No. 99068-9

SUPREME COURT
OF THE STATE OF WASHINGTON

M.E. and J.E., minors, through JOHN R. WILSON,
as Litigation Guardian *ad Litem*;
and JOSHUA EDDO, individually,

Petitioners,

v.

CITY OF TACOMA, a political subdivision of
the State of Washington,

Respondent.

PETITIONERS' ANSWER TO BRIEF OF *AMICUS CURIAE* KING COUNTY SEXUAL ASSAULT RESOURCE CENTER IN SUPPORT OF GRANTING REVIEW

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A. INTRODUCTION

The King County Sexual Assault Resource Center ("KCSARC")'s *amicus* memorandum confirms that this Court should grant review, particularly under RAP 13.4(b)(4). Petitioners answer KCSARC's memorandum to elaborate on two critical points raised in it.

B. ARGUMENT IN ANSWER TO KCSARC

First, this Court should grant review to guide lower courts on the proper lens to use when looking at the summary judgment record in a child abuse case—a lens informed by the tragic realities of how child sexual abuse occurs and why detecting abuse is hard. One might be tempted to think about this case in purely legal terms. The Legislature's words in RCW 26.44 are certainly important, as are the appellate decisions interpreting those words. But this case does not ask this Court merely to reconcile the law under RAP 13.4(b)(1).

As KCSARC's memorandum makes clear, the statute's legal standards mean little if courts do not properly understand child molestation cases. These cases, the KCSARC explains, are real life tragedies, not cold hypothetical constructs; children behave in unexpected ways because of the dangers they face. *Amicus* Memo. at 2-5. Courts must understand and account for these often-surprising dynamics. If courts do not, they cannot properly apply RCW 26.44.050's standard. If courts do

not, they cannot fulfill their duty on summary judgment to view the evidence and reasonable inferences in the light most favorable to plaintiff children. *See, e.g., Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). If courts do not, they cannot advance the state's vital policy of protecting children from abuse, a policy the Legislature and this Court both have articulated. Laws of 1985, ch. 259, § 1; RCW 26.44.010; *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 79, 1 P.3d 1148 (2000).

However, as KCSARC noted in its memo at 2, "Division II's holding fails to recognize the known dynamics of child molestation," a failure with broad consequences. Division II's opinion did more than extinguish the petitioners' claims; it was published, making it a manual for other courts to follow. It will remain that way unless this Court steps in.

Given the undeniable importance of preventing child sex abuse, this Court's guidance is critical to ensure lower courts—and law enforcement—understand how to interpret the evidence in child molestation case, especially on summary judgment. Otherwise, the result will be, as in this case, less protection for vulnerable children facing "clear and present danger" to their "health, welfare, or safety." RCW 26.44.020(18). Review is warranted under RAP 13.4(b)(4).

Second, KCSARC's memorandum confirms the need for this Court to address for the first time law enforcement officers' duty to children under RCW 26.44.050. Until now, this Court's decisions on RCW 26.44.050 have centered on DSHS's liability, not that of law enforcement.[1] Division II recognized that the cause of action under RCW 26.44.050 is available against law enforcement officers, not just DSHS.[2] And the City of Tacoma ("City") has not argued otherwise. Ans. at 1.

This Court should grant review under RAP 13.4(b)(4) to provide guidance for law enforcement agencies. As will be noted *infra*, RCW 26.44.050 creates a ***broader*** duty for law enforcement, while Division II's

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[1] This Court has considered RCW 26.44.050 several times, beginning in 1998's decision that approved of Court of Appeals opinions finding an implied cause of action against DSHS caseworkers for negligent investigation. *McKinney v. State*, 134 Wn.2d 388, 396, 950 P.2d 461 (1998). Since then, this Court has held that RCW 26.44.050 creates an actionable duty of care both for the benefit of children and for "a child's parents, even those suspected of abusing their own children, when investigating allegations of child abuse," *Tyner*, 141 Wn.2d at 81-82; a child's posttraumatic stress disorder from a physical examination is not actionable under RCW 26.44.050 because an implied cause of action is available only for a "harmful placement decision," not other harm, *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 601-02, 70 P.3d 954 (2003); a parent's voluntary placement of a child with a grandparent during an investigation is not an actionable placement decision, *Roberson v. Perez*, 156 Wn.2d 33, 47, 123 P.3d 844 (2005); a stepparent does not have a cause of action under the statute, *Ducote v. State, Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 700, 222 P.3d 785 (2009); mandatory reporters of child abuse are impliedly liable under RCW 26.44.030 for failing to report suspected child abuse, *Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 77-78, 247 P.3d 421 (2011); and a report "a report predicting future abuse absent evidence of current or past conduct of abuse or neglect does not invoke the duty to investigate under former RCW 26.44.050," *Wrigley v. State*, 195 Wn.2d 65, 67, 455 P.3d 1138 (2020).

[2] *McCarthy v. County of Clark*, 193 Wn. App. 314, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018 (2016); *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006).

decision, and the City's argument, narrows it, to the detriment of Washington's children. The Legislature gave a central role for law enforcement in RCW 26.44, expecting that officers would "diligently and expeditiously take appropriate action," Laws of 1985, ch. 259, § 1, and fulfill their duty "to protect children," *Tyner*, 141 Wn.2d at 80. KCSARC's memorandum underscores the imperative that this Court construe the statute and Division II's opinion with the Legislature's broad purpose in mind. Review is merited.

As KCSARC argues, the City's briefing misunderstands its officers' responsibilities under RCW 26.44, to the detriment of children in Tacoma. *Amicus* Memo. at 6-7. While the City acknowledges its police have an actionable duty to conduct a proper investigation of abuse, the City's argument shears away the core of that duty. The City believes that its officers' role is confined to "enforcement," not prevention. Ans. at 10, 12 & n.5. The City thinks that law enforcement officers have no impact on a child abuse case unless they have probable cause. For the City, that generally means probable cause "to arrest." *Id.* at 12. The City believes that unless police have probable cause, any negligence in the investigation cannot be the proximate cause of harm to the child. *Id.* That argument reveals the City has a dangerously limited view of how its police must respond when they know a child rapist has access to children.

Law enforcement officers have a much more extensive role, as KCSARC points out: law enforcement officers do not simply wait to receive a referral from CPS. In KCSARC's experience, the "first call" is often "to the police," not to DSHS. *Amicus* Memo. at 1. KCSARC's experience aligns with common sense and the statute's surrounding structure. Particularly when child abuse is criminal, most reporters reasonably choose to dial 911, not to Google the phone number for Child Protective Services ("CPS"). Plus, mandatory reporters—doctors, teachers, nurses, psychologists, etc.—may report child abuse to DSHS *or* to a law enforcement agency. RCW 26.44.030(1)(a). When officers receive a qualifying "report," the statute requires them to investigate, not merely to defer to DSHS. RCW 26.44.050.

Then, when law enforcement officers receive a report, they must treat the matter as more than a criminal investigation. RCW 26.44.050. Besides having the authority to arrest an offender, *they have statutory authority to take children into protective custody*. RCW 26.44.050. Officers may act "if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order." *Id.* In this provision, the Legislature conferred *broader* powers—and responsibilities—on law enforcement agencies than it did CPS

caseworkers. RCW 26.44.050 does not provide CPS staff with this type of extra-judicial authority: Police officers can act without waiting for a shelter care hearing under RCW 13.34.050, while CPS cannot. Besides this extraordinary civil power, law enforcement officers also have the statutory responsibility to report their investigative findings to CPS. *Id.* Thus, the information available to CPS depends, at least in part, on law enforcement officers performing a proper investigation. Officers must do much more than investigate whether a crime occurred.

Based on this broad responsibility, law enforcement officers play a crucial role in a child's placement. A placement is not just a decision about where to send a child, but also includes "letting a child *remain* in an abusive home." *M.W.*, 149 Wn.2d at 601-02 (emphasis added). Police's negligence can cause that result (a child remaining in an abuse home) in more ways than one—not just by failing to arrest someone in the home. If a law enforcement officer's investigation is negligent, the law enforcement agency will not realize there is a basis for taking the child into protective custody. Or the agency will provide an incomplete report to the CPS, so police's negligence will lead to a child staying in an abusive home, meeting the proximate causation test.

The City's proximate causation argument includes another serious flaw that diminishes law enforcement's duty to children. The City's

argument implicitly assumes that probable cause is measured based on what the officers knew at the time, instead of what they *should have known* had they conducted a reasonable investigation. Ans. at 11-12. In other words, the City attempts to limit its liability under RCW 26.44.050 to a standard akin to recklessness. This Court's intervention is necessary. RAP 13.4(b)(4).

KCSARC's memorandum raises another critical point that this Court should address in order to guide law enforcement agencies on their legal duty to children. As KCSARC rightly points out, RCW 26.44's broad definition of "abuse or neglect" requires law enforcement agencies, as well as CPS, to act when children are in "'clear and present danger.'" *Amicus* Memo. at 5 (citing RCW 26.44.020(1), and quoting RCW 26.44.020(18)). The statute does not allow officers to sit idly until abuse occurs. The City and other municipalities would benefit from an opinion addressing that component of their duty. And law enforcement agencies need guidance that a child molester poses such a clear and present danger to children living with them. The dynamics of child molestation, KCSARC helpfully explains, do not allow law enforcement agencies to "assume that any children living with a child rapist are safe." *Id.*

In these ways, law enforcement's duty can be described as broad, as touching on civil matters, and as extending to individual children who

are at great risk of harm. Under RCW 26.44.050, officers are doing so much more than reacting to a crime that has already happened.

KCSARC's memorandum highlights the practical harm that results when municipalities fail to appreciate the breadth of their law enforcement officers' responsibilities to children. When properly trained, law enforcement officers "understand the severity of the danger of a child living with a child rapist." *Amicus* Memo. at 4. So "the focus from Division II should [have] be[en] the inexcusable failure of law enforcement to perform a background check on all the adults residing in the home, specifically including Karlan." *Id.* The proper law enforcement response should be "urgency," *id.*, not conducting a limited and passive investigation into whether a crime occurred. Any other application of RCW 26.44.050 and .020(18) does not abide the statutory purpose of preventing child sex abuse. "[I]n resolving a question of statutory construction," this Court has said, the right interpretation is the one "which 'best advances the legislative purpose.'" *Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991) (quoting *In re R.*, 97 Wn.2d 182, 187, 641 P.2d 704 (1982)).

C. CONCLUSION

Tacoma police knew a child rapist had access to two young girls, but did not perform a reasonable investigation in response. Division II's

opinion holds the City is not liable as a matter of law. KCSARC's memorandum shows that this Court's review is necessary to provide guidance to law enforcement agencies, interpreting law enforcement's precise duty to abused kids for the first time. In doing so, this Court will have the opportunity to interpret RCW 26.44.050 in a manner that furthers the Legislature's important objective of protecting children. Civil liability creates "[a]ccountability," this Court has further explained, *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), and creates incentives for municipalities to properly supervise and train their employees, *King v. City of Seattle*, 84 Wn.2d 239, 244, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997). More to the point, civil liability for negligent investigations will "encourage thorough investigation," as this Court has said. *Babcock v. State*, 116 Wn.2d 596, 616, 809 P.2d 143 (1991). Given the high stakes for children statewide and the importance of law enforcement agencies in abuse investigations, review is warranted. RAP 13.4(b)(4).

DATED this 15th day of December, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petitioner's Answer to Brief of Amicus Curiae King County Sexual Assault Resource Center In Support of Granting Review*** in Supreme Court Cause No. 99068-9 to the following parties:

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

DATED: December 15, 2020, at Seattle, Washington.

Frankie Wylde, Legal Assistant
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Comments:

Petitioners Answer to Brief of Amicus Curiae King County Sexual Assault Resource Center In Support of Granting Review

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