No. 1026765
SUPREME COURT
OF THE STATE OF WASHINGTON

TERESA ROGERSON,

Petitioner,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent,

and

STATE OF WASHINGTON,

Defendant.

ANSWER TO *AMICUS CURIAE* WSAJ FOUNDATION

Susan MacMenamin
WSBA No. 42742
Assistant City Attorney
SEATTLE CITY
ATTORNEY'S OFFICE
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Telephone: (206) 684-8200

Amber L. Pearce
WSBA No. 31626
FLOYD, PFLUEGER,
KEARNS, NEDDERMAN &
GRESS P.S.
3101 Western Avenue, #400
Seattle, WA 98121
Telephone: (206) 441-4455
Attorneys for Respondent
City of Seattle

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I. INTRODUCTION

Amicus Washington State Association for Justice Foundation (WSAJF) supports discretionary review under RAP 13.4(b)(4) because it believes that this case involves an issue of substantial public interest. Mem. at 14. But WSAFJ fails to discuss how or why any particular issue of substantial public interest has ramifications beyond the particular parties and facts of this case. This is chiefly because the Legislature created a "public interest" remedy in 2015. WSAJF's bare recitation that this case affects the public interest, without more, is an insufficient basis to grant review. Accordingly, discretionary review should be denied.

WSAFJ also omits critical facts from the record; does not identify the duty that the Seattle Police Department allegedly owed; and conflates (1) the public policy behind government discretionary immunity for executive acts with (2) public policy supporting no cause of action for negligent investigation.

Further, WSAJF argues that the issue of whether a cause of action for negligent investigation exists is "unsettled," Mem. at 15, but acknowledges—as did the Court of Appeals—that this issue has been settled through "30 years of consistent appellate decisions." *Id.* The Court should deny discretionary review because the issue is well settled. This case does not satisfy RAP 13.4(b)(4).

II. ARGUMENT IN ANSWER TO *AMICUS CURIAE*

A. WSAJF omits the critical fact that victim participation is required to advance a criminal investigation.

In support of discretionary review, WSAJF states that Rogerson "waited and waited" for a decade for her Sexual Assault Kit (SAK) to be tested, Mem. at 1, but critically omits the fact that an investigation—regardless of the status of the SAK—requires the victim's participation.[1] Here, Rogerson

[1] WSAJF's timeline of the SPD investigation is incorrect. *See* Mem. at 4. There is no admissible evidence in the trial court record that a detective reviewed the criminal history database and found the arrest history report for Johnny Lay, much less that the detective learned that Lay was a registered sex offender supervised by the Department of Corrections. Further, there is no

skipped her scheduled interview with the SPD detective in 2007; did not respond to the detective's calls and letter asking to reschedule the interview; and did not provide anyone at SPD with her updated contact information. For eleven years, she never inquired about the status of the criminal case or the SAK or communicated with SPD in any way. CP 178, 182, 267, 255-56, 267 and 269.

The Seattle officers consistently testified that regardless of whether and/or when the SAK is tested, the victim—who is the "foundation" of a criminal case—must participate in the initial interview and the investigation if the subsequent criminal prosecution is to be successful. CP 257-59; CP 800. SPD inactivates an investigation when a victim does not participate or stops participating, but investigations can be reactivated if a

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admissible evidence in the trial court record that the detective "noted that Lay's identifiers matched Rogerson's description of her assailant." *Id*. Based on the foregoing, there was no basis to ever "create a photo montage" or contact "the DOC officer assigned to supervise the suspect." *Id*.

victim later chooses to participate again. CP 257, 259-60, 274-77, and 284-287.

Respectfully, many victims choose for a variety of personal reasons to not move forward with an investigation; stop participating in one; or decline to assist the prosecution before or during trial. Here, Rogerson stopped participating in the investigation in 2007. Rogerson's SAK was stored and available to be tested at any time before 2018 if she reinitiated her participation in the investigation.

Washington has never insisted that a law enforcement officer has a "duty" to override the victim's discretion by unilaterally pursuing victim contact, a nonfeasance duty that Rogerson characterizes as "negligent investigation." The Court of Appeals correctly affirmed dismissal of Rogerson's negligent investigation claim—a decision grounded in 30 years of consistent and well-reasoned jurisprudence. The Court should deny discretionary review.

B. WSAJF does not identify what duty the Seattle Police Department allegedly owed Rogerson with respect to its investigation.

WSAFJ argues that "surrounding circumstances" inform the determination of whether a municipality has exercised reasonable care. Mem. at 7. Here, the "surrounding circumstances" involve nonfeasance in the context of inactivating a criminal case when victim participation stops. WSAFJ concedes that "Washington has not recognized an *affirmative duty to investigate*." Mem. at 8 (emphasis in original). WSAFJ also admits that "tort law *generally* imposes no affirmative duty to act." *Id*. (emphasis in original) (citing *Peterson v. State*, 100 Wn.2d 421, 426 671 P.2d 230 (1999), and RESTATEMENT (SECOND) OF TORTS § 315 (1984)).

There is no specific act or omission that law enforcement officers committed here that warrants overturning 30 years of jurisprudence, nor does WSAFJ recognize one. In sum, the surrounding circumstances in Rogerson's case, in tandem with

police nonfeasance and WSAFJ's failure to satisfy RAP 13.4(b)(4) supports denying discretionary review.

C. The Legislature declined to enforce "accountability through tort liability."

WSAJF argues that "public policy is better served by '[a]ccountability through tort liability.'" Mem. at 12 (quoting *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983)). But in 2015 when the Legislature passed the Victims of Sexual Assault Act, it expressly declined to impose tort liability.

The Act required that all newly collected SAKs be submitted to the Washington State Patrol crime lab for testing within 30 days (subject to some parameters). *See* RCW 5.70.040; *see also* HB 1068, 2015 c 247 Sec. 1. The State later added a requirement that untested, stored kits must be tested by October 2019. *See* RCW 5.70.050; *see also* HB 1166, 2019 c 93 Sec. 7.

Each statute expressly states that it does *not* create a private right of action. *See* RCW 5.70.040(6); RCW 5.70.050(6). The legislation is explicit and unambiguous that *no private right of action* arises. *See* RCW 5.70.040(6) and .050(6) (both

providing that "Nothing in this section may be construed to create a private right of action or claim on the part of any individual, entity, or agency against any law enforcement agency or any contractor of any law enforcement agency."). Accordingly, WSAFJ's argument of "accountability through tort liability" is best addressed to the Legislature, not the Supreme Court.

D. WSAJF conflates public policy behind discretionary immunity with public policy supporting no cause of action for negligent investigation.

WSAJF heavily relies on *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983) for the proposition that the public policies behind discretionary immunity are as "outdated" as those for no cognizable cause of action for negligent investigation. Mem. at 11-14. However, the vintage of public policy continues to support no cognizable claim for negligent investigation. Its age, alone, is not a legally valid basis upon which to ignore 30 years of jurisprudence.

Further, *Bender* addresses discretionary governmental immunity, which is a "court-created rule of immunity" the purpose of which is to "prevent the courts from passing judgment on basic policy decisions that have been committed to coordinate branches of the government." *Id.* at 497. *Bender* distinguishes between discretion "exercised at a truly executive level, to which immunity is granted, from that discretion exercised at an operational level, to which liability may attach[.]" *Id. Bender* overturned *Clipse v. Gillis*, 20 Wn. App. 691, 582 P.2d 555 (1978), and *Moloney v. Tribune Pub'g Co.*, 26 Wn. App. 357, 613 P.2d 1179 (1980), because the lower court did not determine whether "the actions of those police officers were basic policy decisions or whether actual balancing of risks and advantages took place." *Bender*, 99 Wn.2d at 498 (internal quotes omitted). It did not overturn *Clipse* and *Gillis* due to a public policy analysis.

In sum, *Bender* limited discretionary immunity to executive-level decisions, not operational-level decisions under

the four-part test enunciated in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1985). *Bender* neither undermined nor negated public policy supporting no cognizable cause of action for negligent investigation.

This case does not apply discretionary immunity. Accordingly, *Bender*, *Clipse*, and *Gillis* do not undermine public policy announced in *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991). The *Dever* Court affirmed the lower court's dismissal of plaintiff's negligent investigation claim because—as here—he failed to state a claim upon which relief could be granted. *Id*. at 42. *Dever*, citing cases from other jurisdictions, states that the "reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement." *Id*. at 45. Additionally, officers have "broad discretion to allocate limited resources among the competing demands." *Id*.

The Supreme Court denied Dever's petition for discretionary review in 1992. 118 Wn.2d 1028, 828 P.2d 563. The Court should likewise deny Rogerson's petition for discretionary review. WSAJF contends that this issue is "unsettled," Mem. at 15, but WSAJF also acknowledges that the issue has been settled based on "30 years of consistent appellate decisions." *See id.*

III. CONCLUSION

The Court should deny discretionary review. WSAJF contends that "surrounding circumstances" in individual cases determine whether an actionable duty of care applies. Here, the "surrounding circumstances" involve nonfeasance in the context of inactivating a criminal case when victim participation stops. RAP 13.4(b)(4) does not apply.

This document contains 2,156 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 20th day of March, 2024.

ANN DAVISON

Seattle City Attorney

By: /s/ Susan MacMenamin
Susan MacMenamin, WSBA No. 42742
Assistant City Attorney
SEATTLE CITY ATTORNEY'S OFFICE
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Telephone: (206) 684-8200
Susan.MacMenamin@seattle.gov

FLOYD, PFLUEGER, KEARNS, NEDDERMAN & GRESS, P.S.

By: /s/ Amber L. Pearce
Amber L. Pearce, WSBA No. 31626
Floyd, Pflueger, Kearns, Nedderman & Gress, P.S.
3101 Western Avenue, Suite 400
Seattle, WA 98121
Telephone: 206-441-4455
APearce@NWTrialAttorneys.com

Attorneys for Respondent City of Seattle

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I declare under penalty of perjury and the laws of the State of Washington that on the below date, I delivered a true and correct copy of the foregoing via the method indicated below to the following parties:

Counsel for Appellant: Gary W. Manca Philip A. Talmadge Talmadge/Fitzpatrick, PLLC 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 gary@tal-fitzlaw.com phil@tal-fitzlaw.com	☒ VIA SUPREME COURT E-FILING ☐ VIA FACSIMILE: ☐ VIA MESSESNGER ☐ VIA U.S. MAIL
Counsel for Appellant: Julie A. Kays Friedman Rubin, PLLP 1109 First Avenue, Suite 501 Seattle, WA 98101-2988 jkays@friedmanrubin.com	☒ VIA SUPREME COURT E-FILING ☐ VIA FACSIMILE: ☐ VIA MESSESNGER ☐ VIA U.S. MAIL
Attorney for State of Washington: Scott A. Marlow Andrew Biggs Asst Attorney General, Torts Div Wash State Attorney General 800 5th Ave., Ste 2000, TB-14 Seattle, WA 98104-3188 scott.marlow@atg.wa.gov andrew.biggs@atg.wa.gov	☒ VIA SUPREME COURT E-FILING ☐ VIA FACSIMILE: ☐ VIA MESSESNGER ☐ VIA U.S. MAIL

wing.li@atg.wa.gov elizabeth.gilletti@atg.wa.gov leanne.rolling@atg.wa.gov TOROlyEF@atg.wa.gov	

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

DATED at Seattle, Washington on March 20, 2024.

/s/ *Teri A. Watson*
Teri A. Watson
Legal Assistant

FLOYD PFLUEGER & RINGER PS

March 20, 2024 - 11:57 AM

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- skatinas@nwtrialattorneys.com
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- tbashaw@friedmanrubin.com
- valeriemcomie@gmail.com

Comments:

Sender Name: Susan Klotz - Email: sklotz@floyd-ringer.com
Filing on Behalf of: Amber L Pearce - Email: APearce@NWTrialAttorneys.com (Alternate Email: twatson@nwtrialattorneys.com)

Address:
Floyd Pflueger Ringer P.S
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Seattle, WA, 98119
Phone: (206) 441-4455 EXT 219

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