No. 97583-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN MANCINI,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

Nancy Talner, WSBA #11196
Antoinette M. Davis WSBA #29821
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
Telephone: (206) 624-2184

William Block, WSBA #7578
ACLU-WA Cooperating Attorney
P.O. Box 2728
Seattle, WA 98111
Telephone: (206) 624-2184

J. Dino Vasquez WSBA #25533
ACLU-WA Cooperating Attorney
KARR TUTTLE CAMPBELL
701 Fifth Ave., Suite 3300
Seattle, WA 98104
Telephone: (206) 223-1313

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The identity and interest of *amicus curiae* are set forth in the Motion for Leave to File *Amicus Curiae* Brief that accompanies this brief.

QUESTIONS PRESENTED

1. Whether there is any valid basis for immunity from common law tort liability for negligent police operations that result in wrongful home invasions and detentions.

2. Whether the theory that wrongful police conduct arising from negligence in an investigation is immune as a "forbidden tort" can withstand the legislature's waiver of sovereign immunity in RCW 4.92.090 and 4.96.010, and this Court's holding in *Beltran-Serrano v. City of Tacoma*.

STATEMENT OF THE CASE

In this case, the Tacoma's Police Department's SWAT team violently broke into the home of Ms. Kathleen Mancini, a person completely unrelated to their target. The Tacoma Police Department was investigating a man named Matt Logstrom in connection with drug crimes. RP 42. A drug-involved confidential informant identified an apartment in one of four identical buildings that she thought Logstrom lived in. RP 47-48. That apartment, however, belonged to Ms. Mancini, who had no relation whatsoever to Logstrom. CP 377, RP 51-52. The police knew that the apartment was Ms. Mancini's, but thought that Logstrom might be living in an apartment rented by his mother. RP 220. They never, however, identified the name of Logstrom's mother, RP 52-53, 220-21, nor did they ever

identify the name of Ms. Mancini's son, RP 51. The police did not follow their standard procedure (used in 95% of cases) to do a controlled buy to confirm the apartment the target, Logstrom, was living in. RP 49-50. They did no surveillance (also done in 95% of cases), because they worked 9 to 5 and effective surveillance would have to be at night. CP 390-91, RP 49-50, 305. They looked into Ms. Mancini's history, and admittedly could find no link between her and Logstrom. CP 377, RP 51-53. The police failed to check social media to see that she had lived in Hawaii most of her life nor followed up to see that Logstrom had not been born in Hawaii. RP 306, 313, 368. They did not do a reverse directory search that would have shown a dedicated Group Health line in the apartment serving Ms. Mancini's work as a call nurse, highly inconsistent with the informant's description of a filthy drug house occupied by Logstrom. RP 54.

Although police failed to substantiate any link between Logstrom and Ms. Mancini's apartment, they nevertheless applied for a search warrant for Ms. Mancini's home. Ex. 103, CP 177-80, RP 221-22. In the application the police failed to mention that the apartment was rented to Ms. Mancini and not the target, Logstrom. Ex. 103, CP 177-80. The police also conspicuously stated that a Dodge Charger belonging to Logstrom was parked "in front" of the target apartment but failed to disclose that parking was on an entirely different level than Ms. Mancini's apartment and served

multiple buildings. Ex 103, CP 177-80, RP 382-83. The police further failed to disclose they had done no surveillance or any controlled buys to confirm a connection between Logstrom and Ms. Mancini's home. Ex. 103, CP 177-80. Ultimately, the police failed to disclose any facts demonstrating their lack of any known connection between Ms. Mancini and Logstrom. Ex. 103, CP 177-180.

After police obtained the warrant, they broke into Ms. Mancini's home, cuffed her and led her outside in her nightgown. RP 371-86. Although they "immediately" realized that they were in the wrong apartment, they continued to hold Ms. Mancini for an extended period, shackled and in the cold, subjecting her to harsh questioning. RP 228-234, 371-86, 393-94. As Ms. Mancini showed in court, in targeting her home, the police failed to do the type of investigation that a reasonable person would, including failing to create any verification of information and speculation supplied by an informant, failing to examine the red flags that they had the wrong location, and failing to immediately remedy their error after they broke in. In almost all of their operational activities, both before and after applying for the warrant, they were negligent.

A jury returned a verdict for Ms. Mancini on her negligence claim. The court of appeals, however, held that a claim of tortious conduct arising out of negligent police investigation is a "forbidden tort," "because of the

potential chilling effect such claims would have on investigations." Concluding that Ms. Mancini's case focused on the negligent pre-intrusion investigation, the court of appeals ruled that the City should have been granted judgment as a matter of law. *Mancini v. City of Tacoma*, 8 Wn.App.2d 1066 (2019) (*Mancini II).* This Court granted review.

SUMMARY OF ARGUMENT

The City of Tacoma police negligently identified Ms. Mancini's apartment as the location of Logstrom's drug operations, invaded and removed her from her home, shackled her, and forcefully questioned her even after the police knew they were in the wrong apartment. Tort law provides an authorized form of redress for the breach of duty and proximately caused damages to person and property that occurred here. Moreover, this form of government liability is essential to deter dangerous conduct and provide a fair distribution of risk of loss.

The Washington legislature holds the constitutional authority to determine whether and how to allow suits against the State. *See* Washington Constitution Article II, § 26. The legislature, in RCW 4.92.090 and RCW 4.96.010, elected to broadly waive sovereign immunity and make the State and local governments liable in tort "to the same extent as if [they] were a private person or corporation," although it has reinstituted immunity in selected instances as it has seen fit. *See, e.g.*, RCW 46.44.020. While this

Court created an exception to the waiver of sovereign immunity for high-level discretionary governmental decisions (the essence of governance), *see Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), it has also clarified the difference between governmental duties to the general public - which do not give rise to tort liability, and common law tort obligations arising from direct interactions with individuals - which necessitate a duty of care. *See* ***Beltran-Serrano v. City of Tacoma***, 193 Wn.2d 537, 442 P.3d 608 (2019).

In *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), this Court expressly rejected case law that created immunity for negligent conduct related to police investigations. Nevertheless, a set of court of appeals cases adopted, in conclusory fashion, a rule that claims for tortious actions arising out of "negligent investigation" are a "forbidden tort." Nothing in the Washington Constitution, the legislature's actions or this Court's holdings justifies such an immunity, as reinforced in this Court's recent decision in *Beltran-Serrano v. City of Tacoma*.

Judicial creation of a new blanket immunity for negligent conduct arising out of "investigatory functions" is contrary to law, bad policy, and should be rejected.

ARGUMENT

A. Negligence Tort Liability is Essential to Holding Government Accountable and Providing Redress to People Wronged

As testified to at trial, there are over 60,000 SWAT raids in the U.S. each year. A significant portion of these raids are "wrong door" raids in which children and pets have been killed and people have literally been scared to death. RP. 154. These raids have escalated as police have employed a "rapid and broad expansion of military-like tactics, weaponry, equipment, vehicles, and the like." RP 97. Military-style raid units use tactics designed to "disorient" and "subdue" people in the home. RP 99-101. Tacoma police did exactly that when they used a battering ram to break down Ms. Mancini's door, immediately followed by eight black clad, masked police entering her home with long guns pointed and throwing her to the ground, handcuffing her and taking her outdoors in nothing but a nightgown - even though police "immediately" realized they had the wrong apartment. RP 228-34, 370-83. As testified at trial, there is "absolutely no excuse" for barging into the wrong door. RP 102.

Negligence tort law is an essential way to provide people redress and motivate the government to prevent and correct abuses.

> Accountability through tort liability in areas outside the narrow exception noted above [high level discretionary acts], may be the only way of assuring a certain standard of performance from governmental entities. . . . The most promising way to correct the abuses, if a community has the political will to correct them, is to

> provide incentives to the highest officials by imposing liability on the governmental unit. The ranking officials, motivated by threats to their budget, would issue the order that would be necessary to check the abuses in order to avoid having to pay damages.

Bender, supra, 99 Wn.2d at 588.

These sentiments were echoed in *Beltran-Serrano:* "[To immunize the government] would undermine the value of tort liability to protect victims, deter dangerous conduct and provide a fair distribution of risk of loss." *Beltran-Serrano, supra,* 193 Wn.2d at 550.

As explained in Stephens and Harnetiaux, "*The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*," 30 Seattle U. L.Rev. 35 (2006):

> It has long been recognized that tort liability is a powerful tool for encouraging responsible conduct. Indeed, a primary purpose of tort law is to provide for civil enforcement of social norms. Private lawsuits often accomplish results that government action cannot achieve through criminal sanctions, regulatory enforcement, or other means. Both public and private actors alter their behavior in response to tort liability, and any suggestion that tort liability is not an impetus for change in the context of governmental conduct rests on the doubtful premise that the government is uniquely unable to reform.
> . . . .
> Additionally, the value of tort liability does not lie solely in encouraging responsible conduct; tort liability also provides necessary compensation to injured victims. This compensatory function is arguably the greatest value that tort law provides.

Id. at 59 (footnotes omitted).

Tort liability is essential to motivate governments to adopt policies and procedures that prevent what happened here and is an important avenue of redress for Ms. Mancini.

B. Judicial Interference with the Washington Legislature's Constitutional Authority to Waive Sovereign Immunity is and Should be Extremely Limited

The Washington Constitution grants the legislature the power to determine "in what manner, and in what courts, suits may be brought against the state." *See* Washington Constitution Article II, Section 26. In 1961, the Washington legislature exercised that right and provided that the government shall be liable for its torts "to the same extent as if it were a private person or corporation," a decision that it reaffirmed in 1963, *see* RCW 4.92.090, and again in 1967, *see* RCW 4.96.010.

The waiver of sovereign immunity is intentionally quite broad. *See Evangelical United Brethren Church*, *supra*, 67 Wn.2d at 252. The legislature has, on occasion, exercised its constitutional right to re-institute immunity in selective situations. *See* RCW 46.44.020 (relating to public highways); RCW 9.94A.843 (release of information on sex offenders); RCW 4.24.210 (land made available for recreational purposes). Any issue of immunity should be determined by the legislature, not the courts.

While this Court recognizes that the waiver of sovereign immunity applies to operational conduct, liability does not attach to high-level

discretionary acts – the essential acts of governance. *See Evangelical United Brethren Church*, *supra*, 67 Wn.2d at 252. Applying the limited "discretionary immunity" exception directly to law enforcement, this Court held in ***Mason v. Bitton***, 85 Wn.2d 231, 534 P.2d 1360 (1975), that the operational police decision to engage in a high-speed chase is not entitled to immunity:

> We are fully convinced that the initial decision to give or not to give chase, and the decision as to whether to continue the pursuit are properly characterized as *operational*, and not the "basic policy decision" discussed in *King* [84 Wn.2d], at page 246 [525 P.2d 228]. To now hold that this type of discretion, exercised by police officers in the field, cannot result in liability under RCW 46.61.035, due to an exception provided for basic policy discretion, would require this court to close its eyes to the clear intent and purpose of the legislature when it abolished sovereign immunity under RCW 4.96.010. If this type of conduct were immune from liability, the exception would surely engulf the rule, if not totally destroy it.

Mason, 85 Wn.2d at 328.

Mason also clarified the way in which the sovereign's liability in tort applies "to the same extent as if it were a private party or corporation," RCW 4.96.010, which avoids imposing *greater* liability for special governmental "public duties" but does not immunize government from the *same* liabilities a private actor would have for the same conduct, such as negligence resulting in wrongful intrusion and detention.

As recently as last term, this Court agreed in *Beltran-Serrano*, *supra*, that a government's tort liability is the same as that of a private party.

"The central purpose behind the public duty doctrine is to ensure that governments do not bear greater tort liability than private actors." 193 Wn.2d at 549.

The government, for example, owes a duty to the general public to enforce the laws. The governmental actor does not acquire tort liability by virtue of the mere failure to carry out that public duty.[1]

Where, however, the governmental actor is directly interacting with an individual, it is subject to the same duty held by every private individual to use "reasonable care to refrain from causing foreseeable harm in interactions with others." *Beltran-Serrano*, *supra*, 193 Wn. 2d at 614. To apply the public duty doctrine to immunize direct contact with individuals "would inappropriately lead to a partial restoration of immunity by carving out an exception to ordinary tort liability for governmental entities." *Id.*

As held in *Beltran-Serrano*, the common law duty of care – the essence of negligence - in the context of law enforcement, "encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance." *Id.* at 550. "Beltran-Serrano's negligence claims arise out of Officer Volk's direct interaction with him, not the breach of a generalized public duty." *Id*. "[I]f the officers do act, they have a duty to act

[1] The legislature can, however, by statute, create an actionable duty on the part of governmental actors, *see Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), but that is not the situation here.

with reasonable care." *Id*., citing *Coffel v. Clallam County,* 47 Wn. App. 397, 403, 735 P.2d 686 (1987).

The legislature has waived sovereign immunity for both the State and local governments. This Court has made clear that under such waiver, a governmental actor is liable "to the same extent as if it were a private party or corporation," RCW 4.92.090, 4.96.010. The role of the courts is to uphold, not overturn this legislative determination.

C. There is No Basis for Creation of a New Immunity for Negligence "Related to Evidence Gathering Activities"

The specific issue of immunity for operational negligence in investigation that results in direct harm to an individual has been considered before. In *Clipse v. Gillis,* 20 Wn.App. 691, 695-96, 582 P.2d 555, 557-558 (1978), the court of appeals held that police have "discretionary act" immunity from a claim of negligent investigation resulting in an unjustified arrest. This Court, in *Bender v. City of Seattle, supra,* explicitly disapproved this holding in *Clipse*. *See Bender, supra*, 99 Wn.2d at 589-90.

The City concedes it is liable in tort when its operational conduct results in a wrongful invasion and detention. *See* Supplemental Brief of Petitioner p. 11, 14 (referencing false arrest, false imprisonment, malicious prosecution, assault, and battery). It argues, however, that where its

wrongful operational conduct consists of negligence in investigation resulting in wrongful intrusion and detention, that claim is forbidden.

This distinction has no basis in the statutes waiving sovereign immunity or the decisions of this Court. The sovereign is liable "to the same extent as if it were a private person or corporation." RCW 4.92.090, RCW 4.06.010. A private person is liable if they negligently enter the wrong property or detain someone without good cause, *see, e.g.,* Restat 2d of Torts, § 497 ; so too is the sovereign.

Notwithstanding the lack of any basis for distinguishing among torts or judicially creating immunities, and *Bender's* rejection of immunity for negligence involving investigations, *Bender, supra,* at 589-90, a series of court of appeals cases have singled out injuries arising out of negligence in investigations as a "forbidden tort." These decisions are noteworthy for their almost total lack of analysis. The cases ignore the legislature's decision to waive sovereign immunity and the public and private benefits of that waiver. Instead, they rely entirely on the proposition that: "holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement." *See, e.g.,*

Dever v. Fowler, 63 Wn.App. 35, 45, 816 P.2d 1237, 1238, *amended on reconsideration*, 824 P.2d 1237 (1991); *Mancini II*, *supra*, Slip Op. p. 4.[2]

There is, however, no justification for creating immunity based on the claimed "chilling effect" on law enforcement. The benefits from the waiver of sovereign immunity are "to protect victims, deter dangerous conduct and provide a fair distribution of risk of loss." *Beltran-Serrano*, *supra*, 193 Wn.2d at 550. What is "chilled" by liability for negligence is the freedom to act unreasonably in invading persons and property.

Nothing in the legislative history of the waiver of sovereign immunity suggests that the potential of a "chilling effect" should insulate the sovereign from its common law tort liability for its negligence. If such immunity is needed, it is for the legislature, not the courts to make that determination. *See Kelso v. City of Tacoma*, 63 Wn.2d 913, 918-19, 390 P.2d 2, 6 (1964).

The City also argues that the creation of this "forbidden tort" is just a variation of the public duty doctrine. None of the cases adopting the forbidden tort concept, however, tie it to the public duty doctrine, nor could they logically do so. Where, as here, police operations negligently lead to

[2] Other cases have simply cited, without any reasoning, the conclusion that negligence claims involving investigations are not permitted. S*ee, e.g.*, *Fondren v. Klickitat* 79 Wn.App 850, 862, 905 P.2d 928, 934 (1995); *Keates v. Vancouver*, 73 Wn.App. 257, 267, 869 P.2d 88, 93, *review denied*, 124 Wn.2d 1026, 883 P.2d 327 (1994).

invasion of a private party's home, the police are subject to the same duty of reasonable care as a private person. *See Beltran-Serrano, supra,* 193 Wn.2d at 549-50.

When a police officer carrying out their duties negligently runs into another driver, the municipality is liable for the tort. *Kelso, supra*. When a policeman "kicks in the wrong door," the fact that they were acting in the course of their duties does not excuse the tort.[3] Unless this Court creates a special immunity, which it should not, no actor, public or private, should be able to invade the private home of another, forcibly remove them and subject them to harsh and demeaning treatment, without taking due care to ensure that such action is justified and reasonable.

D. The Existence of a Warrant Does Not Confer Immunity.

The City argued that the existence of a search warrant insulates the City from liability. This fails on two accounts. First, there was negligence in unduly detaining and questioning Ms. Mancini after the entry, itself sufficient to sustain the verdict.

Second, the existence of a warrant does nothing to cure the City's negligence in deciding to invade the wrong apartment. In both *Bender,*

[3] *See also M.W. v Dept of Soc & Health Serv,* 149 Wn.2d 589, 70 P.3d 954 (2003), declining to extend statutory liability for negligent investigation involving personal intrusion because "DSHS has an existing common law duty not to negligently harm children." *M.W., supra,* 149 Wn.2d at 600.

supra, and *Turngren v. King County,* 104 Wn.2d 293, 705 P.2d 258 (1985), this Court has held that in a civil action where the police, in applying for a warrant, fail to make full disclosure of what they know and should have known, the warrant confers no immunity; "the existence or nonexistence of probable cause must then be determined by the jury." *Turngren, supra,* 104 Wn.2d at 306, quoting *Bender, supra,* 99 Wn.2d at 594. *See also, Bender* at 592, 597 ("a 'reasonable person' standard must be applied" by the jury, which may consider the views of the prosecutors "along with any other evidence on the existence or nonexistence of probable cause."); *Bender* at fn4 (quoting the actual jury instruction).

The police in this case were negligent in targeting Ms. Mancini's apartment and detaining her. The jury was instructed using a standard even stricter than required by *Bender* and *Turngren* and found for Ms. Mancini.[4] The warrant provides the police and the City no shield from the consequences of their negligence.

[4] The jury here was instructed that the police are not liable if an officer acts pursuant to a valid warrant, Instruction 18, CP 519, and that a party challenging a warrant must show that the officer who obtained the warrant knowingly withheld material information or misrepresented the facts in order to obtain the warrant, Instruction 16, CP 519. Even under these instructions, stricter than required by *Bender and Turngren*, the jury found liability, and there was ample evidence for them to so find.

CONCLUSION

The facts in this care provide particularly compelling evidence of the dangers of immunizing police officers' conduct. The police were negligent in investigating whether Ms. Mancini was related to their target. After and independent of the intrusion they were negligent in failing to recognize their mistake, resulting in Ms. Mancini being held for a prolonged period of time outdoors in the cold, in shackles; and they were negligent in subjecting her to emotional distress by harsh questioning when they knew or should have known she was an innocent bystander. *See also Garnett v. City of Bellevue,* 59 Wn. App. 281, 796 P.2d 782 (1990), cited with approval in *Beltran-Serrano, supra,* 193 Wn.2d at 551. By holding all these negligent acts immune because they related to "investigatory acts," the court of appeals overrides the legislature's waiver of sovereign immunity and nullifies the benefits of holding the City and the police to the same standard of care as would apply to a private person or corporation.

There is neither legal nor policy justification for such an exemption. The decision of the court of appeals should be reversed and judgment re-entered for Ms. Mancini.

RESPECTFULLY submitted this 20th day of March, 2020.

KARR TUTTLE CAMPBELL

By: */s/ J. Dino Vasquez*

J. Dino Vasquez, WSBA # 25533
KARR TUTTLE CAMPBELL
701 Fifth Ave., Ste. 3300
Seattle, WA 98104
Telephone: 206-223-1313
E-mail: dvasquez@karrtuttle.com

Nancy Talner, WSBA #11196
Antoinette M. Davis, WSBA #29821
William Block, Cooperating Attorney, WSBA #7578
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
E-mail: talner@aclu-wa.org
E-mail: tdavis@aclu-wa.org
E-mail: bblock@aclu-wa.org

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the Supreme Court of The State of Washington and electronically served a true and correct copy this document to the following parties:

Attorneys for Mancini

Gary Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
gary@tal-fitzlaw.com

Lori Haskell, WSBA #15779
7511 Greenwood Ave., N, Ste. 314
Seattle, WA 98103
lori@haskellforjustice.com

Attorneys for City of Tacoma

Jean Homan, WSBA #27084
Tacoma City Attorney's Office
747 Market St., Ste. 1120
Tacoma, WA 98402
jhoman@cityoftacoma.org

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

Dated this 20th day of March, 2020.

/s/ Heather L. Hattrup
Heather L. Hattrup
Legal Assistant to J. Dino Vasquez
hhattrup@karrtuttle.com

KARR TUTTLE CAMPBELL

March 20, 2020 - 1:42 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97583-3
Appellate Court Case Title:	Kathleen Mancini v. City of Tacoma, et al.

The following documents have been uploaded:

- 975833_Briefs_20200320133705SC222852_7970.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Mancini Brief.pdf
- 975833_Motion_20200320133705SC222852_9656.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Mancini_Motion_for_Leave_to_File_Amicus_Brief.pdf

A copy of the uploaded files will be sent to:

- bblock@aclu-wa.org
- danhuntington@richter-wimberley.com
- doug.mitchell@co.kittitas.wa.us
- dvasquez@karrtuttle.com
- gary@tal-fitzlaw.com
- gcastro@ci.tacoma.wa.us
- haskell@haskellforjustice.com
- hhattrup@karrtuttle.com
- jhoman@cityoftacoma.org
- lori@haskellforjustice.com
- matt@tal-fitzlaw.com
- pamloginsky@waprosecutors.org
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- valeriemcomie@gmail.com

Comments:

Sender Name: Jessica Smith - Email: jsmith@karrtuttle.com
Filing on Behalf of: Jose Dino Vasquez - Email: dvasquez@karrtuttle.com (Alternate Email: hhattrup@karrtuttle.com)

Address:
701 5th Avenue
Ste. 3300
Seattle, WA, 98104
Phone: (206) 224-8296

Note: The Filing Id is 20200320133705SC222852