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No. 97583-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF TACOMA,

Appellant

v.

KATHLEEN MANCINI,

Respondent

APPELLANT'S BRIEF

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I. INTRODUCTION

On January 4, 2011, the Pierce County Superior Court issued a controlled substance warrant for 28625 16th Avenue SW, Apartment B-1, Kathleen Mancini's home. The warrant was based upon information provided by a reliable, proven confidential informant (CI) who had seen methamphetamine, scales and packaging material in the suspect Matthew Logstrom's apartment. The confidential informant also told police that Logstrom did not have anything in his name and that his mother rented the apartment for him. Prior to obtaining the warrant, police vetted the informant's information and learned that Apartment B-1 was rented by Kathleen Mancini, an older white female *who was believed to be Logstrom's mother*.

When the officers executed the warrant, they realized that the interior of Apartment B-1 did not match the description of Logstrom's apartment as provided by the informant. After conducting a short investigation to confirm that Mancini was not Logstrom's mother and was not connected to the drugs that police were seeking, the officers learned that Logstrom lived in the building next door, in Apartment A-1. The CI had identified the wrong building.

Kathleen Mancini sued the City of Tacoma for a variety of state tort claims, all of which were dismissed by the superior court on summary

judgment. On appeal, this Court reversed the grant of summary judgment on four of plaintiff's claims: negligence, false imprisonment, invasion of privacy and assault and battery. These four claims were tried to a jury in the King County Superior Court that returned a verdict for the defense on all claims except the negligence claim.

At trial, plaintiff's negligence claim was based solely on the contention that the investigation leading up to issuance of the search warrant was "shoddy" and should have included specific investigatory steps, such as a controlled buy and surveillance of the suspect's apartment. The evidence adduced at trial and the arguments made by plaintiff's counsel left no doubt that plaintiff's negligence claim was, in actuality, a claim for negligent investigation. As this Court recognized in the previous appeal, it is indisputable that Washington does not recognize common law claims for negligent investigation against police. Consequently, plaintiff's negligence claim should never have been submitted to the jury.

II. ASSIGNMENT OF ERROR & ISSUE

1. The trial court erred in denying the City's motion for judgment as a matter of law on plaintiff's negligence claim, both at the close of plaintiff's case-in-chief, and at the close of all evidence. RP 486:10 – 504:15; RP 516:18 – 518:24; RP 544:11-20. See also RP 558:7-21 (defense objection to negligence instructions).

2. The trial court erred in submitting plaintiff's negligence claim to the jury where the claim was based on the allegation that the police officers were negligent in not making a controlled narcotics buy and not conducting surveillance prior to obtaining and executing a search warrant on plaintiff's home.

ISSUE: Where the alleged negligent acts were the police's failure to make a controlled buy and to conduct surveillance prior to obtaining a controlled substance warrant for plaintiff's home, was plaintiff's negligence claim actually a common law claim for negligent investigation that should not have been submitted to the jury under clear Washington case law?

III. STATEMENT OF THE CASE

A. Factual History

This case stems from a search warrant obtained on January 4, 2011, and executed on January 5, 2011, for the residence at 28625 16th Avenue SW, Apartment B-1. Exhibit 103 (Complaint for Search Warrant, Apt. B-1); Exhibit 104 (Search Warrant, Apt. B-1). The warrant was obtained as part of a narcotics investigation conducted by the Tacoma Police Department Special Investigations Division (SID) as a result of information provided by a confidential informant (CI) who had successfully worked with SID officers in the past. Id. See also RP

48:15-24 (prior use of CI); RP 42:10-22 (information from CI); RP 57:6-18 (timing of information and warrant); RP 252:10 – RP 254:23 (information from CI). The CI told Officer Kenneth Smith of SID that the subject of the investigation, Matthew Logstrom, was selling methamphetamine, and that she had observed dealer-size quantities of methamphetamine in his vehicle and his apartment at the Sound View Terrace Apartments. Exhibit 103, p 2 (Mancini 000218); RP 252:10 – RP 254:23. The CI also told Officer Smith that “Matt” did not have anything related to his residence in his name and that he either lived with his mother or his mother rented the apartment for him. RP 220:10-18; RP 255:8-17.

When police checked on the lease for Apartment B-1, they learned it was rented by a middle age white female who the officers believed was “Matt’s” mother. RP 52:9 – 53:1; RP 262:1 – 263:12. Additionally, when the CI directed officers to the apartment complex and pointed out the apartment (B-1), officers found Logstrom’s car parked in front of the building where Apartment B-1 was located. RP 255:3 – 257:2. See also Exhibit 112 (photos of Charger taken by police prior to obtaining warrant).

As it turns out, the CI misidentified the apartment. The subject of the investigation, Matthew Logstrom, actually resided in the building next

door, in Apartment A-1. RP 293:20-25. See also Exhibit 1, p 28-29 (Incident No. 110040415.4, pages 6 and 7 of 8); Exhibit 101 (Complaint for Search Warrant, Apt. A-1); Exhibit 102 (Search Warrant, Apt. A-1).

The officers did not have a warrant for Apartment A-1. Believing that it was likely that Logstrom was already aware of their presence, in an effort to salvage the investigation, they chose to make contact with Logstrom through a consensual contact. RP 296:6-25. The officers proceeded to Apartment A-1 and knocked on Logstrom's door. Id. Logstrom answered the door and gave consent for the officers to enter his residence in order to conduct a protective sweep. RP 296:24 – 297:25. See also Exhibit 106. During the protective sweep, the officers found a marijuana grow operation in Logstrom's residence. RP 296:24 – 297:25. Officer Smith then went back to Tacoma, prepared a new complaint and search warrant, and presented the new warrant to the same judge in the Superior Court who had issued the warrant for Apartment B-1. RP 299:10 – 300:4; Exhibits 101 and 102. The court issued the new warrant for Apartment A-1¹, and as a result, officers recovered methamphetamine, a

¹ As evidenced by their actions, the officers made every effort to stay well within constitutional boundaries governing search and seizure. They had a valid search warrant authorizing entry into plaintiff's home (Exhibits 103 and 104), they obtained a signed consent from Logstrom to perform a protective sweep of his home (Exhibit 106), and then the officers obtained a new warrant in order to conduct a thorough search of Logstrom's home (Exhibits 101 and 102).

stolen pistol, a shotgun, ammunition, marijuana, a scale and packaging material. RP 302:9 – 303:21; Exhibit 105; Exhibit 110.

B. Procedural History

Plaintiff initiated the instant action, asserting numerous causes of action. CP 1 – 9 (Complaint for Damages). Plaintiff's claims for negligent training and supervision were dismissed pursuant to CR 12(c), as were plaintiff's claims under Article I, §§ 1, 3, and 7 of the Washington State Constitution. CP 48 – 50. Following discovery, the City moved for summary judgment on plaintiff's negligence claim, a discrimination claim under RCW 49.60.030, and state tort claims of assault and battery, false imprisonment, defamation, invasion of privacy, and outrage. CP 201 (Motion for Summary Judgment); CP 51 (Affidavit of Jean Homan); CP 167 (Affidavit of Kenneth Smith); CP 257 (Plaintiff's Opposition); CP 330 (Declaration of Lori Haskell); CP 298 (Declaration of Norm Stamper); CP 317 (Declaration of Kathleen Mancini); CP 228 (Reply in Support of Summary Judgment); CP 234 (Supplemental Affidavit of Jean Homan). On summary judgment, plaintiff abandoned her RCW 49.60 claim. See CP 257-279; CP 441 n.9. The trial court granted the City's motion and dismissed all remaining claims. CP 254.

Plaintiff appealed the grant of summary judgment. Division I of the Court of Appeals affirmed in part and reversed in part. CP 431 – 469

(Unpublished Opinion, filed June 8, 2015, hereinafter Mancini I). The appellate court affirmed dismissal of plaintiff's defamation and outrage claims. Id. The appellate court reversed summary judgment on plaintiff's negligence, assault and battery, false imprisonment and invasion of privacy claims. Id.

Plaintiff's claims for negligence, assault and battery, false imprisonment and invasion of privacy claims proceeded to trial before a jury in the King County Superior Court. See CP 530 (Trial List of Exhibits); CP 535 (Witness Record). The jury found for the defendant on plaintiff's claims for invasion of privacy, false imprisonment, and assault and battery. CP 526. In so doing, the jury necessarily found that the search warrant was supported by probable cause and that the officers had not exceeded the scope of the warrant. See CP 520 (Instruction No. 17); CP 521 (Instruction No. 18). Plaintiff did not appeal the jury's verdict on these claims.

The jury found for the plaintiff on her claim of negligence. CP 526. At trial, however, plaintiff's theory of liability on the negligence claim was that officers should have done a controlled buy and should have done surveillance before obtaining and executing the search warrant on

plaintiff's home. See, e.g., RP 7:19-25²; RP 738, lines 14-23³. Because plaintiff's negligence claim was based on alleged deficiencies in the police investigation leading up to the issuance of the warrant, plaintiff's negligence claim was for negligent investigation. As such, it is not legally cognizable and the claim should not have been submitted to the jury for consideration.

On September 25, 2017, judgment was entered on the jury's verdict. On October 20, 2017, the City timely filed its Notice of Appeal. See Appendix 1-8.

² During opening statement: "He didn't do any surveillance. He didn't do a controlled buy. And you will hear testimony that those are two things that are very, very important to do in any drug case before you go in front of the judge and you file an affidavit that says, I want a search warrant, and I want a search warrant for a particular apartment. Didn't happen in this case." RP 7:19-25.

³ During closing argument: "Now, this is the affidavit for the search warrant. Doesn't say anything about any investigation, other than driving the drug informant to the apartment parking lot and that they had his birthdate. They even had a picture of him, and they had some of his criminal history. This is the affidavit that they gave to the judge. It doesn't say a word about anything else they did to ascertain that they were going to the correct address, and it doesn't say, gee, we didn't do any surveillance. We didn't do a controlled buy." RP 738:14-23. See also RP 728, lines 11-19: "...their idea of an investigation was to put this woman in a van and drive her through the parking lot of the complex that had four identical buildings. And she just points to – she just points to an apartment and says 'That's it.' And that is pretty much the extent of their investigation because, ladies and gentlemen, I will posit to you that you do not have one shred of evidence that they did anything else, not one, because there's nothing in the incident report."

IV. ARGUMENT

A. Standard of Review

The issue of whether a claim is cognizable is a question of law. See Dever v. Fowler, 63 Wn. App. 35, 44-45, 816 P.2d 1237 (1991). See also Buchheit v. Geiger, 192 Wn. App. 691, 696-97, 368 P.3d 509 (2016)(common legal usable of term “cognizable” used in connection with standard for considering a motion to dismiss for failure to state a claim). Questions of law are reviewed *de novo*. Ang v. Martin, 154 Wn.2d 477, 481, 114 P.3d 637 (2005).

B. The jury’s verdict on the intentional torts necessarily establishes that the warrant was supported by probable cause, that the officers did not exceed the scope of the warrant, and that the officers acted with lawful authority.

Four claims were submitted to the jury: negligence, invasion of privacy, false imprisonment, and assault and battery. CP 526-529. The jury returned a verdict for the City on invasion of privacy, false imprisonment, and assault and battery. Id. In reaching this verdict and in light of the instructions given to the jury, the jury necessarily found that the warrant was supported by probable cause, that the officers’ did not exceed the scope of the warrant, and that the officers acted with lawful authority.

On plaintiff's assault and battery claim, for example, the jury was instructed that the City would be liable for assault and battery if unnecessary violence or excessive force was used in accomplishing plaintiff's detention during the service of the warrant, and that "[t]he degree of force must be reasonable given the totality of circumstances...judged objectively from the information available at the time from the perspective of a reasonable officer on the scene." CP 517 (Instruction No. 14). Plaintiff's expert testified that the tactics used by the officer in executing the warrant were appropriate and that no unnecessary force had been used:

Q Okay. And the tactics that were used to execute the warrant in this case were proper. Correct?

A I would see them as proper, yes.

Q Okay. And it would not be -- I will tell you, Chief, there's going to be a question of fact for the jury to resolve as to whether or not Ms. Mancini was made to lay down on the floor in the hallway. I'm going to take her facts for the purpose of my questions. Okay?

A Sure.

Q So if we assume that the officers did order her down onto the floor when executing a search warrant, that would be proper, wouldn't it?

A Yes.

Q And if they did then put her in handcuffs, that would be proper. Correct?

A Yes.

Q And if you had a subject -- because, again, to keep everyone safe, they need to gain control quickly -- who is not moving, it would not be improper to push that person to the floor, would it?

A Correct.

Q And so none of the tactics used by the officers were excessive with respect to the amount of force. Correct?

A Yes, that's correct.

RP 174:24 – 175:23. In light of the instruction and Mr. Stamper's testimony, in finding for the City on the assault and battery claim, the jury therefore necessarily concluded that the police did not use excessive force while detaining plaintiff, and that their conduct was objectively reasonable.

Similarly, on plaintiff's false imprisonment claim, the jury was instructed that a false imprisonment occurs when police deprive a person of their liberty or otherwise restrain the person without lawful authority. CP 515 (Instruction No. 12). See Bender v. Seattle, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). The jury was also instructed that officers may detain a resident of a house when executing a valid search warrant, and that the detention in conjunction with the warrant may be unreasonable if unnecessarily prolonged or if it involves an undue invasion of privacy. CP

518 (Instruction No. 15). See Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L.Ed.2d 340 (1981); Franklin v. Foxworth, 31 F.3d 873 (9th Cir. 1994).

Additionally, the jury was instructed on the standard for probable cause and on the standard for overcoming the warrant's presumption of validity. CP 519 (Instruction No. 16); CP 520 (Instruction No. 17). See Bender, 99 Wn.2d at 591-92. Finally, the jury was instructed that if they found that there was probable cause to support the warrant, but also found that the officers exceeded the scope of the warrant, they should find for the plaintiff on her claims. CP 521 (Instruction 18). See also RP 649:24 – 652:15 (court's discussion of Instruction No. 18). In closing argument, defense counsel told the jury that if it found that the officers exceeded the scope of the warrant, either by detaining plaintiff or continuing to search after the officers had determined they were in the wrong place, then the jury should find for the plaintiff on her claims. RP 791:22 – 792:11. See also CP 571 (excerpt from plaintiff's closing PowerPoint presentation – “Probable Cause...Is Not A Defense...if Officer Exceeded the Scope of the Warrant.”)

Since the jury resolved these disputed questions of fact (whether the officers continued to search or continued to detain plaintiff after knowing they were in the wrong apartment) in the City's favor, the jury

necessarily concluded both that the warrant was supported by probable cause and that the officers had not exceeded the scope of their authority under the warrant.

C. The evidence adduced at trial and arguments presented by plaintiff unequivocally establishes that plaintiff's negligence claim was a claim for negligent investigation.

In Mancini I, this Court stated that Mancini's negligence claim was not a claim for negligent investigation because Mancini did not allege that the negligent investigation led to her being wrongly considered a suspect in a crime. CP 448-49. But while the record on summary judgment was not sufficiently developed to establish the exact nature of plaintiff's negligence claim, the record developed at trial on remand leaves no doubt that plaintiff's negligence claim was for negligent investigation.

Throughout the trial, plaintiff consistently argued that the City was negligent because officers did not do an adequate investigation before obtaining the search warrant from the superior court. For example, in opening statement, plaintiff's counsel told the jury that "we expect [the police] to do due diligence when carrying out their duties" and that the police should not "cut corners." RP 4:23; RP 5:16-18. Counsel also told the jury in opening that the police got plaintiff's apartment by mistake

because they did not do a controlled buy or surveillance in this case. RP
7-8.

When questioning Officer Kenneth Smith, the case agent in charge of this investigation, plaintiff repeatedly questioned Officer Smith's decision to not do a controlled buy or conduct surveillance prior to obtaining the warrant:

Q And you did not do any surveillance on this apartment, did you?

A Correct.

Q And you didn't do any surveillance on the car. You knew what -- you had identified Logstrom's car at that point.

A Yes. Correct and correct.

Q It was a black Dodge Charger.

A Yes.

Q And you did no surveillance on the vehicle.

A Correct.

Q And you did no surveillance on the apartments.

A Correct.

Q And isn't it true, Officer, that you do surveillance in about 95 percent of your cases where the intention is to get a warrant of this nature?

A Yes, ma'am.

Q And isn't it true that you often do controlled buys to pinpoint a residence where you believe drugs are being dealt?

A Yes, ma'am.

Q And that's typical protocol, is it not?

A Not protocol, but it's something we do about -- or I did 95 percent of the time.

Q And you didn't do either in this case.

A Correct.

Q In fact, you pretty much relied on the confidential informant, did you not?

A No.

RP 49:6 to 50:9. See also RP 216:16-25; RP 221:23 – 222:8.

Similarly, plaintiff's expert's opinion focused almost exclusively⁴ on the officer's failure to conduct surveillance or do a controlled buy prior

⁴ Although plaintiff's expert, Norm Stamper, also opined that the officers did not do a sufficient job vetting either the CI or the information she provided, on cross examination Mr. Stamper conceded that he did not know what the officer had done to vet the CI or her information. RP 157:6-11 (knows only that the officer had used the CI twice in the past); RP 201:16 – 202:5 (no information about the databases checked by the officer or what the officer did to vet the CI). Cf. RP 247 – 251 (steps taken to vet CI pursuant to TPD procedures); RP 254 – 265 (steps taken to investigate information provided by CI). Mr. Stamper also offered the opinion that the officers had conducted an actual search after realizing that they were in the wrong apartment, but admitted that his opinion was based on conjecture. RP 161:22 – 163:5 (“it is my conjecture that that’s what happened.”). Given that the jury found for the defense on all other claims, and thereby necessarily concluded that the police did not exceed the scope of the warrant, this opinion from Mr. Stamper is of no import to the instant appeal. Finally, Mr. Stamper was questioned about the fact that officer did not include in the warrant application information about all of the databases he checked, but Mr. Stamper conceded that inclusion of that information in the warrant affidavit would not have negated probable cause; it would have only served to strengthen probable cause. Compare RP 140:1 – 141:18 and RP 180:24 – 181:8. Moreover, Mr. Stamper was careful to state that he was not saying that the officer's affidavit in support of

to obtaining the warrant. For example, Mr. Stamper spoke extensively about never “trusting” the CI and the need to conduct surveillance (perhaps for months) and do controlled buys to confirm the CI’s information. RP 132 – 138. When asked directly, Mr. Stamper conceded that his opinion was that the officers should have undertaken different and additional *investigatory* steps:

Q And it's been your opinion that the officer should have done a controlled buy. Correct?

A Yes.

Q And that would be part of a narcotics investigation.

A Yes.

Q And they should have done additional surveillance.

A Yes.

Q And that would be part of a narcotics investigation.

A Correct.

Q So your opinion is that they should have done different and more investigatory steps in investigating the crime at issue. Right?

the warrant was untruthful. RP 180:17-19 (“Q: Are you saying you have knowledge of facts to suggest that Officer Smith was not truthful in his affidavit? A: Let me be very clear. I do not.”). Absent evidence that the officer recklessly or intentionally omitted material facts that would have negated probable cause, the warrant is presumed valid. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007); Turngren v. King County, 104 Wn.2d 293, 305, 705 P.2d 258 (1985); Bender v. Seattle, 99 Wn.2d 582, 592, 664 P.2d 491 (1983). See also RP 499:9 – 501:20 (trial court: “We also issue a number of search warrants, so we don’t expect an officer to say, I ran Accurant and did 85 other things that didn’t result in some sort of positive information. ...”).

A Yes.

RP 201:6-18.

Finally, in closing argument, plaintiff made her claim of negligent investigation explicit:

Let's back up and look at what they did and didn't do because there's been testimony from the police involved in this raid that they did surveillance on 95 percent of their cases. 95 percent. They didn't do it in this case.

...

And so they have this information for a month. They sat on it. And then all of a sudden, their informant comes to them and says, "I got in this guy's apartment. I've seen his dealer-sized quantities of drugs." So "boom" they got to move on it. They got to move on it right now.

They don't do any surveillance. Their idea of an investigation is to put someone who is on drugs -- and you will see in the affidavit the -- and I'm going to show a portion to you in a moment, and you'll have it in the exhibits that go back into the exhibit room with you, how well-versed this woman was in the drug trade. You don't get that well-versed in the drug trade unless you are, yourself, involved in drugs. So that's who they relied upon.

(emphasis added) RP 727:1-22.

Because their idea of an investigation in this case, before they took a battering ram and broke down the door of an innocent citizen who has never done anything illegal, who has never been in any kind of legal trouble in her life, their idea of an investigation was to put this woman in a van and drive her through the parking lot of a complex that had four identical buildings. And she just points to -- she just points to an apartment and says, "That's it."

And that was pretty much the extent of their

investigation because, ladies and gentlemen, I will posit to you that you do not have one shred of evidence that they did anything else, not one, because there's nothing in the incident report.

(emphasis added) RP 728:7-19.

I talked to you about their procedures and whether they've take any responsibilities for them, if they had made any changes. Well, guess what number one is when it comes to dealing with informants? And the officer said drug informants are very, very important to them. It allows them to do a lot of their work. Fine. Nobody's got a problem with that. But even their own procedure says that information from an informant should be checked for accuracy, and that's what didn't happen here because accuracy is not driving an informant to a parking lot with four identical buildings and saying, "Hey, point to the one where the drugs are," because that's what they did. *That was their investigation.*

(emphasis added) RP 736:14 – 737:1. See also CP 564 (excerpt from plaintiff's closing PowerPoint presentation – “Negligence in Obtaining Warrant”); CP 569 (“Negligence in Obtaining Warrant – Tacoma Police Cut Corners and It Stripped Kathleen Mancini of Her Sense of Safety”)

And plaintiff's position at closing was consistent with plaintiff's earlier argument to the court in response to the defense's motion for a directed verdict at the close of plaintiff's case-in-chief:

There was virtually no police work done here. They put a drug informant in a car, drove her by four identical buildings and said, “Point out which one is the one where you saw the drugs.” That is the extent of the investigation. (RP 488:4-8)

...

What is negligence on the part of the officer? The officer admitted that he does surveillance in 95 percent of his cases, and he did none here. They did not attempt a controlled buy. They didn't do anything, and they haven't shown us they have done anything. (RP 488:20-24)

...

So we feel very strongly on the negligence claim, Your Honor. This should have never happened, and *if the officer had done any police work, whatsoever*, it would not have happened. (emphasis added)(RP 489:17-20)

In light of the evidence adduced at trial and the arguments presented by plaintiff's counsel, there is no question that plaintiff's theory of liability on negligence was that the officers were negligent in how they conducted the narcotics investigation before obtaining and executing the search warrant. There is simply no other way to construe the record – plaintiff's negligence claim was based *solely on how the officers conducted a criminal narcotics investigation*.

Moreover, the testimony adduced at trial established that the officers did, in fact, *consider Mancini as potentially associated with Logstrom's narcotics activities and did consider Mancini's apartment as the situs of the criminal activity*. Officer Smith testified that he ran an Accurant report on both Logstrom and the address and in so doing, he learned that the apartment was being rented by Kathleen Mancini. RP 262:1-13. Once he learned the apartment was rented by Mancini, he ran Mancini through all of the same databases that he had used for Logstrom.

Id. at lines 9-13. At the conclusion of his investigation, he had not been able to determine the name of Logstrom's mother and had concluded the Mancini was likely Logstrom's mother:

Q And you never ascertained the name of Matthew Logstrom's mother, did you?

A With who? I'm not sure –

Q Did you ascertain the name of Matthew Logstrom's mother?

A Yes. I asked the informant if she knew his mother's name.

Q Oh, okay.

A And then I also did the background check to see if I could figure that out, who his mother was.

Q Okay. And what -- what name did you find?

A I wasn't able to find a name.

Q And maybe you misunderstood my question. You were never able -- you never ascertained the name of Matthew Logstrom's mother. Is that right?

A Correct.

Q So you made an assumption that it was Kathleen Mancini.

A Yes.

RP 52:12 – 53:1. See also RP 262:14 – 263:12 (“Q: Mancini and

Logstrom aren't even close. A: No. Q: So doesn't that disqualify this

location as being associated with Matthew Logstrom? A: No. I had information that it was his mother. Matt was a white male; she was a white female. He was 30; she was approximately, I believe, in her 60s at the time. So there is a chance, mother/son, possible relationship....”); RP 267:16 – 268:18; RP 461:4-10 (“Q: And it was your information, I believe it was, that Matthew Logstrom was living in an apartment rented by his mother? A: Yes. Q: So when Ms. Mancini came towards you, you didn’t know if she was Matt Logstrom’s mother or not, did you? A: Correct.”); RP 466:12 – 16 (“Q: And you believe there may be weapons and meth and a felon in this apartment. A: Correct. Q: And she may be his mother. A: Correct.”).

This Court therefore should reconsider its conclusion, based on the summary judgment record, that plaintiff’s claim was not one for negligent investigation, based on the record as developed at trial on remand. The procedural posture of this case is similar to that of Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005). In Roberson, the Court of Appeals initially reversed an order dismissing the plaintiff’s negligent investigation claims and remanded for trial. 99 Wn. App. 439 (2000). At trial, however, plaintiff’s evidence made clear that the parties’ child had not been the subject of a harmful placement decision; the plaintiff parent herself had sent the child out-of-state. On a second appeal from the jury’s

verdict in favor of the plaintiff, the action was properly dismissed, because the negligent investigation claim was not actionable given the facts as adduced at trial. 119 Wn. App. 928 (2004); aff'd at 156 Wn.2d 33 (2005).

Similarly here, the testimony and the arguments presented at trial supports only one conclusion: The plaintiff's theory of liability was that the police officers were negligent in how they conducted a narcotics investigation and as a result, plaintiff was identified as being potentially connected to criminal narcotics activity and her residence as the situs of such activity. That is a negligent investigation claim, the fact that plaintiff was ultimately not arrested notwithstanding. And as outlined herein, this claim is not cognizable and should have been dismissed.

D. No Washington court has ever allowed a common law claim for negligent investigation against police.

As the Court itself recognized in the previous appeal in this matter, Washington courts have repeatedly and consistently held that there is no common law cause of action for negligent investigation against the police in this state⁵. See, e.g., M.W. v. Dept. of Social and Health Services, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) (“Our courts have not recognized a

⁵ The courts have carved out a very narrow exception to this rule for police and DSHS under RCW 26.44.050, which only applies to reports of child neglect or abuse where a negligent investigation results in a harmful placement decision. M.W. v. Dept. of Social and Health Services, 149 Wn.2d 589, 601-602, 70 P.3d 954 (2003); Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000). This case does not include a claim of negligent investigation under RCW 26.44.050.

general tort claim for negligent investigation.”); Laymon v. Department of Natural Resources, 99 Wn. App. 518, 530, 994 P.2d 232 (2000) (“A claim of negligent investigation will not lie against police officers.”); Rodriguez v. Perez, 99 Wn. App. 439, 434, 994 P.2d 874 (2000) (“Thus, in general, a claim for negligent investigation does not exist under the common law because there is no duty owed to a particular class of persons.”); Corbally v. Kennewick School District, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999) (“In general, a claim for negligent investigation is not cognizable under Washington law.”); Fondren v. Klickitat County, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) (“A claim for negligent investigation is not cognizable under Washington law.”); Donaldson v. City of Seattle, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992) (“Washington does not recognize the tort of negligent investigation.”).

In Fondren v. Klickitat County, *supra*, plaintiffs brought a claim for negligent investigation based on the investigation of a fatal shooting. Fondren, 79 Wn. App. at 852. Initially, plaintiff Clyde Fondren was convicted of manslaughter as a result of the investigation. Id. at 853. After the conviction was reversed on appeal, a second jury acquitted Mr. Fondren, finding that he had acted in defense of himself or another. Id. The Fondrens brought a civil suit against the County for a variety of claims, including negligent investigation. Id. The County then moved for

judgment on the pleadings, arguing that the Fondrens had failed to state a claim upon which relief could be granted, and the trial court denied the motion on the negligent investigation claim. Id. at 853-54 and 862.

The County appealed the trial court's denial of its motion to dismiss the negligent investigation claim. On appeal, the Court of Appeals reversed the trial court, finding that the negligent investigation claim was simply not cognizable under Washington law. Id. In support of its finding that the negligent investigation claim should have been dismissed for failure to state a claim, the Court of Appeals relied upon Donaldson v. City of Seattle, 65 Wn. App. 661, 831 P.2d 1098 (1992), review dismissed, 120 Wn.2d 1031 (1993).

In Donaldson, the court was called upon to address a tort claim for negligent investigation brought by the estate of a woman killed by a man against whom the woman had obtained a no-contact order. Donaldson, 65 Wn. App. at 663-665. The woman's estate brought a negligence action against Seattle, arguing, in part, that Seattle had a duty under the Domestic Violence Protect Act (DVPA), Chapter 10.31 RCW, to conduct a follow-up investigation by searching for the abuser even when the abuser had fled the premises. Id. at 671. The plaintiff alleged that "any negligence in the course of such investigation expose[d] the City to liability." Id. The Court

of Appeals rejected this claim, finding that the statute did not impose an affirmative duty to conduct such an investigation:

Nowhere in the original act, nor any of the subsequent amendments, did the Legislature create a special duty to conduct follow-up investigations after the initial response where the violator is absent. Washington does not recognize the tort of negligent investigation. Liability for negligent investigation would be a substantial change in the law and is certainly not required as a necessary inference from the duty to make a mandatory arrest.

There is a vast difference between a mandatory duty to arrest and a mandatory duty to conduct a follow-up investigation. In the arrest situation the officer is on the scene, the arrest is merely a matter of deciding to do so and a few minutes to physically effectuate the arrest. A mandatory duty to investigate, on the other hand, would be completely open ended as to priority, duration and intensity. Would it entail ignoring other calls for a domestic violence response, ignoring other reported crimes, ignoring response to a report of an injury traffic accident? How long does such duty continue? To the end of the officer's shift? Or is the department obligated to detail another officer to take over? Merely to state such obvious practical problems is to demonstrate the extraordinary difficulty that would follow in attempting to implement any such mandatory duty of investigation. Law enforcement must be vested with broad discretion to allocate limited resources among the competing demands.

It is true that in this case Donaldson complains only of a failure to go to Barnes's mother's home, but such duty must be part of a general duty applicable in other similar situations. What if Barnes's mother gave the police another address and so on ad infinitum?

...

Police responsibility in regard to any further investigation becomes part of their overall law enforcement function and

does not generate a right to sue for negligence. We hold the Domestic Violence Protection Act limits the mandatory duty to arrest to cases where the offender is on the scene and does not create an ongoing mandatory duty to conduct an investigation. The claim should have been dismissed at the close of plaintiff's case and the judgment is therefore reversed.

(emphasis added) Id. at 671-72. See also Rodriguez v. Perez, 99 Wn. App. 439, 443, 994 P.2d 874 (2000) (“For example, the duty of police officers to investigate crimes is a duty owed to the public at large and *is therefore not a proper basis for an individual’s negligence claim.*” (emphasis added)).

This Court initially rejected a common law cause of action for negligent investigation against the police in Dever v. Fowler, 63 Wn. App. 35, 44-45, 816 P.2d 1237 (1991) (“Furthermore, although no Washington case has expressly denied a cause of action for negligent investigation, other jurisdictions have held that no such actions exists.”). The rationale given for rejecting this claim was the chilling effect it would have on law enforcement and on the vigorous prosecution of crimes. Id. See also Keates v. City of Vancouver, 73 Wn. App. 257, 268-69, 869 P.2d 88, 94 (1994) (“Our State ‘recognizes the central roles which police and prosecutors play in maintaining order in our society and the burdens imposed on each of us as citizens as part of the price for that order.’ Our state also recognizes that lawsuits against police officers tend to obstruct

justice..... We would distort the balance between society and the individual if we were to allow plaintiffs to bypass the threshold requirement of malicious prosecution in bringing a cause of action for negligent infliction of emotional distress. This would have a chilling effect on police investigation and would give rise to potentially unlimited liability for any type of police activity.”); Smith v. State, 324 N.W.2d 299, 301-02 (Iowa 1982)(cited by Dever v. Fowler, *supra*)(“Although these cases involve different factual situations and arise under a variety of circumstances, they all rely on public policy and the interest of the public in vigorous and fearless investigation of crime for the results reached. ...The public has a vital stake in the active investigation and prosecution of crime. Police officers and other investigative agents must make quick and important decisions as to the course an investigation shall take. Their judgment will not always be right; but to assure continued vigorous police work, those charged with that duty should not be liable for mere negligence.”); Wilson v. O’Neal, 118 So. 2d 101, 105 (Fla. App. 1960)(cited by State v. Smith, *supra*)(“On the other hand, law enforcement and the protection of society from crime would likely be adversely affected if law enforcement agents were subject to liability in damages for simple negligence in the performance of their duties if the citizens they charge with crime should not be convicted.”).

At trial, plaintiff claimed that the City was negligent because the warrant contained inaccurate information, and had the officers done a “proper” investigation (e.g., surveillance and a controlled buy), the officers would have learned of the error and would not have obtained/executed a search warrant on plaintiff’s home. This specific basis for negligence, separate and apart from the general rule that Washington does not recognize a common law claim for negligent investigation, has already been soundly rejected by the Supreme Court:

But what makes a negligence standard “unworkable” is that it is inherently inconsistent with the concept of probable cause and with the warrant process.

A tolerance for factual inaccuracy is inherent to the concept of probable cause. Probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial. *A negligence standard goes too far in requiring police to assure the accuracy of the information presented* and is inconsistent with the concept of probable cause, which requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found. In evaluating whether probable cause supports the search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward. *The fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true.* Probable cause requires more than suspicion or conjecture, but it does not require certainty. “Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred.” As the Connecticut Supreme Court recognized in rejecting a

negligence standard, insistence on the accuracy of an affidavit poses a catch-22 situation for police: requiring police to thoroughly investigate the accuracy of an affidavit, a feat impossible to do without a warrant.

(emphasis added; internal citations omitted) State v. Chenoweth, 160 Wn.2d 454,475-76, 158 P.3d 595 (2007).

These policy considerations are equally compelling in the instant case. As the testimony in this case shows, the case agent undertook an exhaustive search of available databases in an effort to vet the information provided by the CI. He checked Accurint, WASIC, NCIC, DAPS, LINX, the Law Enforcement Support Agency's records and DOL, in addition to various social media sites. RP 259 – 265. He took the CI to the scene and had her identify the location, and then he returned on his own to examine the location and document the suspect's vehicle in front of the Mancini apartment. RP 255:18 - 256:23. Moreover, the CI had been previously established as reliable, and had provided information leading to successful narcotics investigations in the past. RP 48:15 – 24. Further, it is not uncommon for officers to obtain a controlled substance warrant, as opposed to a controlled buy warrant, in an effort to get drugs off the street and facilitate additional investigations. RP 222:4-8; RP 207:21 – 208:7(Mr. Stamper agreeing that there are probably tens of thousands of warrants issued every year for narcotics investigations where there is no

controlled buy); RP 437:14 – 438:9 (Sgt. Schultz testifying that it is not unusual to get a warrant based on CI information where no control buy is done).

The investigation in the instant case was exactly what is expected of police – a proactive, vigorous investigation directed at criminal drug activity that harms society, as a whole. If this Court does not correct the error, allowing plaintiff’s negligence claim to stand will have exactly the kind of chilling effect that the courts have expressly eschewed in holding that such a claim is not cognizable.

E. The jury’s verdict establishes that the police officers did not exceed their privilege in executing a valid search warrant.

Generally, the law of the case doctrine “stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Pursuant to RAP 2.5(c)(2), however, “[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would be best served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.” RAP 2.5(c)(2). Under this rule, “application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous

decision would work a manifest injustice to one party.” Roberson, 156 Wn.2d at 42.

The City respectfully asks this Court to use its authority under RAP 2.5(c)(2) and correct a misstatement of law contained in Mancini I.

In Mancini I, the Court stated:

Instead, Mancini’s claim is a straightforward one, grounded in the common law. She claims that she had a common law right in the sanctity of her home and that *the City’s agents had a duty not to engage in a nonconsensual invasion of her dwelling*. This duty, the duty to refrain from invading a private individual’s home, whether intentionally (a trespass) or negligently (resulting from the absence of due care) is one of common law origin and applies to all. *Her neighbors could not invade her home. The same is true of the City’s agents*.

(emphasis added) CP 447. The City submits that this conclusion – that the City’s agents (police officers) could not enter plaintiff’s home without her consent – is contrary to law, as the officers had a valid warrant issued by the Superior Court. Fourth Amendment to the United States Constitution; Maryland v. Garrison, 480 U.S. 79, 87, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987)(entry legal because made pursuant to valid warrant, and acknowledging “the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.”); Chapter 10.79 RCW

(Searches and Seizures); CrR 2.3. See also State v. Chenoweth, *supra*; Brutsche v. City of Kent, 164 Wn.2d 664, 193 P.3d 110 (2008).

The existence of a valid warrant is critical to the analysis because only the government has both the duty and the ability to obtain and execute search warrants. Unlike plaintiff's neighbors, the police – when in possession of a valid search warrant – are the only persons who can lawfully engage in a nonconsensual entry. Further, there is no question that the existence of a valid warrant creates a privilege to enter the premises for the purposes stated in the warrant. Brutsche v. City of Kent, 164 Wn.2d at 675 (citing Restatement (Second) of Torts §210, for the proposition that “the privilege to execute the order of a court to do any act on the land ‘carries with it the privilege to enter the land for the purposes of executing the order.’”). So long as the officers do not exceed the scope of that privilege, there can be no basis for tort liability. Id. at p. 675-78. In the instant case, the jury's verdict confirms that the officers did not exceed the scope of the privilege.

The Mancini I court's conclusion that the officers (who possessed a valid search warrant) had a duty to avoid a “nonconsensual invasion” of Mancini's home is not sustainable and contrary to both state and federal jurisprudence.

V. CONCLUSION

The trial record unequivocally establishes that plaintiff's negligence claim was based on what Officer Smith did in the course of his investigation prior to obtaining the warrant, and the lack of a controlled buy and surveillance. Moreover, plaintiff's theory was that because the officers were negligent in their investigation, they wrongly considered both Mancini and her residence to be connected with illegal drug activity. As such, the negligence claim was a common law claim for negligent investigation. This claim is not cognizable and should not have been permitted to proceed to verdict.

Therefore, the City respectfully ask that this Court to reverse the judgment in favor of plaintiff on plaintiff's negligence claim and dismiss plaintiff's negligence claim.

DATED this 27 day of April, 2018.

WILLIAM C. FOSBRE, City Attorney

By: /s/ Jean P. Homan
JEAN P. HOMAN, WSBA #27084
Deputy City Attorney
Attorney for Appellant City of Tacoma

CERTIFICATE OF SERVICE

I hereby certify that I forwarded the foregoing documents:
APPELLANT’S BRIEF to be delivered by ABC Legal Messenger to the
following:

Lori S. Haskell
Law Office of Lori S. Haskell
936 North 35th Street, Suite 300
Seattle, WA 98103-8869
lori@haskellforjustice.com

EXECUTED this 27 day of April, 2018, at Tacoma, WA.

/s/Gisel Castro

Gisel Castro, Legal Assistant

Appendix

1
2
3
4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

5 KATHLEEN MANCINI, a single
6 woman,

7 Plaintiff,

8 vs.

9 CITY OF TACOMA,

10 Defendant.
11

NO. 12-2-17651-5 KNT

NOTICE OF APPEAL TO
COURT OF APPEALS, DIVISION I

12 Defendant City of Tacoma seeks review by the Court of Appeals, Division I, of
13 the Judgment entered in this matter on September 25, 2017.

14 Copies of the Judgment and the verdict upon which the Judgment is based are
15 attached to this notice.

16 DATED this 20th day of October, 2017.

17 WILLIAM C. FOSBRE, City Attorney
18

19
20 By: /s/ Jean Homan
JEAN P. HOMAN
21 WSBA #27084
Deputy City Attorney
22 Attorney for Defendants
23
24
25

The Hon. Steve Rosen
Hearing Date: September 25, 2017
Time: 4:00 p.m.

FILED
KING COUNTY, WASHINGTON
SEP 25 2017
SUPERIOR COURT CLERK
DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Kathleen Mancini,

Plaintiff,

v.

City of Tacoma, et al.

Defendants.

No. 12-2-17651-5 KNT

Judgment Summary And Judgment On
Verdict

1. Judgment Creditor: Kathleen Mancini
2. Judgment Debtor: City of Tacoma
3. Principal Judgment Amount: \$250,000.00
4. Interest To Date of Judgment: None
5. Statutory Attorney Fees: \$200.00
6. Costs: ~~\$1,080.61~~ \$654.73
7. Other Recovery Amounts: None
8. Principal Judgment Amount Shall Bear Interest at 3.10%
per annum.
9. Attorney Fees, Costs and Other Recovery Amounts Shall
Bear Interest at 3.10% per annum.

Judgment Summary and
Judgment On Verdict

1

Lori S. Haskell
4711 Aurora Ave. N.
Seattle, WA 98103
(206) 728-1905

10. Attorney for Judgment Creditor:

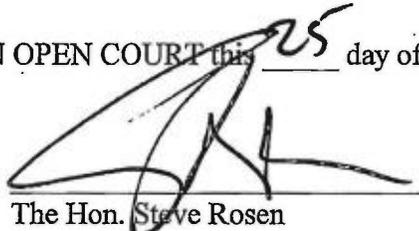
THIS MATTER having come on regularly and duly for hearing this day before the undersigned judge of the above-entitled court, and the jury having returned a verdict in favor of plaintiff Kathleen Mancini, and the court being fully advised in the premises, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff Kathleen Mancini be and hereby is awarded judgment against the defendant, in the amount of \$250,000.00 together with costs in the amount of \$~~1,080.61~~^{654.73} and it is further

ORDERED, ADJUDGED AND DECREED that statutory attorney fees of \$200.00 are awarded.

ORDERED, ADJUDGED AND DECREED that interest will accrue on said judgment at the rate allowed by law.

DONE IN OPEN COURT this 25 day of September, 2017.


The Hon. Steve Rosen

Presented by:

Lori S. Haskell WSBA #15779
Attorney for Plaintiff

Office of the City Attorney for Tacoma

Jean Homan WSBA #27084
City of Tacoma

Judgment Summary and
Judgment On Verdict

2

Lori S. Haskell
4711 Aurora Ave. N.
Seattle, WA 98103
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FILED
KING COUNTY, WASHINGTON

AUG 31 2017

SUPERIOR COURT CLERK
BY Shelly Jones
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

KATHLEEN MANCINI, a single
woman,

Plaintiff,

vs.

CITY OF TACOMA,

Defendant.

NO. 12-2-17651-5 KNT

SPECIAL VERDICT FORM

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

QUESTION 1:

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

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

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

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

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

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

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

ANSWER: \$ 250,000

Instruction: Continue to question 2A.

ORIGINAL

QUESTION 2:

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

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

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

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

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

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

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

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

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

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

ANSWER: \$ _____

Instruction: Continue to question 3A.

QUESTION 3:

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

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

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

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

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

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

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

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

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

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

ANSWER: \$ _____

Instruction: Continue to question 4A.

QUESTION 4:

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

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

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

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

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

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

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

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

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

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

ANSWER: \$ _____

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

DATED this 31 day of August, 2017.


Print Name: Francis Carandang
Presiding Juror

TACOMA CITY ATTORNEYS OFFICE

April 27, 2018 - 12:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77531-6
Appellate Court Case Title: City of Tacoma Appellant v. Kathleen Mancini, Respondent
Superior Court Case Number: 12-2-17651-5

The following documents have been uploaded:

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Phone: 253-591-5629

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