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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.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The brief submitted by the City of Tacoma (“City”) is remarkable for its insistence that this Court should treat the facts below in a light most favorable to it as the *moving* party on summary judgment. Plainly, this is contrary to the rule on the proper treatment of evidence on summary judgment. This effort is part of the City’s calculated effort to paint Cesar Beltran-Serrano, a seemingly homeless, older, mentally ill Hispanic man, as a major threat to Officer Michel Volk when that fact is, at a minimum, *heavily in dispute*.

When the facts and any reasonable inferences from them are considered in a light most favorable to Beltran-Serrano, as this Court must do on review, the interaction between Officer Volk and Beltran-Serrano needlessly escalated to Volk’s unreasonable employment of deadly force against him. The record from expert testimony and eyewitness accounts indicates that Beltran-Serrano posed no threat to Volk, or anyone else, to justify Volk’s employment of deadly force. Volk did not have probable cause to arrest Beltran-Serrano for any alleged wrongdoing; rather, her interaction was seemingly a part of her community caretaker function.

The City offers no good policy reasons to contradict the principle that Volk owed Beltran-Serrano a traditional negligence duty of care to avoid the unreasonable employment of deadly force. The reasonableness

of Volk's use of deadly force must be assessed under the totality of the circumstances of her interaction with Beltran-Serrano.

Moreover, the City repeatedly misstates the public duty doctrine, transforming that doctrine into a principle of sovereign immunity both the Legislature and this Court have rejected. The doctrine is inapplicable to common law actions. Even if it were applicable, it is merely a focusing tool to require that a duty is owed to an individual, not the public generally. Simply put, Volk did not shoot the "general public." She shot Beltran-Serrano. The public duty doctrine is inapplicable.

B. STATEMENT OF THE CASE

The City's statement of the case largely emanates from Officer Volk's statement that she provided 11 days after the incident in question, after she had the opportunity to consult with counsel. It is distinctly different from her earlier accounts of events. *See* Br. of Appellants at 9 n.3.

The City falsely asserts in its brief that its rendition of the facts must be accepted because "undisputed evidence" supports its narrative. Resp't br. at 2. However, the evidence here is far from "undisputed." Taking the facts in a light most favorable to *Beltran-Serrano*, as this Court

routinely does on review of summary judgment orders,¹ the following facts must be deemed to be true for purposes of review in this case:

- The interaction between Officer Michel Volk and Cesar Beltran-Serrano occurred in Tacoma on June 29, 2013 (CP 364);
- Volk noticed Beltran-Serrano wandering aimlessly in an area known for panhandling;² his bicycle and bag were nearby; she sought to perform her community caretaker function by informing him about panhandling laws and dealing with his strange behavior;
- Volk lacked reasonable suspicion or probable cause to arrest Beltran-Serrano even for panhandling (CP 304-05, 381);
- Volk observed that Beltran-Serrano appeared homeless, had poor hygiene, and was engaged in odd activities (CP 365, 393-95, 400);
- Volk knew Beltran-Serrano did not speak English and she radioed for a Spanish-speaking officer who was only minutes away (CP 400, 411-12, 524);
- Despite radioing for a Spanish-speaking officer, Volk approached Beltran-Serrano speaking in English (CP 440);
- Beltran-Serrano did not assault Volk;³

¹ This Court reviews the facts on summary judgment in a light most favorable to the nonmoving party. It also treats reasonable inferences from those facts in favor of the nonmoving party. *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Credibility issues, as here, are for the trier of fact. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

² The City takes issue with the assertion in appellants' opening brief that Beltran-Serrano was "wandering aimlessly." Resp't br. at 2. Volk's own July 10, 2013 written statement is the genesis for this statement. There, Volk said she observed Beltran-Serrano standing on a street corner – *no mention* is made of any sign. CP 364. Shortly thereafter, she then saw him lying on his stomach digging in the ground with his hands. *Id.* For want of a better description, that is "aimless" behavior. It should be noted that in Volk's later April 13, 2016 deposition testimony, Beltran-Serrano was walking in and out of traffic, behavior that might also be considered "wandering." Moreover, the sign he allegedly possessed mysteriously disappeared. CP 302-03.

³ The City insists in its brief that Beltran-Serrano swung a club or pipe at Volk, hitting her. This assertion is belied by a number of facts in the record. Volk's story of her altercation with Beltran-Serrano changed in its relating. Initially, she did not tell Officer Cool that Beltran-Serrano came at her with a pipe before she tasered him. Br. of

- Beltran-Serrano tried to avoid Volk and crossed the street, turning his back to Volk (CP 415, 432, 446);
- Although he had turned his back to Volk, as the City *admits*, resp't br. at 5 n.2, Volk nevertheless tasered Beltran-Serrano, but the taser failed to stop him (CP 400-01, 451);
- Volk then shot Beltran-Serrano in the back⁴ four times with her Glock 45 (CP 458).

Expert testimony supported the view that Volk's actions were contrary to good police practices generally, CP 381, violative of the City's own protocols for law enforcement interactions with mentally ill people, br. of appellants at 10-11, and constituted an unreasonable, unnecessary, and excessive use of deadly force. CP 477.

C. ARGUMENT

Appellants at 9 n.3. There is no evidence that Beltran-Serrano used the object depicted in the City's brief at 4, except for Volk's obviously self-serving assertions to that effect, made after-the-fact. The City even *misrepresents* the testimony of Winona Stevens about this object, resp't br. at 4, citing CP 424. Her actual testimony was that Beltran-Serrano was backing away from Volk, CP 424-25, and that the object in his hand, an object she could not see very well, *id.*, was not a weapon. CP 425 ("I didn't see anything that, that resembled a weapon in his hand..."). That is consistent with her declaration. CP 416. She also testified that Beltran-Serrano never attacked Volk with a pipe and did not strike or hit at her. *Id.*

Moreover, ballistics evidence contradicted Volk's claim that Beltran-Serrano was swinging a pipe at her when she shot him. CP 459. By sworn declarations, eye witnesses to these events did not see an altercation with or assault on Volk by Beltran-Serrano. CP 415, 432. Finally, WSP dashcam videos did not depict an altercation or assault, CP 502, nor did Trooper Rushton see a weapon. CP 316.

⁴ The City asserts that Beltran-Serrano's ballistics expert testimony documented that Beltran-Serrano was shot while facing Volk, resp't br. at 6. That is not true. Ballistics expert, Matthew Noedel, testified that Beltran-Serrano's left flank faced Volk's pistol, CP 456, 458, and the bullets struck Beltran-Serrano in the buttocks, torso, and back. *Id.* CP 466. Critically, the path of Volk's bullets was physically inconsistent with Volk's assertion that Beltran-Serrano was swinging or moving his arms at the time he was shot. CP 459.

(1) The City Owed Beltran-Serrano a Duty to Avoid the Unreasonable Use of Deadly Force

Beltran-Serrano seeks a rule by this Court clarifying that law enforcement officers owe a duty under common law negligence principles to refrain from the unreasonable use of deadly force against citizens. The City does not deny the point advanced in Beltran-Serrano's opening brief at 15-20 that Washington law on officer use of deadly force and any consequent liability arising out of it to the victims of such deadly force is not a picture of clarity. Instead, it argues that this unclear state of the law should be perpetuated, putting both officers and the public at risk.

The City contends that it owed no duty under common law negligence principles to Beltran-Serrano, asserting that the use of deadly force is a volitional act and that a duty under common law negligence principles can *never* exist as to a volitional act. Resp't br. at 13-27. The City also contends that it is not liable to Beltran-Serrano for its improper training and supervision of Officer Volk. *Id.* at 36-38. The City is wrong in each instance. Each argument will be addressed in turn.

(a) An Officer Owes a Common Law Duty Not to Unreasonably Use Deadly Force Even if the Officer's Decision to Shoot Is Volitional

As indicated in Beltran-Serrano's opening brief at 25-28, the trial court erred in concluding that the City could not be liable in negligence if

Volk acted volitionally. Simply put, the trial court's position and the City's argument is illogical. If a government negligently trains an officer in the use of deadly force and conduct leading up to the volitional act of using deadly force, a duty is owed to the victim of that illicit use of deadly force.⁵ Numerous courts have so concluded. Br. of Appellants at 26-28. As the California Supreme Court cogently observed in *Hayes v. County of San Diego*, 305 P.3d 252, 257-28 (Cal. 2013), "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." The City tries to brush off these authorities and the illogic of its position, but it never distinguishes the analysis of the California Supreme Court in *Grudt v. City of Los Angeles*, 468 P.2d 825 (Cal. 1970), *Munoz v. Olin*, 596 P.2d 1143 (Cal. 1979), and *Hayes*, or the courts in D.C., Arizona, or Louisiana. Resp't br. at 25-27.

The City also fails to effectively address the point made in Beltran-Serrano's opening brief at 24-28 that Washington law recognizes that the

⁵ In a simple automobile accident, a driver may *volitionally* decide to turn the wheel of her car into the vehicle of another driver. That "volitional act," however, is analyzed under traditional common law negligence duty principles. Moreover, a tortfeasor should not be given what amounts to a free pass for conduct leading up to the volitional act. An airline that improperly trains its pilots or allows them to fly drunk, for example, should be held responsible for that conduct leading up to the pilot's decision that flies an airplane into a mountain, the ocean, or another plane.

same conduct can result in both claims based on intentional torts *and* negligence. Resp't br. at 17-18.⁶ If the City's argument here were correct, then a party claiming that a defendant engaged in volitional or intentional conduct could *never* assert a claim in negligence. Obviously, cases like *Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003) and *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009) make it abundantly clear that although intentional torts and negligence have different elements, they are not mutually exclusive, that is, the assertion of an intentional tort in a case does not *bar* the assertion of a negligence case, as the City contends.

The principal case cited by the City for its extreme view is *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008). Resp't br.

⁶ The City's inability to grasp the analogy to corporate negligence and informed consent claims is odd. Resp't br. at 17 n.4. As noted in Beltran-Serrano's opening brief at 25, in the same case, arising out of the same facts, a plaintiff can state a claim against a hospital for corporate *negligence* and a claim against a physician for the failure to secure the patient's informed consent, a claim based on the *intentional* tort of battery. Like the example also cited there of actions against the government for *negligent* investigation of child abuse, such negligence claims are not barred merely because the plaintiff may also sue the abuser or offender for intentional conduct. Another similar example is that of cases involving the negligent supervision of a parolee or probationer who then harms a third person. Negligence and intentional conduct co-exist in such cases. Merely because a victim may sue an improperly supervised parolee or probationer for assaultive conduct does not bar a claim against the government agency that improperly supervised the parolee or probationer. *See* n.18 *infra*. The same principle applies to a school district's negligent supervision of a student who then assaults another student, *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016), or a group care facility that negligently supervises a staff member who assaults a resident. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997).

at 15-16. But that case, relating to damage to property occurring during the execution of a search warrant, *nowhere* states that intentional tort and negligence claims may not generally arise in the same case. Rather, this Court interpreted the elements of a trespass to encompass principles of reasonable conduct, the core of a negligence theory:

Under *Goldsby*, which has never been overruled, and the *Restatement (Second) of Torts* (1965), a city may be liable in trespass for unnecessary damage to property caused by its law enforcement officers executing a search warrant, on the theory that unreasonable damage to the property exceeds the privilege to be present on the property and search...

...

Therefore, under *Goldsby*, if officers executing a search warrant unnecessarily damage the property while conducting their search, that is, if they damage the property to a greater extent than is consistent with a thorough investigation, they exceed the privilege to be on the land and liability in trespass can result.

Id. at 671-72, 673.⁷ In *Johansen v. Cox*, 2017 WL 497608 (W.D. Wash. 2017), the district court expressly rejected the theory now advocated by

⁷ In *Torre v. City of Renton*, 164 F. Supp. 3d 1275 (W.D. Wash. 2016), the district court stated at 1285:

Under Washington law, a person commits a trespass if he intentionally enters the property of another without sufficient privilege or if his actions on the property exceed the scope of that privilege. *Goldsby v. Stewart*, 158 Wash. 39, 41, 290 P. 422 (1930). A valid search warrant provides law enforcement with the limited privilege to enter and search a person's home in a *reasonable* manner. *Brutsche v. City of Kent*, 164 Wash.2d 664, 673, 193 P.3d 110 (2008). Therefore, when an officer acts unreasonably in executing a warrant, he exceeds the scope of his

the City in a case where a city correctional officer grabbed and pulled on a jail inmates arm and leg, breaking his ankle. The court stated at *2 n. 2:

Defendants rely on *Brutsche* for the proposition that Officer Cox could not have acted negligently because he intended to pull plaintiff from the bunk. *Brutsche* does not hold that deliberate actions of officers are not reachable in negligence. The case holds that a trespass action will lie against police officers who act unreasonably during the execution of a search warrant and damage property. *Brutsche*, 164 Wn.2d at 674. Unreasonable behavior includes accidental and intentional conduct. *Id.* The opinion does not support defendants' argument that volitional application of force by a corrections officer cannot be negligent.

In sum, the City's illogical, unsupported argument should be rejected. The presence of a potential battery claim in a case does not foreclose a duty in negligence owed by law enforcement officers not to unreasonably employ deadly force.

(b) Law Enforcement Owes a Duty of Care to Citizens Not to Unreasonably Use Deadly Force Under the Totality of the Circumstances

For all of the reasons set forth in Beltran-Serrano's opening brief at 28-34, this Court should confirm the view set forth in numerous Court of Appeals decisions that law enforcement officers owe a duty of care to

privilege and, in doing so, commits a trespass. *Id.* (official "may be held liable in trespass...on the theory that unreasonable damage to the property exceeds the privilege to be present on the property and search.").

Thus, a trespass claim encompasses negligence principles and a separate negligence claim is unnecessary. *Id.*

citizens not to unreasonably use deadly force. This Court should properly articulate the requisite duty in accordance with the articulation of that duty in *Grudt*.

Stubbornly ignoring the mishmash of existing Washington law described *supra*, the continuing problem of the excessive use of deadly force, particularly against minorities, and the reason for the upsurge of support for I-940, the City simply insists that a negligence duty does not exist and never offers any thoughts on the appropriate contours of such a duty.

Washington courts have recognized that law enforcement officers owe a duty under common law negligence principles to citizens with whom they interact. The City cannot explain away decisions like *Coffel v. Clallam County*, 47 Wn. App. 397, 735 P.2d 686, *review denied*, 108 Wn.2d 1024 (1987), *Garnett v. City of Bellevue*, 59 Wn. App. 281, 796 P.2d 782 (1990), *review denied*, 116 Wn.2d 1028 (1991), or *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013), (discussed in Beltran-Serrano's opening brief at 17-19).⁸ Indeed, the City only references them in connection with its public duty doctrine argument. Resp't br. at 28, 31-33. It refuses to acknowledge that the courts in those

⁸ The City makes no effort to discuss the federal cases cited by Beltran-Serrano that discern a common law negligence duty under Washington law. Br. of Appellants at 18 n.14.

cases explicitly recognized that law enforcement officers owed common law negligence duties to the plaintiffs. Those cases belie the assertion of the court in *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88, review denied, 124 Wn.2d 1026 (1994) that law enforcement activities “are not reachable in negligence.” *Id.* at 267.

This Court can readily discern the need for a simple, clear-cut common law duty principles for those instances where law enforcement officers employ deadly force unreasonably.⁹ That rule is the one employed by the California Supreme Court beginning in *Grudt* and culminating in *Hayes*.¹⁰ Law enforcement officers owe a duty of care to all persons with whom they interact, whether or not mentally ill as was Beltran-Serrano, to refrain from the unreasonable employment of deadly force against such persons; the reasonableness of the officer’s conduct is assessed in light of the totality of the circumstances surrounding the officer’s interaction with the person. Under such a rule, courts will not

⁹ This is the direct counterpart of the public/legislative effort to clarify the criminal aspects of the use of deadly force. As this Court is aware, the Legislature enacted Initiative 940, Laws of 2018, ch. 11, but then amended it. Laws of 2018, ch. 10. That process has been challenged and the case is before this Court. *Eyman v. Wyman*, (Cause No. 95749-5).

¹⁰ The City asserts that this duty principle would circumvent defenses of self-defense and reasonableness of an officer’s conduct, justifying its unsupported contention by importing cases arising under 42 U.S.C. § 1983 and the Fourth Amendment into the analysis. Resp’t br. at 22-27. The City’s contention is simply not true. Both self-defense and the reasonableness of an officer’s conduct, including “tactical decisions” about which the City complains at 21, are obviously relevant to the *reasonableness* of the use of deadly force under the totality of the circumstances of the officer-citizen interaction.

need to parse the various aspects of negligence such as improper training of officers to interact with the mentally ill, improper training in the employment of lethal force, or the negligent and intentional acts by the officer in using deadly force. Instead, the officer’s training in interacting with the citizenry and persons with special needs, officer training in the use of deadly force, the particular characteristics of the person against whom force is used, and the particular facts of the officer-citizen interaction and employment of deadly force are all relevant factors for the jury to assess in deciding the reasonableness of officer employment of deadly force under the totality of the circumstances analysis.

(c) The City Was Negligent in Its Training and Supervision of Officer Volk

The City contends in its brief at 36-38 that it was not negligent for improperly training or supervising Volk.¹¹ In making its argument, it offers the bizarre assertion that Beltran-Serrano “failed to adduce competent evidence” to support this theory. *Id.* at 38. *See also, id.* at 21 n.6. Seemingly, the City *ignores* the detailed testimony of Chief Donald van Blaricom and Susan Peters on how Officer Volk violated City policy for law enforcement interactions with mentally ill people. Br. of Appellants at 21-24.

¹¹ The City implicitly *admits* that a government may owe a duty in negligence to properly train and supervise its officers.

The City relies on *LaPlant v. Snohomish County*, 162 Wn. App. 476, 271 P.3d 254 (2011) and *Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 950 P.2d 20, *review denied*, 135 Wn.2d 1015 (1998).¹² Neither support the City's position on *duty*. In *LaPlant*, this Court actually held that a claim of negligent training/supervision was ultimately superfluous in a case where Snohomish County deputy sheriffs were engaged in the hot pursuit of a suspect who lost control of his vehicle and crashed it, injuring the plaintiff, a passenger in that vehicle. Citing *Gilliam*,¹³ an analogous case, this Court noted that a negligent training/supervision claim was redundant where the county would be liable on *respondeat superior* principles if the officer was negligent:

The rationale in *Gilliam* applies here because the County agreed that it would be vicariously liable for any negligence on the part of the deputies. Both causes of action rest upon a determination that the deputies were negligent and that this

¹² The City believes its argument emanates from this Court's decision in *Niece*. But that case supports *Beltran-Serrano*, because this Court there recognized that an employer owes a duty to third persons harmed by an improperly supervised employee, even if the employee is acting outside the scope of her/his employment. 131 Wn.2d at 51-52.

¹³ The Court of Appeals there recognized that when "an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising the employee," citing *Niece*, 89 Wn. App. at 585-86. Arguably, if Volk shot *Beltran-Serrano* in violation of City policy on interactions with mentally ill people or the use of deadly force, she was acting outside the scope of her employment by the City. See *Eubanks v. Brown*, 180 Wn.2d 590, 602, 327 P.3d 635 (2014) (rejecting the notion that merely because a public official's action occurred during his employment rendered those actions automatically a part of his public office; "Brown was a deputy prosecuting attorney. His public office gave him the authority to prosecute. His public office did not give him the authority to harass, inflict emotional distress upon, or create a hostile work environment for his coworkers.").

negligence was the proximate cause of LaPlant's injuries. If LaPlant establishes the underlying tort, the County automatically will be liable to the same extent as the deputies. If LaPlant fails to establish that the deputies acted negligently, the County cannot be liable, even if it was negligent in training and supervising them. As a result, LaPlant's claim for negligent supervision, under these facts, is not only improper because the County did not disclaim liability for the deputies' actions, it is also superfluous.

162 Wn. App. at 481. The Court specifically held, however, that a duty to properly train/supervise an employee could exist, citing *Niece*. *Id.* at 479 n.5. Thus, *LaPlant* stands for the proposition that a governmental employer is liable under *respondeat superior* principles for the acts of its officers. It does not establish *an immunity* for such governments as to their own negligent conduct. Rather, negligent training/supervision claims are not based on vicarious liability principles but on the employer's *own* breach of duty to the injured party that is independent of its imputed liability for the employer's conduct. *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 47, 380 P.3d 553, *review denied*, 186 Wn.2d 1028 (2016) (reversing dismissal of negligent training/supervision claims against security guard who had sexual relations with student).

Here, the City's argument fails precisely because Beltran-Serrano's negligent training/supervision claim against it is far from "redundant." The City denies that Volk owed *any* duty whatsoever to Beltran-Serrano.

The City's contention that it owes no duty regarding the proper training or supervision of an officer who, while on the job, shoots a citizen because the officer has not been properly trained in the use of deadly force or on interactions with minorities or mentally ill people is illogical. Municipalities employing law enforcement officers are not entitled to *immunity* from the consequences of putting ill-trained or improperly supervised officers out on the street to use deadly force. A municipality and its officers can *both* be negligent in the same occurrence.

Volk was improperly trained to interact with mentally ill persons. Despite the City's unambiguous policies on police interactions with mentally ill persons, Volk behaved as if she did not know those policies or she chose to ignore them, documenting her lack of proper training. The City's liability arises out of Volk's failure to follow these policies.

(2) The Public Duty Doctrine Is Inapplicable Here

The City contends in its brief at 27-36 that the public duty doctrine applies to forestall a duty in negligence on its part to Beltran-Serrano. While it *concedes* that it owes a duty to the same extent that private person or entities do after the statutory abolition of sovereign immunity, *id.* at 27, it makes the strange arguments rejected by this Court, that governments owe no duty to persons harmed in the context of "uniquely governmental functions," *id.* at 29, and that the doctrine applies outside of the statutory

context. *Id.* at 29 n.11. This Court should yet again reject the City’s baseless arguments.

(a) The Public Duty Doctrine Applies Only in the Statutory Setting

Beltran-Serrano’s argument to this Court involves the application of common law duty principles. As such, the duty does not implicate the public duty doctrine, despite the City’s baseless argument to the contrary set out in a footnote.¹⁴

When the City states that “neither *Cummins*, *Munich* nor any other case supports plaintiff’s claim that the public duty doctrine has *only* been used to determine whether the in [sic] owes a tort duty of care based upon a statute,” resp’t br. at 29 n.11, that assertion is simply *false*. The City is obtuse to the authorities set forth in Beltran-Serrano’s opening brief at 37. In *Munich v. Skagit Emergency Cmty. Ctr.*, 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012) (Chambers, J. concurring),¹⁵ this Court stated:

Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. *This court has never held that a*

¹⁴ Arguments advanced in a footnote are, at best, an equivocal or ambiguous indication of a party’s intent to actually make the argument. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). This Court should disregard it.

¹⁵ The holding of the Court is the position taken by a majority of justices concurring on the narrowest grounds. *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). Justice Chambers’ concurring opinion on the public duty doctrine constitutes the Court’s holding in *Munich*.

government did not have a common law duty solely because of the public duty doctrine.

(emphasis added; citations omitted). The Court could not have been any clearer. The public duty doctrine simply interprets statutes to determine “whether a mandated government duty was owed to the public in general or to a particular class of individuals.” *Id.* at 888 (citing *Halvorson v. Dahl*, 89 Wn.2d 676, 574 P.2d 1190 (1978)). The Court’s direction in *Munich* was readily grasped by at least two divisions of our Court of Appeals when confronted with the question.

In *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229 (2015), Division I stated that the public duty doctrine does not apply to common law claims:

The public duty doctrine is not a judicially-created immunity. It does not bar a common law claim brought by the person to whom the breached duty was owed. The trial court erred in dismissing Mancini’s negligence claim.

Id. at *8. *See also, Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 84, 328 P.3d 962 (2014) (Division III noted that public duty doctrine is inapplicable to common law claims).

In sum, the City’s argument that the public duty doctrine applies here is wrong, as the duty Beltran-Serrano seeks to apply is firmly rooted in common law, not statutory principles.

(b) The Public Duty Doctrine Applies to “Governmental” Actions

The City makes a second argument regarding the public duty doctrine that has been routinely rejected by Washington courts. The City argues that the doctrine does not apply to actions for which there is allegedly no counterpart duty on the part of private actors. Resp’t br. at 27-36.

This Court has *repeatedly* rejected the City’s notion that its duty in negligence must mirror a private duty; that is the very foundation for a public duty doctrine. While tort law treats government entities the same as persons or corporations, the government has public duties, mandated by statutes, regulations, ordinances, etc., such as the duty to issue a permit or to maintain the peace, which private persons and corporations do not have. *Munich*, 175 Wn.2d at 887 (“Private persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the state of Washington.”); *Boone v. Dep’t of Soc. & Health Servs.*, 200 Wn. App. 723, 740, 403 P.3d 873 (2017) (“Where there is no similar or corresponding private action comparable to the State’s actions, we examine whether, under the public duty doctrine, the State owes a duty to a particular plaintiff.”).

In specific, although there is, at best, an extremely limited analogy to be drawn between traditional law enforcement functions performed by police officers like Officer Volk and any private sector security counterpart duty, Washington courts have routinely rejected the argument proffered here by the City in the law enforcement context. Merely because law enforcement services are at issue, a duty of care in negligence may still be owed.¹⁶ See, e.g., *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983) (duty of care present as to 911 operators' negligence); *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257, 753 P.2d 523 (1988) (town owed a duty of care to plaintiff injured by its officer's failure to enforce DUI laws); *Munich, supra* (emergency communications center negligently responded to 911 call); *Washburn, supra* (duty of care present as to officers who failed to protect victim during service of anti-harassment order).

Indeed, the entire tenor of the City's argument on the public duty doctrine is nothing more than an invitation to this Court to restore sovereign immunity, a principle abolished by the Legislature in RCW

¹⁶ The City's argument is, in fact, undercut by its own brief. The cases it cites at 34 n.14 do not hold that a government owes *no duty* if the services resulting in the plaintiff's harm are "uniquely governmental" such as law enforcement. Rather, the cases it cites in each instance found that *a duty was owed*.

4.92.090 and 4.96.010, with regard to law enforcement activities.¹⁷ If the City is correct that a government acting in a “governmental,” as opposed to “proprietary” capacity owes no duty to person harmed by the government’s conduct is correct, sovereign immunity is the effective result as to a broad array of activities of government agencies. For example, *nothing* having to do with law enforcement would result in a governmental entity owing persons harmed in such activities, a position contradicted by the cases cited above.¹⁸

The City’s cases cited for this extreme position do not support its position. *No Washington court* has ever held that a government’s duty to parties it has injured is confined to situations in which it is acting in a

¹⁷ The City claims in its brief at 10-12 that it is not actually arguing for a restoration of sovereign immunity. It even goes so far as to claim that Beltran-Serrano seeks “a special set of rules” as to liability for law enforcement activities. *Id.* at 12. That is false. Beltran-Serrano seeks the application of well-established common law duty principles applicable to all others in Washington to officers deciding to use deadly force.

The City’s argument that it is not seeking to restore sovereign immunity is belied by its argument that the statutory abolition of sovereign immunity applies *only* to “proprietary” acts of government. That argument runs counter to the principle that the statutory abolition of sovereign immunity means that state and local governments are “preemptively liable in all instances in which the Legislature has *not* indicated otherwise.” *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995) (emphasis in original). *See generally*, Debra L. Stephens, Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 Seattle U. L. Rev. 345 (2006).

¹⁸ No private person provides parole or probation services, but this Court has had little difficulty in concluding that governments owe a duty of care to victims harmed by persons who are receiving such services and are improperly supervised. *Taggart v. State*, 118 Wn.2d 195, 822 P.3d 243 (1992) (parolees); *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (probationers); *Joyce v. Dep’t of Corrs.*, 155 Wn.2d 306, 119 P.3d 825 (2005) (offender on community supervision).

“proprietary” capacity. *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) is a tax case having nothing to do with the public duty doctrine. Similarly, *Haberman v. Wash. Pub. Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1988) touched upon the public duty doctrine only in passing. This Court concluded the doctrine was inapplicable to the bondholders’ claims of fraud against WPPSS. *Id.* at 158-59. In *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988), this Court rejected application of the doctrine to bondholders’ claims against the State. *Id.* at 422-25. Although the Court discussed a distinction between the proprietary acts of WPPSS in selling bonds and the State’s conduct through the Auditor’s Office, the impact of the Court’s analysis was to further reinforce its decision in *Haberman*. The *public* duty doctrine does not apply to what are essentially *private* acts. *Id.* at 422. But the converse is not true – if the acts are governmental in nature, the government is not immunized from owing a duty; rather that duty must then be analyzed under the public duty doctrine if the duty stems from a violation of a statute, ordinance, or regulation.

In sum, the City’s argument here is unsupported. Merely because law enforcement services are involved in this case, “governmental” activities, the City is not immune.

(c) Even if the Public Duty Doctrine Applies Here, the City Owed Beltran-Serrano a Duty of Care

Finally, as articulated in Beltran-Serrano’s opening brief at 35-36, the public duty doctrine is not an immunity principle, but rather a “‘focusing tool’ ... to determine whether a public entity owed to a ‘nebulous public’ or a particular individual.” *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1998)) (internal quotations omitted). “The public duty doctrine simply reminds us that a public entity – like any other defendant – is liable for negligence only if it has a statutory or common law duty of care.” *Id.* at 27-28.

However, the public duty doctrine has exceptions. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). “Saying an exception applies is simply shorthand for saying the governmental entity owes a duty to the plaintiff.” *Id.* (citing *Taggart*, 118 Wn.2d at 218). As this Court aptly stated, “As with any defendant, the true question in a negligence suit against a governmental entity is whether the entity owed a duty to the plaintiff, not whether an exception to the public duty doctrine applies it.” *Id.* at 754. At least four exceptions to that doctrine were recognized in *Bailey*, 108 Wn.2d at 268. Several apply here.

In *Washburn*, this Court applied the legislative intent exception to the doctrine where the anti-harassment statute, RCW 10.14, evidences a specific intent to protect the victims of harassment, and the decedent was killed by her harasser when officers failed to properly serve the anti-harassment order on that harasser. 178 Wn.2d at 754-57.

Here, the City had policies pertaining to officer interaction with mentally ill persons. Volk either ignored them or was not trained in such policies, given her interaction with Beltran-Serrano. Those policies plainly intended to benefit mentally ill individuals like Beltran-Serrano.

The special relationship exception applies where the government defendant and the plaintiff have a special relationship that sets the plaintiff apart from the public generally. Such a relationship exists wherever (1) there is direct contact between the public official and the injured plaintiff which sets the latter apart from the general public, (2) there are assurances given, and (3) the contact gives rise to justifiable reliance on the part of the plaintiff. *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998). “As to the second element, the assurances need not always be specifically averred, as some relationships carry the implicit character of assurance.” *Chambers-Castanes*, 100 Wn.2d at 286.

Volk approached Beltran-Serrano ostensibly as part of law enforcement’s community caretaker function. She impliedly assured him

that her interaction with him was to help, not shoot him in the back, and Beltran-Serrano legitimately could rely on such assurance.

Further, there is an exception where a defendant voluntarily undertakes to warn or provide aid to a person and does so negligently. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299-300, 545 P.2d 13 (1975).

Here, Volk pursued Beltran-Serrano as part of her community caretaker function, to render aid to a mentally ill person and to educate him on panhandling. CP 364. Given that role, Volk owed a duty to Beltran-Serrano not to unreasonably employ deadly force as part of her “aid” to Beltran-Serrano.

In sum, to the extent the public duty doctrine even applied, as a discussion of the exceptions to the doctrine demonstrates, Volk had a duty to Beltran-Serrano individually, not to a nebulous public. The public duty doctrine does not apply.

D. CONCLUSION

The City’s brief does not detract from the fact that Officer Volk shot an unarmed man who did not constitute an imminent threat to her life. This Court should confirm that governments owe a duty of care in negligence to their citizens when law enforcement officers unreasonably use lethal force. Simply put, law enforcement officers have a duty to

refrain from the unreasonable use of deadly force; the reasonableness of the officer's conduct should be measured in light of the totality of the circumstances confronted by the officer. The public duty doctrine did not apply here.

As there was a question of fact on the breach of the City's duty to Beltran-Serrano, this Court should reverse the trial court's September 1, 2017 summary judgment order and allow Beltran-Serrano's common law negligence claim to go to the jury. Costs on appeal should be awarded to Beltran-Serrano.

DATED this 27th day of June, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

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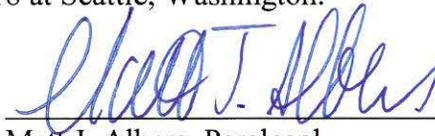
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 27, 2018 at Seattle, Washington.



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