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No. 94744-9
Court of Appeals Cause No. 75519-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

DONNA ZINK,

Appellant,

v.

JOHN DOE G *et al.*,

Respondents.

RESPONDENTS JOHN DOE G AND JOHN DOE H'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

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I. INTRODUCTION

Respondents John Doe G and John Doe H ("the Does") oppose Petitioner Donna Zink's Petition for Discretionary Review by Supreme Court (the "Petition").

Under the Public Records Act, RCW ch. 42.56 (the "PRA"), Ms. Zink requested Level I sex offender registration forms from the Washington State Department of Corrections ("DOC"). The Does filed a class-action lawsuit to block the records' release. The trial court allowed the Does to proceed in pseudonym, and entered a preliminary injunction effectively prohibiting production of the requested records.

Thereafter, this Court decided *Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016) ("*Doe ex rel. Roe*"), which arose out of requests by Ms. Zink under the PRA for Level I sex offender registration records in possession of the Washington State Patrol ("WSP"). The Court held that those records were not exempt from disclosure under the PRA. *Id.* at 385. In view of that ruling, it declined to consider an argument by Ms. Zink that the trial court had abused its discretion by allowing the plaintiffs to proceed in pseudonym: "The issue is moot," the Court reasoned. *Id.* "Zink will receive the records – and the names of the parties – and even if this court were to hold that proceeding in pseudonym

was in error, we would be unable to offer any further relief, as it has already been granted." *Id.*

After the decision in *Doe ex rel. Roe*, the DOC moved without opposition to dissolve the preliminary injunction entered in this matter and dismiss this case, and Ms. Zink filed a motion to "unseal" court records and require the Does to identify themselves. The trial court granted the DOC's motion and denied Ms. Zink's motion. Ms. Zink appealed the denial of her second motion to "unseal" to Division I of the Court of Appeals, which dismissed the appeal as moot "[b]ecause the court dissolved the preliminary injunction enjoining DOC from releasing the records that Zink requested under the PRA that contain the identity of the plaintiffs."

The Court of Appeals reached the correct result. Its unpublished decision is not in conflict with any decision of this Court; to the contrary, it follows *Doe ex rel. Roe*. It is not in conflict with any decision of the Court of Appeals. It presents no significant question of law or issue of substantial public interest. The Court of Appeals simply engaged in a straightforward application of settled law to undisputed facts. There is no basis for this Court to accept review.

II. STATEMENT OF THE CASE

This case arose out of Ms. Zink's requests under the PRA that the DOC produce certain sex offender registration forms. The Does filed suit in King County Superior Court on behalf of a class of Level I sex offenders who were in compliance with the conditions of registry or had been relieved of the duty to register, who were named in registration notifications in the DOC's possession, and whose records fell within the scope of Ms. Zink's PRA requests. (CP 1-11.) The Does contended that the State of Washington had established a comprehensive statutory scheme, codified at RCW 4.24.550, governing the release of sex offender information to the public, and that this comprehensive scheme exempted sex offender registration information from release under the PRA. (*Id.*)

The trial court entered a temporary restraining order enjoining the disclosure of Level I sex offender registration information; and subsequently granted the Does' motions to proceed in pseudonym and for class certification, and entered a preliminary injunction precluding the DOC from disclosing Level I sex offender registration information except as permitted by RCW 4.24.550. (CP 156-58, 116-22, 159-68).

In his order authorizing the Does to proceed in pseudonym, Judge Roger Rogoff determined that "redaction of the names of the plaintiffs constitute[d] a sealing or redaction order" pursuant to GR 15, and that he

was therefore required to "engage in a balancing test to determine whether compelling interests in sealing/redaction exist[ed], and whether those interests outweigh[ed] the public's right to know the information." (CP 118.) After weighing the factors set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), Judge Rogoff concluded that "[r]equiring [the Does] to identify themselves as registered sex offenders in the caption of the lawsuit would defeat the purpose of the lawsuit," that there was "no other way to protect this legal process than by allowing [the Does] to proceed via pseudonym," and that allowing the Does to proceed in pseudonym would cause Ms. Zink "little to no prejudice." (CP 120-21.) Judge Rogoff stated that "should Plaintiffs lose this lawsuit, their names will be provided to Ms. Zink, and will be disseminated publicly after a full and fair hearing" – evidently a reference to the fact that if the Does lost, the DOC would disclose records containing their names to Ms. Zink under the PRA. (CP 120.) On appeal, Ms. Zink has *not* challenged Judge Rogoff's order allowing the Does to proceed in pseudonym. (CP 151-55; Zink's Opening Appellate Brief, *passim*; Petition, *passim*.)

The central question in this case at the trial court level was whether RCW 4.24.550 was an "other statute" that exempted Level I sex offender records from disclosure under the PRA. This was also the question at the

heart of *Doe ex rel. Roe*, which had previously been filed in King County Superior Court in response to a request by Ms. Zink for Level I sex offender records in possession of the WSP. As here, the trial court in *Doe ex rel. Roe* granted a motion by the plaintiffs to proceed in pseudonym and certified a class of Level I sex offenders. 185 Wn.2d at 368-69 n. 1, 385, 374 P.3d 63. The trial court subsequently entered summary judgment for the plaintiffs. *Id.* at 369. This Court granted direct review. *Id.* at 370.

Because resolution of the fundamental issue in *Doe ex rel. Roe* was likely to be dispositive of this case, the Does moved to stay this lawsuit pending this Court's decision in *Doe ex rel. Roe*. (CP 169-264.) Ms. Zink responded to the Does' motion to stay by, among other actions, filing a motion to "unseal" court records. (CP 265-80.) The Does opposed that motion, Ms. Zink filed a reply, and the trial court denied the motion. (CP 281-89, 290-306, 309-10.) By then the case had been reassigned to Judge Palmer Robinson, and in her order denying Ms. Zink's motion to unseal she noted that "[i]n fact, none of the pleadings in this case have been sealed. This motion is an untimely motion to reconsider Judge Rogoff's Order from August 14, 2014. See also LCR 7(b)(6) and (7)." (CP 309-10.)[1] Judge Robinson also stayed this case pending resolution of *Doe ex rel. Roe*. (CP 307-08.) On appeal, Ms. Zink has not challenged Judge

[1] Judge Robinson plainly did not, as Ms. Zink contends in her Petition at 7, "set aside" Judge Rogoff's prior order.

Robinson's order denying Ms. Zink's initial motion to unseal. (CP 151-55; Zink's Opening Appellate Brief, *passim*; Petition, *passim*.)

On April 7, 2016, this Court decided *Doe ex rel. Roe*.. The Court held that RCW 4.24.550 is not an "other statute" exempting Level I sex offender records from disclosure under the PRA. 185 Wn.2d at 384-85, 374 P.3d 63. Of particular significance to the instant appeal, the opinion contained the following passage:

> Because we find that these records are available, it is unnecessary to consider whether the trial court abused its discretion by allowing the plaintiffs to proceed in pseudonym. The issue is moot; Zink will receive the records – and the names of the parties – and even if this court were to hold that proceeding in pseudonym was in error, we would be unable to offer any further relief, as it has already been granted.

Id. at 385.

Based on this Court's interpretation of RCW 4.24.550, the DOC moved to dismiss this case. (CP 311-66.) Neither the Does nor Ms. Zink opposed that motion, and the trial court granted it. (CP 312, 127, 367-68.) Ms. Zink did, however, file a second motion to "unseal" court records. (CP 126-29.) The Does opposed that motion, Ms. Zink filed a reply, and Judge Robinson denied the motion. (CP 130-50.) Judge Robinson reiterated her prior ruling that "[n]one of the Court Records in this Matter have been sealed." (CP 149.)

Ms. Zink filed a notice of appeal with Division I of the Court of Appeals, challenging only Judge Robinson's order denying her second motion to unseal. (CP 151-55; Zink's Opening Appellate Brief, *passim*; Petition, *passim*.) The Court of Appeals dismissed Ms. Zink's appeal, holding that "[b]ecause the court dissolved the preliminary injunction enjoining DOC from releasing the records that Zink requested under the PRA that contain the identity of the plaintiffs," the appeal was moot. *Doe v. Zink*, No. 75519-6-I (June 12, 2017), at 5 (Petition, Appx. A).

III. ARGUMENT

A. Requirements for Acceptance of Review.

A petition for review will not be accepted unless the decision of the Court of Appeals is in conflict with a decision of this Court or another decision of the Court of Appeals, a significant constitutional question is presented, or the petition involves an issue of substantial public interest that this Court should determine. RAP 13.4(b)(1)-(4). The Court of Appeals' application of settled Washington law to undisputed facts in an unpublished decision raises no decisional conflict, no significant constitutional question, and no issue of substantial public interest. This Court should therefore deny Ms. Zink's Petition.

B. The Court of Appeals' Decision Does Not Conflict with Any Decision of this Court or the Court of Appeals.

Ms. Zink argues that the Court of Appeals' decision conflicts with *Doe ex rel. Roe*; *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 330 P.3d 168 (2014); and *John Doe G. v. Department of Corrections*, 197 Wn. App. 609, 391 P.3d 496 (2017), *review granted*, 188 Wn.2d 1008, 394 P.3d 1009 (2017). (Petition at 9, 15-20.) That is incorrect, and thus neither RAP 13.4(b)(1) nor RAP 13.4(b)(2) warrants acceptance of review by this Court.

Doe ex rel. Roe actually compelled the result that the Court of Appeals reached in this case. One of the issues that this Court expressly addressed in *Doe ex rel. Roe* was a challenge by Ms. Zink to an order entered by the trial court allowing the plaintiffs to proceed in pseudonym. 185 Wn.2d at 385, 374 P.3d 63. This Court found the challenge moot because Ms. Zink would be receiving the records she had requested from the WSP under the PRA, and those records would contain the plaintiffs' names. *Id.* Washington's appellate courts "will not address a moot issue unless the issue involves a matter of continuing and substantial public interest." *West v. Reed*, 170 Wn.2d 680, 682, 246 P.3d 548 (2010). No such matter of public interest prevented this Court from declining to

consider Ms. Zink's challenge to the trial court's pseudonym order. 185 Wn.2d at 385, 374 P.3d 63.[2]

This case is indistinguishable from *Doe ex rel. Roe*. Ms. Zink has received the records she requested under the PRA. Those records include the Does' names. Ms. Zink contends that her appeal is not moot because she cannot determine which of the Level I sex offenders whose records she received filed this lawsuit and she supposedly has a personal right to find out, after litigation has concluded, "the identity of the parties summoning her into this cause of action." (Petition at 10). But she cites no legal authority to support that argument. And more importantly insofar as her Petition is concerned, she does not explain how her situation here is any different than it was in *Doe ex rel. Roe*, or why her appeal from the trial court's pseudonym order is not moot here if it was moot there.

Ms. Zink's arguments that the Court of Appeals' decision in this matter is in conflict with *Hundtofte*, 181 Wn.2d 1, 330 P.3d 168, and *John Doe G*, 197 Wn. App. 609, 391 P.3d 496 (Petition at 17-20), are misplaced because mootness was not at issue in either of those cases. *John Doe G*

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[2] Ms. Zink argues that this Court rejected her challenge to the pseudonym order in *Doe ex rel. Roe* because under that order, allegedly, "once the case was completed the court's permission for use of pseudonym expired and the records would be unsealed pursuant to the order of the trial court." (Petition at 15-16.) That is not remotely what the pseudonym order provided for, or what this Court held. The holding in *Doe ex rel. Roe* was plainly that Ms. Zink's challenge was moot because she would be receiving the records she had requested under the PRA. 185 Wn.2d at 385, 374 P.3d 63.

may be of particular interest to Ms. Zink because it arose out of her attempts to obtain special sex offender sentencing alternative ("SSOSA") evaluations from the DOC. 197 Wn. App. at 613, 391 P.3d 496. The trial court allowed the plaintiffs to proceed in pseudonym, and found SSOSA evaluations to be confidential under the Uniform Health Care Information Act and therefore exempt from disclosure under the PRA; the Court of Appeals affirmed. *Id.* at 613-14. Because the Court of Appeals' decision meant that Ms. Zink would *not* receive the records she had sought, Ms. Zink's challenge to the pseudonym order was not moot, and so the Court of Appeals decided the challenge on the merits – and ruled against Ms. Zink. *Id.* at 624-28. By contrast, Ms. Zink's appeal in this case *is* moot because she has already received the records she requested under the PRA. *John Doe G* does not help Ms. Zink at all.

C. The Court of Appeals' Decision Raises No Significant Question of Law or Issue of Substantial Public Interest.

As discussed above, the Court of Appeals' dismissal of Ms. Zink's appeal as moot was a straightforward application of clearly established law to undisputed facts; indeed, it was compelled by *Doe ex rel. Roe*. The Court of Appeals' decision therefore raises no significant question of law or issue of substantial public interest.

Even if this Court were to conclude that the Court of Appeals improperly dismissed Ms. Zink's appeal and that the appeal is not moot,

acceptance of review would be unwarranted under RAP 13.4(b)(3) or (4). This is primarily because the scope of Ms. Zink's appeal is much narrower than her Petition suggests. Ms. Zink did not appeal from Judge Rogoff's initial order allowing the Does to proceed in pseudonym, or from Judge Robinson's order denying her first motion to "unseal" court records, and her Petition does not argue that either of those orders was entered in error. (CP 116-22, 309-10, 151-55; Zink's Opening Appellate Brief, *passim*; Petition, *passim*.) She simply contends that upon dismissal of the Does' claims, Judge Robinson should have revisited Judge Rogoff's pseudonym order and independently conducted an *Ishikawa* analysis, or should have followed the pseudonym order's purported directive that the Does reveal their identities after losing their lawsuit. (Petition at 8, characterizing Ms. Zink's appeal as "request for review of Judge Robinson's order that the records were not sealed and refusal to honor Judge Rogoff's original order to unsealing [sic] the Plaintiff's [sic] identities").

Thus, if this Court were to take up Ms. Zink's appeal on the merits, the only issue for review would be whether Judge Robinson acted within her discretion in refusing to order parties properly proceeding in pseudonym to reveal their identities after the conclusion of litigation. It is readily apparent that Judge Robinson had the discretion to forego a second *Ishikawa* analysis after this lawsuit was over and to interpret the

pseudonym order to say exactly what it plainly said – that if the Does lost, Ms. Zink would receive the records she had requested under the PRA. (CP 120.)[3] Ms. Zink has cited no authority to support the proposition that after a loss, plaintiffs should – retroactively and without prior notice – be stripped of a properly-conferred entitlement to pseudonymity on which they had relied. There is no reason for this Court to accept review merely to examine that question – especially since the relief Ms. Zink seeks would set a troubling precedent, and would have a substantially chilling effect on other potential plaintiffs with interests in vindicating their rights anonymously through the judicial process.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Ms. Zink's Petition and decline to accept review of this case.

[3] Nor would Judge Robinson have been bound by the pseudonym order even if it had directed the Does to reveal their identities upon losing their lawsuit. *See Snyder v. State of Washington*, 19 Wn. App. 631, 636, 577 P.2d 160 (1978) ("In managing … litigation, the trial court must have wide discretion and authority, including the power to issue interlocutory orders, upon every aspect of the case. These orders or rulings may be changed, modified, revised, or eliminated as the case progresses.")

DATED: August 11, 2017.

SAVITT BRUCE & WILLEY LLP

By: */s/ Duncan E. Manville*
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On Behalf of the American Civil Liberties Union Foundation of Washington

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 11, 2017, a true and correct copy of the foregoing document was served via **Email/PDF** on the following parties:

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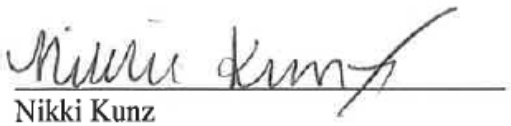

Nikki Kunz

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