

FILED
SUPREME COURT
STATE OF WASHINGTON
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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,

Petitioners,

v.

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

Respondent.

REPLY ON
MOTION FOR DISCRETIONARY REVIEW

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A. INTRODUCTION

Petitioner Cesar Beltran-Serrano received the answer to the statement of grounds for direct review and the opposition to his motion for discretionary review filed by the City of Tacoma (“City”). The City misrepresents the facts of Beltran-Serrano’s shooting and neglects to engage in any real discussion of the criteria in RAP 2.3(b) for discretionary review. Perhaps the strangest omission in the City’s response to Beltran-Serrano’s motion is its failure to acknowledge that *it agreed* below to certification of the trial court’s order under RAP 2.3(b)(4), an action inconsistent with its opposition to discretionary review.

This Court should grant direct discretionary review on the issues posed by Beltran-Serrano in his motion, issues of significant public importance.¹

B. STATEMENT OF THE CASE

Beltran-Serrano provided this Court an extensive description of the facts here. Motion at 1-9. The City disputes some of the facts in the

¹ Beltran-Serrano documented in his Statement of Grounds for Direct Review in considerable detail why the issues he raises are of substantial public importance. RAP 4.2(a)(4). The City’s answer focuses largely on why discretionary review should be denied, repeating its misstatement of the facts. Answer at 1-7. Only belatedly does the City even mention the criteria in RAP 4.2(a), and then it *concedes* that the issue of police use of lethal force may be one of fundamental and urgent public import, *id.* at 7, subsequently launching into its argument as to why it should prevail on the duty issues Beltran-Serrano has raised. *Id.* at 8-9.

Beltran-Serrano motion, but the most significant factual disagreement is about whether Beltran-Serrano struck Officer Volk with a “heavy metal pipe,” as the City now claims.²

First, as the City concedes in its response at 5, on summary judgment (and on review of an order on summary judgment by this Court), all facts and reasonable inferences from them must be considered in a light most favorable to Beltran-Serrano as the non-moving party.

Second, the City *concedes* that its version of the facts “was not captured on the WSP dashcam video.” Resp. at 5. This Court can review the WSP dashcam video for itself, but Beltran-Serrano’s version of the events was corroborated by that video. Motion at 2 n.1.

Third, *numerous* critical factual points are *omitted* from the City’s sanitized version of the events leading to Beltran-Serrano’s shooting. The City is silent, for example, on the following:

- Volk’s various *inconsistent* statements of what transpired – motion at 8 n.6;³
- *none* of the eyewitnesses to the events testified that Beltran-Serrano assaulted Volk – motion at 5-6;

² Volk’s testimony on this point is far from “undisputed” as the City contends. Resp. at 5.

³ For the City to assert that Volk’s deposition testimony is the “best evidence” of what transpired, resp. at 3, is simply incredible in light of Volk’s inability to coherently relate what occurred. It is also contrary to the standard for the treatment of facts on summary judgment.

- the City never offered any medical reports documenting that Volk had been struck by a metal pipe;
- the City *dismissed* the assault in the second degree and obstructing an officer charges it preferred against Beltran-Serrano – motion at 8-9;
- Volk shot Beltran-Serrano *in the back* from 21 feet away – app. at 473;
- ballistic expert testimony indicated that Beltran-Serrano was not shot while waving an object at Volk – motion at 7 n.5.

Simply put, what is undisputed here that Beltran-Serrano was Hispanic, homeless, and mentally ill; he had not committed a crime; Volk tasered and then shot him without waiting for available backup, including officers who were bilingual.

C. ARGUMENT⁴

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

As noted *supra*, the City’s response is strangely silent on the fact that it *joined* in Beltran-Serrano’s motion to certify the trial court’s ruling at issue here. App. at 678. It could not be oblivious to the effect of the trial court’s RAP 2.3(b)(4) certification, a certification usually respected by appellate courts. Seemingly, the City, at least at one time, believed appellate review of the issues here was merited.

⁴ The City quibbles about the issue presented for review here, attempting to recast the issue for the Court. Resp. at 2; Answer at 2-3. But the City below *agreed* to certification of the issue posed by the trial court: “... whether a police officer owes a duty of reasonable care to act reasonably when using deadly force...” App. at 687.

For the reasons set forth in Beltran-Serrano's motion at 10-13, this Court should grant review on the basis of RAP 2.3(b)(4) alone.

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

(a) The Trial Court Committed Obvious Error in Failing to Discern That City Owed a Duty of Care in Tort to Beltran-Serrano

In addition to RAP 2.3(b)(4), review is merited here under RAP 2.3(b)(1). Although the City cites cases supporting its contention that a victim of excessive use of police force may only sue a municipality for assault and battery and not negligence, resp. at 12-13, that assertion is obviously incomplete, as such victims may pursue relief under 42 U.S.C. § 1983. Moreover, the City has *no answer* to the point made at length in Beltran-Serrano's motion (at 15-18) and statement of grounds for direct review (at 9-11) that there are *numerous* cases, state and federal, recognizing that police shooting victims have claims predicated upon assault and battery, 42 U.S.C. § 1983, or negligence principles.⁵ For example, the City cannot reconcile the plainly contradictory decisions of the Court of Appeals in *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88, *review denied*, 124 Wn.2d 1026 (1994) and *Garnett v. City of*

⁵ The City largely has *no answer* in its response to Beltran-Serrano's discussion of the public duty doctrine. Motion at 18-20. The issue is only addressed in the City's answer to the statement of grounds for direct review in passing at 8-9. It is *inapplicable* to common law tort duties, a point the City seemingly does not contest. The trial court erred in applying it here.

Bellevue, 59 Wn. App. 281, 796 P.2d 782 (1990), *review denied*, 116 Wn.2d 1028 (1991) on a duty in tort as to law enforcement activities. This area of law virtually *cries out* for clarification of the available claims. California courts have adopted the simple principle 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).

In sum, the trial court erred in refusing to recognize that the City had a duty in tort to Beltran-Serrano. Turning to the City’s specific negligence-related arguments, it contends that a police shooting victim can *never* establish negligence based on improper training/supervision of police officers and may *never* assert both a negligence and intentional tort claim. It is wrong as to both contentions.

(i) The City Has a Duty to Properly Train/Supervise Its Officers in the Use of Deadly Force

The City contends that it is immune from a claim in tort for negligent officer training/supervision in the use of deadly force if the officer was acting in the course of her/his employment, citing *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 380 P.3d 553, *review denied*, 186 Wn.2d 1028 (2016) and *La Plant v. Snohomish County*, 162 Wn. App.

476, 217 P.3d 254 (2011).⁶ The City confuses a duty on its part with liability on the part of Officer Volk.

Beltran-Serrano was entitled to argue in the alternative that the City was liable on its own for negligent training/supervision or was liable on the basis of *respondeat superior* for Volk's negligent conduct. Indeed, in *La Plant*, Division I specifically recognized that the passenger in a stolen car injured during a police pursuit had a negligence claim against the County on the basis of *respondeat superior* for the negligent driving of the deputies that caused the passenger's injuries. 162 Wn. App. at 478-79. *See also, Traverso v. City of Enumclaw*, 2012 WL 2892021 (W.D. Wash. 2012) (court refuses to dismiss negligence claims against the City where there was no stand-alone claims against the responsible jail officers).

Beltran-Serrano could properly proceed against the City.

(ii) A Claim in Negligence May Arise Out of Intentional Acts

The central thrust of the City's argument is that it cannot be liable in negligence if its officers commit assault and battery, an intentional tort.

⁶ As Division II noted in *Evans*, claims in tort against an employer are analytically distinct from the employer's liability for conduct of an employee based on *respondeat superior*. 195 Wn. App. at 46-47. Plainly, the City was vicariously responsible for Volk's negligence if she was in the course of her employment.

Resp. at 12-14.⁷ The City's argument is baseless, even under the cases it cites.⁸

The California Supreme Court rejected an argument nearly identical to the one presented by the City here. *Grudt v. City of Los Angeles*, 468 P.2d 825 (Cal. 1970).⁹ *Accord, Munoz v. Olin*, 596 P.2d 1143 (Cal. 1979) (both negligence and intentional tort theories submitted to jury in shooting case); *Reed v. D.C.*, 474 F. Supp. 2d 163, 173-74 (D.D.C. 2007) (same).¹⁰

⁷ This argument is contradicted in many cases. *See also*, stmt. of grounds at 9-12.

⁸ For example, in *Tegman v. Accident & Medical Investment, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003), this Court dealt specifically with circumstances where both intentional negligent conduct caused harm to the plaintiff; the fact that some of the harm was caused by intentional conduct did not bar the negligence claim. *See also, Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, *review denied*, 166 Wn.2d 1025 (2009).

In *Grange Ins. Ass'n v. Roberts*, 179 Wn. App. 739, 320 P.3d 77 (2013), *review denied*, 180 Wn.2d 1026 (2014), another case it cites, is inapposite as it deals with a question of insurance coverage under a liability policy that excludes intentional conduct from coverage. *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008) is similarly inapposite. There, police officers did considerable damage to the plaintiff's property by using a battering ram to enter the premises to execute a search warrant. The Court characterized the plaintiff's claim as one in trespass, rather than negligence. The Court never stated that negligence and intentional tort claims could not be presented in the same case.

⁹ There, a police officer in plain clothes, carrying a double-barreled shotgun, approached a car, possibly causing the driver to think he was being robbed or attacked. The driver accelerated the car toward a second plainclothes officer, and then both officers opened fire on the driver, killing him. *Id.* The California Supreme Court reversed dismissal of the negligence claims and held that the plaintiff could present both intentional and negligence theories to the jury in a shooting case.

¹⁰ The court held that a plaintiff in a wrongful police shooting case can proceed to trial on both negligence and assault and battery, noting that "[t]hese cases often share

Officer Volk negligently used deadly force. That her negligence culminates in a volitional act does not disqualify the claim from proceeding in negligence. This case must be evaluated under its totality of the circumstances, including evidence regarding Volk's preshooting conduct. Focusing solely on the moment of the shooting itself would be contrary to established tort principles. *Hayes*, 305 P.3d at 257-58. ("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 negligence claim extends to the entire encounter and is not limited to her ultimate decision to shoot. It is entirely consistent with Washington negligence law to submit both negligent and intentional tort claims to the jury.

(iii) Restatement (Second) of Torts § 302B

The City argues that it did not owe a duty to Beltran-Serrano under § 302B of the *Restatement (Second) of Torts*. Resp. at 14-16. However, that assertion contradicts this Court's decision in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013), a decision that

common characteristics, notably the use of deadly force and evidence of two opposing factual scenarios – a police officer claiming he [or she] shot in self-defense and a witness claiming the decedent was unarmed when shot." *Id.* at 174.

completely underscores the point that a city like Tacoma *can* be liable in negligence for the malfeasance of its police officers.¹¹

§ 302B states that a duty arises where a party, like the City/Volk here, engages in conduct that involves the unreasonable of harm to another through the conduct of a third person. In *Washburn*, police officers negligently served an anti-harassment order on a harassment perpetrator who killed his victim; a duty under § 302B was present.¹² Similarly, in *Coffel*, officers negligently responded to break ins arising out of an ownership dispute as to certain premises, and property destruction occurred; a duty existed under § 302B.¹³

Here, it is no different. The City's policy on officer use of deadly force and training of officers in it was inadequate. Officer Volk acted unreasonably in shooting Beltran-Serrano. The City had a § 302B duty to Beltran-Serrano.

¹¹ This was clearly not a case of nonfeasance on Officer Vick's part, but rather a clear-cut case of misfeasance in which a duty on the City's part arose. Compare *Washburn, supra, Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), and *Coffel v. Clallam County*, 47 Wn. App. 397, 735 P.2d 686, review denied, 108 Wn.2d 1014 (1987) with *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013).

¹² Thus, this Court concluded that law enforcement officers owe a 302B common law duty to protect against the acts of third persons where the officers' own affirmative acts created a risk or exposed those persons to a recognizably high degree of harm. It goes without saying that the officers owe a common law duty to act reasonably to prevent the foreseeable harmful consequences of their own actions, a basic common law negligence principle.

¹³ In each instance, the courts properly recognized that the public duty doctrine was inapplicable.

(b) Effect on Future Proceedings

Nowhere in its response does the City dispute the contention set forth in Beltran-Serrano's motion at 20-21 that the trial court's decision on duty will render further proceedings useless.

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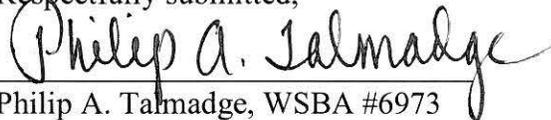
This Court should review the trial court's September 1, 2017 decision under RAP 2.3(b)(1).

D. CONCLUSION

This Court should grant direct discretionary review, whether under RAP 2.3(b)(1) or (4). The proper formulation of a municipality's duty regarding its police officers' use of deadly force is patently an issue of significant public importance in these times. The Court should then reverse the trial court's September 1, 2017 summary judgment order and allowing Beltran-Serrano's negligence claim to go to the jury. Costs on appeal should be awarded to Beltran-Serrano.

DATED this 8th day of December, 2017.

Respectfully submitted,



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DECLARATION OF SERVICE

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

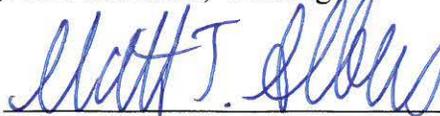
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 8, 2017 at Seattle, Washington.



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