CASE NO. 100076-6

COA No. 365603-III

SUPREME COURT

STATE OF WASHINGTON

THERESA CARSTENSEN,

Petitioner/Appellant,

vs.

DAMON RUIZ,

Respondent.

PETITIONER'S RESPONSE TO PETITION FOR REVIEW OF COURT OF APPEALS DECISION

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I. INTRODUCTION

Damon Ruiz seeks review of the unpublished Court of Appeals decision remanding a sexual assault protection order (SAPO) case for a hearing on the merits. Theresa Carstensen was raped by Damon Ruiz. She sought safety from the court system and the Court denied her the opportunity to be heard. After granting an ex parte temporary order, the trial court, relying on *Roake v. Delman*, reopened and dismissed Ms. Carstensen's temporary protection order. The trial court erroneously interpreted and applied the law depriving Ms. Carstensen of her voice. The Court of Appeals found that the trial court erred in applying *Roake v. Delman*. They reversed and remanded for a hearing on the merits of her SAPO petition. Mr. Ruiz seeks review of this decision but has failed to establish any basis for review under RAP 13.4.

II. STATEMENT OF CASE

On September 23, 2017, Ms. Carstensen went to a concert in Spokane with her friend, Jessica Houston, and Courtney and

Damon Ruiz[1]. CP S22-4. That night Damon Ruiz raped Ms. Carstensen. CP S22-4.

After the rape, Ms. Carstensen's behavior changed. CP S22-104. "She did not want to leave the house. She stopped engaging with [her husband] and the[ir] kids." *Id*. "She used to go walking outside but stopped doing that as well." *Id*. "She really did not talk with anyone. Her friend Jessica would come over occasionally, and [her husband] would walk in to find them crying together." *Id*. On February 2, 2018, Ms. Carstensen told her sister that Damon Ruiz raped her. CP S22-113. After the sexual assault, Ms. Carstensen felt like Mr. Ruiz started to follow her. CP S22-4. She saw him at the grocery store a number of times. *Id.* He got in line immediately after her with only one

[1] The Court of Appeals accurately noted that for the purposes of his motion, "Mr. Ruiz did not dispute the assault, so the detailed allegations are not necessary to [a] determination." *Carstensen v. Ruiz*, 17 Wn. App. 2d 1061, 2021 WL 2156941 (2021). If this Court disagrees, the briefing filed with the Court of Appeals includes a detailed summary of the events of September 23, 2017.

item to check out. *Id.*

"[Ms. Carstensen's] isolating behavior lasted seven or eight months, until June of 2018." CP S22-113. After beginning to come to grips with the rape, Ms. Carstensen told her husband what had happened to her. She then reported it to the Spokane Police Department in June of 2018. CP S22-4. On June 21, 2018, Ms. Carstensen filed for a sexual assault protection order in Lincoln County Superior Court.[2] CP S22-98.

As a result of her fear of Mr. Ruiz, Ms. Carstensen and her family moved 23 miles out of Wilbur, Washington. CP S22-4. On December 9, 2018, Ms. Carstensen was at home and saw Damon Ruiz driving toward her house. "He pulled all the way through the driveway toward our shop." *Id.* Ms. Carstensen was petrified and called the police immediately. *Id*. They took a

[2] In violation of RCW 7.90.110(3), the Lincoln County Superior Court denied the temporary order without providing a basis or filing it. CP S22-4 and CP S22-98, VRP 18. This means there is no record in the court system of Ms. Carstensen's first attempt to find safety other than her statement in the petition.

while to get out and Mr. Ruiz was already gone. *Id*. "Damon stopped and talked with a neighbor business owner, as if he had business there. The business is not in a commercialized area, and [Ms. Carstensen] had never seen anyone stop there before." *Id*.

A. PROCEDURAL HISTORY

On December 11, 2018, just two days after Damon Ruiz drove out to her house, Ms. Carstensen again petitioned for a sexual assault protection order (SAPO) in Lincoln County.[3] CP S22-9. In her SAPO petition, Ms. Carstensen declared, under penalty of perjury: "I am now very afraid because Damon has found me again despite my move. I am afraid of what he will do if he comes to my house again and finds me alone." CP S22-4. The same day, Judge Strohmaier signed a temporary SAPO protecting Ms. Carstensen, setting a return hearing for December 21, 2018. CP S22-7.

On December 18, 2018, Mr. Ruiz filed a "Motion to

[3] This time, Ms. Carstensen was represented by counsel and was able to obtain a temporary order.

Dismiss pursuant to *Roake v. Delman*, 189 Wn.2d 775, 408 P.3d 658 (2018), CR 12(c) and RCW 7.90.130." CP S22-15. "Mr. Ruiz claims that the petitioner failed to show any reasonable fear of future dangerous acts from the respondent." CP S22-16. On the basis of that claim, Mr. Ruiz alleged the temporary SAPO was "invalid." *Id*. Mr. Ruiz only filed this motion and did not file a response to the petition for the sexual assault protection order. VRP 37.

With the motion, Mr. Ruiz filed significant, additional declarations, and exhibits. CP S22-15-74. Mr. Ruiz argued that he could assert a valid defense to Ms. Carstensen's reasonable fear of future dangerous acts. CP S22-16. Mr. Ruiz claimed that he was picking up meat from the business Ms. Carstensen mentioned in her declaration and that he had no idea she lived there until she filed the second SAPO in December. CP S22-27, CP S22-29. In this motion, Mr. Ruiz also requested that Ms. Carstensen pay his attorney fees. CP S22-24.

Ms. Carstensen filed a response brief on December 20,

2018. CP S22-75. In it, Ms. Carstensen reminded the court that "[s]exual assault is the most heinous crime against another person short of murder." CP S22-75. She asked the court to consider the merits of her protection order case. S22-87-88.

On December 21, 2018, the time and place set for the return hearing, the Lincoln County Superior Court heard Mr. Ruiz's motion. Verbatim Report of Proceedings (VRP) at 1. At the hearing, Mr. Ruiz's counsel said, "we're not contesting [the alleged sexual assault] at this point." VRP at 8. He alleged that the "petitioner has the burden to prove that there was acts that are dangerous reasonable acts, that's what they need to prove[.]" VRP at 9-10. Ms. Carstensen's attorney argued, "on the motion to dismiss the petition I think very clearly alleges the reasonable fear." VRP at 14. The judge found that the time since the rape "dissipates" the reasonable fear. VRP at 31. The court found "that just coincidences do happen." VRP at 27.

The court denied Mr. Ruiz's CR 12(c) motion to rule on the pleadings and his request for attorney fees. VRP 40, 48. The

court found that it would "allow [the SAPO] to be reopened with a meritorious defense." VRP at 38. The court considered all the additional evidence filed by the Respondent and granted the motion to reopen. VRP 45-46. The court based this solely on its finding that it must make a finding of reasonable fear to issue a sexual assault protection order. VRP 46. The court said, "I'm going to hang my hat on that[.]" *Id*.

The court did not address the merits of the SAPO except to say a couple of times that Ms. Carstensen was very intoxicated and likely could not consent. VRP 25, 26, 39. The judge said, "I'm only just addressing the temporary order here." VRP at 55. On the record, the court said:

> The concern, I guess, the difference we do have with the petitioner, the Court here, is she's more subjective, I totally believe where she's coming from, this is very disconcerting to her; no question and her husband too. But I do find that she was very extremely drunk to – to, most likely lack of fully consent, but that is not the key issue here.

VRP at 39.

Ms. Carstensen's counsel argued that the reasonableness test should be whether it was reasonable for Ms. Carstensen to be fearful in light of all the circumstances, including that Mr. Ruiz had previously raped her. VRP 23-24. The court rejected this argument adopting a purely objective standard of reasonableness. VRP 32-33.

After significant argument on the form of the order, the court chose to add a box to the form denial that said, "reopen temporary order and dismiss the petition" and checked the box that said, "[t]he petitioner has failed to demonstrate there is a sufficient basis to enter a temporary order without notice to the . . . opposing party." CP S22-122. The court also wrote in: "Petitioner did not present facts showing that she had a reasonable fear of future dangerous acts by respondent." CP S22-123.

Ms. Theresa Carstensen filed a timely appeal. CP S22-119. On May 27, 2021, the Division III Court of Appeals issued an unpublished decision reversing the trial court's dismissal of

her SAPO petition and remanding for hearing on the merits of the final order. Mr. Ruiz filed the instant petition for review.

III. ARGUMENT

Mr. Ruiz has failed to establish any basis for the Washington Supreme Court to take review.

> A petition for review will be accepted by the Supreme Court **only**: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added).

Mr. Ruiz argues under RAP 13.4(b)(1) and (b)(3); however, (A) the decision does not conflict with *Roake v. Delman*, 189 Wn.2d 775, 408 P.3d 658 (2018), and (B) the decision does not violate due process or separation of powers. Therefore, review of the unpublished Court of Appeals decision is unwarranted.

A. THE COURT OF APPEALS APPROPRIATELY APPLIED *ROAKE V. DELMAN* AND FOUND THAT MS. CARSTENSEN HAD MET HER BURDEN TO OVERCOME A MOTION TO DISMISS

1. This Case is Both Factually and Legally Distinct from *Roake*

In *Roake,* Megan Roake was a college student at the University of Washington (UW) when Maxwell Delman, also a student at UW, violently raped her. *Id.* at 777. The rape took place near the end of the quarter. *Id*. When Ms. Roake returned to school, she reported the rape to the police and the university student conduct office. *Id*. at 777-78. The student conduct office issued a no contact order pending the outcome of its investigation. *Id*. While it was pending, Ms. Roake saw Mr. Delman a couple of times on campus and at one or more parties and he always left immediately. *Id*. In January of 2015, Ms. Roake petitioned the court for a sexual assault protection order, describing the violent rape, the times she had seen Mr. Delman, and stating that she did not know what he was capable of. *Id*. at 778. The court issued a temporary sexual assault protection

order and set a hearing fourteen days out. *Id*. After multiple continuances, Mr. Delman, through counsel, filed a motion to dismiss pursuant to CR 12(c). *Id* at 778-79.

> Roake responded that her statement in her petition that she "did not know what Delman was capable of" was sufficient to demonstrate her reasonable fear of future dangerous acts under the act, and that she did not have to prove the existence of acts giving rise to reasonable fear of future dangerous acts to support issuance of a final SAPO. No other assertions or statements, threats, or subsequent actions by Delman were asserted.

Id. at 779.

"The trial court granted the motion to dismiss, holding that the petition failed to establish Roake had any reasonable fear of future dangerous acts from Delman." *Id*.

Here, unlike *Roake*, Ms. Carstensen described a variety of specific subsequent actions taken by Mr. Ruiz that caused her to reasonably fear him. Ms. Carstensen described Mr. Ruiz repeatedly showing up at the grocery store and staring her down. She described how he would walk into the store after her, get a single item, and check out behind her while staring at her. She

described being so afraid, she moved her family 23 miles outside of town and still he drove through her driveway past her house. Ms. Carstensen was petrified and immediately called the police. Despite Mr. Ruiz's claims to the contrary, this is sufficient to overcome a motion to reopen or motion to dismiss.

2. The Court of Appeals Properly Reversed Because the Trial Court Considered Significant Declarations Beyond the Pleadings and Applied the Incorrect Legal Standard

The Washington Supreme Court in *Roake*, "[held] that RCW 7.90.130(2)(e) provides the procedure and opportunity to contest the sufficiency and validity of the petition and temporary order, and that the trial court correctly held that Roake's petition was legally insufficient under RCW 7.90.020(1)." *Roake v. Delman*, 189 Wn.2d 775, 777, 408 P.3d 658 (2018). The Supreme Court issued a four-opinion plurality. The lead opinion was very narrow in its holding, finding that the SAPO statue provides a mechanism under RCW 7.90.130(2)(e) for a respondent to allege "a meritorious defense to the sufficiency of

a temporary SAPO." *Id*. at 784. Mr. Ruiz tries to distinguish between a motion to reopen and CR 12 motion, but this ignores the plain language of *Roake*. The Supreme Court clarified that this is a motion on *the pleadings. Id*.

The *Roake* court held that Megan Roake's pleadings were legally insufficient because they failed to allege "specific statements or actions . . . which g[a]ve rise to a reasonable fear of future dangerous acts[.]" *Id*. at 784-85 and RCW 7.90.020(1). The Supreme Court applied the traditional CR 12 standard and accepted all of Ms. Roake's statements in her pleadings *as true* but found them legally insufficient.

There are two mechanisms available for a sufficiency of the pleadings analysis: CR 12(b)(6) and CR 12(c). CR 12(b)(6) allows a motion to dismiss for "failure to state a claim upon which relief can be granted." CR 12(c) states, "any party may move for judgment on the pleadings." In both CR 12(b)(6) and CR 12(c) motions, courts must "presume that the plaintiff's factual allegations are true and draw all reasonable inferences

from the factual allegations in the plaintiff's favor." *Roake*, 189 Wn.2d at 806 (Yu, J. *dissenting*). The question before the Court is whether the plaintiff has established a prima facie case.

For a CR12(c) motion, the court considers the filing that began the case and the response and makes a legal determination about the sufficiency of the pleadings. Here, the trial court properly determined that under CR 12(c), the pleadings were sufficient and, therefore, denied Mr. Ruiz's CR 12(c) motion. For a CR 12(b)(6) motion, the court only considers the filing that began the case to determine if it legally sufficient. "This weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 102, 233 P.3d 861 (2010). It is unclear how the pleadings could be sufficient under CR 12(c), but not CR 12(b)(6).

Here, the court made a legal determination about the reasonableness of Ms. Carstensen's fear after reviewing declarations well beyond the scope of the pleadings. "By doing

so, the trial court conflated sufficiency of the evidence with credibility of the evidence. Opinion at 10. The Court of Appeals in this case properly determined that the trial court should have only considered the petition and any response; Mr. Ruiz never filed a response[4] to the petition nor did he dispute the sexual assault allegations for the purposes of the motion. Therefore, the only evidence the court could consider was Ms. Carstensen's petition, which the trial court itself found sufficient. VRP 40.

3. The Doctrine of Invited Error Does Not Apply, as Ms. Carstensen Did Not Set Up the Errors Identified by the Court of Appeals

Ms. Carstensen did not invite error by resting on the motion because the trial court was unwilling to address the merits of the SAPO. The Court of Appeals found "[i]f the petition and temporary order are sufficient and valid, the trial court should move forward with a full hearing on the final order." Opinion at

[4] In an endnote, Mr. Ruiz appears to claim that his motion to reopen and supporting documentation constituted a response, but this fundamentally misunderstands what constitutes a pleading within the meaning of CR 12(c).

12. Survivors of sexual assault who seek the safety of the courts, via a petition for a sexual assault protection order, are entitled to a hearing on the merits of their petition. In this case, the trial court denied Ms. Carstensen a hearing in violation of the plain and unambiguous language of RCW 7.90.050.

> Upon receipt of the petition, the court **shall** order a hearing which **shall** be held not later than fourteen days from the date of the order. . . . The court may issue an ex parte temporary sexual assault order pending the hearing as provided in RCW 7.90.110.

RCW 7.90.050 (emphasis added).

"[T]he word "shall" imposes a mandatory, jurisdictional requirement[.]" *Erection Co. v. Dep't of Labor & Indus. of State of Wash.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). When a court receives a sexual assault protection order petition it must set a hearing within 14 days. The language of RCW 7.90.050 is also clear that the court must set a hearing, whether or not it grants a temporary ex parte order. Therefore, if a temporary order were reopened and subsequently denied, RCW 7.90.050 still mandates a hearing on the merits. Here, the court set the

hearing, but refused to allow argument or testimony on the facts of the nonconsensual sexual penetration. Instead, the trial court allowed Mr. Ruiz to reopen the temporary order, ruled on that motion, but never reached the issue of the full hearing. The Court of Appeals appropriately reversed that finding.

4. The Court of Appeals Did Not Make Any Findings That Mr. Ruiz Agreed That He Sexually Assaulted Ms. Carstensen

The Court of Appeals found only that "[f]or purposes of the motion to reopen and dismiss, Mr. Ruiz did not dispute the sexual assault but claimed that the temporary order was invalid because it failed to prove a reasonable fear of future dangerous acts from the respondent as required by *Roake*." Opinion at 4. This is supported by counsel's statements at hearing. VRP at 8. ("[W]e're not contesting [the alleged sexual assault] at this point.") Even if erroneous, the Court of Appeals finding is limited to a motion that already occurred. There is, therefore, no harm in this finding.

B. THE COURT OF APPEALS DID NOT VIOLATE DUE PROCESS[5] OR THE SEPARATION OF POWERS DOCTRINE

The Court of Appeals refused to apply the 2018 amendments to RCW 7.90.020 retroactively. Indeed, the Court agreed with Mr. Ruiz and found that "retroactive application of the statutory amendments to this case would contradict the controlling decision in *Roake* and violate the separation of powers doctrine." Opinion at 9.

"On a practical level, we consider a statue to be retroactive if the "triggering event" for its application happened before the effective date of the statute." *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007). However, generally, newly enacted statutes apply "to all cases pending on direct appeal and not yet final." *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018). "[A] newly enacted statute . . . will only be applied to

[5] Mr. Ruiz claims there is a violation of due process but fails to explain what that violation is. Without guessing, there is no way to respond to this argument.

proceeding that occurred far earlier in the case if the "triggering event" to which the new enactment might apply has not yet occurred." *Id*.

On remand, the Court determined that the 2018 amendments to RCW 7.90.020 would apply to the remanded SAPO. This does not violate separation of powers because the triggering event in this case "is a judicial determination that the petition does or does not meet the statutory requirements." Opinion at 8. On remand, there will be another judicial determination of whether Ms. Carstensen met the statutory requirements.

IV. CONCLUSION

Ms. Theresa Carstensen asks this Court to deny Mr. Ruiz's request for Supreme Court review because he has not established a basis to review.

CERTIFICATE OF COMPLIANCE

This document contains 3439 words exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, this certificate of compliance, the certificate of service, signature blocks, and pictorial images.

RESPECTFULLY SUBMITTED this 22nd day of September 2021.

NORTHWEST JUSTICE PROJECT

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of September 2021, I caused the foregoing document to be filed with the Supreme Court of the State of Washington, and to be served on the Attorney of Record, via the Washington State Appellate Courts' Portal.

DATED this 22nd day of September 2021, at Spokane, WA.

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