Supreme Court No. _____

COA No. 59220-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

LISA EARL, on behalf of and THE ESTATE OF JACQUELINE SALYERS,

Petitioner,

v.

CITY OF TACOMA; SCOTT CAMPBELL, and AARON JOSEPH a/k/a AARON KOMOMUA,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Lisa Earl, the mother and the personal representative of the estate of her daughter Jacqueline Salyers. Earl brought suit alleging negligence claims against police officers Scott Campbell and Aaron Joseph, a vicarious liability claim against City of Tacoma for the negligence of its employees, and a negligent retention claim against Tacoma for its own negligence.

II. COURT OF APPEALS DECISION

Earl seeks review of the published decision in *Earl v. Campbell, et al.*, (COA No. 59220-7-II), issued on June 17, 2025, reconsideration denied on July 27, 2025. Appendices A & B.

In this interlocutory appeal, the Court of Appeals reversed the Superior Court's decision allowing Earl to file an amended complaint which added a negligent retention claim against Tacoma based on its failure to exercise care by continuing to employ Joseph, when Tacoma knew Joseph had a propensity to assault others. Tacoma acknowledged that both officers were

acting "within the course and scope" of their employment at the time their respective actions led up to and included killing Salyers. The Court of Appeals held, "where an employer agrees that it would be vicariously liable because *the* employee was acting within the scope of employment when *the* employee committed *the* negligent act on which the lawsuit is based, a negligent retention claim is redundant and not actionable." Appendix A-8 (italics added).

III. ISSUES PRESENTED FOR REVIEW

This case presents the Court with important and unresolved legal issues concerning the interaction of claims seeking to hold police officers and their municipal employers accountable for actions leading up to and including the use of force, and claims of negligent retention of an "unfit" employee where that employee is a police officer. Long ago this Court recognized "there may be more than one proximate cause for the same injury," and that "[t]he negligence of different persons, though otherwise independent, may concur in producing the

same injury. In such a case all are liable ...." *Estes v. Brewster Cigar,* 156 Wash. 465, 471, 287 P.36 (1930).

The Court of Appeals, however, concluded that "the majority of the text on page 471 [of *Estes*] was overruled in part" by this Court's decision in *Mancini v. Tacoma*, 196 Wn.2d 864, 479 P.3d 656 (2021), and that an additional passage in *Estes* (on pages 473-74) was mere "dictum." *Appendix A-11*, footnote 8. The Court thus held that Earl cannot simultaneously bring vicarious liability and negligent retention claims against Tacoma. Consequently, the issues in this case are:

1. In an action against an employer, may a plaintiff bring both a vicarious liability claim based, in part, on a negligent act of an employee acting within the course of his employment and a claim for negligent retention of that same employee whom the employer knew was unfit for continued employment? Or

must the employee choose one of the two claims pretrial and forego the other?[1]

2. Does the decision below conflict with this Court's decisions in *Estes*, 156 Wash. 465, 287 P.36 (1930) and *La Lone v. Smith*, 39 Wn.2d 167, 234 P.2d 893 (1951), and with several Court of Appeals decisions?

3. Does the decision below subvert the intent of the Legislature which underlies RCW 10.99.090 by making it harder to protect the public and police family members from police officers who have committed, or allegedly have committed, acts of domestic violence?

IV. STATEMENT OF THE CASE

A. Actionability of continued employment of a person known to be violent.

[1] The Superior Court ruled that Earl cannot do any discovery in connection with the added claim of negligent retention until this appeal is over. Thus, Earl has not had the opportunity to conduct any discovery related to that claim.

Negligent retention "consists of … retaining [an] employee with knowledge of his unfitness." *Anderson v. Soap Lake School District,* 191 Wn.2d 343, 358, 423 P.3d 197 (2018). *La Lone*, 39 Wn.2d at 170 ("defendants … were … negligent in retaining in their employ … James Trask, after actual notice … that said Trask was of a violent nature … and … retention … was a proximate cause of [plaintiff's] injuries"). When a job "necessarily brings [an employee] into contact with others *while in the performance of a duty*," and the employer, "without exercising due care," employs "a vicious person" when he "has reason to know" of that person's "propensity" to assault others, then the employer is liable for the injuries that the employee inflicts. *Id.* at 172. *Accord Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 152, n.7, 988 P.2d 1031 (1999), citing the *Restatement (Second) of Torts*, §307 ("Irrespective of whether [employee's] act is within the course of his employment," employer is liable for injury inflicted by retained employee if employee is person that he "knows to be of an exceedingly fiery and violent

temper."). *See, e.g.*, *Fernelius v. Pierce*, 22 Cal.2d 226 (1943) (police chief can be held liable for negligent failure to discharge officers that he knew were brutal and violent); *Grudt v. Los Angeles*, 2 Cal.3d 575, 468 P.2d 825 (1970) (error to dismiss negligent retention claim where plaintiff alleged city negligently continued to employ violent officers). Here, Tacoma knew of Joseph's unfitness but retained him anyway.

B. Joseph's threats to kill his wife, another officer and himself.

On August 4, 2009, Lindsey Joseph reported to the Internal Affairs (IA) section of the Tacoma Police Department (TPD) that her husband had threatened to kill his fellow officer Steven Storwick, and Storwick confirmed this. CP 703-04 (*Appendix D*). She also told Tacoma detectives that her husband had pointed his service pistol at her and threatened to kill her." *Id.* at 704. She told Puyallup detectives that her husband banged his service pistol against a door frame, pointed it at her, held it to her head for five seconds, and threatened to kill her and then kill

himself. *Id.* He told her, "Don't worry, it'll be just like Brame, I'll just take you first and then I'll do me." *Id.*[2]

The Puyallup detectives found her statements and Storwick's statements "very consistent" and corroborated by other evidence. *Id.* at 705. They also noted that TPD IA investigators "were not able to divert [Lindsey Joseph] from giving consistent facts." CP 694, 673. Joseph and his mother later went to the home of Lindsey Joseph's parents and asked them to persuade their daughter to recant. CP 674-76, 693-94, & 775 (*Appendix E*). The parents refused to do that and Lindsey Joseph did not recant. *Id.* Instead, she obtained a court-issued protection order. CP 704 (*Appendix D-2*).

Joseph was arrested and taken to jail. *Id.* He was charged with Assault 2 and Felony Harassment. CP 761-62 (Appendix F).

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[2] Former Tacoma Police Chief David Brame killed his wife Crystal Brame and then himself. CP 55, 57-59, 64. The Estate of Crystal Brame sued Tacoma bringing both a vicarious liability claim and a negligent retention claim. CP 60. *See Kirby v. Tacoma,* 124 Wn. App. 454, 474-75, 98 P.3d 827 (2004).

Under federal law, it is unlawful for any person convicted of *any* domestic violence ("DV") offense to possess a gun.[3] Since every officer must carry a gun, any DV conviction necessarily leads to loss of his job. Aware of that fact, the City dismissed these felony charges and refiled the case with one misdemeanor harassment charge. After a six-month continuance, that charge was also dismissed. CP 273, 448, 698 (Appendix G). And yet Lindsey Joseph was falsely assured that her husband had entered an *Alford* plea to the felony charges. *Id.*

Worse, Tacoma continued to employ Joseph and never took any disciplinary action against him. CP 623. Asserting that it was unable to determine whether Lindsey Joseph's complaint was true, TPD closed its IA investigation and destroyed all its records one year later. CP 505, 312-13,

Seven years later, Joseph precipitated a confrontation with Salyers, a homeless woman living in a car with her husband

[3] *See Gillespie v. Indianapolis*, 13 F.Supp.2d 811 (S.D.1998).

Kenneth Wright, which included Joseph banging the butt of his gun on Salyers' window akin to his actions years before with his wife, and ended with Salyers being shot and killed by Joseph's patrol car partner Campbell.

C. The fatal shooting of Jackie Salyers.

Shortly before midnight on January 28, 2016, while searching for Wright, Joseph and Campbell "spotted Wright seated in the passenger seat of a parked vehicle. Jacqueline Salyers was in the driver's seat. The officers approached the vehicle with guns drawn." *Appendix C-1*. Joseph went to the driver's side; Campbell went to the passenger side. When Salyers put the car in gear and began to drive slowly away, Joseph "was trying to break the driver's side window with the butt of his handgun." *Id.* at *C-2*. "Campbell fired his handgun eight times into the vehicle. Three shots struck Salyers, "one of them fatally striking her in the head." *Id.* at 2.

Joseph said that he never fired his gun. *Id.* Instead, Joseph claimed that "he realized that his firearm was missing its

magazine and he reloaded it with a fresh magazine." *Id.* Hours later his "missing" magazine was found lying on the street. "Relying on Joseph's report that he had not fired his weapon, [Detective] Larsen visually inspected Joseph's weapon and spare magazine and concluded that it had not been fired." *Id.* Larsen did not take possession of Joseph's gun; thus, Joseph's gun was never submitted for forensic testing to see if it had been recently fired. *Id.*

Why Joseph's magazine would simply fall out of his gun; and why "a live round ended up on the pavement next to" the dropped magazine, remained a mystery for years. *Id.* In 2023, however, William Harmening, a police practices expert, found "an inventory form from the evidence unit that showed that Joseph's magazine recovered from the scene was missing one pistol cartridge." *Id.* This raised the possibility that Joseph "accidentally fired his weapon" when he struck his gun against Salyers' window, thereby "causing Campbell to fire his weapon

in what Harmening termed 'contagious fire.'" *Id.* and *Appendix H-5.*

That theory was corroborated by other evidence, including "a witness statement … that one of the officers exclaimed immediately after the shots were fired, 'see what you made me do.'" *Appendix C-2.*

D. Relevant Procedural history.

Initially, Earl sued Campbell, but not Joseph, and brought a vicarious liability/respondeat superior claim against Tacoma. Later, however, Earl discovered (1) Joseph's prior arrest,[4] and (2) evidence suggesting that Joseph's gun *was* fired during the incident in which Salyers was killed, thereby triggering Campbell's fatal shooting. Earl then moved to amend her complaint. The superior court granted her motion, allowing Earl to add a claim against Joseph and a claim of negligent retention

[4] Joseph concealed this fact during his deposition, but it was revealed when Lindsey Joseph's protection order (*see Appendix D-2*) was discovered.

against Tacoma, for not firing Joseph in 2009 when it learned of his violent temper and assaultive behavior. *Appendix A-2*.

The Court of Appeals granted interlocutory review of the ruling allowing Earl to add the negligent retention claim because "there is a conflict between decisions of the Washington State Appellate Courts and the Washington State Supreme Court as it pertains to claims of negligent retention." *Appendix A-7*.[5] The Court of Appeals ultimately reversed the Superior Court's decision concluding that a plaintiff may not simultaneously bring both a vicarious liability claim and a claim of negligent retention of an unfit employee against an employer if the employer agrees that it would be vicariously liable for any employee negligence which a jury might find.

Previously, Earl asked for a transfer of this interlocutory appeal to this Court, thereby accelerating Supreme Court review of the issues raised by this case. Commissioner Michael

[5] The Court denied interlocutory review of the ruling allowing Earl to add a negligence claim against Joseph.

Johnston denied Earl's transfer request, stating that "the better use of judicial resources at this juncture is to allow the Court of Appeals to ponder and determine the certified question, resulting in a decision that may be useful to this court in the event the aggrieved party seeks further review under RAP 13.4." *Appendix C-8*. Earl now seeks further review.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Issues of substantial public interest. (RAP 13.4(b)(4).

Long ago the Legislature "addressed the need for improved coordination and accountability" of Washington law enforcement agencies "when reports of domestic violence are made and the alleged perpetrator is a general authority Washington peace officer." Findings—Intent—RCW 10.99.020. One year after Crystal Brame, the wife of Tacoma police chief David Brame, "was murdered by her husband .. the Washington legislature passed a law requiring police agencies ... to develop officer-involved domestic violence policies." Ginkowski,

Domestic Violence: When the 'Perp' is a Cop, 21-WTR Crim. Just. 14, 15. That statute, RCW 10.99.090, required the development of a written model policy "on domestic violence committed or allegedly committed by" law enforcement officers and mandated that development of procedures for the prompt discipline of such officers. Every law enforcement agency was directed to adopt its own policy on such officers which had to comply with the minimum standards set forth in the statute.

Rightly so because studies have repeatedly shown that compared to males in the general population, male police officers are more likely to engage in DV and to assault women. *See* Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers who Commit Intimate Partner Abuse,* 2015 B.Y.U.L. Rev. 1183. Police are more than twice as likely as civilians to engage in DV, and over a third of officers' wives report violence in their marriage. *On the Front Lines: Police Stress and Family Well-Being, A Fact Sheet,* Report of the House Select Committee, 102d Cong. 32 (1991), at 8.

Absent compliance policies or accountability, given "the reality that officers convicted of a domestic violence crime will almost certainly lose their job because federal law prohibits them from possessing a firearm … the prosecutor may be reluctant to go full circle with prosecution …." Ginkowski, *supra*, at 16. Similarly, absent the availability of negligent retention claims as well as vicarious liability claims, municipalities will continue to subvert laws aimed at protecting women by continuing to employ officers like Joseph, despite knowledge of their propensity to commit acts of violence against women.

B. The decision below conflicts with this Court's decisions, and with decisions of the Court of Appeals because there is no claim "redundancy".

The Court of Appeals' held that

> where an employer agrees that it would be vicariously liable because the employee was acting within the scope of employment when the employee committed ***the allegedly negligent act on which the lawsuit is based,*** a negligent retention claim is redundant and not actionable.

Appendix A-8 (emphasis added). This Court should grant review to consider this erroneous conclusion. The assertion that a negligent retention claim would be redundant is based on a faulty understanding of the independent nature of the two claims, and conflicts with numerous decisions.

1. The two claims are based on different acts of negligence committed by different people.

In its holding and analysis, the Court of Appeals repeatedly used the definite article before the singular noun "act." *Appendix A-8* ("when the employee committed *the* allegedly negligent act on which the lawsuit was based"); *id* at A-18 ("in committing *the* allegedly negligent act"). That shows that the Court below mistakenly believed that there was only *one* negligent act "on which the lawsuit is based." Or that *both claims* were based on the same "allegedly negligent act" of employee Joseph. However, the vicarious liability is not based solely on Joseph's attempt to break Salyers' window by hitting it with his gun. It is also based on other acts committed by Joseph,

(e.g., rushing up the vehicle with his gun drawn without waiting for more officers), and on acts of Campbell (such as shooting while standing on the right side of the vehicle in a position where the car could not possibly strike him), including, but not limited to Campbell's final act of shooting Salyers in the head. *Beltran-Serrano v. Tacoma,* 193 Wn.2d 537, 541, 545, 442 P.3d 608 (2019) (*before* shooting plaintiff with a regular gun officer shot plaintiff in the back with a stun gun; a jury could find that "the series of actions leading up to the decision to shoot" constituted an "unreasonable escalation" of the encounter).

In contrast, Earl's negligent retention claim is based upon the negligence of Tacoma, i.e., the employer, for retaining Joseph as an armed officer even though it knew Joseph had a propensity for violence, for threatening to commit murder and suicide, and for pointing his loaded pistol at people. The retention claim is not based on anything Joseph did; instead, it is based on what Tacoma did not do. Thus, the jury in this case could find that Joseph's act of pointing a gun at Salyers was *not* a negligent act,

but that Tacoma's failure to fire Joseph was a negligent act (and also a proximate cause of Campbell's act of shooting her).

In other words, whether or not Joseph acted negligently in 2016 is irrelevant to Tacoma's liability for its *own* negligent act of choosing to continue to employ Jospeh after 2009 despite "knowing of his vicious temperament or propensities to assault persons," which made him "unfit" for employment. *La Lone,* at 172.

2. The claims are not redundant. Employee negligence is *not* an element of negligent retention.

If an employer "employs a vicious person to do an act [such as making arrests] which necessarily brings him into contact with others while in the performance of a duty, he is liable for harm caused by the vicious propensity." *Id.* "Common sense dictates" that knowingly retaining a "mentally unstable" police officer who is contemplating suicide "poses a danger to the people he encounters" and breaches the employer's duty to exercise ordinary care. *Narney v. Daniels,* 115 N. Mex. 41, 51-

52, 846 P.2d 347 (1992). When the employer furnishes the employee with a gun, "the duty to exercise due care" when deciding to continue to employ him is even more obvious. *Id.*

And yet, without citing any authority, the Court below asserts that "the negligent retention claim against [Tacoma] depends on the jury finding that Joseph acted negligently – the same finding that the jury must make for the vicarious liability claim." *Appendix A*-26-27. This statement *conflicts* with the same Court's prior decision in *Peoples v. Puget Sound's Best Chicken*, 185 Wn. App. 691, 701, 345 P.3d 811 (2015), which explicitly holds *the exact opposite*:

> A successful negligent retention claim imposes liability on the employer for his or her own negligence in retaining an unfit employee, ***not for the employee's wrongful act***.

(Emphasis added).

The decision below also conflicts with *Rucshner v. ADT, Security Systems Inc.*, 149 Wn. App. 665, 680, 204 P.3d 271 (2009) and *Carlsen* v. *Wackenhut*, 73 Wn. App. 247, 252-53, 868

P.2d 882 (1994) (listing elements of negligent retention but making no mention of having to prove any negligent conduct by the employee). Moreover, in *Carlsen* the plaintiff brought *both* a negligent hiring claim and a vicarious liability claim against the employer *and still* the Court remanded the case for trial on *both* claims. *Carlsen,* at 252, n.4.

In other words, whether or not pointing a loaded gun at Salyers head was a negligent thing to do, it was the type of violent act that Tacoma *knew* he was disposed to commit, and that was likely to unnecessarily escalate a confrontation and make a confronted person try to get away (just as Beltran tried to get away from the officer who shot him). And yet Tacoma negligently continued to employ him to make arrests and to supply him with a gun.

Moreover, in all three of these cases, the Court of Appeals *reversed* the summary judgment dismissal of a claim of negligent hiring and sent the case back for trial on that claim. *Peoples*, at 694; *Rucshner,* at 669; *Carlsen*, at 248, 257 (failure to discover

employee's "propensity for violence"). The decision in this case is irreconcilable with these cases.

C. The decision below conflicts with *La Lone* by failing to recognize that there can be *multiple* proximate causes of a plaintiff's injury, including negligent retention.

In *La Lone*, 39 Wn.2d 167, this Court affirmed a judgment in the plaintiff's favor on a claim of negligent retention. There the employer retained an employee who had physically assaulted a tenant. Later, the employee physically attacked another tenant. There was nothing "negligent" about the employee's second attack; the employee intentionally assaulted the tenant. But there was a proximate cause connection between *the employer's* negligent retention of the employee despite knowledge of his "vicious disposition" and the injury to the second tenant.

Proximate cause *is* an element of negligent hiring or retention. But *La Lone* makes no mention of employee negligence. Instead, *La Lone*, repeatedly mentions employer retention of an employee with a known "reckless or vicious disposition." Here, the Court of Appeals miscited *La Lone* for

the proposition that the employer's retention of employee Trask "was **the** proximate cause of La Lone's injuries." *Appendix A-13.* But *La Lone* actually held that the negligent retention of Trask "was **a** proximate cause of the injuries and damage suffered by the plaintiff." *Id.* at 170. Thus, this Court recognized that for purposes of a negligent retention claim it simply does not matter whether the employee's negligent conduct was another *proximate cause* of the injuries suffered.[6]

Earl alleges that Joseph's acts were proximate causes of Salyers death, because what Joseph did caused Officer Campbell to shoot Salyers in the head. Earl *also* alleges that Tacoma's retention of Joseph was a proximate cause of Salyers' death, because Tacoma *knew* Joseph was "unfit" to be a police officer due to his "reckless or violent disposition." Had Tacoma fired him, he never would done anything to trigger Campbell into

[6] "Proximate cause is generally a fact question for the jury …." *Meyers v. Ferndale School District,* 197 Wn.2d 281, 294, 481 P.3d 1084 (2021). *Accord Rucshner,* at 282.

shooting, or to trigger Salyers into attempting to drive away. Had Joseph been fired in 2009, he never would have encountered Salyers at all. Thus, a jury could easily find that the negligent failure to fire Joseph was a proximate cause of Salyers' death.

In *Meyers*, this Court recognized this type of proximate cause. There, a teacher took his class on an off-campus walk but never sought the required approval of the walk from the school principal. *Id.* at 285. While his students were on the walk, a driver traveling lost control of his vehicle which left the roadway and struck and killed Anderson, one of the students. *Id.* at 284-85. The student's parents sued the school district for failing to use reasonable care to protect its students from unsafe drivers.

The District argued that there was no proximate cause connection between this breach and the resulting accident. This Court, however, rejected this argument, noting that if the teacher had sought principal approval, the principal might have refused to grant permission for the off-campus walk, in which case the student would never have been at the location where the car

struck him, and "Anderson's death could have been prevented." *Id.* at 290. Similarly, Tacoma's failure to fire Joseph was a proximate cause of Salyers' death because Joseph would never have encountered Salyers if he'd been fired. *Accord Carlsen,* 73 Wn. App. at 248-49.[7]

In sum, the decision below conflicts with the decision in *La Lone* which holds that when an employer "employs a vicious person to do an act ***which necessarily brings him into contact with others*** while in the performance of a duty, [the employer] is subject to liability for harm caused by the [employee's] ***vicious propensity***." *La Lone*, at 172 (emphasis added).

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[7] *See also Ponticas v. KMS Investments,* 331 N.W.2d 907 (Minn. 1983) ("Negligence in hiring … was the only reason [employee] … had contact with the [plaintiff].") Note, *The Negligent Hiring Theory of Liability*, 53 CHI-KENT L. REV. 717, 724 (1977) ("plaintiff met the employee as a direct result of the employment").

D. The decision below conflicts with *Estes*.

1. Multiple defendants can be sued in one lawsuit, even though the last defendant to act had the most direct causative effect.

This Court has consistently held that when there are multiple proximate causes, the "negligence of different persons, though otherwise independent, may concur in producing the same injury, "all are liable. They may be held either jointly or severally." *Estes*, at 471. The Court of Appeals, however, dismissed *Estes* as having no precedential value.

In *Estes*, a police officer shot and injured the plaintiff. The officer was induced to shoot because he saw a store manager running after Estes shouting that Estes had robbed the store. In fact, Estes had *not* robbed the store. Estes sued three parties: the employee (the store manager); the officer (Failing); and the store manager's employer (Brewster Cigar).

The employer argued that it was improper to join all three defendants in one complaint. The trial court agreed and dismissed the entire suit but this Court reversed, holding that it

was permissible because it was *alleged* that the conduct of *each* defendant was *a* proximate cause of Estes' injury.

Estes alleged that the employee's false robbery accusation "set in motion" the chain of events leading to his injury by inducing Failing to shoot him by falsely calling Estes a robber. The employee argued that he couldn't have been a proximate cause of Este's injury because he wasn't the person who shot Estes. This Court held that just because Failings act of shooting Estes was an intervening act of a third person, that did not prevent the employee's earlier act from also being a proximate cause of Estes' injury. *Estes*, at 470.

Estes also alleged that Brewster Cigar was negligent for negligently continuing to employ the store manager because the manger was a person with a disposition to make recklessly make false accusations. This Court held that it was perfectly permissible to include Brewster in the suit along with the other two defendants, and he could "*recover against as many as the facts of his case will warrant.*" *Id.* at 469.

Estes' claim against Brewster ultimately failed because there was "no allegation" in his complaint that Brewster "continue[d] the servant in his employment after he ha[d] knowledge" of any tendency on the part of [its] servant" to commit reckless acts. *Id.* at 473-74. Earl's negligent retention claim does not suffer any such defect. Here, it is undisputed that Tacoma *knew* of Joseph's propensity to threaten to kill people and to point his gun at their heads. Tacoma knew because Joseph's wife and Joseph's fellow police officer reported Joseph's assaults and threats to the IA department of the TPD.

Thus, although this case is factually distinguishable from *Estes*, the legal holding of *Estes* applies here. If the negligent acts of three separate defendants are all independent proximate causes of the killing of Earl's daughter, then she can "join them in one action *and recover against as many as the facts of his case will warrant*." *Id.* at 469 (italics added). "In such a case, all are liable." *Estes,* at 471, quoting *Hellan v. Supply Laundry Co.,* 94 Wash. 683, 686, 163 P. 9 (1917).

The Court of Appeals concluded that this statement was merely dicta. Even assuming, *arguendo,* that it was dicta when stated in *Estes,* it was essential to the holding in *Hellan,* where the exact same statement was made. *Estes* could not have demoted the holding of *Hellan* to dicta simply by citing it.

2. *Mancini* did not abrogate any part of *Estes* that is relevant to this case.

In *Estes* this Court rejected the employer defendant's argument that "differences in the nature of the liability of the several defendants … ma[d]e the [plaintiff's] complaint duplicitous." *Estes*, at 468. Estes had brought both a negligent retention claim and a vicarious liability claim. His vicarious liability claim failed because the employee's negligent act was *not* committed in the course of his employment. *Id.* at 473. But here, Tacoma admits that all of Joseph's acts were committed in the course of his employment. Thus, consistent with *Estes*, there should be no impediment to bringing both a vicarious liability claim and a negligent retention claim against Tacoma in this

case. The Court of Appeals held that this part of *Estes* was recently "abrogated" by *Mancini v. Tacoma*, 196 Wn.2d 864, 479 P.3d 656 (2021). *Appendix A*-10. But there was no claim of negligent retention in *Mancini* and no discussion of "redundant" claims. The only part of *Estes* that *Mancini* abrogated (in footnote 7) was language describing the reasonableness standard of care applicable to a *Beltran* claim.

VI. CONCLUSION

The decision rendered below is contrary to decisions of this Court (in *La Lone, Estes* and *Hellan*), and to other decisions of the same division of the Court of Appeals (*Carlsen*, *Rucshner*, *Al-Hellou*, and *Peoples*). By forcing plaintiffs to choose between claims of negligent retention and vicarious liability, the decision below threatens to eviscerate the tort of negligent retention, and undermines the express legislative policy of protecting domestic partners of police officers and members of the community from officers who have a known propensity to engage in domestic violence.

The issues raised in this case continue to arise in other cases and need resolution. They arose in *Dold v. Snohomish County,* Case No. 2:20-cv-00383-JHC (U.S. District Court for the Western District of Washington). After denying the defendant's motion to dismiss plaintiff's negligent retention claim, (*see* 2023 WL 1818139 (W.D. Wash. 2023)), the district court certified the same questions to this Court which accepted certification. *Dold v. Snohomish County,* Wash. Supreme Court No. 101820-7. But before this Court could act, the case was settled. These issues need resolution.

Petitioner, therefore, asks this Court to grant review of the decision issued below.

This document contains 4,996 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 26th day of August, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 26th day of August, 2025.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 17, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA EARL, on behalf of and THE ESTATE OF JACQUELINE SALYERS, Respondent, v. SCOTT CAMPBELL; the marital community of Scott and Jane Doe Campbell; AARON JOSEPH a/k/a AARON KOMOMUA; and the marital community of Aaron Joseph/Komomua and Jane Doe Joseph/Komomua; and CITY OF TACOMA, Petitioners.	No. 59220-7-II PUBLISHED OPINION

CRUSER, C.J.—Officer Scott Campbell fatally shot Jacqueline Salyers in 2016. Lisa Earl, Salyers' mother, sued Campbell and the City of Tacoma in United States District Court in 2017, alleging negligence, excessive force, and substantive due process claims. The district court granted summary judgment for the City, dismissing Earl's claims. Following the Washington State Supreme Court's decision in *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019), the district court vacated summary judgment on the state law negligence claims. In 2021, Earl filed negligence claims against the City and Campbell in Pierce County Superior Court. In 2023, after receiving a report from a police practices expert, Earl moved to amend her complaint to add a negligence claim against Officer Aaron Joseph, Campbell's partner, and a claim against

the City for negligent retention of Joseph. The superior court granted Earl's motion to amend the complaint. Petitioners sought discretionary review. We granted discretionary review in 2023.[1]

Petitioners argue that Earl's negligent retention claim is not viable because Earl alleged, and the City conceded, that Joseph was acting within the scope of his employment during the incident in question, and thus agreed that in the event the jury concludes that Joseph acted negligently in his use of force, the City is vicariously liable for Joseph's negligence. The City asserts that where the employer agrees that it is vicariously liable for an employee's negligence, a negligent retention claim cannot be simultaneously asserted. In answering the certified question, we hold that where an employer concedes that its employee was acting within the scope of their employment during the allegedly negligent act, and that it is vicariously liable for the employee's negligence, a simultaneous negligent retention claim is superfluous and cannot be brought.

FACTS

I. BACKGROUND

In January 2016, Tacoma police officers Scott Campbell and Aaron Joseph received a tip regarding the location of Kenneth Wright, who had numerous outstanding warrants for his arrest. The informant provided a description of the vehicle Wright was seen in. The officers located a vehicle that matched the informant's tip, and found Wright sitting in the passenger's seat. Jacqueline Salyers, Wright's girlfriend, was sitting in the driver's seat.

[1] In an order modifying the commissioner's grant of review, we limited review solely to the issue certified by the trial court under RAP 2.3(b)(4), and declined review of whether the trial court erred in granting the motion to amend the complaint to add Joseph as a defendant. Ruling Granting Discretionary Rev., *Earl v. Campbell*, No. 59220-7-II (Wash. Ct. App. April 1, 2024).

According to Joseph's declaration, upon locating the suspect vehicle, he parked the patrol car in front of Wright's vehicle, exited, and approached Wright's vehicle with his weapon drawn while commanding Wright and Salyers to show their hands. Campbell also exited the patrol car and approached Wright's vehicle. According to Campbell's declaration, as he observed Wright, Wright appeared to lean over and reach under his seat. Focused on Wright, Campbell drew his weapon and approached the passenger side of the vehicle.

As the officers approached, Salyers began inching the vehicle forward. Joseph struck Salyers' window with his weapon in an effort to break the window, and as he did, Salyers accelerated. Joseph stated, "[w]ithin a few seconds of the car accelerating, I heard gunshots and saw the muzzle flash from the gun." Clerk's Papers (CP) at 122. Campbell explained that Salyers accelerated the car in his direction, causing him to jump backwards and rapidly move away from the car. At that point, he "fired a volley of shots at the driver," ultimately hitting Salyers with four bullets and killing her. *Id.*

II. PROCEDURAL HISTORY

A. 2017 Complaint

In April 2017, Earl (Salyers' mother, the personal representative of Salyers' estate, and the legal guardian of two of Salyers' four minor children) filed a federal lawsuit in the United States District Court for the Western District of Washington. Earl asserted an excessive force claim, substantive due process claims, and wrongful death claims.[2]

[2] *Earl v. Campbell*, No. C17-5315BHS, 2019 WL 1403262, at *1 (W.D. Wash. Mar. 28, 2019) (court order), *vacated in part*, 2020 WL 777205 (W.D. Wash. Feb. 18, 2020) (court order), *aff'd*, 859 F. App'x 73 (9th Cir. 2021).

In March 2019, the federal court granted the City's motion for summary judgment. *Earl*, 2019 WL 1403262, at *4, 9. The court concluded that "Campbell is entitled to qualified immunity on the Estate's excessive force claim, Plaintiffs fail to submit sufficient evidence to establish any substantive due process claim, and Plaintiffs have failed to establish their negligence claims as asserted in the complaint." *Id*. at 4.

Earl filed a motion for reconsideration in July 2019, following our supreme court's decision in *Beltran-Serrano*.[3] The court granted Earl's motion in February 2020, vacating the previous order in regard to Earl's state law claims.[4] The court reasoned that "reconsideration is warranted because *Beltran-Serrano* constitutes a significant change in the law and undermines the Court's analysis of their state law claims." *Earl*, 2020 WL 777205, at *3. The court declined to exercise supplemental jurisdiction over the state law negligence claims, dismissed the 42 U.S.C. § 1983 claim with prejudice, and dismissed the state law claims without prejudice. *Id.* Earl appealed the district court's grant of summary judgment regarding the federal claims to the Ninth Circuit. *Earl v. Campbell*, 859 F. App'x 73 (9th Cir. 2021). In June 2021, the Ninth Circuit affirmed the district court's grant of summary judgment regarding the claims of excessive force, substantive due process, and denial of access *Id*. at 73-74, 76.

B. 2021 Complaint

In August 2021, following the federal district court's order vacating the grant of summary judgment as to Earl's state law claims, Earl filed state law negligence claims in Pierce County

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[3] *Beltran-Serrano* holds that the fact that an officer's conduct may constitute an intentional tort does not preclude a negligence claim. *Beltran-Serrano*, 193 Wn.2d at 540.

[4] *Earl v. Campbell*, No. C17-5315BHS, 2020 WL 777205, at *5 (W.D. Wash. Feb. 18, 2020) (court order), *aff'd*, 859 F. App'x 73 (9th Cir. 2021).

Superior Court. Again, Earl alleged that Campbell acted negligently in shooting and killing Salyers, and his negligence caused the wrongful death of Salyers. The complaint alleged that the City was liable for the negligent conduct of Campbell.

1. 2023 Amended Complaint

In May 2023, Earl moved to amend her complaint, seeking to add a negligence claim against Joseph, a vicarious liability claim against the City based on Joseph's negligence, and a negligent retention claim against the City for retaining Joseph.

Earl retained a police practices expert, and argued that new evidence brought to light by the expert's report contradicted Joseph's assertion that he did not fire his gun on the night of Salyer's death, which bore upon Joseph's veracity.[5] Earl also discovered that Joseph was investigated for domestic violence in 2009. Earl argued that "[h]ad he been fired, as he should have per policy, Joseph would not have committed negligent acts, such as his own admitted act of smashing his police pistol against her window, giving rise to Jackie Salyers' death." CP at 29. The superior court granted Earl's motion to file the amended complaint adding the negligence claim against Joseph and the negligent retention claim against the City.

In the amended complaint, Earl stated that when Joseph was initially interviewed, "he maintained that he was carrying three ammunition magazines that night, that each one had the capacity to hold 13 bullets, and that all three were filled to capacity." *Id.* at 446. However, the police practices expert discovered that "[o]ne live bullet was missing and unaccounted for." *Id.* at 447. This discovery prompted Earl to further investigate Joseph's background.

[5] Earl did not assert that Joseph shot Salyers.

According to the complaint, in investigating Joseph's background, Earl discovered that in 2009, Joseph's then-wife "reported to the Tacoma Police Department that Joseph had threatened to shoot and kill her, to shoot and kill his fellow police officer Steven Storwick, and to shoot and kill himself." *Id.* According to the complaint, during the incident involving his then-wife, Joseph struck his gun against a door frame. Joseph was arrested and charged with assault in the second degree and felony harassment.[6] According to the complaint, the prosecutor moved to dismiss the felony charges, "stating that the case was more appropriately handled in District Court." *Id.* at 448. The superior court granted the motion, and a misdemeanor charge was filed against Joseph in district court. "Joseph requested and received a deferred prosecution," after which the charge was dropped and the court later granted Joseph's petition to expunge his arrest records. *Id.*

Earl now argues that "[i]t was unreasonable and negligent for the City of Tacoma to continue to employ Joseph as a police officer" after learning of his "criminal behavior . . . reckless handing of his gun . . . [and] that Officer Joseph was psychologically and emotionally disturbed enough to threaten to kill himself and others." *Id.* at 448-49. Earl asserts in the amended complaint that "[b]y committing several acts, including but not limited to the smashing of his gun against her window, Officer Joseph negligently escalated the confrontation between Salyers and the police, and his negligent acts were proximate causes of the wrongful death of [Salyers]." *Id.* at 452. In regard to the negligent retention claim, Earl asserts that:

> The City of Tacoma negligently failed to fire Officer Joseph after learning of his criminal assault on his wife, his criminal threat to kill his fellow police officer, his emotional and psychological instability and his threat to kill himself, and his reckless handling of a gun by smashing it against a door frame. Tacoma's negligent retention of Joseph as a police officer employee of City was a proximate cause of the wrongful death of Jacqueline Salyers.

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[6] *See* Br. of Resp't, App. D.

Id. at 455.

The City moved for the court to reconsider its order granting Earl's motion to file an amended complaint, asserting that Earl's claims of newly discovered evidence were without merit and prejudiced the City. The City argued that the court's order was contrary to controlling case law which, according to the City, required employees to be acting outside the scope of employment in order for a negligent retention claim to be actionable. The City argued that according to precedent, a negligent retention claim is not viable alongside a claim of vicarious liability, as it would be redundant. The trial court denied the motion.

2. Motion for Discretionary Review

In July 2023, the City filed a motion to certify an order for discretionary review and to stay proceedings. The proposed question asked whether the court's order granting Earl's motion to amend her complaint " 'involve[d] a controlling question of law as to which there is a substantial ground for a difference of opinion and that the immediate review of the order may materially advance the ultimate termination of litigation.' " *Id.* at 461 (quoting RAP 2.3(b)(4)).

In August 2023, the superior court granted the motion in part, finding "that there is a conflict between decisions of the Washington State Appellate Courts and the Washington State Supreme Court as it pertains to claims of negligent retention." *Id.* at 825. The court certified the following issue for appeal:

> Is a claim for negligent retention actionable where the Plaintiff has asserted claims which, if proven, would impose liability against the employer under the doctrine of respondeat superior and where there is no allegation that the employees were acting outside the course and scope of their employment at the time of the alleged tortious conduct?

Id. at 826. We granted discretionary review.

ANALYSIS

This case comes before us on the certified question from the trial court set forth above. When Earl brought this amended complaint on behalf of the estate asserting negligence claims against Campbell and Joseph and vicarious liability claims against the City, the City, in its answer to the complaint, conceded that both Campbell and Joseph were acting "within the course and *scope* of [their] employment at the time of the events that give rise to this lawsuit." *Id.* at 806 (emphasis added).[7] It is this feature of the case that answers the certified question from the trial court. We hold that where an employer agrees that it would be vicariously liable because the employee was acting within the scope of employment when the employee committed the allegedly negligent act on which the lawsuit is based, a negligent retention claim is redundant and not actionable.

We review certified questions de novo, as they involve questions of law. *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722, 406 P.3d 1149 (2017). The doctrine of vicarious liability, or respondeat superior, "imposes liability on an employer for the torts of an employee who is acting on the employer's behalf." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). However, an employer is not vicariously liable when an employee "steps aside from the employer's purposes in order to pursue a personal objective." *Id.* While "the scope of employment limits the employer's vicarious liability. . . . the scope of employment is not a limit on an employer's liability for a breach of its own duty of care." *Id.*

[7] The City's answer contains a typo in which the words "Scott Campbell" appear in paragraph 92 in which the City intended to say "Aaron Joseph."

Apart from vicarious liability, an employer has a limited duty "to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others," even when an employee is acting outside the scope of employment at the time. *Id.* The causes of action for negligent hiring and retention arise out of this duty. *Id.* Negligent hiring and retention claims are based on the theory that it was the employer who wronged the injured party, and these claims are entirely independent of the liability an employer might have under the doctrine of respondeat superior. *Id.*

In negligent retention claims, "[a]n employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries." *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 148-49, 988 P.2d 1031 (1999). To establish proximate cause, the plaintiff must show that the injured party was injured by some negligent or other wrongful act of the employee alleged to have been negligently hired or retained. *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 43, 747 P.2d 1124 (1987). Specifically, the plaintiff must show that the employee's poor performance that was the proximate cause of plaintiff's injury was also the same type of poor performance that the employer was aware of. *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 544, 184 P.3d 646 (2008); *See Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 360-61, 364, 423 P.3d 197 (2018).

Initially, we note that the superior court certified this question because it opined "that there is a conflict between decisions of the Washington State Appellate Courts and the Washington State Supreme Court as it pertains to claims of negligent retention." CP at 825. Because the court of appeals is bound by supreme court precedent, we first address the supreme court cases cited by the

parties and the trial court. Second, we examine the relevant court of appeals cases that the superior court and Earl identified as decisions that supposedly conflict with each other and with supreme court precedent.

I. SUPREME COURT CASES

Earl cites *Estes v. Brewster Cigar Co.*, 156 Wash. 465, 287 P. 36 (1930), *abrogated by Mancini v. City of Tacoma*, 196 Wn.2d 864, 479 P.3d 656 (2021), in support of her assertion that a negligent retention claim brought in a case where the employer agrees that the employee was acting within the scope of employment is not redundant to a vicarious liability claim. In *Estes*, Mr. Daymude, an employee of the Brewster Cigar Company, was accused of causing an assault against a customer of Brewster. 156 Wash. at 466-67. Estes alleged that Brewster, in addition to selling cigars, conducted an unlawful gambling game (a dice game) at its store "whereby cigarettes, cigars, tobacco and other merchandise of value were bet, wagered and hazarded upon chance." *Id.* at 467. Estes alleged that on a particular date he was induced to engage in this dice game by Daymude, and that after losing the game he attempted to leave the store. *Id.* Upon leaving the store, Daymude pursued Estes and screamed such things as "Thief" and "robber", causing a police officer who heard the commotion to attempt apprehension of Estes. *Id.* The police officer shot and wounded Estes during the pursuit. *Id.*

Estes sued both Daymude and Brewster, claiming that Brewster was vicariously liable for Daymude's actions. *Id.* at 466, 468. The supreme court held that because Daymude was not acting within the scope of his employment when he pursued Estes without cause, Brewster was not vicariously liable for Daymude's wrongful act. *Id.* at 472-74. The court also observed,

> There is a line of cases, to which we have lent sanction in *Matsuda v. Hammond*, 77 Wash. 120, 137 [P.] 328, 51 L. R. A. (N. S.) 920, to the effect that a

> master is liable for the unauthorized wrongful acts of his servant, if he continues the servant in his employment after he has knowledge that the servant has committed or is liable to commit wrongful acts while in the performance of the duties for which he is employed. *But this consideration is not present here*. There is no allegation in the complaint in this instance that the master had knowledge of any such tendency on the part of the servant.

Id. at 473-74 (emphasis added).

In her brief Earl makes much of this passage, suggesting that it constitutes a holding that a negligent retention claim is viable alongside a vicarious liability claim.[8] We find no such holding in *Estes*. First, this passage is *dictum*. Estes' claim against Brewster was solely one of vicarious liability based on his assertion that Daymude was acting within the scope of employment in committing the wrongful act. *Id.* at 472-73. Second, the *Estes* court *rejected* Estes' assertion that Daymude was acting within the scope of employment and accordingly held that Brewster was not vicariously liable for Daymude's wrongful act. *Id*. at 473. As such, there was no occasion for the *Estes* court to address the question of when the employee is, undisputedly, acting within the scope of employment, the employer is separately liable for a negligent hiring claim. *Id*. at 473-74. At most, this passage from *Estes* is an acknowledgment that a cause of action for negligent hiring exists within the law—a proposition the City does not dispute in this case. *See Peoples v. Puget*

[8] Later in her brief, Earl claims that "In *Estes*, the Supreme Court specifically recognized a negligent retention claim *and* a vicarious liability claim against an employer are not 'incongruent.' " Br. of Resp't at 51. She cites to page 471 of *Estes*. The majority of the text on page 471 was overruled in part in 2021. The most relevant portion of text on the page Earl cites to states: " 'There may be more than one proximate cause for the same injury. The negligence of different persons, though otherwise independent, may concur in producing the same injury. In such a case, all are liable. They may be held either jointly or severally.' " *Estes*, 156 Wash. at 471 (quoting *Hellan v. Supply Laundry Co*., 94 Wash. 683, 686, 163 P. 9 (1917)). Again, we disagree with Earl's contention that *Estes* holds that a negligent retention claim is viable alongside a vicarious liability claim when it has been established that the employee acted within the scope of employment in committing the wrongful act.

Sound's Best Chicken!, Inc., 185 Wn. App. 691, 702, 345 P.3d 811 (2015) ("The Supreme Court has twice cited *Matsuda* as recognizing liability for negligent hiring or retention.").

Moreover, *Matsuda v. Hammond*, 77 Wash. 120, 137 P. 328 (1913), cited by *Estes* and by Earl in her brief, does not aid our analysis of the certified question. In *Matsuda*, the employer (Hammond) was sued for vicarious liability for the act of his employee (Bell) in assaulting Matsuda, a customer of Hammond, by punching Matsuda in the nose, causing it to break, while attempting to collect a debt owed to Hammond. *Id.* at 121. Unlike the City in the case at bar, Hammond disputed that her employee was acting within the scope of his employment during the commission of the wrongful act. *Id.* at 123. Our supreme court agreed with Hammond and held that Bell was *not* acting within the scope of his employment in assaulting Matsuda. *Id.* In its discussion, the court stated:

> An employer is liable for the unlawful and criminal acts of his employee only when he directly authorizes them, or ratifies them when committed; or, perhaps, continues an employee in his employment after he has knowledge that the employee has committed, or is liable to commit, unlawful acts while in the pursuit of his employer's business. The liability does not arise from a mere contract of employment to do a legitimate and lawful act.

Id.

Here again, Earl cites *Matsuda* for the proposition that an employer can be liable for the negligent retention of an employee when the employee inflicts harm on a third party. But the City does not dispute this proposition. Rather, the City contends that the fall back claim of negligent retention would only need to come into play where the employer *disputes* that its employee was acting outside the scope of employment or there has been a judicial finding to that effect. Because the employee in *Matsuda* was determined not to have been acting within the scope of employment in committing the wrongful act, *Matsuda*, like *Estes*, is distinguishable from this case.

In *La Lone v. Smith*, 39 Wn.2d 167, 168, 234 P.2d 893 (1951), which Earl cites repeatedly in her brief., a man named Trask was working as a janitor for a property management company at an apartment complex in Spokane. Trask, who was known to be alcohol dependent and to have assaulted a different tenant in the past, assaulted the plaintiff, Mr. La Lone. *Id.* at 169-70. La Lone brought suit against the property owner (Smith), as well as the property manager (Fancy). *Id.* at 168. Although Trask was named in the complaint, he was not served with the complaint and was dismissed from the action. *Id.* La Lone brought a claim of negligent retention against Smith and Fancy based on Trask's known history of drunken and assaultive behavior. *Id.* at 169-70. La Lone did not make a claim of vicarious liability. *Id.* at 171. Smith and Fancy argued on appeal that their retention of Trask as an employee was not the proximate cause of La Lone's injuries because "Trask turned aside from his duties as janitor to engage in a fight with [La Lone]." *Id.* In rejecting this claim, the supreme court noted that the trial court made an unchallenged finding that Smith and Fancy's retention of Trask was the proximate cause of La Lone's injuries. *Id.* The court further stated,

> In the instant case, the doctrine of *respondeat superior* is not involved, because the issue is whether appellants were negligent in their retention of Trask. The trial court found that they were, and that finding is accepted by us as an established fact.
>
> Our decisions in *Matsuda v. Hammond*, 77 Wash. 120, 137 Pac. 328; *Estes v. Brewster Cigar Co.*, 156 Wash. 465, 287 Pac. 36; and *Miller v. Mohr*, 198 Wash. 619, 89 P.[2d] 807, while not directly in point, recognize the legal principle that the negligent employment or retention of an incompetent employee makes the employer liable for injuries inflicted upon a third party by such employee.

Id.

Earl contends that *La Lone* stands for the proposition that a negligent retention claim is not redundant to a vicarious liability claim. Earl states "[T]he fact that Trask assaulted La Lone while

Trask was acting *within* the scope of his employment did not preclude employer liability for negligent retention." Br. of Resp't. at 19. This statement not only mischaracterizes the holding in *La Lone*, but entirely misses the point. In *La Lone*, the plaintiff chose to pursue a claim against only the employer, and only for negligent retention. La Lone did not also pursue a claim of vicarious liability. *La Lone*, 39 Wn.2d at 168. *La Lone* does not stand for the proposition that where a plaintiff pursues a claim against a defendant for a wrongful act committed in the course of employment, and also pursues a claim of vicarious liability against the employer for that same act *for which the employer stipulates was committed in the course of employment*, that the plaintiff can simultaneously pursue a claim of negligent retention against the employer.

Earl also relies on *Niece*, which is easily distinguishable from this case and the certified question it spurred. The issue in *Niece* was the special relationship between a group home and its vulnerable, disabled resident, in a claim of negligent protection. *Niece*, 131 Wn.2d at 43, 46. There was no allegation that the group home's employee was acting within the scope of his employment. The supreme court, in holding that Elmview had a special relationship with Niece triggering a duty of care to protect Niece from "all foreseeable harms," distinguished the duty arising from this special relationship from the doctrine of vicarious liability:

> Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf. Where the employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable. Whether or not the employer has any particular relationship to the victim of the employee's negligence or intentional wrongdoing, the scope of employment limits the employer's vicarious liability. However, the scope of employment is not a limit on an employer's liability for a breach of its own duty of care.
>
> Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by

> an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior."

Id. at 48 (internal citations omitted) (quoting *Scott*, 50 Wn. App. at 43).

Earl treats this passage as somewhat of a smoking gun, as though it stands for the proposition that a plaintiff who was injured by the negligent act of an employee and to whom the employer, based on its admission that its employee acted within the scope of employment in committing the negligent act, is vicariously liable, can also pursue a claim of negligent retention for the same wrongful act. To arrive at this conclusion Earl ignores the context of the holding in *Niece*, which was about the application of the special relationship doctrine.

The court, having held that Elmview owed Niece an independent duty of care based on its special relationship with Niece, went on to address Niece's claim of negligent supervision. In addressing this claim, the court explained that

> The theory of liability for negligent supervision is based on the special relationship between employer and employee, not the relationship between group home and resident.
> . . . While an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator, a group home for developmentally disabled persons has a duty to protect residents from such predators regardless of whether those predators are strangers, visitors, other residents, or employees.

Id. at 49.

The court stated that it was "unnecessary to resolve" the negligent supervision claim because of Elmview's "much broader" duty to Niece by virtue of its special relationship with her:

> The same evidence that would establish Elmview's negligence under a broad theory of negligent supervision will also establish its negligence in failing to protect Niece from all foreseeable harms. Niece's cause of action for negligent supervision thus *collapses into* her negligence claim based on Elmview's breach of its special relationship duty of care. We therefore find it unnecessary to determine whether Niece has presented a factually sufficient claim for negligent supervision.

Id. at 52 (emphasis added). Stated another way, Niece's negligent supervision claim was redundant to the negligent protection claim. *Id.* at 52, 59. *Niece* does not support Earl's contention in this case. Rather, it supports the City's argument that redundant claims are not actionable.

In *Anderson*, cited by the trial court, the plaintiff brought suit against the Soap Lake School District for negligent hiring, training, and supervision based on the actions of its girls' varsity basketball coach. *Anderson*, 191 Wn.2d at 352. The basketball coach served the plaintiff's daughter, a player on the girls' basketball team, as well as several other minors, alcohol at an evening party at his home. *Id.* at 348-49. After leaving the party, the plaintiff's daughter was killed in a single-car accident in which her boyfriend, who had also been served alcohol by the coach, had been driving. *Id*.

The court first discussed the negligent hiring and retention claims, noting that these claims failed at the outset due to Anderson's failure to produce "any evidence" that would support either of these claims. *Id.* at 357-58. Because "Anderson did not present a genuine issue of material fact regarding whether Soap Lake was negligent when it hired and retained"[9] the basketball coach and the claim therefore failed at the outset, the court did not go on to analyze the elements of these claims.

[9] *Anderson*, 191 Wn.2d at 359.

The court next discussed the negligent supervision and training claims. As to these claims, which are analytically distinct from negligent hiring and retention claims, the court found it necessary to determine whether the coach was acting within the scope of his employment before deciding whether Anderson had demonstrated a genuine issue of material fact. *Id.* at 360-61. The court stated:

> Even if we assume that Anderson presented sufficient evidence to create a genuine issue of material fact regarding the reasonableness of Soap Lake's training and supervision of Lukashevich, we still must determine whether Lukashevich was acting within the scope of his employment. This is because an action based on negligent training and supervision "is applicable *only* when the [employee] is acting outside the scope of his employment." RESTATEMENT (SECOND) OF TORTS § 317 cmt. a [(AM. LAW INST. 1965)] (emphasis added). If the employee is acting within the scope of his employment, then an employer is "vicariously liable under the principles of the law of Agency" instead. *Id.*

Id. at 361 (first alteration in original). The court concluded that the coach acted *outside* the scope of his employment and, as a result, proceeded to analyze "whether Anderson presented genuine issues of material fact to survive summary judgment on her negligent supervision claim." *Id.* at 363.

The trial court in the case at bar was confused about the import of *Anderson*'s failure to explicitly state that acting outside the scope of employment was an element, at least impliedly, of a negligent retention claim when it stated unequivocally that it is an element of both a negligent training and supervision claim. But this observation ignores that Anderson's initial failure to show that the school district had any reason to know, either when it hired or retained the coach, that he was inclined or likely to provide alcohol to underage students from the school negated the need for the court to explore this particular question.

After concluding its discussion of Anderson's negligent hiring, retention, training, and supervision claims, the court addressed Anderson's alternative claim that the school district was vicariously liable for the coach's conduct in serving alcohol to Anderson's daughter. *Id.* at 373. Because the coach had not acted within the scope of his employment, the court held that summary judgment on that claim was appropriate.

Although it may be tempting to conclude that the existence of a vicarious liability claim in *Anderson* demonstrates that claims for negligent retention and vicarious liability can coexist here, such a conclusion ignores the salient posture of this case: here, the City *concedes* that Joseph acted within the scope of his employment in all aspects of his interaction with Salyer. Unlike in *Anderson*, the scope of employment question is neither contested nor a matter that requires determination by either the trial court or a jury.[10]

In summary, none of the Washington Supreme Court cases cited by Earl or the trial court support the assertion that when an employer stipulates that its employee acted within the scope of employment in committing the allegedly negligent act, and would thereby be vicariously liable in the event the trier of fact finds the employee acted negligently, that a separate claim of negligent retention is actionable and not redundant. We next consider the court of appeals cases cited by the trial court and the parties.

[10] It is axiomatic that where an employer both *disputes* that its employee acted within the scope of employment, thereby seeking to evade vicarious liability, and disclaims liability under the theories of negligent hiring, retention, training, or supervision, the plaintiff is permitted to pursue alternate or incongruous theories of liability.

II. COURT OF APPEALS CASES

In *LaPlant v. Snohomish County*, 162 Wn. App. 476, 477-78, 271 P.3d 254 (2011), cited by the parties, sheriff's deputies pursued a stolen vehicle in which LaPlant and another plaintiff, Pennamen, were passengers. During the pursuit, the driver lost control of the car and collided with a brick sign, causing injuries to LaPlant and Pennamen. *Id.* LaPlant and Pennamen sued Snohomish County alleging negligence based on vicarious liability. *Id.* at 478. Similar to this case, LaPlant and Pennamen were permitted to amend their complaint to add claims of negligent training and supervision. *Id.* Division One of this court granted discretionary review to decide "whether a negligent training and supervision claim should be dismissed when an employer, against whom vicarious liability is also alleged, admits that its employees' allegedly negligent conduct occurred within the scope of employment." *Id.* at 477. Thus, the issue in *LaPlant* is nearly identical to the issue we are asked to decide in this case, with the minor difference that this case involves a claim of negligent retention rather than negligent supervision and training.

The court first noted that a negligent supervision claim "requires a plaintiff to show that an employee acted *outside* the scope of [their] employment." *Id.* at 479. "But when an employee commits negligence within the scope of employment, a different theory of liability—vicarious liability—applies." *Id.* at 479-80. The court cited its earlier opinion in *Gilliam v. Department of Social & Health Services, Child Protective Services*, 89 Wn. App. 569, 950 P.2d 20 (1998), another negligent supervision case. *LaPlant*, 162 Wn. App. at 480. In *Gilliam*, the court reiterated that "[a]n employer is generally vicariously liable for the negligent acts of an employee conducted within the scope of employment," but that when an employee causes harm through acts done outside the scope of employment, the employer may be liable for negligent supervision. *Gilliam*,

89 Wn. App. at 584-85. In *Gilliam*, as in *LaPlant*, the employer conceded that the employee acted within the scope of employment and thus, the claim of negligent supervision was redundant: "If Gilliam proves Morrow's liability, the State will also be liable. If Gilliam fails to prove Morrow's liability, the State cannot be liable even if its supervision was negligent." *Id.* at 585.

Similarly, in *LaPlant*, the court held that vicarious liability and negligent supervision claims are redundant where the employer admits that its employee acted within the scope of employment in committing the negligent act:

> The rationale in *Gilliam* applies here because the County agreed that it would be vicariously liable for any negligence on the part of the deputies. Both causes of action rest upon a determination that the deputies were negligent and that this negligence was the proximate cause of LaPlant's injuries. If LaPlant establishes the underlying tort, the County automatically will be liable to the same extent as the deputies. If LaPlant fails to establish that the deputies acted negligently, the County cannot be liable, even if it was negligent in training and supervising them. As a result, LaPlant's claim for negligent supervision, under these facts, is not only improper because the County did not disclaim liability for the deputies' actions, it is also superfluous. The trial court should have granted the County's motion to dismiss.

LaPlant, 162 Wn. App. at 481.[11]

In *Evans v. Tacoma School District No. 10*, 195 Wn. App. 25, 47, 380 P.3d 553 (2016), cited by the trial court, our division similarly applied this reasoning regarding the relationship

[11] Claims involving negligent hiring or retention are distinct from claims involving negligent supervision or training. "An employer can be liable for negligent hiring or retention for failing to exercise ordinary care by hiring or retaining an employee known to be unfit. . . . Negligent hiring occurs at the time of hiring, while negligent retention occurs in the course of employment." *Evans v. Tacoma Sch. Dist. No*. 10, 195 Wn. App. 25, 46-47, 380 P.3d 553 (2016) (internal citation omitted). Employer liability in claims of negligent supervision or training "arises when the employer knows or has reason to know that the employee presented a risk of danger to others. . . . The employer has a duty to 'prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.' " *Id*. at 47 (internal citation omitted) (quoting *Niece*, 131 Wn.2d at 48).

between negligent retention or supervision claims and vicarious liability claims. In *Evans*, the plaintiff brought claims for vicarious liability as well as negligent hiring, retention, training, and/or supervision. *Id.* at 30. Significantly, the employer in *Evans*, unlike the employers in *LaPlant*, *Gilliam*, and this case, did *not* concede that its employee, who had sexually abused a student, was acting within the scope of employment. *See, e.g.*, *id.* at 35, 37, 40. Citing the reasoning in *Niece* and *LaPlant*, we explained:

> The causes of action for negligent hiring, retention, supervision and training are analytically different from vicarious liability. These claims arise when the employee is acting outside the scope of employment. They are based on the concept that the employer's *own* negligence is a wrong to the injured party, independent from the employer's liability for its employee's negligence imputed by the doctrine of respondeat superior. In fact, an injured party generally cannot assert claims for negligent hiring, retention, supervision or training of an employee when the employer is vicariously liable for the employee's conduct.

Id. at 47 (internal citations omitted).

In *Hicks v. Klickitat County Sheriff's Office*, 23 Wn. App. 2d 236, 248, 515 P.3d 556 (2022), we again affirmed this understanding of the relationship between vicarious liability, negligent retention, and scope of employment. *Hicks* involved a negligent retention claim against the Department of Social and Health Services regarding a social worker's negligent investigation of a child abuse report. *Id.* at 238. Relying on *Evans*, we stated:

> Under the doctrine of respondeat superior, an employer can be vicariously liable for its employee's torts committed *within* the scope of employment. In *Evans*, the court held that claims for negligent hiring, retention, supervision, and training, which arise from conduct occurring *outside* the scope of employment, are analytically different from vicarious liability. An injured party generally cannot assert negligent retention claims when the employer is vicariously liable for the employee's conduct.

Id. at 248 n.9 (internal citations omitted).

We explained in *Hicks* that "[n]egligent retention claims generally arise when an employee is acting outside the scope of their employment," and held that because Hicks failed to demonstrate that the social worker "acted outside the scope of employment, . . . Hicks' negligent retention claim fails as a matter of law." *Id.* at 248.

The final court of appeals case warranting discussion because Earl significantly relies on it is *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 868 P.2d 882 (1994), although this reliance is not well taken. *Carlsen* contains no discussion of the relationship between vicarious liability and claims of negligent hiring or retention. Rather, the plaintiff in *Carlsen*, who had been sexually assaulted by a concert worker (Futi) employed by Wackenhut at the Tacoma Dome, asserted claims of negligence for which, she alleged, Wackenhut was vicariously liable, as well as negligent hiring and supervision of Futi. *Id.* at 249. The trial court dismissed the claims of negligent hiring and supervision on summary judgment and we reversed, finding that the plaintiff demonstrated a genuine issue of material fact as to the those claims. We said this in footnote 4:

> The trial court's order on summary judgment did not dismiss Carlsen's lawsuit against Wackenhut. Neither did it indicate that there was no just reason to delay an appeal. Although Wackenhut's counsel state in its brief that Carlsen's lawsuit, insofar as it was based on respondeat superior, had been dismissed, it does not cite to the record to support that statement. Furthermore, the trial court's order belies that assertion. . . . The order, therefore, is not appealable pursuant to RAP 2.2(d); . . . Nevertheless, we have chosen to review the trial court's order pursuant to the provisions of RAP 2.3.

Id. at 252 n.4 (some internal citations omitted).

In other words, the defendant in *Carlsen* did not ask us to examine the relationship between vicarious liability and negligent hiring or supervision because the defendant in that case did not realize the vicarious liability claim remained a part of the case. Upon realizing the issue, we

acknowledged that the order was not appealable and converted our review to discretionary review under a different rule of appellate procedure. *Id.*

Earl nevertheless asserts that in *Carlsen*, we held that Futi was acting within the *scope* of his employment when he sexually assaulted the plaintiff. Earl focuses on the following quotations from *Carlsen*: " 'Futi was, in a real sense, responsible for protecting young concert goers' and 'for ushering patrons to their seats.' " Br. of Resp't at 23 (quoting *Carlsen*, 73 Wn. App. at 255-56). These statements do not reflect the *Carlsen* court determining that Futi was acting within the scope of his employment as Earl contends. Rather, these statements were made within the context of our holding that a genuine issue of material fact existed about whether Wackenhut should have more closely investigated Futi's background before hiring him. We stated,

> Although Futi's responsibilities were, arguably, not so great as those delegated to the employees in *Easley* or *Welsh*, in that he was not guarding valuable personal property and was not authorized to carry a weapon, Futi was, in a real sense, responsible for protecting young concert goers. Viewing the evidence most favorably to Carlsen, as we must, there is at least an inference that Wackenhut held Futi out as more than a mere ticket taker.
>
> . . . .
>
> . . . A jury might well conclude that it was reasonable for concert patrons to look upon Futi as one authorized to perform security functions, and that, therefore, Wackenhut should have more extensively examined Futi's background before hiring him. The need for such a determination by a jury seems especially compelling in light of the limited information and inconsistencies in Futi's applications for employment. This additional investigation might well have disclosed Futi's prior juvenile record.

Carlsen, 73 Wn. App. at 255-56.[12, 13]

Carlsen does not stand, as Earl contends, for the proposition that a negligent hiring or retention claim is not redundant to a vicarious liability claim when an employee undisputedly acts within the scope of employment in committing the wrongful act. Again, the vicarious liability claim in *Carlsen* was not before us on appeal. *Id.* at 252 n.4.

III. SECONDARY AUTHORITY

Earl argues that *Dold v. Snohomish County*, No. 2:20-CV-00383JHC, 2023 WL 1818139, at 2 (W.D. Wash. Feb. 7, 2023) (court order), an order on reconsideration from the United States District Court for the Western District of Washington, is instructive here.[14] The *Dold* court sought to answer whether, under Washington law, there is "outside the scope of employment" element in negligent retention claims. In *Dold*, it must be noted, no negligence claim was brought against the employee that would have triggered vicarious liability on the part of the employer. *Id.* Within this context, *Dold* distinguished *Hicks*, stating "*Hicks* answered a different question than the one presented here." *Id.* The court explained,

> Unlike in *Hicks*, there is no direct negligence claim that could give rise to vicarious liability against the County. *Under such circumstances*, the Court believes that the Washington Supreme Court would not adopt a "scope of employment" requirement

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[12] Referencing *Easley v. Apollo Detective Agency, Inc*., 69 Ill. App. 3d 920, 387 N.E.2d 1241 (1979) and *Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc*., 474 A.2d 436 (R.I. 1984).

[13] We note that "Washington courts uniformly have held as a matter of law that an employee's intentional sexual misconduct is not within the scope of employment." *Evans*, 195 Wn. App. at 38.

[14] We note that "[f]ederal cases are not binding on this court, which is 'free to adopt those theories and rationale which best further the purposes and mandates of our state statute.' " *Kumar v. Gate Gourmet, Inc*., 180 Wn.2d 481, 491, 325 P.3d 193 (2014) (quoting *Grimwood v. Univ. of Puget Sound, Inc*., 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988), *overruled in part by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017)).

> for negligent retention claims, at least in cases where there is no remaining claim for vicarious liability.

Id. (emphasis added). Even if *Dold* were binding on this court, the facts in *Dold* are distinguishable from those in Earl's case because *Dold* did not involve a vicarious liability claim. We therefore find *Dold* unhelpful and unpersuasive.[15]

IV. EARL'S ARGUMENTS AND THE CERTIFIED QUESTION

The certified question asks:

> Is a claim for negligent retention actionable where the Plaintiff has asserted claims which, if proven, would impose liability against the employer under the doctrine of respondeat superior and where there is no allegation that the employees were acting outside the course and scope of their employment at the time of the alleged tortious conduct?

CP at 826.

Earl contends that the claim of negligent retention is actionable by focusing on the wrong question, to wit, whether the tort of negligent retention contains an "outside the scope of employment" *element. See generally* Br. of Resp't at 12-44. But the certified question does not ask what the elements are of negligent retention. Rather, it asks whether the negligent retention claim is "actionable," meaning, not redundant or superfluous, when coupled with a vicarious liability

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[15] We also disagree with *Dold's* analysis. Relying on *Anderson*, the court stated that "the test adopted in *Anderson* does not require that the employee's conduct occur outside the scope of employment." *Dold,* 2023 WL 1818139, at 2. The court continued: "Reading *Anderson* as a whole, the most reasonable inference is that the Washington Supreme Court would not adopt an 'outside the scope of employment' requirement for negligent retention claims." *Id*. In reaching this conclusion, the *Dold* court ignores key language from *Anderson*. As we noted above, the *Anderson* court explicitly stated that even if Anderson succeeded in presenting a genuine issue of material fact regarding her negligence claims, the court would still need to determine whether the coach was acting within the scope of employment, "because an action based on negligent training and supervision 'is applicable *only* when the [employee] is acting outside the scope of his employment.' " *Anderson*, 191 Wn.2d at 361 (alteration in original).

claim in which there is no question that the employee was acting within the scope of employment during commission of the negligent act.

The cases outlined above plainly answer this question in the negative. We hold that a claim for negligent retention is redundant and not actionable in cases where the following two factors are present: (1) the plaintiff brings a negligence claim against an employee as well as a vicarious liability claim against the employer, and; (2) there is no genuine issue of material fact that the employee acted within the scope of employment in the commission of the allegedly negligent act (either because the employer admits the employee acted within the scope of employment or a reasonable fact finder could reach but one answer to this question).[16, 17]

Logically, there is no need to pursue a claim for negligent retention when, as Earl concedes, the negligent retention claim against the City depends on the jury finding that Joseph acted

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[16] *G.M. v. Olympia Kiwanis Boys Ranch*, 30 Wn. App. 2d 685, 692, 548 P.3d 548, *review denied*, 3 Wn.3d 1024 (2024) ("Issues of fact may not be resolved on summary judgment unless, based on the evidence presented, reasonable minds can reach only one conclusion.").

[17] Earl points us to 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 15.04 (7th ed. 2022) (WPI), for support, stating "If Tacoma's argument that Earl cannot proceed simultaneously on both vicarious liability and employer liability for its own negligence were to be accepted, that would render WPI 15.04 utterly meaningless in all cases where the concurrent tortfeasors were a negligent employee and a negligent employer." Br. of Resp't at 50. But Earl ignores the note included with this instruction, which states: "Do not use this instruction if the third person was acting as an agent of either the plaintiff or defendant." WPI 15.04. As the note indicates, this instruction does not apply to Earl's negligent retention claim, as Joseph was acting as an agent of the City.

negligently—the same finding the jury must make for the vicarious liability claim.[18] Moreover, Earl also concedes that she cannot recover additional damages on the negligent retention claim should the jury make the necessary finding that Joseph acted negligently (which will trigger the City's vicarious liability). Thus, Earl effectively concedes she can get no additional benefit out of the negligent retention claim in light of her decision to pursue a negligence claim against Joseph.

The negligent retention claim Earl seeks to pursue is superfluous to the vicarious liability claim in light of there being no question that Joseph was acting within the scope of his employment in the commission of the allegedly negligent act and we hold that she cannot pursue this claim alongside her vicarious liability claim.

[18] During oral argument, Earl's counsel cited negligent training as an example of a claim that can coexist with a claim of negligence when the employer would also be vicariously liable. Negligent training is a unique claim that stands in contrast to negligent hiring, retention, and supervision claims. Whereas a negligent hiring, retention, or supervision claim depends upon a finding that the employee acted negligently—a key feature that renders these claims redundant when brought alongside a negligence claim in which the employee acted within the scope of employment—a negligent training claim against the employer can survive even where the trier of fact determines the employee did not act negligently. Consider, for example, a law enforcement officer who accidentally causes the death of a pedestrian during a pursuit. If the officer had been trained to conduct a pursuit in spite of traffic conditions that would render it dangerous to do so, and followed that training to the letter in conducting the pursuit that resulted in the death of the pedestrian, a jury could reasonably conclude that the officer was not negligent. It does not follow, however, that the employer should escape liability for training that is arguably negligent and was the proximate cause of the pedestrian's death. Although counsel for Earl was correct in identifying negligent training as a unique type of claim that is potentially not susceptible to a finding of redundancy when the employee acted within the scope of employment, this has no bearing on the claim at issue here.

CONCLUSION

We hold that Earl's negligent retention claim fails as a matter of law because it is superfluous in light of the fact that Joseph was acting within the scope of employment and Earl was therefore able to bring a vicarious liability claim against the City regarding Joseph's allegedly negligent conduct. We reverse the superior court's decision allowing Earl to amend her complaint to add a claim of negligent retention.

CRUSER, C.J.

We concur:

MAXA, J.

GLASGOW, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

July 28, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA EARL, on behalf of and THE ESTATE OF JACQUELINE SALYERS, Respondent, v. SCOTT CAMPBELL; the marital community of Scott and Jane Doe Campbell; AARON JOSEPH a/k/a AARON KOMOMUA; and the marital community of Aaron Joseph/Komomua and Jane Doe Joseph/Komomua; and CITY OF TACOMA, Petitioners.	No. 59220-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Lisa Earl moves for reconsideration of the court's published opinion filed on June 17, 2025. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Glasgow, Cruser

FOR THE COURT:

CHIEF JUDGE

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LISA EARL, on behalf of THE ESTATE OF JAQUELINE SALYERS,

Petitioners,

v.

CITY OF TACOMA, SCOTT CAMPBELL, and AARON JOSEPH a/k/a AARON KOMOMUA,

Respondents.

No. 103008-8

Court of Appeals No. 59220-7-II

RULING DENYING REVIEW and DENYING MOTION TO TRANSFER

Lisa Earl, acting on behalf of the Estate of Jaqueline Salyers (collectively the Estate), seeks discretionary review of a decision by Division Two of the Court of Appeals granting discretionary review of an interlocutory decision by the Pierce County Superior Court in the Estate's pending civil action against the city of Tacoma and two of its police officers, Scott Campbell and Aaron Joseph, also known as Aaron Komomua (collectively the City). The Estate alternatively moves for review to be transferred to this court. The alternative motions are denied for reasons stated below.

This litigation arises from the fatal police shooting of Jacqueline Salyers on January 28, 2016. Tacoma Police Officers Campbell and Joseph approached a parked vehicle during a search for Kenneth Wright. Salyers was behind the wheel and Wright was in the front passenger seat. Officers approached the vehicle with their sidearms

drawn and yelling commands. Campbell claimed Salyers ignored his command and drove the vehicle directly at him. Joseph was meanwhile trying to break the driver side car window with the butt of his handgun. Campbell then fired his handgun eight times into the vehicle. Three shots struck Salyer, one them fatally striking her in the head.

Campbell and Joseph continue to assert that Joseph did not fire his weapon during the fatal encounter. But Joseph reported that during the incident he realized his firearm was missing its magazine and he reloaded it with a fresh magazine. He reported that he did not recover the missing magazine from the scene.

Detective Ryan Larsen recovered Joseph's missing magazine at the scene. Relying on Joseph's report that he had not fired his weapon, Larsen visually inspected Joseph's weapon and spare magazine and concluded that it had not been fired. Because the weapon was reportedly not fired, the department followed its practice of not submitting the weapon for further testing.

Earl's police practices expert, William Harmening, independently reviewed the incident reports. In May 2023 Harmening submitted a supplemental report suggesting that Joseph fired his weapon once during the encounter with Salyer. Harmening relied on a PowerPoint slide deck prepared by investigating agencies and an inventory form from the evidence unit that showed that Joseph's magazine recovered from the scene was missing one pistol cartridge. Harmening questioned how (1) one of Joseph's magazines ended up on the pavement, and (2) a "live round" ended up on the pavement next to the loaded magazine. Response to Mot. for Disc. Rev. (No. 59220-7-II), Appx. at 379. Harmening reported that it was possible that Joseph accidently fired his weapon, possibly causing Campbell to fire his weapon in what Harmening termed "'contagious' fire." Harmening noted that a witness statement related that one of the officers exclaimed immediately after the shots were fired "'see what you made me do!'" *Id.* at 386.

Meanwhile, the department hired Joseph in 2006. In 2009 Joseph was arrested for an alleged domestic violence crime. The department's Internal Affairs Division investigated and determined that the allegations against Joseph were "'Not Sustained.'" Mot. for Disc. Rev. (No. 59220-7-II), Appx. at 211. In May 2010 the court dismissed the charges against Joseph with prejudice.

In 2013 Joseph petitioned to expunge his arrest record. The court granted the petition and ordered that all of Joseph's non-conviction data be deleted and expunged from any state record open to the public. On February 11, 2016, the department destroyed the 2009 files concerning Joseph. That was 14 days after Salyer was killed.

At his deposition in 2018, Joseph did not mention the 2009 allegations and investigation when asked whether any complaints had been lodged against him since he had joined the department.

Meanwhile, in 2017 the Estate sued the City and Campbell in the United States District Court, asserting an excessive force claim against Campbell, substantive due process claims against Campbell, and state law negligence claims against the City and Campbell. In March 2019 the district court dismissed all of the Estate's claims in summary judgment. After this court issued a decision holding that the fact that a law enforcement officer's conduct may have constituted an intentional tort did not preclude a negligence claim, the federal court vacated summary judgment on the Estate's state law claims. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 540, 442 P.3d 608 (2019). The Ninth Circuit affirmed the district court's decision in June 2021.

In August 2021 Earl filed in Pierce County Superior Court state law negligence claims against the City and Campbell. As indicated, in May 2023 Harmening submitted his expert report concerning Joseph's handgun magazine. The Estate also learned of Joseph's 2009 arrest. Earl then moved to amend her complaint to add (1) a claim against the City for negligent retention of Joseph, and (2) a negligence claim against Joseph.

The superior court granted the motion to amend the complaint and denied the City's motion for reconsideration. The City then moved to certify discretionary review of two issues under RAP 2.3(b)(4): (1) whether the Estate's failure to recognize the significance of information in its possession for six years constituted excusable neglect, and (2) whether a claim of negligent retention is redundant in light of the Estate's already asserted negligence claim and the City's admission that its employee was acting within the course and scope of their employment during the shooting incident. The court partly granted the motion, certifying for immediate review a single question framed as follows:

> Is a claim for negligent retention actionable where the Plaintiff has asserted claims which, if proven, would impose liability on the employer under the doctrine of respondeat superior and where there is no allegation that the employees were acting outside the course and scope of their employment at the time of the alleged tortious conduct?

Mot. for Disc. Rev. (No. 59220-7-II), Appx. at 9.

The City sought discretionary review in the Court of Appeals. Commissioner Aurora Bearse granted discretionary review as to the certified question framed by the superior court. Additionally, acknowledging the City's argument that the statute of limitations and the Washington Criminal Records Privacy Act barred the Estate's claims as to Joseph, the commissioner also granted review of an uncertified question: whether the superior court erred in allowing the Estate to amend its complaint. *See* RAP 2.3(e) (appellate court may specify issues to be reviewed). A panel of judges granted the Estate's motion to modify the commissioner's ruling as to amendment of the complaint but denied the motion as to the issue the superior court certified under RAP 2.3(b)(4). The net result is that the Court of Appeals will review only whether the Estate's negligent retention claim is actionable. The Estate now seeks discretionary

review in this court. RAP 13.3(a)(2), (c), (e); RAP 13.5(a). In the alternative, the Estate moves to transfer the pending Court of Appeals matter to this court. RAP 4.4.

To obtain discretionary review in this court, the Estate must demonstrate that the Court of Appeals committed obvious error that renders further proceedings useless or probable error that substantially alters the status quo or that substantially limits a party's freedom to act, or that the court departed so far from the accepted and usual course of judicial proceedings that it is necessary for this court to intervene. RAP 13.5(b). The Estate does not explicitly argue whether the Court of Appeals committed obvious or probable error, just that the court committed error in granting review on the issue certified under RAP 2.3(b)(4). The Estate otherwise argues the Court of Appeals departed from the accepted and usual course of judicial proceedings within the meaning of RAP 13.5(b)(3).

The Estate is correct that interlocutory review is disfavored generally, as appellate courts are very reluctant to insert themselves into a lower court's ongoing proceedings. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). However, the Court of Appeals will review a superior court's interlocutory ruling if the lower court commits obvious error that renders further proceedings useless or commits probable error that substantially alters the status quo under RAP 2.3(b)(1)-(2), and/or the superior court departed so far from the accepted and usual course of judicial proceedings as to justify interlocutory review under RAP 2.3(b)(3), and/or the court certifies or the parties agree that a disputed question of law is deserving of immediate appellate review under RAP 2.3(b)(4). In this instance, Commissioner Bearse agreed with the superior court that the question of law it certified was worthy of review.

As indicated, the Estate does not argue specifically that the Court of Appeals committed obvious or probable error under RAP 13.5(b)(1)-(2). The Court of Appeals

commits "obvious error" within the meaning of RAP 13.5(b)(1) if its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See* I WASHINGTON APPELLATE PRACTICE DESKBOOK, § 4.4(2)(a) at 4-34—4-35 (4th ed. 2016) (interpreting analogous obvious error rule under RAP 2.3(b)(1)). Stated another way, the error is obvious because it is plain or manifest. The obvious error also must render further proceedings "useless." *See id*. at 4-36. Or stated more simply, the court "made a plain error of law that markedly affects the course of the proceedings." II WASHINGTON APPELLATE PRACTICE DESKBOOK, § 18.3 at 18-14 (4th ed. 2016) (discussing obvious error rule under RAP 13.5(b)(1)).

Here, the Estate discusses whether the superior court committed obvious or probable error under RAP 2.3(b)(1)-(2). It does not matter. The Court of Appeals granted review of the certified question under RAP 2.3(b)(4). On that point, the Estate argues the certification was faulty because, in the Estate's view, there is no disputed "controlling question of law as to which there is substantial ground for a difference of opinion," immediate review of which "may materially advance the ultimate determination of the litigation." RAP 2.3(b)(4). The disputed question of law central to the certified question—whether the Estate has an actionable cause of action in negligent retention under the circumstances of this case—is obvious in light of the pleadings thus far in this case. Whether interlocutory review of that question will "materially advance the ultimate determination" of this case within the meaning of RAP 2.3(b)(4) might be debatable, but it cannot be said the Court of Appeals committed "obvious error" under RAP 13.5(b)(1) when it exercised its discretion to consider the issue on the merits at this juncture.

Even if the Court of Appeals committed obvious error in accepting for review of the certified question (it did not), further proceedings are not rendered "useless" under RAP 13.5(b)(1). Far from it. The Estate will have the benefit of briefing and argument

on this disputed issue and a Court of Appeals decision on the merits for which the aggrieved party may seek further review in this court by way of a petition for review. RAP 13.4. Stated another way, the Estate has the opportunity to prevail on this issue in the Court of Appeals.

Assuming for the sake of argument that the Court of Appeals committed probable error when it accepted for review the certified question, the Estate still must show substantial alteration of the status quo or a substantial limitation on a party's freedom to act. RAP 13.5(b)(2). This "effects" prong of RAP 13.5(b)(2) does not apply if the probable error merely alters the status quo of the instant litigation or substantially limits a party's freedom to act in relation to that litigation; there must be some immediate effect outside the courtroom, such as an injunction. *In re Dependency of N.G.*, 199 Wn.2d 588, 594-98, 510 P.3d 335 (2022); *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014); Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV., 1541, 1546 (1986). The Estate has not demonstrated that it can meet this criterion. The Court of Appeals decision merely alters the course of litigation. There is no showing of any effect outside the courtroom.

Establishing whether the Court of Appeals departed from the accepted and usual standards of judicial proceedings within the meaning of RAP 13.5(b)(3) is particularly difficult. It essentially requires the petitioner to show that the Court of Appeals made a "'renegade decision'" "that is unjustified under any view of the applicable law or facts."II WASHINGTON APPELLATE PRACTICE DESKBOOK, § 18.3 at 18-14.

There is no departure worthy of review here. The Court of Appeals decision to accept review of the certified question falls within the court's rule-based authority. RAP 2.3(b)(4). That the Estate is unhappy the certified question will be decided on the

merits now rather than after a final appealable decision is not a basis for establishing review in this court under RAP 13.5(b)(3).

As indicated, the Estate alternatively asks that this case be transferred to this court under RAP 4.4. The City is correct that this request is premature: "A party should not file a motion to transfer until the record has been perfected and all briefs have been filed in the Court of Appeals." *Id.* These prerequisites have not been met. Complaining of delay in the Court of Appeals, the Estate urges liberal application of RAP 4.4 in order "to serve the ends of justice." RAP 1.2(c). This argument is unpersuasive, as the better use of judicial resources at this juncture is to allow the Court of Appeals to ponder and determine the certified question, resulting in a decision that may be useful to this court in the event the aggrieved party seeks further review under RAP 13.4.

The motion for discretionary review is denied. The motion to transfer the case to this court is denied.

COMMISSIONER

June 26, 2024

APPENDIX D

09-1-03733-8 32646282 STAO 08-17-09

IN THE SUPERIOR COURT OF PIERCE COUNTY

STATEMENT OF ARRESTING OFFICER and PRELIMINARY FINDING OF PROBABLE CAUSE

STATE OF WASHINGTON)
) ss. NO: 09103B39
County of Pierce)

Comes now Detective Ken Lewis, Puyallup Police Department Law Enforcement Officer, and states that the following person was arrested by this officer at the following time and place:

Name: Joseph, Aaron James

DOB 07-13-82 Sex Male Race White

Arrest Date: 08-13-2009 Time: 1625

Place of Arrest; 1008 South Yakima Avenue, suite 302, Tacoma WA

Incident No: 09007177

Listed Booking Charges:
Assault, 2nd degree - Domestic Violence (RCW 9A.36.021.DV)
Harassment (felony - death threat) (RCW 9A.46.020.B)

On August 4th, 2009, Lindsey Joseph reported to Tacoma Police Sergeant Corinna Curtis that her husband, Tacoma Police Officer Aaron Joseph, had threatened to kill one of his co-workers. She explained that the couple was in the process of divorce, and that Mr. Joseph was accusing her of having an affair with his co-worker and former partner, Officer Steven Storwick. She reported to police that Mr. Joseph called her and screamed something similar to, "I'll kill that mother fucker!" She also described another incident that had occurred at her parents' home on North Visscher Street approximately a month ago in which she described Aaron Joseph becoming emotionally unstable and threatening suicide. The wife reported that her husband had put his service pistol to his head several times while making these suicidal threats a month prior. Mrs. Joseph expressed concern for Storwick's safety. Tacoma Police personnel began investigating the complaint, and TPD Sergeant Curtis and TPD Lieutenant Gustason interviewed the involved parties.

According to Tacoma Police Department's initial reports, Officer Steven Storwick corroborated Lindsay Joseph's account of the incident and reported that Mr. Joseph had called him on July 31st and screamed, "I'll fucking kill you!" Storwick also reported that in the days since the original threat was made, Aaron Joseph had apologized to him, made more angry threats, apologized to him again, then began making references to walking over his dead body to Mrs. Joseph. Storwick also reported that Lindsey Joseph had told him about how her husband had pointed a gun at her head during the incident at her parents' home. Tacoma Police Internal Affairs personnel subsequently interviewed Mrs. Joseph, and she confirmed in her statement that Aaron Joseph had pointed his service pistol at her head and threatened to kill her. In the transcript of a statement provided to TPD investigators, interviewers asked Mrs. Joseph why she had waited to report the incidents. She answered, "He's a Police Officer." Tacoma Police Department requested the assistance of Puyallup Police to investigate the alleged criminal acts.

Detective Sergeant Ryan Portmann and Detective Ken Lewis interviewed Lindsey Joseph on August 11th, 2009. Portmann and Lewis were also provided with the appropriate initial Tacoma Police Department reports and statements relating to the allegations. Mrs. Joseph's statement was very consistent with both her prior report to Tacoma Police and the interview she'd provided to TPD's Internal Affairs personnel. In a recorded statement, Lindsey Aaron stated her husband had pointed a pistol at her head and told her, "...don't worry, it'll be just like Brame. I'll just take you first, and then I'll do me." She also told Puyallup Police investigators, "...the gun was literally to my head maybe five seconds at the most. And... and that was... that was really... I mean that was the scariest moment..." The victim could only estimate the date of the occurrence at the time, however Portmann and Lewis were later able to use Officer Storwick's phone records and other parties' statements to determine this occurred on or about the evening of June 16th, 2009. During the same interview, Lindsey Joseph also said that her husband made a threat against Officer Storwick on August 4th, 2009. She told Portmann and Lewis that Aaron angrily told her, "You guys are dead to me," and, "I could kill that mother fucker!" Mrs. Joseph said she was fearful of her husband, and that she also feared he was capable of harming Steven Storwick. She obtained a protection order on August 11th, 2009, and it was immediately served on Mr. Joseph.

Portmann and Lewis spoke with Mark and Laurie Jones, Lindsey Joseph's parents. Mr. and Mrs. Jones were able to provide corroborating information regarding the family's activities around June 16th, 2009. They also reported that Lindsey had told them about the incident in which Aaron pointed the gun at her. Both parents also stated that Aaron Joseph's mother Linda had been calling them several times since their daughter had reported the incident to Tacoma Police. The topic of these phone calls and a subsequent face-to-face meeting,

according to Mr. and Mrs. Jones, was to beg them to convince their daughter to recant. The parents reported feeling pressured by Aaron Joseph's family.

Portmann and Lewis interviewed Steven Storwick on August 12th, 2009. Storwick's description and timeline of events also corroborated. He was also able to provide a debit card transaction and phone records that coincided with details of the investigation. These phone records also helped confirm the date of the occurrence Lindsey Joseph had described at her parents' home. Storwick also reported that Aaron Joseph had shouted death threats at him similar to, "I'll fucking kill you!" over the phone on July 31st, 2009. He also told Portmann and Lewis that after Mr. Joseph apologized to him the next day on August 1st, he later learned that Aaron Joseph made a similar threat against him to Lindsey on August 4th, 2009. Mr. Storwick told investigators that due to his former partner's questionable emotional state and anger, he was concerned for both his and Lindsey Joseph's well-being.

At this point in their investigation, Detective Lewis and Sergeant Portmann found that the involved parties' statements were very consistent and corroborated with the details of the alleged incidents. After consulting with the Pierce County Prosecutor's Office, Portmann and Lewis took Aaron Joseph into custody for the assault and threats with the assistance of other members of the Tacoma and Puyallup Police Departments on August 13th, 2009.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. *(RCW 9A.72.085)* This form was completed and signed in Puyallup, Washington on

Detective Ken Lewis/ #282
Reporting Officer's Signature: #282

Puyallup Police Department - 311 W. Pioneer, Puyallup WA 98371 - Phone 253-841-5415

This finding does not preclude the prosecuting agency from filing formal charges at a later time.

DATED this _____ day of August at _____ hours.

_____
SUPERIOR COURT JUDGE

Incident No 09007177

APPENDIX E

Honorable Shelly K. Speir-Moss

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

LISA EARL, on behalf of and THE ESTATE OF JACQUELINE SALYERS, Plaintiff, v. SCOTT CAMPBELL; the marital community of Scott and Jane Doe Campbell; AARON JOSEPH a/k/a AARON KOMOMUA and the marital community of Aaron Joseph/Komomua and Jane Doe Joseph/Komomua; and CITY OF TACOMA, Defendants.	NO. 21-2-07268-4 DECLARATION OF MARK JONES

I, MARK JONES, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I have personal knowledge of the facts set forth here.

2. I am the father of Lindsey Jones, formerly known as Lindsey Joseph, when she was previously married to Aaron Joseph, and who is now using the name Lindsey Jones Conley.

3. In August of 2009, my daughter told me and my wife Laurie Jones that her husband Aaron Joseph had assaulted her with a gun, that he had put the gun to her head and threatened to kill her and then to kill himself, just like former Tacoma police chief David Brame did.

4. Aaron's mother Linda Paris did come over to our residence and Aaron Joseph was with her. They repeatedly told us that they knew unflattering things about Lindsey and they proposed a kind of quid pro quo. They proposed that if we would persuade Lindsey to take back what she said Aaron did to her, then they would keep silent about the things that they knew Lindsey had done. They said we won't make anything public if you will get Lindsey to recant.. My wife and I refused to agree to that and simply said we would tell Lindsey to tell the truth.

DATED this 6th day of July, 2023.

Mark R Jones

Mark R. Jones

CARNEY BADLEY SPELLMAN, P.S.
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APPENDIX F

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. AARON JAMES JOSEPH, Defendant.	CAUSE NO. 09-1-03733-9 INFORMATION

DOB: 7/13/1982 SEX : MALE RACE: WHITE
PCN#: 539877585 SID#: UNKNOWN DOL#: UNKNOWN

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse AARON JAMES JOSEPH of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

That AARON JAMES JOSEPH, in the State of Washington, on or about the 16th day of June, 2009, did unlawfully and feloniously, under circumstances not amounting to assault in the first degree, intentionally assault Lindsey Joseph with a deadly weapon, to-wit: a handgun, contrary to RCW 9A.36.021(1)(c), a domestic violence incident as defined in RCW 10.99.020, and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse AARON JAMES JOSEPH of the crime of FELONY HARASSMENT, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely

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connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That AARON JAMES JOSEPH, in the State of Washington, on or about the 31st day of July, 2009, without lawful authority, did unlawfully, knowingly threaten Lindsey Joseph and/or Stephen Storwick to cause bodily injury, immediately or in the future, to that person or to any other person, and by words or conduct place the person threatened in reasonable fear that the threat would be carried out, and that further, the threat was a threat to kill the person threatened or any other person, thereby invoking the provisions of RCW 9A.46.020(2)(b) and increasing the classification of the crime to a felony, contrary to RCW 9A.46.020(1)(a)(i)(b) and 9A.46.020(2)(b), a domestic violence incident as defined in RCW 10.99.020, and against the peace and dignity of the State of Washington.

DATED this 14th day of August, 2009.

PUYALLUP POLICE DEPARTMENT
WA02701

GERALD A. HORNE
Pierce County Prosecuting Attorney

geb

By: /s/ GRANT E. BLINN
GRANT E. BLINN
Deputy Prosecuting Attorney
WSB#: 25570

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APPENDIX G

Supreme Court No. 102018-0

Pierce County Superior Court Cause No. 21-2-07268-4

SUPREME COURT
OF THE STATE OF WASHINGTON

LISA EARL,

Petitioner,

v.

TIMOTHY L. ASHCRAFT, Presiding Judge, Pierce County Superior Court; MATTHEW H. THOMAS, Judge, Pierce County Superior Court,

Respondents.

DECLARATION OF LINDSEY MARIE CONLEY

Jennifer Wellman
WSBA #299193
Skellenger Bender
1301 Fifth Ave., Suite 3401 |
Seattle, WA 98101
jwellman@skellengerbender.com

James E. Lobsenz
WSBA #8787
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
lobsenz@carneylaw.com

Attorneys for Plaintiff

I, Lindsey Marie Conley, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I have personal knowledge of the facts set forth here.

2. I married Aaron James Joseph in 2007. We divorced in 2010. Before the marriage even took place, I saw red flags that he should not be police officer and asked him several times to seek counseling and his response was always "the police department won't hire me if I go to counseling"

3. In 2007 while Aaron was a Tacoma Police Officer, he threatened to kill me and himself, "like Brame did". Exhibit 1 (DVPO and criminal charges).

4. I filed for a Petition for a Domestic Violence Protection Order and ultimately was contacted by a female police officer, Tacoma Police Department,(TPD)'s internal affairs officers and a woman from the Pierce County prosecutor's office.

5. I was interviewed several times by TPD and internal affairs, at both a precinct and TPD headquarters. I remained consistent in that I wanted to go forward with charges against Aaron.

6. I told them I wanted Aaron to get help. I was told at the time that Aaron was charged with DV felony assault because he threatened me with his TPD issued gun.

7. Most of the communication I had with the authorities was by phone with a woman in the prosecutor's office. Aaron was placed on paid administrative leave and we began divorce proceedings.

8. Before the Puyallup Police Department took over the investigation of Aaron, TPD internal affairs detectives told me that I did not have to go forward with the charges against Aaron. It felt like they were trying to talk me out of pressing charges. I insisted.

9. At some point, the woman I had been talking to at the prosecutor's office told me that Aaron had agreed to take an Alford plea. I remember her specifically saying, "Alford plea" because I was unsure what that meant.

10. I was informed today (by Ms. Earl's attorney Mr. Lobsenz) that Aaron never entered any Alford plea.

11. As I understood it at the time, entering an Alford plea meant that Aaron was not going to say if he did or did not do it, but that he would face a judicial consequence just as if he did commit the crime. Now, looking back, maybe the prosecutor was talking about the misdemeanor charge that did go forward.

12. When I spoke to the woman in the prosecutor's office, she mentioned that TPD would be the responsible party for putting Aaron through counseling or anger management treatment. I was surprised to learn that Tacoma was going to continue to employ him. I was extremely frightened to ever see Aaron or any of his friends while out and about in Tacoma, this was a large part of why I don't live in Tacoma any more.

13. The woman in the prosecutor's office who spoke to me sounded apologetic when she explained the outcome to the case regarding Aaron.

14. I was never told that Aaron's arrest record was expunged. I have not spoken to Aaron since the divorce was initiated.

DATED this 13th day of June 2023.

Lindsey Marie Conley

APPENDIX H

Honorable Shelly K. Speir-Moss

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF PIERCE

LISA EARL, on behalf of and THE ESTATE OF JACQUELINE SALYERS, Plaintiff, v. SCOTT CAMPBELL; the marital community of Scott and Jane Doe Campbell; AARON JOSEPH a/k/a AARON KOMOMUA and the marital community of Aaron Joseph/Komomua and Jane Doe Joseph/Komomua; and CITY OF TACOMA, Defendants.	NO. 21-2-07268-4 DECLARATION OF WILLIAM HARMENING

I, WILLIAM HARMENING, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. My name is William M. Harmening, I am 64 years old, and I reside at 2058 Halls Mill Road in Unionville, Tennessee 37180. Since 2014 I have provided expert witness services in cases related to police practices, police use of force, forensic psychology, and correctional practices. I have consulted in over 250 cases in 40 states, and have been qualified by Courts across the Nation, including Federal Courts in Seattle and Tacoma..

2. I recently was provided with a copy of the *Declaration of Detective Ryan Larsen in Support of Defendants' Motion for Reconsideration*, dated June 23, 2023 and I have read it.

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3. Larsen acknowledges interviewing Officer Joseph within hours of the shooting of Jacqueline Salyers on that night.

4. Joseph told Larsen that he somehow lost the ammunition magazine that he had loaded into his pistol that evening. Joseph denied any knowledge of how or when it purportedly happened. He told Larsen that he was not aware that it had fallen out of his gun until Officer Campbell told him that his magazine was missing out of his weapon.

5. I can honestly say that in 40+ years of being in and around policing, I have NEVER seen a case where an officer's magazine fell out of his weapon.

6. The Glock magazines are secured in the weapon and can only fall out after a magazine release is manually depressed. The mechanism has some tension to avoid magazines being accidentally released. The only time I have ever seen a magazine released was during a physical altercation where a suspect inadvertently depressed the release button. Joseph did not claim to have had any struggle with anyone that night.

7. Joseph told Larsen that after Campbell told him he was missing his magazine; he then reloaded his gun with a fresh magazine of 13 rounds. A fully loaded Glock 21 weighs 26 ounces empty and 38 ounces when fully loaded. I find it impossible that an officer's magazine could somehow slip out of a high- quality firearm like a Glock 21, and further, that the officer would be unaware of it hitting hard pavement at his feet.

8. At no time did Officer Campbell say anything about telling Joseph his magazine was missing, nor was he asked. This was a recorded interview with the transcript provided.[1] Larsen never asked Campbell any questions about Joseph's magazine or Joseph's gun. He never asked

[1] Pages 161-167 of 443-page discovery file.

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him if he ever noticed that Joseph was missing any equipment. Larsen completely avoided the subject and Campbell never said anything about it. I find this failure to question Campbell on this subject and Larsen's complete failure to see whether Campbell would confirm Officer Joseph's representation that Campbell notified him he was missing a magazine to be inexcusable.

9. Making Joseph's scenario even more impossible, his "lost" magazine was found forward of where Salyers' vehicle came to rest. That would mean however the magazine came out of the weapon, it happened when the officers were in foot pursuit of Wright. According to both officers' statements, they realized Wright may have been armed with a rifle, so they stopped. Joseph stated that he returned to the cover of his squad car, holstered his weapon, and armed himself with his department issued assault rifle. This would mean that Joseph actually ran back to his vehicle and holstered a weapon that had lost nearly half its weight. I find it impossible that an experienced police officer would not have known this.

10. Larsen acknowledges that one live .45 caliber round was found lying on the street right next to the "lost" or "dropped" magazine. Larsen never asked Joseph to explain how this live bullet came out of the dropped magazine or came to be there. Based on my knowledge and experience, there are only two scenarios that can answer this question.

a. Officer Joseph did in fact fire his weapon one time. Multiple bullet fragments found by CSTs were too badly damaged to identify. It is possible that Joseph hit the vehicle. It is also possible that his shot missed. The shot caused Joseph's weapon to jam. This happens when an empty casing is not properly ejected and a new bullet is loaded on top of it, causing a "stovepipe" of the two rounds. This leaves the gun's upper slide in a partially opened position and the gun inoperable. In this scenario, Joseph now has 12 rounds in his magazine and a live

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round and empty casing in the ejection port (his gun was loaded 13+1). A malfunction like this is not uncommon and is caused by either not properly cleaning the weapon or by not properly gripping the weapon when it's fired. Every police officer knows how to quickly deal with such a malfunction of their weapon. They rotate the weapon to the right so that the ejection port is facing downwards and then they "rack" the slide manually. This hopefully clears out the two jammed rounds, causing them to fall to the ground, and at the same time loads a fresh round from the magazine into the chamber. After performing this task as he was trained, Joseph would have had 11 bullets in his magazine, a fresh bullet chambered, and a live round and empty casing on the ground near his feet.

b. Joseph then depressed his magazine release and allowed the partially loaded magazine to fall to the pavement. He then loaded a fresh magazine. He now would have had 13 rounds in his magazine and a live round in the chamber, and the gun would have appeared as though it had not been fired. The magazine containing 11 rounds as well as the live round and empty casing that were previously expelled were now on the ground where CSTs found two of them. It cannot be determined or testified to why Joseph released the partially loaded magazine, if in fact he did, however there are two possibilities with the same outcome. Either 1) Joseph was attempting to make his weapon appear as though it had not been fired, or 2) when he cleared the jammed rounds, he also dropped the magazine in case the magazine's spring was defective, which has been known to happen. Either way, and as described above, he denied even knowing that the magazine was on the pavement.

c. The second scenario is similar. We know from both officers' statements that when Joseph approached the vehicle, he struck the driver's side window with his gun. As I discuss in my original analysis and report, this was reckless on his part. One of the reasons why

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is that the gun could accidentally fire or he could accidentally pull the trigger if his finger was inside the trigger guard. It is entirely possible that Joseph did accidentally fire his weapon, perhaps even causing Campbell to then fire his weapon in a case of "contagious" fire. Under this scenario it is even more likely that Joseph could have experienced a jammed gun, thus causing him to clear the weapon as described above. We know from witness statements that one of the officers was heard immediately after the shots were fired yelling "*see what yall made me do!*" It is not implausible to suggest that Campbell may have yelled that knowing that Joseph's accidental shot caused him to inappropriately use deadly force. Striking the window could not have caused the magazine to fall out of the weapon. The configuration of the weapon makes this impossible, and furthermore, the empty magazine was found many feet forward from where Joseph says he struck the window.

d. If either of these scenarios is correct, then at some point the empty casing Joseph expelled from his weapon was removed from the scene. This certainly would have facilitated an effort to hide the fact that Joseph fired his weapon. There would have been nothing he could do with the partially loaded magazine and live round. Removing the live round would have made it worse by then having two missing rounds. Had he loaded the live round back in the magazine and put the 12-round magazine back in his belt, then Detective Larson would have included those rounds in his bullet count and would have shown Joseph's knowledge of one missing round. Instead, assuming this scenario is true, he chose to make his weapon appear as if it had never been fired and then plead ignorance to the dropped magazine and live round found on the pavement.

11. I do believe Detective Larson realized there was a problem. Given Joseph's account of loading a fresh magazine after being told by Campbell that his magazine was missing, any

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police officer, especially an experienced detective, would know that there would have been a live round still in the gun's chamber if it was never fired. Strangely, during his interview of Joseph, he asked "*Did you have to rack a round or anything?*"[2] Joseph tells him he did not, and that he just inserted a new magazine. Larson then asks him again, "*Okay. So you put a magazine in. You don't need…you didn't rack it?*" Joseph responds that he did not, and the subject was never again mentioned. Detective Larson's questions tell me that he knew the live round lying on the pavement was a question that needed answered. He recognized the problem but unfortunately accepted Joseph's answer and made no effort to confront and clarify, as detectives are trained to do. This is consistent with the fact that Larson NEVER documents in any report that the dropped magazine had only 11 bullets in it, thus leaving one bullet unaccounted for. Nor does he ever take the simple step of confirming with Campbell that he did in fact tell Joseph that his magazine was missing. And finally, it would have been standard protocol to take custody of Joseph's weapon and to submit it to the crime lab for testing. This would have answered the question of whether Joseph fired the weapon. That was not done.

12. In his declaration dated June 23, 2023, Detective Larsen states that he did not submit Joseph's weapon to the lab for analysis because he determined himself by visually inspecting it that it had not been fired. There are several problems with this, as follows:

a. It is common knowledge that gunshot residue (GSR) comes in various forms, including microscopic particulate. No criminalistics lab performs their analysis by simply visually inspecting the weapon. They do it by swabbing the surface being examined, applying

[2] Page 127 of 443-page discovery file. Joseph interview transcript.

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various chemical reagents, and then using magnification to view the surface. Scanning electron microscopy is the only available method to confirm the presence of GSR particles.[3]

b. Larson did not provide a description of his inspection in his original report. He stated only that he inspected the weapon prior to conducting a bullet count. It is always necessary to inspect a loaded weapon before unloading it to count the bullets. In his declaration, he stated that he put his finger in the chamber and inspected the barrel and determined there was no gunpowder residue, no blackening or debris, and no smell of gunpowder. Aside from the fact that this is in no way a proper GSR analysis, he does not provide this description in his original report, only in his declaration after he became aware of the issues I raised in my supplemental report.

13. I have read Detective Larsen's explanation for his failure to take possession of Officer Aaron Joseph's police department issued Glock 21 pistol on the night of January 28-29, 2016 and his failure to submit that gun to the Washington State Crime

14. Larsen did not take Joseph's gun and submit it to the Washington State crime lab for testing. But Larsen did submit a .45 cal. weapon found in the Salyers' vehicle to the crime lab for analysis, even though both officers stated that *neither* Salyers nor Wright fired a weapon. The obvious question is, if Larson is capable of identifying GSR, or the lack of, by simply touching, smelling, and visually inspecting a weapon, why did he not do that with the gun found in the vehicle? If both officers agreed that neither Joseph's gun nor the gun found in the vehicle was ever fired, then why submit the latter to the crime lab but not the former? The fact is, he

[3] Houck et al. (2018). The science of crime scenes, second ed. As quoted at https://www.sciencedirect.com/topics/medicine-and-dentistry/gunpowder#:~:text=Scanning%20electron%20microscopy%20is%20the,present%20and%20not%20their%20form.

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followed proper protocol with the suspect weapon, but ignored it when it came to Joseph's weapon.

15. Larson further stated in his declaration (par. 10) that "*A Glock .45 magazine containing 11 live rounds, and one loose .45 caliber live round were recovered at the scene and documented in a supplemental report. I believe this to be the magazine that Officer Joseph was missing.*" Here Larson has chosen his words carefully. First of all, you would think Larson would know with certainty that it was Joseph's magazine. He did not because *he* never inspected it or even counted the bullets found in it. The fact that it was found with a bullet missing was never documented by Larson in any one of *his* reports.

16. Finally, if Joseph's gun really was so defective as to have a loaded magazine simply fall out of it without the release being pressed, why would any detective give such a gun back to the officer? Why would any officer want to continue to use a gun that had malfunctioned in such an exceptional and unheard of manner? IF a magazine could fall out for no reason once, what would prevent that from happening again, and why would an officer want to arm himself with such a weapon that he might find had once again "lost" its magazine leaving the officer with a gun that could not be fired because it had no ammunition in it at all.

DATED this 6th day of July, 2023.

William M. Harmening
07/04/2023

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ ESERVICE to the following:

Attorneys for Defendants
Richard B. Jolley
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801 Second Avenue Suite 1210
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myotter@cityoftacoma.org

DATED this 10th day of July, 2023.

s/Deborah A. Groth
Deborah A. Groth, Legal Assistant

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CARNEY BADLEY SPELLMAN

August 26, 2025 - 8:16 AM

Filing Petition for Review

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Lisa Earl, Respondent v. City of Tacoma, Scott Campbell, et al., Appellants (592207)

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