentional tort context the subjective belief of the defendant's fear of harm may be considered. Holding peace officers to an objective standard of reasonableness is consistent with decades of precedent.

[7] In *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984), this Court adopted a "totality of the circumstances" test to evaluate the reasonableness of a

but that is insufficient to remedy the unique problem here. If an inadequately trained officer negligently initiates an encounter with an innocent vulnerable citizen, and then negligently escalates the situation into a conflict, that situation might still result in a reasonable fear of imminent harm for the officer. Self-defense would still apply to absolve the office of the battery. The governmental authority employing that officers should not be unaccountable for having created the deadly circumstances in the first place.

(2) This Court Need Not Defer to the Legislature to Find a Common Law Duty that Will Reduce the Unreasonable Use of Deadly Force Against Citizens

WSAMA next argues that, in the past, this Court has only found that police officers have negligence duties when the Legislature has already implied it, and that there is no statutory cause of action for "negligent investigation" in Washington. WSAMA br. at 7-10. It claims that this Court should refrain from finding a common law duty because this is a policy decision that is the purview of the Legislature. *Id.* WSAMA complains that officers do not have a duty of care in performing investigations that take weeks or months, and thus should not have a duty

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defendant's "reasonable apprehension of danger" in the context of a self-defense instruction. However, this "totality of the circumstances" test is insufficient in police deadly force cases, because it only looks at the circumstances to evaluate reasonable fear. It does not examine whether the defendant improperly initiated conflict, nor does it account for the imbalance of power between police – who are authorized by law to use deadly force – and citizens.

of care for "investigations" preceding the use of deadly force that may only take seconds. *Id.*

Again, this Court should reject the straw man argument that the common law duty at issue here is one of "investigation." It is not. It is to refrain from using deadly force unreasonably as part of the totality of the circumstances. The "harm" is the use of force, not the "investigation" or "stop" which initiated the encounter. In this case there was no investigation, but in other contexts, the "investigation" is simply part of the totality of circumstances that allow a jury to evaluate whether the officer's use of deadly force was reasonable.

Also, WSAMA suggests that this Court should shy away from examining and possibly expanding the common law to recognize this doctrine. WSAMA br. at 10. It avers that this Court should await "legislative guidance" rather than adopt California's approach. *Id.*

WSAMA's legislative deference argument might be more persuasive if Beltran-Serrano were inventing a new tort out of whole cloth, but that is not the issue here. As explained in Beltran-Serrano's opening brief, the problem here is not that governments are *never* accountable for the improper use of deadly force, but that the rules regarding their accountability are too confusing, and constrained to address the serious

problem of improper and unauthorized police violence against unarmed people. Br. of App. at 15-19, 28-30.

This Court has authority to examine duty issues based on "logic, common sense, justice, policy, and precedent." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). It does not need to defer to the Legislature to conduct this examination, nor is such deference always the best way to protect life, human dignity, and civil rights. This Court should find a duty because logic, common sense, justice, policy, and precedent demands it.

(3) Amici Belittle Beltran-Serrano, an Innocent Victim of Violence, as a Way of Avoiding Actual Legal Arguments

WSAMA complains that Beltran-Serrano is trying to avoid other more "onerous" theories and seeks an "easier path to recovery" that those afforded by other legal theories. WSAMA br. at 11-15. WSAMA analogizes this case to cases involving plaintiffs who tried to plead negligence claims to avoid the two-year statute of limitations on intentional torts. *Id.,* citing *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986), *Seely v. Gilbert*, 16 Wn.2d 611, 134 P.2d 710 (1943), and *Boyles v. City of Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991). WSAMA claims that Beltran-Serrano's duty argument is nothing more than a litigation "tactic." *Id.* The Insurers share this cynical attitude,

calling Beltran-Serrano's argument as nothing more than an attempt at pleading "artifice." Insurers' br. at 5-6.

As a threshold matter, whether this Court's decision to find a duty makes Beltran-Serrano's claim easier or harder to win is not a legal argument against it. Whether a person or entity has a legal duty should not be decided on the basis of the plaintiff's or defendant's likelihood to prevail. Amici are attempting to belittle Beltran-Serrano and paint him as incapable of succeeding on his other claims.

Also, the suggestion that the statute of limitations cases WSAMA cites have some bearing on this Court's analysis is wrong.[8] None of the cases involved allegations of negligent conduct. In all three cases, the issue was that the *pleaded facts* only sounded in intentional tort. In *Eastwood,* three television stations broadcast that a man was a co-conspirator in a criminal matter. *Eastwood,* 106 Wn.2d at 467-68. More than two years later, the plaintiff filed suit claiming defamation, negligence, false light invasion of privacy, and negligent inflictions of emotional distress. *Id.* This Court concluded that when the facts clearly sounded in defamation, a false light invasion of privacy claim is subject to

[8] WSAMA concedes as much when it points out that the issues in those cases are completely different, but claims that their true "rationale" that a plaintiff should not be able to "recharacterize a tort to avoid an applicable defense." WSAMA br. at 13. This is nonsense, as there is a material difference between asserting a claim that is not supported by the facts, and asserting a claim that is supported by the facts but which the trial court believes is not or should not be recognized in law.

the two-year statute of limitations for defamation. *Id.* at 474. In *Seely,* the underlying facts are not mentioned, but the original claim was for assault and battery. *Seely,* 16 Wn.2d at 612. The plaintiff literally slapped a conspiracy cause of action on the complaint, with no supporting facts, to try to evade the statute of limitations. *Id.* at 615. In *Boyles,* there was absolutely no mention of any negligent conduct by the officer, or even any mention of prearrest conduct. *Boyles,* 62 Wn. App. at 175. The only facts in *Boyles* were that the officer used excessive force and injured the plaintiff in the course of arresting her. *Id.* There was no question in *Boyles* that the officer had the right to use force, and that he had not negligently created a dangerous situation. *Boyles,* 62 Wn. App. at 176.

It is offensive for amici to suggest Beltran-Serrano is an underhanded, incompetent litigant who is deceiving this Court to avoid a bar to recovery. Amici think that Beltran-Serrano is bringing this issue before the highest court in Washington as a mere "tactic," or because he is too lazy and incompetent to recover under another cause of action. This issue is important for this Court to consider. Asking this Court to consider whether the common law in Washington should address the issue of unreasonable use of deadly force is not a "tactic."

(4) <u>Washington Should Lead on this Issue Rather than Following Inapposite or Poorly-Reasoned Authority from Other Jurisdictions</u>

WSAMA next suggests that other jurisdictions do not consider "negligence principles in the context of intentional acts." WSAMA br. at 14. The Insurers also raise this argument. Insurers' br. at 6-7. WSAMA also cites a number of cases in which it claims "courts have held that a plaintiff may not base a negligence claim on a police officer's intentional use of force." *Id.* As with its prior description of this issue as "tactical," WSAMA argues that Beltran-Serrano is doing nothing more than trying to "artfully plead around" defenses the City would like to raise. *Id.*

Again, it is telling that WSAMA bases its legal argument in its fear that it will have fewer avenues, such as qualified immunity, to escape liability when an officer uses deadly force unreasonably. WSAMA's duty argument is not about law, justice, policy, common sense, or precedent. It is about protecting the government from accountability. It is not as if negligence claims have no defenses, but WSAMA apparently fears that those defenses will not be found by a jury to be legitimate.

Also, none of the foreign cases to which WSAMA cites provide any rationale for refusing to recognize a duty in Washington. In *Latits v. Phillips*, 298 Mich. App. 109, 112, 826 N.W.2d 190, 192 (2012), an officer who properly conducted a traffic stop gave chase to a fleeing suspect in automobile. The officer shot at the suspect, who was about to

ram another officer with his car. Even if this Court recognized the duty that Beltran-Serrano advocates, *Latits* would not go to the jury on negligence claims. The facts of *Harrison v. City of Charleston*, 11-0598, 2011 WL 8193583 at *1 (W. Va. Nov. 28, 2011) are almost identical to *Latits.* There were likewise no facts to support a negligence claim in *Britton v. City of Crawford*, 282 Neb. 374, 377, 803 N.W.2d 508, 512 (2011) (officers executing proper procedures in searching for a suspect shot the suspect when he pointed a gun at them).

The facts of other cases WSAMA cites do not inspire confidence that a duty *should not* exist in some cases. They simply show that a duty does not yet exist in those jurisdictions. In *Sylvester v. City of New York*, 385 F. Supp. 2d 431, 434 (S.D.N.Y. 2005), an officer in plain clothes with uncorrected vision problems drew his gun and approached an unarmed man in a crowd. The unarmed man's father, believing the unidentified plain clothed man was about to shoot his son, pulled out a pocket knife. The officer shot the father dead. The U.S. District Court dismissed the family's negligence claim on the grounds that the shooting was an intentional act. But the Court never considered the issue of whether a duty should exist in such circumstances. In *City of Waco v. Williams*, 209 S.W.3d 216, 219 (Tex. App. 2006), four police officers responded to a call that a man would not leave his sister's property when asked. By the time

the police arrived, the conflict had been resolved and the sister asked the man to come back in the house. Nevertheless, the four officers tackled the man, who did not resist. While he was on the ground, each of the four officers shot their tasers at him, holding the triggers and shocking him repeatedly until he passed out and then died. The officer did not attempt to aid him. The Texas Court of Appeals dismissed the family's negligence claim, stating that they used their tasers intentionally, and dismissed the claim under Texas law, which provided total sovereign immunity for intentional torts.

WSAMA next notes that the Arizona Supreme Court recently overturned a lower court decision recognizing a duty in negligence for the unreasonable evaluation of the need to use deadly force. *Ryan v. Napier*, 245 Ariz. 54, 425 P.3d 230, 236 (2018). In that case, the only "negligent" conduct at issue was a police officer's decision to release a police dog on a suspect.

However, the *Ryan* court distinguished contrary foreign cases on facts that are identical to the facts at issue here: that a "discrete act[] of negligent conduct" preceded the use of force. *Id.,* citing *Reed v. District of Columbia*, 474 F. Supp. 2d 163, 174 (D.D.C. 2007) ("So here, a distinct act of negligence, a misperception of fact, may have played a part in the decision to fire." (citation and internal quotation marks omitted));

Hernandez v. City of Pomona, 145 Cal. App. 4th 701, 51 Cal. Rptr. 3d 846, 859–60 (2006) (concluding that a wrongful death complaint for shooting a fleeing suspect was sufficient to plead negligence based on officers' pre-shooting conduct that created the situation justifying use of excessive force), *rev'd on other grounds,* 46 Cal. 4th 501, 94 Cal. Rptr. 3d 1, 207 P.3d 506, 521 (2009); *D.C. v. Chinn*, 839 A.2d 701, 711 (D.C. 2003) ("[I]f, in a case involving the intentional use of force by police officers, a negligence count is to be submitted to a jury, that negligence must be distinctly pled and based upon at least one factual scenario that presents an aspect of negligence apart from the use of excessive force itself and violative of a distinct standard of care.").

Thus, contrary to WSAMA's claim of a "national consensus" on this issue, more and more courts are grappling with the problem of ill-trained or negligent police officers who unintentionally create situations where deadly force is then used. This Court should join those that have ruled in favor of more accountability and responsibility in these kinds of cases.

(5) <u>There Is No Legal "Iron Curtain" that Prevents Juries from Considering Whether Predicate Negligence Made an Intentional Act Unreasonable</u>

The Insurers argue that intentional and negligent acts are "wholly different legal realm," and therefore "basic common law principles"

prohibit finding a duty to avoid the unreasonable use of deadly force. Insurers' br. at 3-4.[9] The Insurers contend that as a matter of law an intentional act cannot be the result of negligence. *Id.* They claim that it "makes little sense" to "claim that [negligent][10] acts caused a volitional act." *Id.* at 4.[11]

The Insurers are wrong to suggest that negligence can never lead to an intentional tort, or that courts have never developed negligence duties where intentional tort claims are insufficient. The most common example of this is the medical field. The doctrine of informed consent was originally developed as part of the intentional tort of battery. *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 313, 622 P.2d 1246 (1980). If the patient had consented to the bodily touching entailed in the doctor's treatment of his condition, no action for battery could lie at common law. *Id.* To prevent physicians from completely avoiding tort responsibility merely by always getting the unknowledgeable patient's consent to

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[9] Presumably, the Insurers believe that California has been violating "basic common law principles for decades by recognizing such a duty.

[10] To soften the uncomfortable implications of their argument, the Insurers state that Volk's actions against Beltran-Serrano were "non-tortious." Insurers' br. at 4. However, this Court must take the facts in the light most favorable to Beltran-Serrano, and as explained *supra*, several experts described Volk's actions as being below the standard of care.

[11] It is understandable that the Insurers would want to dissuade this Court from considering whether negligent acts can lead to the unreasonable use of deadly force. It is quite common for intentional acts to be excluded from insurance coverage. 12 Am. Jur. Proof of Facts 3d 505 (Originally published in 1991).

treatment, courts recognized that, as in other areas of intentional tort law, the individual's consent to the otherwise actionable behavior must be "informed" to be valid. *Id.*

In short, because doctors could defeat legitimate claims for malpractice by claiming general consent and therefore no "battery," courts developed the duty in negligence of requiring informed consent to create more just results. Now, a breach of the standard of care requiring physicians to obtain consent (negligence) can lead to a battery (intentional tort), even if the claims are still separate. *Id.*

Here, the exact same reasoning applies. Battery claims are sometimes insufficient to provide just outcomes in unreasonably deadly force situations. Police, like doctors, are *authorized* to "offensively touch" citizens in a number of situations. If they are not responsible for minimizing negligent conduct that *leads inexorably* to a harmful battery, then they are excused for a whole range of behavior that causes real harm.[12] Focusing on the moment of the shooting itself ignores inadequate training for dealing with the mentally ill, failure to use de-escalation

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[12] The fallacy of the Insurers' argument is laid bare in a recent case in the news. https:// www.nytimes.com/ 2018/09/14/us/botham-jean-dallas-shooting-amber-guyger.html. An off-duty officer mistakenly (negligently) thought that she was entering her own apartment. Instead, she was entering a stranger's apartment. Believing (negligently) that she was confronting an intruder, she (intentionally) shot the man who was sitting in his own home. If only battery is at issue, then the sole question for the jury is whether the officer was in fear of harm. This renders irrelevant the officer's negligent actions in *putting* herself in fear by negligently breaking into an innocent stranger's home.

techniques, failure to use alternatives to lethal force, or declining to wait for backup among other misconduct.

(6) The Insurers' Proximate Cause Argument Is Circular and Ignores that Proximate Cause Is a Jury Question

The Insurers argue that "non-volitional" and "non-tortious" acts cannot be the proximate cause of the volitional act. Insurers' br. at 9-10. They contend that "[n]on-actionable behavior does not create liability, no matter how much it might be criticized." *Id*. They also claim that Beltran-Serrano does not allege that Officer Volk's negligent actions caused harm, only the intentional shooting. *Id.*

First, the Insurers' argument is circular. They aver that Officer Volk breached no duty, which the trial court never reached because it found no duty. This Court has been asked to review the trial court's ruling that no duty exists, not a finding that there was no breach. Yet the Insurers claim Volk's breach of a duty they say does not exist could not have been the cause of the injury here.

Second, the trial court never reached the question of proximate cause, because it found no duty as a matter of law. If this Court finds a duty, proximate cause is a fact issue for the jury. *Johnson v. State*, 77 Wn. App. 934, 937, 894 P.2d 1366, 1368 (1995), *as amended* (June 20, 1995), citing *McLeod v. Grant Cty. Sch. Dist. No. 128,* 42 Wn.2d 316, 324–25,

255 P.2d 360 (1953); *see also*, *Mason v. Bitton*, 85 Wn.2d 321, 327, 534 P.2d 1360, 1364 (1975) (reversing summary judgment in favor of officers and remanding proximate cause issue for trial when police car chase ended in fatality).

Third, there is evidence that Volk acted negligently, particularly with her failure to follow proper procedures when confronting Beltran-Serrano, needlessly escalating the situation, and then using force against him as he was walking away. This evidence is attested to by numerous experts in the record, br. of app. at 9-12, and Beltran-Serrano will not waste this Court's time by repeating it all in detail here. There is ample expert evidence in the record that Volk's negligent preshooting conduct caused the shooting.

Amici Insurers do not demonstrate a lack of proximate cause as a matter of law. If this Court finds a duty, the negligence claim must be remanded.

(7) <u>There Are Distinct Acts of Negligence Here that Led to the Unreasonable Use of Deadly Force</u>

The Insurers claim that although other states have recognized that negligence can lead to an intentional tort, there is no "distinct act of negligence" at issue here. *Id.* at 10-15. They claim that out-of-state authorities do not support Beltran-Serrano's argument, because they

distinguish between cases where there is evidence of negligence and of a battery, and cases where plaintiffs simply allege that a battery was perpetrated in a negligent manner. *Id.*

The Insurers misapprehend the facts of this case. This is not a situation where the only alleged act of "negligence" was the application of intentional force itself, as described in cases like *D.C. v. Chinn*, 839 A.2d 701, 711 (D.C. 2003) and *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. Dist. Ct. App. 1996).

This case provides that exact example provided in *Chinn*. There are distinct acts of negligence here, separate from Volk's use of intentional force, eyewitness accounts that dispute Volk's version of the events, and a violation of departmental policy for dealing with the mentally ill. As Beltran-Serrano has repeatedly explained, Officer Volk acted negligently in multiple respects when she came into contact with Beltran-Serrano, before she escalated the situation and then improperly used deadly force.

The Insurers' attempt to distinguish *Cty. of Los Angeles, Calif. v. Mendez*, ___ U.S. ___, 137 S. Ct. 1539, 1543, 198 L. Ed. 2d 52 (2017) is perplexing because (1) it undermines their prior proximate cause argument, and (2) its analysis undermines their policy arguments and supports the finding of a duty here. In *Mendez,* officers who had no warrant and failed to follow knock and announce procedures broke into a

suspect's home and shot him. Although the Supreme Court criticized the Ninth Circuit Court of Appeals for failing to draw an appropriate causal link between a warrantless entry and the use of excessive force, the Insurers admit that on remand the Ninth Circuit did establish that causation existed. Insurers' br. at 14, citing *Mendez v. Cty. of Los Angeles*, 897 F.3d 1067 (9th Cir. 2018). Also, although the tort duty in *Mendez* comes from 42 U.S.C. § 1983, the §1983 tort duty was established "according to principles derived from the common law of torts." *Id.* at 1074. Therefore, as a matter of public policy, Congress does not believe that there should be any prohibition on holding officers responsible for negligent acts that lead to the use of excessive force. This Court should not hesitate to similarly rule.

Finally, the Insurers make the startling assertion that Volk's decision to confront and escalate the encounter with Beltran-Serrano without probable cause is not tortious because "she never arrested him." Insurers' br. at 15.

The Insurers are factually, legally, and morally wrong. They are factually wrong because Beltran-Serrano was arrested and charged with offenses that were later dismissed. CP 337-38. They are legally wrong because using physical force intentionally to stop someone from leaving is a seizure of their person, and constitutes an arrest under the Fourth

Amendment. *California v. Hodari D.*, 499 U.S. 621, 624, 111 S. Ct. 1547, 1550, 113 L. Ed. 2d 690 (1991). Finally, the Insurers are morally wrong, because one would hope it is an axiom that if an officer does not have probable cause to arrest a suspect, she should not shoot him.

The Insurers offer no basis for discarding the analysis of foreign authorities that favor finding a duty here.

(8) Insurers Misread California Authority and Ignore Repeated Statements that the Duty Beltran-Serrano Advances Has Existed for Decades in California Law

Finally, the Insurers claim that this Court should ignore California law that has, for decades, recognized that police officers have a duty to act reasonably when using deadly force. Insurers' br. at 15-16. Interestingly, they ground this argument in a complete misreading of *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 639, 305 P.3d 252, 263, 160 Cal. Rptr. 3d 684, 697 (2013). *Id.* They claim that *Hayes* "never reached the question of duty," and instead focused on the nature of the injury. *Id.*

The Insurers' convoluted discussion of *Hayes* should not distract from the simple principle that case enunciates *repeatedly*, that California courts have for decades recognized the precise negligence claim that Beltran-Serrano advocates here:

> This court has long recognized that peace officers have a duty to act reasonably when using deadly force.

> The second duty would be to use deadly force in a reasonable manner, a duty we have long recognized in California.
>
> Moreover, our holding in *Grudt* clarifies that preshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct.
>
> This court has, however, long recognized that peace officers have a duty to act reasonably when using deadly force—a duty that is at issue here.
>
> Our case law has long recognized that peace officers have a duty to act reasonably when using deadly force.

Hayes, 57 Cal. 4th at 629, 630, 632, 636, 637. *Hayes* also makes crystal clear that the tort recognized in California is a single tort, sounding in negligence, where the element of injury is met by the intentional shooting of the victim.

What *Hayes* demonstrates is that courts can, and have, found that negligent acts can lead to the unreasonable use of deadly force. There is no prohibition in the common law against finding a negligence duty to avoid the unreasonable use of deadly force, even if that force is used intentionally.

D. CONCLUSION

Amici offer no compelling legal or public policy arguments against the existence of duty for police officers to avoid the unreasonable use of

deadly force. This Court should find a duty so that juries may examine, based on the totality of circumstances, whether the use of deadly force by an officer was reasonable or unreasonable. Municipal entities should be held accountable for negligent acts that create and escalate contacts with people that result in deadly force being used unreasonably.

DATED this 26th day of October, 2018.

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

DATED: October 26, 2018 at Seattle, Washington.

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