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STATE OF WASHINGTON
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NO. 97583-3

**SUPREME COURT OF THE
STATE OF WASHINGTON**

KATHLEEN MANCINI, Petitioner

v.

CITY OF TACOMA, ET. AL., Respondent

**RESPONDENT CITY OF TACOMA'S ANSWER TO
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION'S AMICUS BRIEF**

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I. INTRODUCTION

Like Plaintiff Kathleen Mancini and her other Amicus American Civil Liberties Union (“ACLU”), Amicus Curiae Washington Association for Justice Foundation (“WSAJ”) does not contest that the Tacoma Police Department acquired probable cause for its search¹ and properly obtained a lawful warrant from a neutral magistrate for its entry into Mancini’s apartment². It also is undisputed the jury in Plaintiff’s later civil trial concerning that entry rejected each of the intentional tort claims, but was allowed to consider a claim for negligent investigation that Washington precedent had long ago rejected. *See* P’s Supp. Br., WSAJ Br., ACLU Br., CP 525-28. Unlike Plaintiff or Amicus ACLU, however, WSAJ concedes there is a heavy burden to overcome the rule of *stare decisis*. *See* WSAJ Br. at 6-16. As shown below, however, neither WSAJ nor Plaintiff meet it.

¹ WSJA also does not dispute a search warrant may issue upon probable cause, established by a sworn affidavit, which may be based in whole or in part upon an informant’s hearsay. *See State v. Chenoweth*, 160 Wn.2d 454, 465-66, 158 P.3d 595 (2007).

²Without citing any support and ignoring evidence of record, WSAJ misleadingly claims Tacoma Police only “reli[ed] on [an] unsubstantiated tip” to “obtain[] a search warrant from Pierce County Superior Court” so they could “avoid administrative obligations required by King County.”² WAJ Br. 1-2, 13 n. 6. Tacoma and others, however, have provided more accurate, complete and record-based statements of the relevant facts. *See* Tacoma Answer to Pet. for Rev. 1-4; Tacoma Supp. 1-6; WAPA Br. 2-8. Here, it needs only to be noted that the subject warrant actually was based upon facts provided by a reliable, proven confidential informant who had personally seen evidence consistent with drug dealing (i.e. methamphetamine, scales and packaging material in the suspect’s apartment), who identified Mancini’s specific apartment in question, and *whose information police had vetted*. *See* Ex. 103-104, 107; RP 42, 48, 57, 252– 56, 220-21, 260-72, 276-77.

II. ANALYSIS

A. LIKE OTHER STATES, WASHINGTON HAS LONG HELD THERE IS NO COMMON LAW DUTY TO INVESTIGATE

WSAJ begins by giving an “overview of negligent investigation claims under Washington common law;” unfortunately, this “overview” misstates this state’s thirty years of unbroken-precedent, precedent consistently rejecting a common law negligent investigation cause of action. *See* WSAJ Br. 3-6. For example, WSAJ claims that although this Court, in *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), supposedly rejected “the public policy reason to extend *immunity* for investigative acts, this same public policy was soon cited as a basis to bar claims for what was termed ‘*negligent investigation*’” by our Courts of Appeal. WSAJ Br. 4-5 (emphasis added).³ This argument is disingenuous and misstates *Bender*.

Bender contains *no* discussion of “the *public policy reason to extend immunity* for investigative acts” that were actually involved in that case, much less a discussion of the policies for rejecting a common law duty to

³ WSAJ notes “[t]his Court is not bound by courts of appeals decisions.” WSAJ Br. 6 n. 3 (citing *Fast v. Kennewick Public Hosp. Dist.*, 187 Wn.2d 27, 40, 384 P.3d 232 (2016)). However, as shown below, this Court *itself* has long likewise held there is no common law negligent investigation tort. Further, “our current system of rigorous debate at the intermediate appellate level creates the best structure for the development of Washington common law,” *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018), and thus this Court gives Court of Appeals precedent respectful consideration. *See Belling v. Emp’t Sec. Dep’t*, 191 Wn.2d 925, 932-33, 427 P.3d 611 (2018) (refusing to overrule 13-year-old Court of Appeals ruling without a “compelling” reason).

investigate. This is not surprising, since *Bender* did not involve a claim for negligent investigation.. Instead, as later noted by *Dever v. Fowler*, 63 Wn. App. 35, 44-45, 816 P.2d 1237 (1991), *rev. denied*, 118 Wn.2d 1028 (1992), *Bender* only “overruled portions of two Court of Appeals decisions that extended the doctrine of *discretionary governmental immunity* to public officers performing their duties.” (*citing* 99 Wn.2d at 589–90) (“Although police investigations and the disclosure of investigation information to the press are of a discretionary nature, we do not view those actions as the type of high level, policymaking decisions of a governmental entity that fall within the rule of discretionary governmental immunity.”). Any “argument that *Bender* created a cause of action for negligent investigation is meritless.” *Id.*⁴

Rather, the policies the Courts of Appeal identify as the “reason courts have refused to create a cause of action for negligent investigation” – *e.g.* it “would impair vigorous prosecution and have a chilling effect upon law enforcement,” *Dever*, 63 Wn. App. at 45 – are the *same* policy reasons *this Court* gave for applying the decades long precedent rejecting such a tort. *See*

⁴ Indeed, this Court in *Brutsche v. City of Kent*, 164 Wn.2d 664, 679, 193 P.3d 110 (2008), “decline[d] to address the negligence claim” plaintiff asserted when “law enforcement officers using [force] to gain entry” into a home pursuant to a warrant, “because the actions of the officers in breaching the doors on [plaintiff’s] property were intentional, not accidental” *See also Torre v. City of Renton*, 164 F.Supp.3d 1275, 1285 (W.D. Wa. 2016)(holding *Brutsche* did not support negligence suit for entry under a lawful warrant because “plaintiff may not bring a negligence claim against police officers for damage” from the entry since “according to the Supreme Court of Washington, courts should treat claims like Plaintiff’s as trespass claims and not as negligence claims.”)

Ducote v. State, Dep't of Soc. & Health Servs., 167 Wn.2d 697, 702, 222 P.3d 785 (2009)(negligent investigation claims “do not exist under common law in Washington” because of “the chilling effect such claims would have on investigations.”)(citing *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999); *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999)).⁵

WSAJ next claims this Court only has “referenced the ‘no duty’ rule developed in the courts of appeals,” and has done so where the issue instead “involved the proper interpretation of a statutory cause of action.” Thus, according to WSAJ, there “is no *binding* decision *from this Court*” on negligent investigation because this Court “has never squarely examined the issue” and

⁵ WSAJ oddly claims that in a footnote’s dicta “Division I questioned whether its refusal in *Dever* to recognize a common law claim of negligent investigation was consistent with this Court’s decision.” WSAJ Br. 17 n. 8 (citing *Hanson v. City of Snohomish*, 65 Wn. App. 441, 444 n. 1, 828 P.2d 1133 (1992), *rev’d on other grounds*, 121 Wn.2d 552, 852 P.2d 295 (1993)). This not only ignores that *this Court* later relied on and followed *Dever*’s progeny to reject such claims, *see e.g. Ducote*, 167 Wn.2d at 702, but that immediately after *Hanson* and repeatedly thereafter on its own, Division I followed its *Dever* holding that a negligent investigation cause of action “would impair vigorous prosecution and have a chilling effect upon law enforcement.” *See Lambert v. Morehouse*, 68 Wn. App. 500, 505, 843 P.2d 1116 (1993); *see also e.g. Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723, 735 (2013) (“Washington common law does not recognize a claim for negligent investigation because of the potential chilling effect such claims would have on investigations.”)(citing *Dever, supra.*)(“No Washington court has ever recognized a separate and distinct cause of action for negligent investigation”); *Ducote v. State, Dep’t of Soc. & Health Servs.*, 144 Wn. App. 531, 534, 186 P.3d 1081 (2008), *aff’d*, 167 Wn.2d 697, 222 P.3d 785 (2009) (“There is no common law cause of action for negligent investigation.”)(citing *Dever, supra.*); *Lesley for Lesley v. Dep’t of Soc. & Health Servs.*, 83 Wn. App. 263, 273, 921 P.2d 1066, 1072 (1996) (“The *Dever* court reasoned that recognizing such a cause of action “would impair vigorous prosecution and have a chilling effect upon law enforcement.”)

“its statements appear to be dicta.” WSAJ Br. at 3, 6-7 (emphasis added)(citing *Wrigley v. State*, 195 Wn.2d 65, 455 P.3d 1138 (2020); *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009); *M.W. v. Dept. of Social and Health Services*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003)). Again, WSAJ’s argument is inaccurate.

While it is true that the Courts of Appeals decisions addressing negligent investigation have provided more detail as to the reasons for the courts’ analysis, it is incorrect to say that this Court has never squarely examined the issue. For example, in *Wrigley*, the issue before the court was whether DSHS owed a duty to the plaintiff to investigate a report of possible future harm to a child over whom DSHS had exercised jurisdiction. Although the Court’s analysis in *Wrigley* was focused on whether a duty arose under RCW 26.44.050, acknowledgement of the lack of a common law claim for negligent investigation was a necessary corollary of the Court’s analysis. This is so because, as explained by this Court previously, governmental entities can be subject to both common law duties (duties that governments have in common with private persons) and unique, statutorily-imposed governmental duties (*not* also imposed on private persons) that are for the benefit of the public as a whole. *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 887-88, 288 P.3d 328 (2012) (Chambers, J. concurring) (discussing common law duty applying to government under premises liability law as opposed to

the statutory duty to issue building permits”); *Oberg v. Dep't of Natural Res.*, 114 Wn.2d 278, 787 P.2d 918 (1990) (discussing difference between State’s common law duty as landowner as compared to statutorily-imposed public duty to provide fire protection services, and finding that public duty did not “subsume” common law duty as property owner).

Similarly, in *Ducote v. Dep’t of Soc. & Health Servs.*, *supra*, this Court was asked to refine a negligent investigation claim under RCW 26.44.050, and to determine the class of persons for whom the claim exists. In reaching its decision that stepparents were not within the class of persons for whose especial benefit RCW 26.44.050 was enacted, this Court necessarily had to examine how this cause of action came to be recognized, and as such, the court’s analysis began with its express acknowledgement that Washington does not recognize a common law claim for negligent investigation. 167 Wn.2d at 702. Contrary to WSAJ’s assertion, this first step was essential to the *Ducote* court’s analysis because *if there had been a common law duty, there would be no need* to find an implied cause of action in RCW 26.44.050⁶. Moreover, in *Ducote*, this Court expressly endorsed the policy reasons cited by prior Courts of Appeals decisions as the basis for the rule.

⁶ In *Tyner v. Dept. of Soc. & Health Serv’s*, 141 Wn.2d 68, 1 P.3d 1148 (2000), this Court applied the three part test from *Bennett v. Hardy*, 113, Wn.2d 912, 784 P.2d 1258 (1990), to find an implied cause of action for negligent investigation in RCW 26.44.050.

Ducote, 167 Wn.2d at 702-03 (“in general, a claim for negligent investigation does not exist under the common law in Washington. That rule recognizes the chilling effect such claims would have on investigations.”) Indeed, the Supreme Court not only has held “[o]ur courts have not recognized a general tort claim for negligent investigation,” *M.W.*, 149 Wn.2d at 601 (emphasis added), but acknowledges “we have not recognized a general tort claim of negligent investigation.” *See Wrigley*, 195 Wn.2d at 76 (emphasis added)⁷. This Court’s repeated rejection of a negligent investigation duty is not *dictum* because its rejection was essential to the Court’s analysis in these cases. *See e.g. Earley v. State*, 48 Wn.2d 667, 672, 296 P.2d 530 (1956)(“quoted language is not dictum, for it reveals the rationale of that decision.”)

Finally, WSAJ’s “overview” neglects to mention the rejection of a common law duty to investigate and was not only “developed by the courts of appeal” *of our state*, but also is the established common law rule. *See Dever*, 63 Wn. App. at 45 (noting “other jurisdictions have held that no such action [for negligent investigation] exists.”) (citing *Smith v. State*, 324 N.W.2d 299, 302 (Iowa 1982); *Drake v. State*, 126 Misc.2d 309, 482 N.Y.S.2d 208, 210 (N.Y. Ct.Cl. 1984); *Boose v. Rochester*, 71 A.D.2d 59, 421 N.Y.S.2d 740, 744 (N.Y. App.Div.1979); *Gisondi v. Harrison*, 120 A.D.2d 48, 507

⁷ Further, this Court declined to accept review in *Dever v. Fowler*, *supra*, the first case from a Washington appellate court declining to recognize a cause of action for negligent investigation.

N.Y.S.2d 419, 423 (N.Y.App. Div.1986)). Indeed, the “courts that have considered whether to recognize a common law tort of negligent investigation by law enforcement officers have held that no such tort exists.” See *Lahm v. Farrington*, 166 N.H. 146, 90 A.3d 620, 623–24 (NH 2014)(citing e.g. *Waskey v. Municipality of Anchorage*, 909 P.2d 342, 344 (Alaska 1996)). See also *Twomey v. Tuscaloosa Cty.*, 2019 WL 2325945, at *11 (N.D. Ala. 2019); *Hogue v. City of Phoenix*, 240 Ariz. 277, 378 P.3d 720, 724 (Ariz. Ct. App. 2016); *Shelton v. City of Westminster* 138 Cal.App.3d 610, 621–622, 188 Cal.Rptr. 205 (1982); *Wilson v. O’Neal*, 118 So.2d 101, 105 (Fla. App. 1960), cert. denied, 365 U.S. 850 (1961); *Wimer v. State*, 122 Idaho 923, 841 P.2d 453, 455 (Idaho Ct. App. 1992); *Flores v. Dalman*, 199 Mich. App. 396, 502 N.W.2d 725 (1993); *Geissler v. Catanio*, 2018 WL 3141832, at *18 (D. N.J. 2018); *Inman v. City of Whiteville*, 236 N.C.App. 301, 308, 763 S.E.2d 332 (2014); *Snyder v. U.S.*, 990 F.Supp.2d 818, 832-833 (S.D. Ohio 2014); *Casteel v. Tinkey*, 151 A.3d 261, 270–71 (Pa. 2016)); *Bromund v. Holt*, 24 Wis.2d 336, 129 N.W.2d 149, 153–54 (1964).

B. NO “CLEAR SHOWING” THAT 30 YEAR ADHERENCE TO THE COMMON LAW RULE WAS “INCORRECT” AND “HARMFUL”

Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” See *State*

v. Johnson, 188 Wn.2d 742, 756, 399 P.3d 507 (2017)(quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Accordingly, this Court does “not lightly set aside precedent,” *id.* (citing *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008)), but requires “a *clear showing* that an established rule is incorrect *and* harmful before it is abandoned.” *Id.* at 756-57 (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))(emphasis added). The Supreme Court requires such a showing so the law will not be seen as “subject to incautious action or the whims of current holders of judicial office.” *Stranger Creek, id.* at 653.

Though the ““party seeking to overrule a decision’ *must make this showing*,” *Johnson*, 188 Wn.2d at 757 (quoting *Kier*, 164 Wn.2d at 804; *State v. Barber* , 170 Wn.2d 854, 864, 248 P.3d 494 (2011))(emphasis added), Mancini has not expressly requested our state’s precedent be overruled or attempted to make such a showing. *See generally* Mancini Pet. for Rev.; Mancini Supp. Br. Instead, only Amicus WSAJ makes the request, WSAJ Br. 6-17, but a “case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court.” *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (quotation marks and citation omitted). *See also e.g. Ruff v. Cty. of King*, 125 Wn.2d 697, 704 n. 2, 887 P.2d 886 (1995)(“this court need not consider this issue”) (citing cases);

State v. Gonzalez, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988)("[W]e have many times held that arguments raised only by amici curiae need not be considered"); *Comm'r of Pub. Safety v. Freedom of Info. Comm'n*, 312 Conn. 513, 93 A.3d 1142, 1166 (2014) (declining "invitation of the amici to overrule" precedent because plaintiff "does not expressly ask us to overrule [precedent], ... the amici raise this issue for the first time in these proceedings," and "an amicus brief can be helpful in elaborating issues properly presented by the parties, [but] it is normally not a method for injecting new issues into an appeal, at least in cases where the parties are competently represented by counsel").

In any case, Amicus WSAJ fails to make the showing necessary to overrule 30 years of Washington precedent holding that Washington does not recognize a common law claim for negligent investigation.

1. Lack of a Common Law Duty to Investigate Is Not "Incorrect"
Amicus WSAJ appears to argue the common law's rejection of an investigative duty meets the "being 'incorrect' prong" of the two-part *stare decisis* test since it supposedly is "inconsistent" and violates "logic and common sense." WSAJ Br. 7-12, 16-17. A careful review of this argument shows otherwise.

First, WSAJ claims the absence of a common law negligent investigation claim is contrary to the "duty of reasonable care with respect to ... *affirmative acts* creating a risk of foreseeable harm." *Id.* at 7-12 (emphasis added). How-

ever, Mancini’s claim here does not allege negligence with respect to “affirmative acts” during the investigation leading up to the entry. Rather, she pleads in her complaint, and tried in court, the claim that police were negligent for *omitting* affirmative acts of investigating *more* before they exercised the privilege to enter under the authority of a lawful warrant. *See* CP 2-8; Tacoma’s Reply 12-18 (record citations). The last thirty years of this state’s precedent rejecting such claims – and the additional decades of precedent in other states – is *fully consistent* with “[t]he common law of torts [which] has long distinguished between ‘acts’ and ‘omissions,’ refusing to impose liability for the latter” *See Robb v. City of Seattle*, 176 Wn.2d 427, 435-37, 295 P.3d 212 (2013)(citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 56, at 339–40 (4th ed. 1971); Restatement (Second) of Torts § 302 cmt. a (1965)).⁸

⁸ WSAJ argues that the City misapprehends the duty analysis underlying *Beltran-Serrano*. Br. P. 11. According to WSAJ, any time police officers take an affirmative act in furtherance of the statutorily imposed duty “to provide police services, enforce the law and keep the peace,” the government is necessarily assuming a common law duty of reasonable care. Thus, under WSAJ’s argument, if a government does not take action to fulfill its statutorily imposed duties (duties imposed for the benefit of the public), there is no enforceable tort duty, but if the government does take action to fulfill its statutory public duties, it is subject to negligence liability. This argument misapprehends the public duty doctrine and turns decades of this Court’s jurisprudence on its head. In order to determine whether the government owes a duty in any particular case, the salient question is not whether the government has chosen to act. The salient question is whether the duty is owed to the general public or the individual. As succinctly outlined in the *Munich* concurrence, “the public duty doctrine applies to governmental duties mandated by legislative bodies and not common law duties owed by every private and public entity alike[.]” *Munich*, 175 Wn.2d at 894. As this Court very recently reaffirmed in *Beltran-Serrano*, the statutorily imposed duty “to provide police services, enforce the law and keep the peace” . . . “have always been, and will continue to be, nonactionable duties owed to the public at large.” *Beltran-Serrano*, 193 Wn.2d at 551-52.

Indeed, *none* of WSAJ’s citations in support of “affirmative act” liability found a common law duty breached by an alleged *failure to act* during a police investigation – and none support doing so now. *Compare* WSAJ Br. 8-11 with *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532 (2011)(in suit for affirmative act of *negligent design by engineering company*, Court held “construction design professionals had a duty not to cause injury or death because of a collapse of a building”); *Robb*, 176 Wn. 2d 436-37) (requiring *dismissal of negligence claim* for failure of police *investigating a call* to remove shotgun shells from shooter’s access because it was “more properly considered a *case of omission* than *affirmative action*”) (emphasis added); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 759-60, 310 P.3d 1275 (2013) (duty arose when officer actively *served protective order on abuser in the presence of his victim* before leaving, because those *acts* “created a new and very real risk to [the deceased’s] safety based on [her abuser’s] likely violent response to the antiharassment order and his access to [her”⁹ See

⁹ WSAJ characterizes the process of “targeting Mancini’s residence for an armed raid” as an “affirmative act.” WSAJ Br. 11-12. However, the negligence actually alleged here was not that police focused their suspicions on her apartment as a place of drug trafficking, but instead was the supposed “negligence in *obtaining warrant*” by failing to do a *better* investigation before the warrant was obtained. CP 2-8, 561, 564, 569 (emphasis added); Tacoma’s Reply 12-18 (record citations). Mere “targeting” of the investigation on Mancini’s apartment, without having any contact with her until *after* entering the apartment under the already lawfully obtained warrant, was not the issue litigated in this case and did not involve *Beltran’s* concern for alleged negligence occurring while “*in the course of law enforcement interactions* with” the Plaintiff. See *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550-52, 442 P.3d 608 (2019).

also Tacoma Answer to Pet. for Rev. 5-8; Tacoma Supp. 8; WSAC et al. Br. 15-16. The decades of precedent by Washington courts and other states instead has long rejected the *different* issue of a common law investigative duty. *See* discussion *supra*, at Section II.A.

One reason the common law rejects such a duty, especially for police investigations, is because: “Everything law enforcement *undertakes* conceivably might have some impact on a particular family or individual” and if a “broad view of ‘duty by undertaking’ were the law, ... ‘[e]very unsolved crime could then theoretically give rise to a cause of action by the victim or a deceased victim's relatives for negligent investigation.’” *See Vasquez v. State*, 220 Ariz. 304, 206 P.3d 753, 762 (Ariz. Ct. App. 2008). *See also Hogue v. City of Phoenix*, 240 Ariz. 277, 281, 378 P.3d 720, 724 (Ariz. Ct. App. 2016)(same).

Second, WSAJ claims common law precedent is contrary to “logic and common sense” because it supposedly forbids a “‘negligent investigation’ tort” even though Amicus found three cases “permit[ing] claims in a variety of contexts to be based on negligent investigative acts.” WSAJ Br. 16-17. However, none of those cases allege a separate common law duty to investigate. Instead, each addressed only whether there was a duty under one of the narrow exceptions to the *different common law rule* that there is no duty to protect others from the *intentional torts of third parties*.

Thus, the cited *H.B.H v. State*, 192 Wn.2d 154, 168-78, 429 P.3d 484 (2018), concerned the common law “protective special relationships” exception that created a DSHS duty to protect children it placed in foster care from abuse by foster parents. The *Wrigley* decision rejected DSHS liability under the explicit RCW 26.44.050 statutory duty to investigate before a father killed his son when no prior report of abuse had been made, though *dicta* in a footnote opined the father’s “prior acts of domestic violence *against*” *the mother* “*may* be appropriately addressed in a general negligence claim on remand.” *See Wrigley*, 195 Wn.2d at 78 n. 7. Because *Wrigley*’s substantive analysis had just reaffirmed “we have *not recognized a general tort claim of negligent investigation*,” *id.* at 1144 (emphasis added), the footnote’s reference to a claim for not *protecting the mother* that “*may* be appropriately addressed in a general negligence claim,” could not have concerned a negligent investigation tort. Presumably the footnote referenced a potential claim – again inapplicable here – under the exception to the rule concerning a third party’s intentional torts. Finally, *Taggart v. State*, 118 Wn.2d 195, 213-14, 822 P.2d 243 (1992), concerned – as even WSAJ admits – the common law *special relationship* exception creating a “‘take charge’ duty owed by a parole officer based on the officer’s failure to investigate reports of parole violation.” *See* WSAJ Br. 16.

That this Court has recognized exceptions, inapplicable here, that create

a common law duty to protect against the intentional acts of third parties does not make the otherwise general absence of an investigative duty a violation of “logic and common sense.” More importantly, where – as here – there is neither a failure to protect against the intentional acts of a third party nor a claim of a “special relationship,” WSAJ’s citation to those principles come nowhere near being a “clear showing” the 30 year rejection of a separate tort of “negligent investigation” has been “incorrect.”

2. Absence of Negligent Investigation Tort Has Not Been “Harmful”
WSAJ next seems to argue the absence of a common law duty to investigate meets the second *stare decisis* prong of being “harmful” since it supposedly “cannot be justified as a matter of public policy” and “undermines considerations of justice.” WSAJ Br. 12-16. This too is erroneous.

First, as to public policy, WSAJ a) gives no weight to the grounds favoring the long established precedent at issue; b) discusses at length only interests it claims oppose that precedent; and c) wrongly asserts “[n]o Washington court to date has balanced the public policies implicated by the no duty rule.” *Id.* In fact, an investigative duty was rejected precisely *because* the Court has balanced the public interests. *See e.g. Wrigley*, 195 Wn.2d at 76 (“To balance” societal interests “in the context of investigations, we have not recognized a general tort claim of negligent investigation”). This balancing is especially important for negligent police investigation claims, given the importance of the societal issues at stake.

Our Courts have long held that *rejecting* a common law investigative duty, while *allowing* actions for *intentional torts occurring during police investigations*, “strike[s] the appropriate balance between the public's right to have a criminal apprehended and the suspect's right to be free from injury.” *Keates v. City of Vancouver*, 73 Wn. App. 257, 266–68, 869 P.2d 88 (1994)(rejecting negligence claim for police investigation because no duty was owed and the “utility of the investigative conduct, ... vastly out-weighs the risk of harm.”) (*citing Hanson*, 121 Wn.2d at 557 (“it is to the best interest of society that those who offend against the law shall be promptly punished; that any citizen who has good reason to believe that the law has been violated shall have the right to take proper steps to cause the arrest of the offender; and that in taking such steps the citizen who acts in good faith shall not be subjected to damages merely because the accused is not convicted”).¹⁰. Such a resolution results from the fact the rights of those suspected of crime must be balanced with “the central roles which police and prosecutors play in maintaining order in our society and the burdens imposed on each of us as

¹⁰ WSAJ suggests the “balance” it prefers would be to grant “qualified immunity” to officers and hold only municipalities liable. WSAJ Br. 4, 13-15. Apart from the fact the efficacy of such an approach has not been borne out by experience, *see e.g.* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 *Notre Dame L. Rev.* 1797, 1811–13 (2018); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 *U. Pa. J. Const. L.* 797, 818-21 (2007), WSAJ suggesting its own alternate balance without addressing any supposed defect in the balance made by the Courts is not a “clear showing” the Court’s balance somehow has been “harmful.”

citizens as part of the price for that order.” *Keates*, 73 Wn. App. at 267 (quoting *Hanson*, 121 Wn.2d at 568 (Utter, J., dissenting)). See also Answer to ACLU, p. 3-6. Further, the “right to be free of restraint ... is limited by the obvious policy of the law to encourage proceedings against those who are apparently guilty of criminal conduct” so “plaintiff’s recovery must be determined by established rules defining the torts of false arrest and imprisonment and malicious prosecution, rules which permit damages only under circumstances in which the law regards the imprisonment or prosecution as improper and unjustified.” *Boose*, 421 N.Y.S.2d at 744 (cited with approval in *Dever*, 63 Wn.App. at 45).

In short, it is well settled that a tort of negligent investigation would “impair vigorous prosecution and have a chilling effect upon law enforcement” as well as “give rise to potentially unlimited liability for any type of police activity.” *Keates*, 73 Wn. App. at 269. Contrary to WSAJ’s claim, a balancing of the public interests at stake has not only been made but is the basis for the precedent amicus now seeks to overturn. This Court “will not ‘overrule prior decisions based on arguments that were adequately considered and rejected in the original decisions themselves.’” *Johnson*, 188 Wn.2d at 757 (quoting *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011)).

Second, WSAJ also argues the common law is “harmful” because it supposedly undermines “considerations of justice” since potential plaintiffs such

as Mancini allegedly “are utterly powerless against government entities, which are entrusted with the unparalleled authority to execute an armed and potentially violent raid of a private residence without permission¹¹ or warning.” WSAJ Br. 16. That Mancini here was very much empowered to bring several intentional tort claims against Tacoma (and actually submitted those claims to a jury, *see e.g.* CP 2-8, 525-28), disproves any supposed “powerlessness.” That a jury of her peers found against her on these claims (because the jury found officers had not behaved as she claimed when entering her apartment under a lawful warrant, *id.*), is not a denial of justice but its fulfillment.

WSAJ has identified nothing that has changed since the common law rule at issue was adopted that would justify a change in that long settled law. When the reasons for a rule continue to exist, so should the rule.

C. *CHENOWETH* SUPPORTS FOLLOWING COMMON LAW RULE

WSAJ claims Tacoma’s reference to the probable cause warrant requirement of *State v. Chenoweth*, 160 Wn.2d 454, 478-9, 158 P.3d 595 (2007) “overlooks the core issue on review, misreads *Chenoweth*, and disregards the

¹¹ Again, WSAJ’s assertion that law enforcement’s entry into Mancini’s home was “without permission” is a gross misstatement of the record. Law enforcement’s entry into Mancini’s home was done “with permission” from the superior court, and therefore, was privileged. *See Brutsche, supra.*

differences between tort remedies and safeguards governing rights of criminal defendants.” WSAJ Br. 17. These assertions not only are mistaken but contradict WSAJ’s positions.

The core issue in this review is the absence of a common law duty to investigate, and WSAJ agrees imposing a duty “rests on considerations of ... public policy” WSAJ Br. 3. So too “probable cause represents an accommodation between the ‘opposing interests’ of police officers and criminal suspects, ... *the same interests* that we must balance here” in analyzing a claimed negligent investigation tort remedy. *See Lahm v. Farrington*, 166 N.H. 146, 153, 90 A.3d 620, 626 (2014) (rejecting claim that “something beyond probable cause—the ‘reasonable investigation’ [Plaintiff] demands —” is a required common law duty.) Thus, the *same policy concerns* that preclude a tort of “negligent investigation” are the same reasons underlying *Chenoweth*’s rejection of a negligence standard as “unworkable” for analyzing under state and federal criminal law the validity of grounds for a warrant. *See Chenoweth*, 160 Wn.2d at 473; *see also e.g. Franks v. Delaware*, 438 U.S. 154, 177 (1978) (“[a]llegations of negligence or innocent mistake are insufficient” to invalidate a warrant.)

Toward that end, there cannot be *different standards* in criminal and civil tort cases for the *same conduct* by *the same officials* without forcing police to choose between advancing public safety or protecting themselves and their

employer from liability. Indeed, in that WSAJ argues civil liability changes police practices, WSAJ Br. 12-13, the result would be to abandon decades of the delicate balancing of public safety concerns with private rights that are enshrined in the criminal and civil law to create instead a “broadly stated and apparently novel theory of negligence ...” *Geissler v. Catanio*, 2018 WL 3141832, at *18 (D.N.J. 2018)(rejecting “negligent failure to investigate as a common law cause of action”). WSAJ’s proposal would not overturn “incorrect and harmful” precedent... it would create it.

III. CONCLUSION

For the reasons stated herein, this Court should reject the arguments made by Amicus WSAJ and should affirm Division I’s opinion.

DATED this 24th day of April, 2020.

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On April 24, 2020, I hereby certify that I electronically filed the foregoing RESPONDENT CITY OF TACOMA'S ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS BRIEF with the Clerk of the Court, which will send notification of such filing to the following:

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