

No. 95062-8

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondent.

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MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF THE MOVING PARTIES

Cesar Beltran-Serrano and Bianca Beltran-Serrano, the guardian *ad litem* of his person and his estate, ask this Court to grant direct discretionary review of the decision set forth in Part 2.

B. DECISION

The trial court entered an order on September 1, 2017 granting partial summary judgment to the City of Tacoma (“City”) dismissing Beltran-Serrano’s claim of common law negligence against the City for the excessive use of deadly force against him by its police officers, concluding that the City owed no duty to him not to use excessive deadly force. That court certified the issue for appellate review pursuant to RAP 2.3(b)(4).

C. ISSUES PRESENTED FOR REVIEW

1. Does a government, acting through its law enforcement officers, owe a duty of care in tort to persons with whom those officers interact to refrain from using lethal force against such persons unless those persons present an imminent threat to the lives of the officers or others, and no other reasonable alternatives to deadly force exist?

2. Does the public duty doctrine apply to preclude the existence of a common law duty of care in tort to persons against whom law enforcement officers improperly employ lethal force?

D. STATEMENT OF THE CASE

Taking the facts in a light most favorable to Beltran-Serrano as the non-moving party on summary judgment, *Dowler v. Clover Park Sch. Dist. No. 409*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011),<sup>1</sup> on June 29, 2013, Tacoma Police Officer Michel Volk was working swing shift and driving north on Portland Avenue in Tacoma. App. at 328. She saw a man wandering aimlessly on the corner of an intersection that was a known location for panhandling. *Id.* Volk decided to park her patrol vehicle near the man and educate him about panhandling laws. She did not have reasonable suspicion or probable cause that the man was committing a crime. App. at 343. She approached the man, and observed him digging in a hole for no apparent reason. App. at 357-59. She also observed 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. App. at 329. Volk began to talk to the man. App. at 364. He looked at her blankly and continued to dig in the hole. *Id.* Officer Volk then asked the man if he understood English, and he shook his head, indicating “no”. *Id.* Volk radioed for a Spanish speaking

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<sup>1</sup> But in this case, Beltran-Serrano’s version of events is actually corroborated on video. A dashcam video from a Washington State Patrol trooper became public. App. at 325. That video showed the interactions between Volk and Beltran-Serrano on the street corner. *Id.* There was no physical assault or altercation shown on the video and confirmed by Trooper Rushton in his deposition. App. at 466. Various lay witnesses also confirmed Beltran-Serrano’s description of the events. App. at 38-51, 378-411, 472-83.

officer, Jake Gutierrez. App. at 488. Gutierrez was nearby, between less than one and a half minute away with sirens on, or five minutes at a normal speed. App. at 375-76.

After determining the man did not understand her, and before Gutierrez arrived, Volk moved closer to him and interrogated him in English. App. at 364. The man became scared, confused, and attempted to get away from her. App. at 379. He started to cross the intersection of E. 28th Street and Portland Avenue. App. at 396, 410. Volk chased Beltran-Serrano across the street. App. at 379-80. In an attempt to stop him, she used her taser on his back as he was moving away from her. App. at 364-65. The taser did not have its desired effect and Beltran-Serrano was still standing, able to brush the taser tags away from his body. App. at 415. Beltran-Serrano turned away from Volk and continued to try to get away from her. App. at 396. 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, through and through his buttocks, into his torso and across his left forearm into his upper left back. App. at 379-80, 422. The shooting occurred within 37 seconds of Volk's call for back-up. App. at 360.

Beltran-Serrano had substantial expert testimony below indicating from well-qualified experts like Susan Peters and former Bellevue Police

Chief Donald Van Blaricom that Volk breached a duty of care to Beltran-Serrano. Volk's actions were contrary to Tacoma Police Department policies and training on police encounters with mentally ill individuals, according to Beltran-Serrano's experts. Tacoma police officers are trained to identify symptoms of mental illness among subjects they choose to interact with. App. at 439, 450-55. Specifically, officers learn that a person with schizophrenia may demonstrate neglect of basic hygiene, a "blunted" emotion expression, disordered thinking, and delusions. App. at 454. 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. App. at 357-59. This behavior did not seem normal to Volk. App. at 359. Volk also noted that the taser may not have affected Beltran-Serrano due to his apparent mental instability. App. at 368. A reasonable police officer would have been alerted that Beltran-Serrano was at least potentially suffering from mental illness and acted accordingly. App. at 458-59.<sup>2</sup>

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<sup>2</sup> 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. App. at

Police practices expert Peters explained that Volk’s interactions with Beltran-Serrano were inconsistent with training and policy and needlessly escalated the situation. App. at 440-41. 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. App. at 440-41. 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. *Id.* Peters opined that “[h]ad Officer Volk continued to stand back (about 7 to 8’ as she stated from Beltran), remain patient and wait for Officer Gutierrez to arrive, more likely than not, a different outcome in this case would have occurred.” App. at 441. Critically, Volk was unaware of a majority of the procedures guiding law enforcement interactions with mentally ill subjects. App. at 440-41.

In addition to her errors in dealing with a mentally ill individual, Chief Van Blaricom testified that Volk needlessly escalated a simple informative talk with a citizen into a deadly force situation. She did not have reasonable suspicion or probable cause to suspect Beltran-Serrano of the crime of panhandling. App. at 343. Multiple witnesses testified that

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454-55. These modified behaviors are important in order to prevent a situation from escalating, to calm the subject down, and handle the situation. App. at 460-61.

there was no assault or altercation on the street corner. App. at 379, 395-96. Significantly, Trooper Rushton's dashcam video likewise did not depict an altercation or assault on the corner. App. at 466. Volk had no legal justification or duty to pursue Beltran-Serrano when he chose to walk away from her and across the street. App. at 469.<sup>3</sup>

Volk created a volatile and threatening situation through her own actions that escalated the confrontation. App. at 342-44. Significantly, she knew that back-up was a mere few minutes away. App. at 344. She chose not to wait for Officer Gutierrez, and instead forced an interaction with someone who could not understand her and was "non-responsive" to her commands. *Id.* 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 understand English. App. at 364. Volk didn't need to taser Beltran-Serrano.<sup>4</sup>

Immediately after the taser failed to have its intended effect, Volk then overreacted and shot Beltran-Serrano four times in the torso,

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<sup>3</sup> Chief Donald 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 since back-up was on the way. App. at 470.

<sup>4</sup> 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." App. at 364. Volk either improperly deployed the taser, or ignored her training that mentally ill individuals may not be affected by the use of a taser. App. at 368.

buttocks, and arm as he was moving backward and away from her. App. at 368, 422. Volk's determination that lethal force was justified was unreasonable in light of the objective facts and no reasonable police officer would have felt threatened in the same situation. App. at 344-45. There was no evidence Beltran-Serrano posed any threat, let alone a threat of imminent serious injury or death justifying use of lethal force, to Volk or anyone else. App. at 397. Beltran-Serrano had "turned away from the officer like he was trying to run away and that's when she pulled out the gun and popped it four times." App. at 473. He was unarmed, moving away from the officer, and had an overall passive demeanor. These actions all culminated in Volk's choice to shoot him four times from a distance that she described to be twenty-one-feet.

Although not relevant on summary judgment when the facts are considered in a light most favorable to Beltran-Serrano as the non-moving party, in order to attempt to justify this shooting, Volk later claimed that Beltran-Serrano had lifted a metal object and was swinging it in her direction, causing her to fear for her life. App. at 330. That assertion is unsupported by scientific evidence.<sup>5</sup> In addition to Volk's claim of imminent threat of harm from Beltran-Serrano being fully debunked by

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<sup>5</sup> Ballistics expert Matthew Noedel confirms "[n]one of the fired bullet paths to Beltran support him 'swinging' or otherwise moving his arms at the time of receiving the gunshots. Such claims are not supported by the physical evidence." App. at 423.

the WSP video, Trooper Rushton's testimony, and eyewitnesses, Volk suffered from credibility problems, given her changing, and widely varying, accounts of events.<sup>6</sup> Credibility issues are, of course, for the trier of fact. *Duckworth v. Langland*, \_\_ Wn. App. \_\_, 966 P.2d 1287, 1290 (1998) ("Because this is a summary judgment appeal, we do not weigh the parties' credibility but resolve all inferences in favor of the non-moving party.").

Beltran-Serrano was severely injured by the shooting. App. at 61-203. Although no eye witnesses corroborated Volk's version of events, and despite the fact that Volk did not sustain any injuries, the Tacoma Police charged Beltran-Serrano with Assault in the second degree and Obstructing a Law Enforcement Officer; those charges were ultimately

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<sup>6</sup> Volk asserted that Beltran-Serrano posed a threat to her, but gave markedly differing versions of events that led to the shooting. Hours after shooting Beltran-Serrano, Volk told fellow officer Loretta Cool that Beltran-Serrano did not listen to her, and that he came toward her. App. at 462-63, 492. Then she tasered him and the taser had no effect. App. at 462. Next, he ran across the road, she followed him, and then he came at her with a piece of metal. *Id.* She stated she "blocked the attack with her arm. *Id.* She fired her weapon, which did not seem to stop him, so she fired again. *Id.* She said the second shots stopped him." *Id.*

Eleven days later, Volk issued a four-page written statement recounting the shooting. App. at 328-31. Volk reported that while she was standing on the street corner with Beltran-Serrano, he bent over to get what she thought would be his identification, grabbed a pipe, and swung it at her. He then ran into the street. App. at 329. In an oral statement on July 10, 2013, Volk reported Beltran-Serrano hit her in the arm at the street corner of the intersection. App. at 366. She stated he then ran across the street, and she followed. App. at 366-67. As he was running away from her, Volk reported she tasered him in the back. App. at 368. None of the multiple lay witnesses who observed this event saw Beltran-Serrano hit Volk with a heavy metal object, either on the street corner or in the intersection.

dismissed. App. at 301-02.

Beltran-Serrano, through his guardian *ad litem*, filed the present action in the Pierce County Superior Court against the City. App. at 1-7, 23-29. The City moved for partial summary judgment. App. at 204-98. Beltran-Serrano opposed that motion. App. at 299-322. The trial court, the Honorable Susan Serko, granted the City's motion on September 1, 2017, concluding essentially that the City owed no common law duty under Washington law not to use deadly force against Beltran-Serrano, applying the public duty doctrine to bar his negligence action. App. at 662-64. Beltran-Serrano moved to certify the trial court's ruling. App. at 665-75. The City joined in the motion. App. at 678. The court then certified the issue pursuant to RAP 2.3(b)(4). App. at 685-88.<sup>7</sup> Both the City and Beltran-Serrano filed timely notices for discretionary review to this Court. App. at 692-712.

#### D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Taking the facts, and reasonable inferences from those facts in a light most favorable to Beltran-Serrano as the non-moving party, this case

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<sup>7</sup> The court's September 25, 2017 *nunc pro tunc* order posed the issue as follows:

The issue of whether a police officer owes a duty of reasonable care to act reasonably when using deadly force is an issue appropriate for certification.

App. at 690.

involves a police officer's negligent use of deadly force against Cesar Beltran-Serrano, a seemingly homeless, older Hispanic man with apparent mental illness, a non-English speaker, who posed no imminent threat to Volk or anybody else. Here, Volk lacked probable cause to arrest Beltran-Serrano. Moreover, he did not constitute an imminent threat to the life or limb of Officer Volk or anybody else; for purposes of summary judgment, as documented in the WSP dashcam, Beltran-Serrano never struck Volk.<sup>8</sup>

(1) Review Is Merited under RAP 2.3(b)(4)

The first and plainest reason direct discretionary review is merited here is that the trial court certified the issue of the City's negligence under RAP 2.3(b)(4). *See Wash. Counties Risk Pool v. Clark County*, Supreme Court Cause No. 91154-1 (6/1/15 Ruling Granting Review).

RAP 2.3(b)(4) allows a trial court, as here, to certify an issue as a basis for discretionary review of an interlocutory order where the parties have agreed, or the trial court's order "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." While no Washington case law has expressly interpreted RAP 2.3(b)(4), or enunciated a particular test for

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<sup>8</sup> If Beltran-Serrano did not strike Volk, the City's own police expert admitted Volk's use of deadly force against Beltran-Serrano would not be justified. App. at 414.

when certification is or is not appropriate, the language of RAP 2.3(b)(4) was based on 28 U.S.C. § 1292(b). 2A Karl B. Tegland, *Wash. Practice Rules Practice* (8th ed.) at 176, 181-82.

Federal law indicates that the primary purpose of certification and early discretionary review is practical – to avoid continuing protracted and expensive litigation after an early ruling on a controlling issue, especially where little or conflicting appellate authority on the issue exists and the entirety of the litigation must be revisited if the ruling on the issue was later overturned. *United States v. Am. Soc’y of Composers, Authors & Publishers*, 333 F. Supp. 2d 215, 221 (S.D.N.Y. 2004) (quoting *German v. Fed Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995)); *Reese v. BP Exploration (Alaska), Inc.*, 643 F.3d. 681 (9th Cir. 2011).

By its terms, RAP 2.3(b)(4) certification is appropriate where three criteria are met – a controlling question of law, substantial grounds for differences of opinion on that question, and immediate review on the question may materially advance the ultimate termination of the case. The trial court recognized that the issue it decided was novel and that its final resolution by an appellate court would likely advance the ultimate resolution of the case. Its request for appellate review merits deference by this Court. *See Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20

(2011); *In re Estate of Haviland*, 161 Wn. App. 851, 854, 251 P.3d 289 (2011), *aff'd*, 177 Wn.2d 68, 301 P.3d 31 (2013) (noting that case involved an issue of first impression).

The trial court was presented with clearly articulated reasons for certification by Beltran-Serrano in the RAP 2.3(b)(4) motion. This case met the RAP 2.3(b)(4) criteria. First, a controlling question of law is present. The trial court wrongly decided the gateway issue of whether the City, through its police, owed Beltran-Serrano a duty to refrain from the improper use of deadly force; it misapplied the public duty doctrine. That decision will affect the remaining claims in this case.

Second, there are substantial grounds for a difference of opinion on the gateway issue. This is an issue of first impression for this Court about which Beltran-Serrano and the City clearly disagree. Review is particularly important in such cases, as noted in Beltran-Serrano's statement of grounds for direct review.

Finally, immediate review will advance the ultimate, and correct, resolution of the issues here. Immediate review will materially advance the termination of the litigation because it will determine if negligence principles apply in this case. In short, once the threshold and controlling legal questions are resolved on appeal, it will guide the trial in this lawsuit.

In sum, in order to correctly resolve the key issue in this case and its attendant, consequent issues so as to advance the proper resolution of this case, this Court should honor the trial court's RAP 2.3(b)(4) certification and grant review.

(2) Review Is Also Merited under RAP 2.3(b)(1)

(a) The Trial Court Erred in Failing to Discern a Negligence-Based Duty Not to Improperly Use Deadly Force

The trial court committed obvious error in failing to discern that the City owed a duty in tort to Beltran-Serrano not to use deadly force under the circumstances present here. RAP 2.3(b)(1). The trial court here committed obvious error in assuming that there was no duty in tort for police officers in Washington to refrain from the unreasonable use of deadly force in no small part because the public duty doctrine applied. In effect, the trial court re-introduced sovereign immunity for municipalities with regard to police practices.

Our Legislature abolished sovereign immunity. "The doctrine of governmental immunity springs from the archaic concept that 'The King Can Do No Wrong.'" *Kelso v. City of Tacoma*, 63 Wn.2d 913, 914, 390 P.2d 2 (1964). In 1961, the Legislature enacted RCW 4.92.090 abolishing state sovereign immunity. That waiver quickly extended to municipalities in 1967. RCW 4.96.010; *Kelso*, 63 Wn.2d at 918-19; *Hosea v. City of*

*Seattle*, 64 Wn.2d 678, 681, 393 P.2d 967 (1964). Local governments have since been “liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation.” RCW 4.96.010. These statutes operate to make state and local government “presumptively 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).

Here, the City’s duty analysis and application of the public duty doctrine is nothing more than a backdoor device to effectively restore sovereign immunity despite legislative abolition of that immunity. “[G]overnmental entities in Washington are liable for their ‘tortious conduct’ to the ‘same extent’ as a private person or corporation.” *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013) (citing RCW 4.92.090(2)).

Some Washington courts have perceived that governments are immune from all claims arising out of police practices generally. *Keates v. City of Vancouver*, 73 Wn. App. 257, 267, 869 P.2d 88, *review denied*, 124 Wn.2d 1026 (1994) (“...law enforcement activities are not reachable in negligence.”). To the extent the trial court agreed with such a proposition, it erred.

Plainly, Washington law makes governments liable in negligence for “law enforcement activities.” For example, in *Garnett v. City of Bellevue*, 59 Wn. App. 281, 796 P.2d 782 (1990), *review denied*, 116 Wn.2d 1028 (1991), Division I recognized that a claim of negligent infliction of emotional distress could be stated against police officers for their interaction with women in a lounge.

Further, Washington courts have recognized that under Washington common law, a police officer must act *reasonably* when an officer undertakes to act. *Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686, *review denied*, 108 Wn.2d 1014 (1987). This duty stems from the common law duty to avoid the foreseeable consequences of one’s actions.<sup>9</sup> There, a number of local police officers and sheriff’s deputies responded to two different break-ins at the plaintiffs’ place of business (both resulting from an ownership dispute). The day after the first break-in, the responding deputy told the plaintiff that the matter was “strictly a civil case, and that he ‘didn’t want to hear any more about it.’” *Id.* at 399. That evening, other officers responded to a second call and found that the perpetrator had returned and was destroying the premises. *Id.* Those officers “took no action to prevent the destruction” and, instead,

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<sup>9</sup> Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts. *Restatement (2d) of Torts* § 281 cmts. c, d (1965).

told the property owners *they* had to leave. *Id.* at 399-400. Division II upheld a negligence claim against the County.

In *Washburn*, this Court discerned a common law duty under § 302B of the *Restatement (2d) of Torts* on the part of Federal Way police officers who negligently served an anti-harassment order on the harasser who then murdered his harassment victim.<sup>10</sup>

The duty sought by Beltran-Serrano here is not an onerous one. It has been applied in our sister states. California courts have “long recognized that peace officers have a duty to act reasonably when using deadly force.” *Hayes v. County of San Diego*, 305 P.3d 252 (Cal. 2013) (citing *Munoz v. Olin*, 596 P.2d 1143 (Cal. 1979); *Grudt v. City of Los Angeles*, 468 P.2d 825 (Cal. 1970)). “...the reasonableness of a peace officer’s conduct must be determined in light of the totality of the circumstances.” *Hayes*, 305 P.3d at 257.<sup>11</sup> In *Hayes*, the California

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<sup>10</sup> As noted in Beltran-Serrano’s statement of grounds for direct review, federal courts applying Washington law have determined that general negligence principles apply to the conduct of law enforcement officers employing deadly force.

<sup>11</sup> Police practices expert Sue Peters confirmed that a similar approach applies in Washington: “as an officer, you look at the whole situation and assess it together, so if there’s several red flags, that’s how an officer views situations,” app. at 486, as did Chief Van Blaricom:

From a police practices perspective, the fundamental issues in any use of force are: 1) Was force reasonably necessary under the totality of circumstances? 2) If force was reasonably necessary, was the amount or degree of force used objectively reasonable under the totality of circumstances?

App. at 335-36.

Supreme Court held that an officer's "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. Such liability can arise, for example, if the tactical conduct and decisions show, as part of the totality of circumstances, that the use of deadly force was unreasonable." *Id.* at 263. As the California Supreme Court summarized, "peace officers have a duty to act reasonably when using deadly force, a duty that extends to the totality of the circumstances surrounding the shooting, including the officers' preshooting conduct." *Id.*

Like California, other jurisdictions have likewise held that complainants in a wrongful death or excessive force action against law enforcement are allowed to submit both a negligence claim and an assault and battery claim to the jury. *See, e.g., Reed v. District of Columbia*, 474 F. Supp. 2d 163, 173-174 (D.D.C. 2007) (negligence claim submitted to jury in wrongful death shooting claim against police officer where a "distinct act of negligence, a misperception of fact, may have played a part in the decision to fire."); *LaBauve v. State*, 618 So.2d 1187, 1190 (La. App.), *review denied*, 624 So. 2d 1235 (La. 1993) (trial court did not err in allowing negligence claim against police officer where officer pushed 76-year-old man onto rocks and gravel in course of arrest); *Picou v.*

*Terrebonne Par. Sheriff's Office Through Rozands*, 343 So. 2d 306, 308 (La. App. 1977).

In sum, the trial court committed obvious error in concluding that the City was seemingly exempt from a duty of care in tort to Beltran-Serrano to refrain from unreasonably employing deadly force against him in this case. Review is merited. RAP 2.3(b)(1)-(2).

(b) The City Owed Beltran-Serrano a Duty of Care in Tort and the Trial Court Misapplied the Public Duty Doctrine in Concluding to the Contrary

The trial court also committed obvious error in concluding that the public duty doctrine<sup>12</sup> barred Beltran-Serrano's negligence claim. RAP 2.3(b)(1). This was not a matter of a duty owed to the amorphous public, but one owed particularly to Beltran-Serrano, the shooting victim.

The public duty doctrine does not apply here. The public duty doctrine is a “‘focusing tool’... to determine whether a public entity owed a duty 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

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<sup>12</sup> The public duty doctrine has been criticized by jurists and scholars alike. *J&B Development Co. v. King County*, 100 Wn.2d 299, 311, 669 P.2d 468 (1983) (Utter, J., concurring); Jenifer Kay Marcus, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401, 414-17 (1989).

has a statutory or common law duty of care.” *Id.* at 27-28. It is not an immunity – a surreptitious restoration of sovereign immunity abolished by RCW 4.92.090 and RCW 4.96.010 – as the City would have this Court believe. To this end, the public duty doctrine does not apply here for two key reasons.

Most patently, the trial court erred in applying the public duty doctrine to a common law cause of action. *Munich v. Skagit Emergency Comm. Ctr.*, 175 Wn.2d 871, 288 P.3d 328 (2012). This Court has clearly limited the public duty doctrine to legal obligations imposed by a statute, ordinance, or regulation:

Since its inception, the “public duty” analysis has remained largely confined to cases in which the plaintiff claims that a particular statute has created an actionable duty to the “nebulous public.” 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 government did not have a common law duty solely because of the public duty doctrine.

*Id.* at 886-87 (citations omitted).<sup>13</sup>

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<sup>13</sup> Division I agreed that principle in *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229 (2015), holding that the public duty doctrine does not apply to common law claims that exist independent of any statutory duty.

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.

Moreover, in each of the cases referenced *supra* in which a Washington court found a duty in tort for police practices, the court expressly found the public duty doctrine *inapplicable*. This was true for a negligent infliction of emotional distress claim in *Garnett*, and for active malfeasance by officers in *Coffel*, 47 Wn. App. at 403-04. In reversing summary judgment as to those officers and Clallam County, Division II rejected the suggestion that the public duty doctrine applied to the claims against them:

The doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.

*Id.* at 403. This Court's decision in *Washburn*, *supra*, reaffirmed the view that the public duty doctrine is not triggered in cases of misfeasance, such as this. In *Washburn*, this Court held that an officer who served an anti-harassment order had a duty to act reasonably in the service of that order, so as not to expose a third party to criminal behavior. 178 Wn.2d at 759-61.

In sum, review is merited here under RAP 2.3(b)(1). The trial court erred in applying the public duty doctrine.

(c) The Trial Court's Error Will Render Future Proceedings Useless

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*Id.* at \*8. The court permitted Mancini's claim of common law negligence against the City for its nonconsensual invasion of her home. *Id.*

By eliminating Beltran-Serrano's negligence claim against the City, the trial court's decision will have a profound effect on future proceedings in the case. It will greatly alter the trial in this matter by eliminating his approach to claims at trial. This is essentially the same type of impact that prompted Commissioner Pearce to grant direct discretionary review in *Tabingo v. American Triumph LLC*, Supreme Court Cause No. 62913-1 (6/28/16 Ruling Granting Review), where the trial court had dismissed the plaintiff's punitive damages claim. Noting the case involved a fundamental and urgent issue of broad public import, she noted that "deciding the fully developed legal issue on interlocutory review may avoid a second trial that is essentially a retrial before a new jury." Ruling at 14. It is no different here.

E. CONCLUSION

For the foregoing reasons, this Court should grant direct discretionary review. This Court should reverse the trial court's September 1, 2017 summary judgment order and allow Beltran-Serrano's negligence claim to go to the jury. Costs on appeal should be awarded to Beltran-Serrano.

DATED this 17th day of October, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Motion for Discretionary Review* in Supreme Court Cause No. 95062-8 to the following parties:

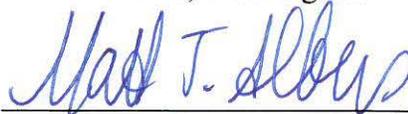
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Original E-filed with:  
Washington Supreme Court  
Clerk's Office

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

DATED: October 17, 2017 at Seattle, Washington.



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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

**October 17, 2017 - 11:35 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95062-8  
**Appellate Court Case Title:** Cesar Beltran-Serrano v. City of Tacoma  
**Superior Court Case Number:** 15-2-11618-1

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**Comments:**

Documents to be filed: (1) Statement of Grounds for Direct Review; (2) Motion for Discretionary Review; (3) Appendix to Motion for Discretionary Review; (4) Motion for Leave to File Overlength Motion for Discretionary Review PLEASE NOTE: As part of the Appendix to the Motion for Discretionary Review, a video on CD will be send to the Supreme Court via US Mail. Thank you.

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