

64281-2

64281-2

NO. 64281-2

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

MARIO LaPLANT and CRYSTA PENNAMEN,

Respondents,

v.

SNOHOMISH COUNTY; JOHN DOES 1 – 10,

Appellants.

---

REPLY BRIEF OF APPELLANTS

---

MARK K. ROE  
Snohomish County Prosecuting Attorney  
BRIDGET E. CASEY, WSBA 30459  
Deputy Prosecuting Attorney  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-6330

FILED  
COURT OF APPEALS DIV. I  
2010 JUN 21 PM 4:34

ORIGINAL

## Table of Contents

I. INTRODUCTION.....	1
A. The trial court erred in failing to dismiss the negligent training and supervision claims in this posture.....	1
1. The negligence claim against Snohomish County requires the jury to determine whether the deputies' actions were negligent.....	1
2. The Federal Decision is Distinguishable.....	4
B. Allowing Prior Bad Act Evidence to Prove the Redundant Claims is Highly Prejudicial. ....	5
II. CONCLUSION .....	8

## Table of Authorities

### Washington State Cases

<u>Gilliam v. State,</u> 89 Wn. App. 569, 584-86, 905 P.2d 20 (1998).....	2, 3, 4, 5, 6, 7
<u>Rodriguez v. Perez,</u> 99 Wn. App. 439, 451, 994 P.2d 874 (2000).....	2, 3, 4, 5, 6, 7
<u>Shielee v. Hill,</u> 47 Wn.2d 362, 365, 287 P.2d 479 (1955) .....	4

### Federal Cases

<u>Logan v. City of Pullman Police Dept.,</u> CV-04-214-FVS 2006. WL 994754 (E.D. Wash 2006).....	6
<u>Tubar v. Clift,</u> 2008 WL 514932, 7 (W.D. Wash., 2008) .....	5, 6, 7

### Federal Statutes

42 U.S.C. 1983.....	4
---------------------	---

### Court Rules

CR 12(b)(6) .....	2
ER 404(b).....	6, 7, 8

## **I. INTRODUCTION**

The trial court erred in failing to dismiss redundant negligent training and supervision claims. The central question in the case is whether the officers were negligent. Allowing the negligent training and supervision claims to proceed permits LaPlant and Pennamen to try nonviable claims and poison the remaining respondeat superior claims with unfairly prejudicial bad act evidence. This Court should reverse the trial court's denial of the County's motion to dismiss negligent training and supervision in this matter.

### **A. The trial court erred in failing to dismiss the negligent training and supervision claims in this posture.**

#### **1. The negligence claim against Snohomish County requires the jury to determine whether the deputies' actions were negligent.**

LaPlant's extensive discussion of the Snohomish County Sheriff's Office pursuit policy and potential jury instructions only serves to reinforce the fact that the crux of this case, no matter how it is labeled, rests on whether the deputies were negligent. Put another way, does the jury's determination whether the employer was negligent depend on whether the individual employees were negligent? Whether Snohomish County negligently trained and supervised deputies in conducting pursuits does not have any

relevance if it is not placed in the context of the specific pursuit that is in question in this case.

Thus, to find Snohomish County negligent on training and supervision also requires finding at least one of the deputies negligently conducted the pursuit in question. That is precisely the analysis which renders the training and supervision claims redundant under Gilliam and Rodriguez. See Gilliam v. State, 89 Wn. App. 569, 584-86, 905 P.2d 20 (1998) and Rodriguez v. Perez, 99 Wn. App. 439, 451, 994 P.2d 874 (2000).

In Rodriguez, plaintiffs brought a negligent investigation claim against police officers and governmental agencies based on an investigation conducted by the police officers. 99 Wn. App. at 441. Plaintiffs also claimed negligent training and supervision of these officers during investigations of allegations of child abuse. Id. The trial court dismissed plaintiffs' claims for negligent investigation and negligent supervision against the law enforcement agencies and their officers pursuant to CR 12(b)(6) and plaintiffs appealed. Id.

At the end of the decision when addressing trial court's dismissal of negligent supervision claims the Court of appeals noted:

[i]f the police officers are found to be negligent in their investigation, then their employers may be held vicariously liable. If the appellants fail to prove negligence, then the employers cannot be held liable even if their supervision was negligent. Based upon the facts presented here, no additional cause of action for negligent supervision is necessary.

99 Wn. App. at 451, citing Gilliam, 89 Wn. App. at 584-585.

Rodriguez specifically precludes the scenario put forward by LaPlant describing verdicts the jury could reach if allowed to consider the underlying negligence claim and the negligent supervision and training claims. While Plaintiff might show how a jury could find the deputies were not negligent and the County was negligent in training and supervising officers, allowing Plaintiff to pursue claims based on respondeat superior and negligent training and supervision is impermissible under Washington law. See Gilliam v. State, 89 Wn. App. 569, 584-86, 905 P.2d 20 (1998); Rodriguez v. Perez, 99 Wn. App. 439, 451, 994 P.2d 874 (2000); and Shielee v. Hill, 47 Wn.2d 362, 365, 287 P.2d 479 (1955).

Aside from arguing the Gilliam decision was limited to the specific facts of that case, LaPlant has not cited a case in which respondeat superior negligence claims and training and supervision claims were allowed to go forward, and the decision to allow both claims was upheld over a challenge to that decision. Plaintiffs

essentially want to pursue a hybrid claim based on acts that occurred within the scope of employment that will automatically subject an employer to respondeat superior liability and training and supervision claims, that would not otherwise be relevant unless the acts were alleged to have occurred outside the scope of employment. LaPlant's attempt to demonstrate how the jury could reach verdicts that are not redundant or inconsistent cannot overcome the clear guidance and precedent of Rodriguez.

## **2. The Federal decision is distinguishable.**

LaPlant cites an out of jurisdiction trial court decision in support of his argument to allow the redundant negligent training and supervision claims to go forward. Tubar v. Clift, 2008 WL 514932, 7 (W.D. Wash., 2008). Tubar relied on Gilliam, in which the court found that because Plaintiff Gilliam had asserted a negligence claim against the employee, and the employer admitted vicarious liability, the claim for negligent supervision was redundant. Id. at 8. That is the exact situation before this court. Nevertheless, the Tubar Court found there was no redundancy because the plaintiff in Tubar had only made a §1983 claim against the individual officer; no negligence claim against the individual officer was alleged. Id. Tubar inexplicably did not discuss

Rodriguez. Tubar does not overrule Gilliam; instead it distinguishes Gilliam based on its unique facts. That basis for distinguishing Gilliam does not exist here.

The Tubar decision similarly distinguishes Logan v. City of Pullman Police Dept. from the facts of Tubar:

The City also argues that allowing the state negligence claim to proceed would be unfairly prejudicial, and cites Logan v. City of Pullman Police, No. CV-04-214-FVS, 2006 WL 994754 (E.D.Wash.2006), for support. However, in Logan, the court dismissed a negligent supervision claim for the same reasons articulated in Gilliam. The court stated: "The reason the Gilliam court held that the plaintiff's claim for negligent supervision against the employer was redundant with the plaintiff's claim for vicarious liability is that both causes of action rested upon a determination that the employee was negligent .... The same is true here."

Tubar v. Clift, 2008 WL 5142932, 7 (W.D.Wash., 2008).

Here, both causes of action rest upon a determination that an officer was negligent. That is what distinguishes this case from Tubar and results in this case falling squarely within the holdings of Gilliam and Rodriguez.

**B. Allowing prior bad act evidence to prove the redundant claims is highly prejudicial.**

LaPlant argues the County has not submitted any evidence in support of the argument that allowing the negligent training and

supervision claims to go forward will allow for the admission of evidence that would not survive an ER 404(b) analysis under a general negligence claim. Plaintiffs have sought discovery and indicated intent to introduce evidence of prior pursuits of Deputy Calnon that are alleged to be out of policy. Motions in Limine Hearing 9/25/2009 RP 19, 48-50. The County sought a motion in limine excluding evidence of prior (and subsequent) pursuits under ER 404(b) which was opposed by Plaintiffs. Motions in Limine Hearing 9/25/2009 RP 48-50. The trial court reserved ruling on whether ER 404(b) prior bad act evidence will be admissible until the Court reviews specific instances of alleged misconduct. CP 6.

The County is not asking this Court rule in a vacuum that any prior or subsequent pursuits are not admissible. What the County is asking this Court to do is to preclude Plaintiffs from using the negligent training and supervision claims as a vehicle to put evidence before the jury that would not be admissible but for the additional and redundant claims. Once that evidence is before the jury, there is no way to prohibit the jury from relying on the collateral and prejudicial evidence to reach its decision on the whether the deputies negligently conducted the pursuit in question.

Denying the redundant claims will set a clear rule that if ER 404(b) prior bad act evidence is offered, it may only be admitted after specific findings regarding its admissibility on the primary negligence claim.

LaPlant has suggested a hypothetical exception to the general prohibition of ER 404(b) in which evidence of prior pursuits could be admissible under a general negligence claim. LaPlant fails to suggest anything close to a realistic hypothetical the trial court will actually face in this case. It is extremely difficult to see how the trial court would allow evidence of prior and subsequent pursuits into evidence on the primary negligence claim except in extremely limited circumstances. The effect of denying the redundant claims would narrow the trial court's scope of what, if any, prior (or subsequent) bad act evidence should be admitted to prove the primary negligence claim. It would preclude the admission of evidence that is not relevant to the primary negligence claim under ER 404(b), under the guise of it being admissible to prove the redundant training and supervision claims.

Allowing Plaintiffs to proceed with at least some "bad act" evidence, which would not be admissible without the negligent training and negligent supervision claims is error, is highly

prejudicial and will taint the record such that the jury may base its decision of the underlying pursuit, on other alleged out of policy pursuits Plaintiff has evidenced an intent to introduce.

## II. CONCLUSION

The trial court erred in failing to dismiss the negligent training and supervision claims in this posture. The trial court's error will allow LaPlant and Pennamen to try nonviable claims and poison the remaining respondeat superior claims with unfairly prejudicial bad act evidence. This Court should reverse the trial court's denial of the County's motion to dismiss negligent training and supervision in this matter.

Respectfully submitted on June 21, 2010.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
BRIDGET E. CASEY, WSBA # 30459  
Deputy Prosecuting Attorney  
Attorneys for Appellants

**DECLARATION OF SERVICE**

I, Gail Bennett, hereby certify that I served a true and correct copy of the foregoing Reply Brief of Appellants upon the person/persons listed herein by the following means:

Atty/LaPlant: Mark Leemon Leemon & Royer 2502 Second Avenue, Suite 610 Seattle, WA 98121 206-269-1100/phone (206) 269-7424 /fax leemon@leeroylaw.com /email	[ ] Email [ ] Facsimile [ ] Express Mail [ ] U.S. Mail [ ] Hand Delivery [X] Via ABC Messenger Service no later than 4:30 p.m. of June 21, 2010
Atty/Pennamen Allen Ressler Ressler & Tesh 821 Second Avenue Suite 2200 Seattle, WA 98104 206-388-0333 /phone 206-388-0197 allen@randtlaw.com /email	[ ] Email [ ] Facsimile [ ] Express Mail [ ] U.S. Mail [ ] Hand Delivery [X] Via ABC Messenger Service no later than 4:30 p.m. of June 21, 2010

FILED  
 COURT OF APPEALS DIV. #1  
 STATE OF WASHINGTON  
 2010 JUN 21 PM 4:34

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 21st day of June, 2010.

  
 \_\_\_\_\_  
 Gail Bennett  
 Legal Assistant to Bridget E. Casey  
 Deputy Prosecuting Attorney