102676-5

No. 84646-9-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

TERESA ROGERSON, individually,

Petitioner,

v.

CITY OF SEATTLE, a municipal corporation,

Respondents,

and

STATE OF WASHINGTON,

Defendant.

PETITION FOR REVIEW

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A. INTRODUCTION

This case presents an important question left unresolved in *Mancini v. City of Tacoma*, 196 Wn.2d 864, 479 P.3d 656 (2021)—whether a police officer may be liable under the common law for negligence when conducting an investigation. In *Mancini*, this Court reinstated the jury's verdict on a different ground, leaving unaddressed several Court of Appeals cases denying recovery for negligence during government investigations. *Id.* at 878 n.7 (collecting cases). That line of "undisturbed appellate authority," Op. at 10, led Division I in this case to uphold the dismissal of Teresa Rogerson's negligence claims against the City of Seattle. Division I insisted that only this Court could chart a "new path." *Id.* at 20.

Rogerson had sued the City after suffering a brutal rape and then submitting to a physically invasive and emotionally traumatic examination to extract forensic evidence such as semen and skin cells. A police policy encouraged such examinations, and a detective promised Rogerson to test the DNA evidence to

identify the rapist. But the police instead let her "rape kit" sit on a shelf for a decade, and Rogerson lived in terror. Rogerson's ordeal is not unique: untested rape kits and police skepticism of rape victims have plagued Washington and other states. Years later, Rogerson's rapist was identified and convicted, and she then claimed negligence against the City.

This Court should review Division I's decision. First, Division I's categorical rule against liability conflicts with this Court's precedents on the statutory waiver of sovereign immunity. Second, contrary to this Court's recent teachings on the public duty doctrine, Division I never considered whether the officers owed a common law duty to a rape victim individually in these circumstances. Third, this case concerns a matter of overriding state importance for this Court to resolve.

B. IDENTITY OF PETITIONER

Rogerson brings this petition.

C. COURT OF APPEALS DECISION

Rogerson asks this Court to review the decision of the

Court of Appeals, Division I, filed on November 27, 2023 ("Op.") and reproduced in the appendix at 1-11. While unpublished, it is accessible at 2023 WL 8187594.

D. ISSUES PRESENTED FOR REVIEW

1. Do government agents and their employers have absolute immunity from liability for their negligence during investigations, or are there circumstances under which such liability may attach?

2. Do police officers owe a duty of care under Washington negligence law to a rape victim who undergoes a physically invasive sexual assault examination to recover forensic evidence?

E. STATEMENT OF THE CASE

(1) A City Policy Directed Police Officers to Encourage Rape Victims to Submit to Invasive Physical Examinations

A stranger rape rarely can be prosecuted successfully without the victim undergoing a second physical invasion—a forensic sexual assault examination. CP 43, 486, 494, 555-56,

573-74, 590-93, 868. These examinations, which can take several hours, yield a "rape kit," the DNA evidence that can prove the rapist's identity.[1] The victim must strip naked and undergo scrutiny from head to toe, with swabs employed to gather the rapist's skin cells and semen from her body and inside her vagina and anus. CP 43, 486, 494, 555-56, 573-74, 590-93, 868. This invasive process re-traumatizes the victims. CP 868.

To encourage victims to consent, the Seattle Police Department ("SPD") adopted a policy for handling rape cases. CP 590-95. The policy instructed officers to persuade victims that these examinations have personal benefits to them in addition to their forensic value. CP 590-93. The policy implored SPD personnel to tell victims "not to destroy evidence by cleaning herself/himself." CP 590.

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[1] *See generally*, https://www.rainn.org/articles/rape-kit.

(2) The Police Brought Teresa Rogerson to the Hospital for a Rape Kit Examination and Promised to Test the DNA Evidence but then Left It on a Shelf

In early 2007, when this policy was in force, SPD dispatched Officer Kurt Alstrin to respond to a 911 call from Rogerson reporting she had just been raped. CP 473-74, 519, 522, 538. Two strangers had abducted her. CP 453, 474. One had raped her in a vehicle and then again in a wooded area. CP 474, 438, 473, 519-20, 799. Rogerson told Alstrin that an identification card fell from the rapist's pocket, and she saw the name "John Lay" on it. CP 438, 460, 474, 507-08. Rogerson also described the rapist's appearance and clothing. CP 473-74. And Lay's DNA was already in the national CODIS DNA database. CP 438.

Alstrin complied with SPD policy, and he personally drove Rogerson in his patrol car to Harborview Medical Center for a forensic examination. CP 473, 478, 591-93, 867. At Harborview, Rogerson suffered through swabs being inserted into her vagina, anus, and other parts of her genitals; combing of

her pubic hair; plucking of her pubic hair; scraping of her skin; trace evidence collection; photographs of her vagina and body; providing her clothing for evidence; and her medical records being released to SPD. CP 512, 545-51, 575-84. Rogerson was there for four-and-a-half hours. CP 552-54. “It was like being raped all over again,” she recalls. CP 486.

Despite the SPD policy’s directive to give “priority” to aggravated rape cases like this one, the head of SPD’s Special Assault Unit (“SAU”) did not send out a detective to interview Rogerson that day, to locate the crime scene, or to otherwise gather evidence. CP 474, 590, 598-601. Rogerson did not hear from anyone at SPD until a few days later, when she spoke on the phone with SPD Detective Roger Ishimitsu. CP 604, 815, 993, 1000. During this conversation, Rogerson “begged and pleaded for him to process my rape kit,” she recalls. CP 480, 483. “He promised me that my rape kit was being tested.” CP 480.

But Ishimitsu never submitted her rape kit for testing. CP 604-05, 831. If he had acted as a reasonable detective would

have, he would have learned that Lay was sitting a half-block away in the King County Jail, would have reviewed Lay's clothing and personal effects for possible DNA, would have had Lay participate in a line up or a photo montage for Rogerson to identify him, and would have obtained a positive match with Lay's DNA profile in CODIS. CP 604-05, 831. Instead, Ishimitsu spent about an hour on "perfunctory" efforts before closing the case after a few weeks. *Id.*

(3) Rogerson Lived in Fear Until Her Rape Kit Was Finally Tested in 2018 and Her Rapist Was Convicted in 2020

Rogerson's rape kit collected dust on a shelf until 2016, when SPD finally submitted it for testing. CP 438, 984-85. In the meanwhile, Rogerson became "I was a different person," she explains. CP 870. "It was the hardest thing, there was not a day that went by that I wondered where he was." CP 870. The thought of her rapist finding her was so "terrifying," she says, that she felt too afraid to go outdoors. CP 870. She felt "sheer terror." CP 870.

In 2018, SPD received notice from the state crime lab that there was a match with Lay's DNA in the CODIS DNA database. CP 438, 984-85. SPD Detective Martinell was then assigned Rogerson's "cold" case. CP 438, 927-35. He located Rogerson quickly, and Rogerson was interviewed within days. CP 439, 927-28. The King County Prosecutor's Office filed charges against Lay soon after. CP 968-73. On October 6, 2020, a jury convicted Lay of rape in the second degree. CP 382-96, 421, 940; *State v. Lay*, 22 Wn. App. 2d 1031, 2022 WL 2230456 (2022).

(4) Division I, Believing Itself Bound by Court of Appeals Precedent, Rejected Rogerson's Negligence Claim Against the City and Explained That Only This Court Could Reverse Course

Soon after Lay's conviction, Rogerson sued. CP 1-26. She alleged that the State Department of Corrections negligently supervised Lay when he was on probation. CP 19-22, 50-53. She also alleged three negligence claims against the City. CP 53-56.

The trial court dismissed Rogerson's claims against the City on summary judgment, CP 1098-1100, and Division I

affirmed, Op. at 1-10. After citing several Court of Appeals cases on claims for negligence arising from government investigations (and failures to investigate), Division I held those cases compelled dismissal. Op. at 10. Division I saw a total bar against a category of claims, which it lumped together under the term "negligent investigation." Op. at 8-9. The court did not examine whether these claims call for an individualized determination, tailored to each case's circumstances. Op. at 8-10. Nor did it analyze the case under common law negligence principles. *Id.* Instead, Division I resurrected the categorical test it had fashioned in *Mancini*. Op. at 8-9. But, perhaps troubled that Rogerson had no relief, Division I pointed to this Court's ultimate authority to determine the common law. Op. at 10.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) The Decision Below Conflicts with This Court's Precedents

Division I's opinion contradicts this Court's interpretation of the legislative waiver of sovereign immunity. It also departs

from this Court's recent cases on government liability—all which repeatedly stress that the public duty doctrine does not apply when a public offer undertaking a government function is liable for negligence if they have common law duty of reasonable care. This Court's cases on police liability underscore that police may assume such a duty when performing their official functions. Review is warranted. RAP 13.4(b)(1).

(a) The Court of Appeals' Sweeping Rule Against "Negligent Investigation" Claims Diverges from This Court's Broad Interpretation of the Legislature's Waiver of Sovereign Immunity

Division I's opinion creates a *de facto* immunity in conflict with the Legislature's waiver of immunity for the state and municipalities. Enacted in the 1960s and codified at RCW 4.92.090 (the state) and RCW 4.96.010 (municipalities), this waiver is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995); *accord Hanson v. Carmona*, 1 Wn.3d 362, 378, 525 P.3d 940 (2023) ("very broadly"); *Mancini*, 196 Wn.2d at 869

("broad"). It operates as a consent to suit. *Kelso v. City of Tacoma*, 63 Wn.2d 913, 916-18, 390 P.2d 2 (1964). And it establishes the scope of government liability, making government answerable in tort just as if it "were a private person or corporation." RCW 4.92.090; RCW 4.96.010. Civil liability may attach no matter whether the state or local government acts in a "governmental or proprietary capacity." RCW 4.92.090; RCW 4.96.010. This waiver thus establishes "all-encompassing" liability. *Oberg v. Dep't of Nat. Res.*, 114 Wn.2d 278, 281, 787 P.2d 918, 920 (1990).

But with Division I's opinion, a new judicial grant of immunity has functionally arisen from Division I's broad new rule. Municipalities are now basically immune from liability for their police officers' "'negligence occurring during the authorized evidence gathering aspects of police work.'" Op. at 8 (quoting *Mancini*, No. 77531-6-I, slip op. at 9). For example, Division I recognized that police officers may be liable for negligent infliction of emotional distress. Op. at 9 n.4 (discussing

Garnett v. City of Bellevue, 59 Wn. App. 281, 796 P.2d 782 (1990)). But because Rogerson alleged injury based on an investigative aspect of police work—testing a rape kit—the court rejected her claim as "noncognizable in our state." *Id.* at 9.

This new immunity clashes square with this Court's many cases holding that, under the waiver of sovereign immunity, police officers may be liable for their negligence even when performing an official duty. *Mancini*, 196 Wn.2d at 880 & n.8; *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 543, 442 P.3d 608 (2019); *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 761-62, 310 P.3d 1275 (2013). No principled reason supports treating police's investigative duties any differently from their other official functions. Division I's immunity becomes even more tenable when viewed against *Mancini*. To be sure, this Court left the issue open there. But if police officers are not immune from their negligence when executing search warrants, which itself is an investigative undertaking, then it follows that they may be liable when performing an investigation.

It is for the Legislature, not the courts, to retreat from the waiver of sovereign immunity. But the Legislature has not done so for police investigations. Of course, the City has noted that RCW 5.70.040, the law passed in 2015 that requires law enforcement agencies to submit rape kits for testing, disclaims any private right of action. CP 118 (citing RCW 5.70.040(6) and .050(6)). But that statutory disclaimer serves a limited purpose—to prevent an implied statutory cause of action under *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 507 (1990). It does not confer immunity against common law claims. When the Legislature wishes to protect municipalities and individual officers from liability, it knows how to do so, enacting special grants of immunity. *See, e.g.*, RCW 4.24.595; RCW 26.44.056(2); RCW 69.50.506(c); *Janaszak v. State*, 173 Wn. App. 703, 726, 297 P.3d 723 (2013) (holding that an immunity statute, RCW 18.130.300, barred a dentist's negligent investigation claim for improper license suspension). But here, neither Division I nor the City ever pointed to statutory immunity for police investigations

generally or for testing of rape kits specifically. If the Legislature wants to foreclose common law liability in this context, it can say so, as it has for other settings. *See generally*, *Hanson*, 1 Wn.3d at 379 (discussing examples). But until then, the general waiver of sovereign immunity permits liability when police perform in this "governmental … capacity." RCW 4.92.090; RCW 4.96.010.

In short, the Court of Appeals has been wrong to create a new form of immunity for government investigations. On this basis alone, this Court should grant review. RAP 13.4(b)(1).

(b) The Decision Below Conflicts with This Court's Many Recent Precedents on the Public Duty Doctrine

Division I's opinion also clashes with this Court's recent cases on the public duty doctrine, especially those on police negligence. The public duty doctrine "guides a court's analysis of whether a duty exists that can sustain a claim against the government in tort." *Ehrhart v. King Cnty.*, 195 Wn.2d 388, 398, 460 P.3d 612 (2020). When an injured person seeks relief based

on a governmental duty imposed by a statute or ordinance, liability generally does not attach. *See, e.g.*, *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 888-89, 288 P.3d 328 (2012) (Chambers, J., concurring). But the public duty doctrine is not a rule of non-liability: it "does not—cannot—provide immunity from liability." *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). It is merely "a focusing tool." *Bishop v. Miche,* 137 Wn.2d 518, 530, 973 P.2d 465 (1999). It is an analytical rule of thumb holding that, if a plaintiff sues based on a violation of a duty owed to the general public, then no cognizable claim is available unless an exception applies. *Norg v. City of Seattle*, 200 Wn.2d 749, 758, 522 P.3d 580 (2023).

This Court has repeatedly rejected Division I's theory that a government defendant may never be liable when performing a public function. This Court clarified in *Norg*, as it has before, that the public duty doctrine is not implicated when a plaintiff claims damages under a common law duty owed to the individual plaintiff. *Norg*, 200 Wn.2d at 758; *Mancini*, 196 Wn.2d at 885-

86; *Beltran-Serrano*, 193 Wn.2d at 549-50; *Munich*, 175 Wn.2d at 886-87 (Chambers, J., concurring)). But Division I, never mentioning this development in Washington law, refused to revisit whether there is a categorical bar on negligence claims arising from investigations, or instead whether the SPD officers owed a duty to Rogerson individually.

That was error. "Washington courts have long recognized the potential for tort liability based on the negligent performance of law enforcement activities." *Beltran-Serrano*, 193 Wn.2d at 543 (collecting cases). Here, Seattle police owed Rogerson a duty to use reasonable care to, at the very least, test her rape kit. This duty stems from the ordinary principles of tort law that apply to private actors and government entities alike.

First, all individuals owe a common law duty to use reasonable care to avoid creating or increasing the risk of harm to other people. *Beltran-Serrano*, 193 Wn.2d at 550; *Robb v. City of Seattle*, 176 Wn.2d 427, 437-39, 295 P.3d 212 (2013); *Restatement (Second) of Torts* § 281 & cmt. e. Just as this duty

applies to private actors, it extends also to police officers in their interactions with individuals when the police undertake a government function. *Beltran-Serrano*, 193 Wn.2d at 550. The same is true here: "the police in this case personally caused the harm of which [Rogerson] complains." *Mancini*, 196 Wn.2d at 885-86.

Second, based also on SPD's special relationship with Rogerson, they owed her a common law duty to exercise reasonable care to complete testing of the rape kit and notify Rogerson of the results. Washington courts have found a special relationship when the criteria in *Restatement (Second) of Torts* § 315 are met. A special relationship arises when "one party was, in some way, entrusted with the well-being of the other party," or the relationship was "custodial or supervisory." *Caulfield v. Kitsap Cnty.*, 108 Wn. App. 242, 255, 29 P.3d 738, 745 (2001) (collecting cases). A special relationship may exist even when there is no true "custodial" relationship. *H.B.H. v. State*, 192 Wn.2d 154, 174, 429 P.3d 484 (2018) ("[N]ot a single

decision identified physical custody as a necessary condition for recognizing a § 315(b) special relationship."). Special relationships may arise in many different settings. *See, e.g.*, *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (business invitees); *Benjamin v. City of Seattle*, 74 Wn.2d 832, 447 P.2d 172 (1968) (common carrier–passenger); *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961) (innkeeper–guest). In short, "entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship." *H.B.H.*, 192 Wn.2d at 173.

Here, the officers formed a special relationship with Rogerson based on her status as a vulnerable victim who had entrusted her body to the police's forensic process. Their relationship came as close to formal legal custody as can be achieved. Again: Rogerson rode in a patrol car to the hospital; SPD policy encouraged stranger rape victims to undergo forensic examinations; and SPD took custody of Rogerson's rape kit. She consented to this invasive and retraumatizing physical

examination because she believed it would lead to accountability for the rapist. CP 462. Rogerson ended up in an especially vulnerable position in relation to SPD. She could do nothing else to ascertain the rapist's identity and protect herself from the emotional and physical trauma of him being on the loose. SPD had the only physical evidence, the DNA in the rape kit, that could establish his identity. Rogerson depended on police. Indeed, SPD policy recognized that stranger rape victims are generally vulnerable to mistreatment and trauma after the rape, as experts confirmed. CP 867-68. Based on Rogerson's vulnerability and her entrusting her body and rape kit, a special relationship arose. *See H.B.H.*, 192 Wn.2d at 173.

Third, the officers had a duty to use reasonable care to avoid causing or increasing Rogerson's emotional distress. *See Garnett*, 59 Wn. App. 281 (negligent infliction of emotional distress for officers' harsh and offensive language in responding to a call that plaintiffs were loitering). This duty also arises when a municipality forms a special relationship with a crime victim.

Chambers-Castanes v. King County, 100 Wn.2d 275, 287, 669 P.2d 451 (1983).

Finally, this case's unique circumstances also triggered a common law duty for the officers to use reasonable care to complete their investigation, not just to test the rape kit over which they had taken custody. As the Court realized in *Washburn*, if a police officer's conduct will create or increase the risk of harm to another at the hands of a third party, then the officer must use reasonable care to guard against that risk becoming realized. 178 Wn.2d at 757-58 (discussing *Restatement (Second) of Torts* § 302B). Here, the City officers took control of the rape kit then did nothing, increasing the risk of emotional and physical harm to Rogerson from her sexual predator being loose. She felt so much "terror," she says, that she did not leave her house. CP 870.

The entrustment of Rogerson as a vulnerable victim also supports recognizing that the City police had to use reasonable care to finish the entire investigation, not just test the DNA. She

was not an undifferentiated member of the general public. The City had taken her by patrol car to the hospital, encouraged her to consent to the examination, and then taken the rape kit. CP 438, 473, 478, 480, 483, 590-92, 595, 867, 984-85. Once a protective duty arose, the police had no reason to stop using reasonable care after testing the rape kit. This Court should recognize that that the officers also had a duty to use reasonable care until the investigation completed.

This Court's decisions in the child abuse context do not foreclose recognizing a tort law duty in circumstances like Rogerson's. *See Wrigley v. Dep't of Soc. & Health Servs.*, 195 Wn.2d 65, 76, 455 P.3d 1138 (2020); *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Those decisions have addressed common law negligence investigation claims only in the child abuse setting. When rejecting such claims, this Court has carefully balanced the unique considerations, including the availability of an implied

statutory remedy and the need to guard against unwarranted intrusions into family integrity. *See Wrigley*, 195 Wn.2d at 76. This case stands on its own and should be decided based on its circumstances.

This petition does not ask this Court to consider adopting an all-encompassing "negligent investigation" claim. Not every negligence claim related to a government investigation is alike. Some claimants protest that the government failed to act at all, perhaps bringing those cases close to the decisions that reject liability for failure to act. *See Mancini*, 196 Wn.2d at 885. Other claimants allege that the government's blundering resulted in a wrongful criminal prosecution—a distinct setting where this Court might consider the unique policy considerations and alternative common law remedies, such as malicious prosecution. This case should be considered for its own circumstances—a rape victim who submits to a physically invasive forensic examination, and then the police take custody of the evidence extracted from her body. While this case presents

important issues, it should not be framed overbroadly.

(2) The Decision Below Presents Recurring Issues of Exceptional Importance That Should Be Decided by This Court

This Court also should grant review under RAP 13.4(b)(4) to decide the issue raised in *Mancini*. The issue has recurred below, and this Court can bring closure to it. This Court, not the lower courts, should decide whether the common law allows police to carelessly abandon stranger rape victims after they consent to forensic examinations.

(a) This Case Presents The Question About Negligent Investigations Left Open in *Mancini v. Tacoma*

In *Mancini*, this Court granted review to decide whether Division I in that case had correctly held that claims for negligent investigation are "forbidden" in Washington. As in this case, Division I there had surveyed Court of Appeals precedents and concluded that police officers may not be liable for their "negligence occurring during the authorized evidence gathering aspects of police work." *Mancini v. City of Tacoma*, 8 Wn. App.

2d 1066, 2019 WL 2092698, at *5 (2019) (unpublished). On review, this Court recognized that line of Court of Appeals cases prohibiting "recovery for negligent police investigation." *Mancini*, 196 Wn.2d at 878 n.7 (collecting cases).

But this Court reversed on a different issue. Tacoma officers had a duty to use reasonable care when executing a search warrant, this Court held, and substantial evidence supported the jury's verdict that they had been negligent. *Id.* at 880, 886-88. So this Court "d[id] not reach the question of whether police may be separately liable for the tort that the parties label 'negligent investigation.'" *Id.* at 868.

Still, both the majority and the dissent in *Mancini* left open the door to negligence claims even when police officers perform investigative functions. The majority stressed that this Court had never foreclosed common-law claims for negligent investigation except in the child abuse context (again, where an implied statutory cause of action already provides a remedy). *Id.* at 878 n.7 (collecting cases). The dissent went one step further. Even

though, according to the dissent, "a common law claim for negligent police investigation … does not *currently* exist," the dissent expressed readiness to "recognize" such a claim. *Id.* at 897 (emphasis added).

Because Division I has revived the very same test that this Court had reviewed—but did not quite reach—in *Mancini*, this case presents the first opportunity since then to squarely decide this issue.

(b) The Court of Appeals Has Decided Many Negligent Investigation Cases That Have Gone Unreviewed

This issue has percolated in the Court of Appeals. More than three decades ago, Division I concluded that "[n]o Washington court has ever recognized a separate and distinct cause of action for negligent investigation." *Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237 (1991). Since then, the Court of Appeals has repeatedly rejected "negligent investigation" claims. The cases have involved different kinds of government investigations, not only criminal matters. *See, e.g.*, *Janaszak*, 173

Wn. App. at 725-26 (dentist's license suspension); *Stansfield v. Douglas Cnty.*, 107 Wn. App. 1, 9, 12-14, 27 P.3d 205, 213 (2001) (state toxicology lab test resulted in criminal prosecution); *Laymon v. Dep't of Nat. Res.*, 99 Wn. App. 518, 530-32, 994 P.2d 232 (2000) (landowners claimed flawed investigation into whether bald eagle nests were present); *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999) (teacher faulted public school officials for not investigating a complaint); *Fondren v. Klickitat Cnty.*, 79 Wn. App. 850, 853, 862, 905 P.2d 928 (1995) (mishandled sheriff's investigation leading to a wrongful conviction); *Donaldson v. City of Seattle*, 65 Wn. App. 661, 671, 675, 831 P.2d 1098 (1992) (police failed to conduct a follow-up investigation after responding to a domestic-violence call). That this issue recurs so often and has reverberated in every Division underscores its surpassing importance. RAP 13.4(b)(4).

Division I seemed to urge this Court to finally reach it. Op. at 10. The lower court, recognizing its "30 years of consistent

appellant decisions," conceded that "stare decisis" binds it in this case—but not this Court. *Id.* Given this Court's "paramount position in the common law decisional hierarchy," Division I realized that "if a new path is to be set forth, only our Supreme Court may identify where that path lies." *Id.* In essence, then, Division I too has concluded this important issue "should be determined by the Supreme Court." This Court should accept that invitation and reaffirm that a law enforcement duty may arise, in appropriately narrow circumstances, when officers are engaged in investigative activities. RAP 13.4(b)(4).

(c) Police Officers' Civil Responsibility to Rape Victims Warrants This Court's Review

With these issues having been previously briefed and debated in this Court, the only thing left is a vehicle to reach them. This is the right case. Not only will this Court finally reach the issue left undecided in *Mancini*, but also it will address the public interest in convicting rapists and protecting their victims. The issue is urgent. Around the country, many women have filed

lawsuits, even class actions, to compel the police and prosecutors to process rape kits and take these cases seriously.[2] These lawsuits have revealed police bias against rape victims.

The crisis appears even worse in Seattle. Last year, an internal memorandum from SPD reported that the office's SAU was no longer even responding to rape cases with adult victims.[3]

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[2] *See generally*, Valeriya Safronova & Rebecca Halleck, *These Rape Victims Had to Sue to Get the Police to Investigate*, New York Times (May 23, 2019), https://www.nytimes.com/2019/05/23/us/rape-victims-kits-police-departments.html; Marc Perrusquia, *"They Abandoned Us": Rape Victims React After Hearing* (Mar. 3, 2023), Institute for Public Service Reporting, https://www.psrmemphis.org/they-abandoned-us-rape-victims-react-after-hearing/; Billy Binion, *Mariska Hargitay Is Wrong About the Rape Kit Backlog*, Reason (Aug. 19, 2020), https://reason.com/2020/08/19/mariska-hargitay-is-wrong-about-the-rape-kit-backlog/.

[3] *See* Sgt. Pamela St. John, *Staffing Issues*, Seattle Police Dep't Memorandum 3 (Apr. 11, 2022), *available at* https://www.documentcloud.org/documents/22047229-st-john-memo-4-11-22?responsive=1&title=1.

Although these facts referenced in footnotes 1-3 are not in the record on review, this Court may consider them. *See, e.g.*, *Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980)

The problem has festered in Seattle for years. For example, the former head of SPD's SAU testified that he had no idea that SPD formally required officers to give priority to strange rape cases. CP 598-99.

The common law should afford relief when no other channel exists. To deny any duty here would condone the re-traumatization of stranger rape victims. To recognize these duties, by contrast, would deter the careless handling of rape kits and compensate the women who suffer the grief of discovering that police have treated their suffering as unimportant. *See, e.g.*, *Washburn*, 178 Wn.2d at 761-62 ("The deterrence of unreasonable behavior through tort liability is, after all, one of the guiding principles of the abolition of sovereign immunity."). Police's indifference to adult sexual assault has become a national and local crisis. To solve it, victims need assurance that

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("Judicial notice of legislative facts is frequently necessary when, as in the present case, a court is asked to decide on policy grounds whether to continue or eliminate a common law rule.").

when they consent to an invasive and humiliating sexual-assault examination, the police will honor these victims' consent to a retraumatizing physical invasion. Only this Court can decide whether these women must be treated with care or instead may be treated with indifference.

G. CONCLUSION

For these reasons, the Court should grant review.

This document contains 4,976 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 27th day of December 2023.

Respectfully submitted,

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APPENDIX

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERESA ROGERSON, Appellant, v. STATE OF WASHINGTON and CITY OF SEATTLE, a municipal corporation, Respondents.	DIVISION ONE No. 84646-9-I UNPUBLISHED OPINION

DWYER, J. — Teresa Rogerson appeals from the dismissal of her amended complaint against the City of Seattle (the City), in which she alleges negligence by Seattle Police Department (SPD) officers following her report of rape. Specifically, Rogerson alleges that the City's police officers breached a duty to exercise reasonable care by not promptly submitting for testing the forensic evidence obtained when she underwent a sexual assault examination and by not taking further steps to identify her assailant. In granting the City's motion for summary judgment, the superior court ruled that "there is no claim for negligent investigation" in our state.

Indeed, Washington courts of appeals have consistently held that negligent investigation by law enforcement is a noncognizable claim. Our Supreme Court has repeatedly declined invitations to opine differently, thus leaving undisturbed that decisional authority. In dismissing Rogerson's amended complaint, the superior court ruled in accordance with appellate decisional

authority. We can find no error in the court so ruling. Rogerson's claims, as pleaded, constitute negligent investigation claims. Accordingly, we affirm the superior court's dismissal of her amended complaint.

I

In 2007, Teresa Rogerson was forcibly abducted from a downtown Seattle sidewalk and violently raped by a man she did not know, who brandished a screwdriver and threatened to kill her. During the incident, an identification card fell out of the man's clothing. Rogerson saw the name "John Lay" on the identification card. The man told Rogerson that he knew she "live[d] at Angeline's," a nearby homeless shelter for women. He told her that if she reported the rape, he would find and kill her.

Rogerson nevertheless promptly reported the rape to her caseworker at the women's shelter. An SPD officer thereafter arrived at the shelter in response to Rogerson's 911 call. Rogerson recounted the incident to the officer and gave him a detailed description of her assailant. She told the officer that, while being held against her will, she had observed the assailant's "prison license," which indicated that his name was "John Lay." The officer asked Rogerson if she would consent to a sexual assault examination, and she agreed. The officer then drove Rogerson to Harborview Medical Center, where she endured an hours-long painful and invasive examination to enable the collection of forensic evidence. During the examination, Rogerson was "tearful, afraid and despondent." Despite "the care and concern" of the sexual assault nurse examiner, Rogerson "felt as if she was reliving the rape all over again."

An SPD detective was thereafter assigned to conduct a follow up investigation of the case. When the assigned detective entered the name "John Lay" into a criminal history database, he discovered an arrest history report for a "Johnny Lay Jr.," whose identifiers matched Rogerson's description of her assailant. The database indicated that "Johnny Lay Jr." was a registered sex offender on active Department of Corrections (DOC) supervision. Notwithstanding the discovery of this information, the detective at no point created a "photo montage" for identification purposes. Nor did he contact the assigned DOC officer to attempt to determine the whereabouts of "Johnny Lay Jr."

A few days after the sexual assault examination, the assigned detective contacted Rogerson by phone to discuss the case and to schedule a follow up interview. According to Rogerson, she repeatedly inquired during the call as to whether the sexual assault kit obtained from the examination had been submitting for testing. The assigned detective assured her that "'the rape kit will be tested.'" He told her, "'[D]on't worry about [the rape kit],'" and that "'it's being taken care of.'" This proved untrue. In fact, the detective closed Rogerson's case as "inactive" within a few weeks of her report, and the sexual assault kit was not submitted for testing until June 2016, nearly a decade later.

In March 2018, SPD received notice from the Washington State Crime Patrol Laboratory that the DNA obtained from Rogerson's sexual assault kit matched that of "Johnny Lay." A different SPD detective, who was then assigned

to the case, contacted and interviewed Rogerson. In October 2020, a jury convicted Lay of rape in the second degree for the rape of Rogerson.

Rogerson thereafter filed an amended complaint against the City alleging negligence by SPD police officers following her report of the rape.[1] Rogerson alleged therein that, despite an express assurance from the assigned detective that her sexual assault kit would be promptly tested, the forensic evidence was not submitted for testing for "over a decade." She further alleged that, had the sexual assault kit been promptly submitted for testing, her assailant would have been easily identified. Instead, Rogerson asserted, she "lived in terror, fear, anxiety and psychological distress for over a decade," "constantly looking over her shoulder—worrying that the man who raped her would find her and kill her as he had threatened to during the rape."

Specifically, Rogerson pleaded that SPD officers had breached a duty of care owed to her by (1) failing to submit the forensic evidence for testing for over a decade, (2) failing to upload the DNA profile thus obtained into a criminal database, (3) failing to create and provide to her a "photo montage" that included the suspect, (4) failing to contact both the suspect whom she had identified and the suspect's probation officer, and (5) failing to further contact Rogerson following her report of the rape. She alleged that the officers had "failed to take steps to positively identify the rape suspect [whom she] had identified by name" and had "failed to investigate her rape case," thus breaching a duty to refrain

[1] Rogerson additionally asserted a negligence claim against the State, claiming that DOC had not taken reasonable precautions to prevent foreseeable harm while Lay was subject to supervision. A stipulated judgment against the State was entered on October 25, 2022.

from causing her foreseeable harm. Rogerson further asserted a claim for negligent infliction of emotional distress, alleging that SPD officers breached a duty of care owed to her by failing to promptly submit the sexual assault kit for testing after assuring her that such action would be taken.

The City thereafter filed a motion for summary judgment seeking dismissal of the amended complaint. The City asserted, in part, that Rogerson's claims constituted noncognizable negligent investigation claims. In response to the City's motion, Rogerson replied that "[i]t is undisputed that [the assigned detective's] 'investigation' into the rape . . . was minimal. A conservative estimate of the time it took [him] to complete the actions on [Rogerson's] case is less than an hour." She additionally submitted declarations and deposition testimony of two experts who opined regarding the actions that a "reasonably prudent" detective would have undertaken. Rogerson asserted that, according to those experts, such a detective would have entered the suspect's name into the police department's internal database, contacted the suspect's community custody officer, and required the suspect to participate in a "line up or photo montage" for identification purposes. She alleged that the assigned detective had breached a duty of care by failing to engage in these actions.

On April 8, 2022, the superior court granted the City's motion for summary judgment. The court determined that the asserted causes of action constituted negligent investigation claims and ruled that "there is no claim for negligent investigation" in Washington. Accordingly, the court dismissed Rogerson's amended complaint.

Rogerson appeals.

II

Rogerson asserts that the superior court erred by dismissing her claims against the City as noncognizable negligent investigation claims. This is so, she avers, because her claims are not rendered unactionable in tort merely because the alleged negligent acts and omissions occurred within a police investigation. We disagree. We, along with our colleagues in Divisions Two and Three of this court, have consistently held that our state does not recognize a claim for negligent investigation. Our Supreme Court has provided no indication that this decisional authority is incorrect. Accordingly, we can find no error in the superior court's decision to rule in accordance with that authority. Having determined that the asserted causes of action constitute negligent investigation claims, we conclude that the superior court properly dismissed Rogerson's amended complaint.

We review de novo a trial court's decision on summary judgment, engaging in the same inquiry as did the trial court. Haley v. Amazon.com Servs., LLC, 25 Wn. App. 2d 207, 216, 522 P.3d 80 (2022). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party bears the burden of demonstrating that there is no disputed issue of material fact. Haley, 25 Wn. App. 2d at 216. "All reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only if a reasonable person could reach but one

conclusion." Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 954, 247 P.3d 18 (2011).

"A claim for negligent investigation is not cognizable under Washington law."[2] Fondren v. Klickitat County, 79 Wn. App. 850, 862, 905 P.2d 928 (1995). We have repeatedly so held. Janaszak v. State, 173 Wn. App. 703, 725, 297 P.3d 723 (2013); Stansfield v. Douglas County, 107 Wn. App. 1, 12-13, 27 P.3d 205, review denied, 145 Wn.2d 1009 (2001); Laymon v. Dep't of Nat. Res., 99 Wn. App. 518, 530, 994 P.2d 232 (2000); Pettis v. State, 98 Wn. App. 553, 558-59, 990 P.2d 453 (1999); Corbally v. Kennewick Sch. Dist., 94 Wn. App. 736, 740, 973 P.2d 1074 (1999); Fondren, 79 Wn. App. at 862; Donaldson v. City of Seattle, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992), review dismissed, 120 Wn.2d 1031, 847 P.2d 481 (1993); Dever v. Fowler, 63 Wn. App. 35, 44-45, 816 P.2d 1237, 824 P.2d 1237 (1991), review denied, 118 Wn.2d 1028 (1992).

In particular, we have declined to recognize a cognizable claim for negligent investigation against law enforcement officials. Stansfield, 107 Wn. App. at 12-13; Fondren, 79 Wn. App. at 862-63; Donaldson, 65 Wn. App. at 671; Dever, 63 Wn. App. at 44-45; see also Mancini v. City of Tacoma, 196 Wn.2d

[2] The few circumstances in which our courts have recognized a claim for negligent investigation are inapplicable here. See, e.g., Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 795-96, 98 P.3d 1264 (2004) (recognizing that an employer's investigation "that negligently fails to discover harassment . . . may be a basis for a determination that the employer failed to take remedial action"); M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 602, 70 P.3d 954 (2003) (recognizing a claim for negligent investigation when such investigation results in placement decisions that cause harm to a child); Lambert v. Morehouse, 68 Wn. App. 500, 505, 843 P.2d 1116 (1993) (recognizing that, "[t]o the extent an employee has an employment contract requiring specific reasons for dismissal, then the employer must conduct an adequate investigation or be liable for breach of that contract"); Tyler v. Grange Ins. Ass'n, 3 Wn. App. 167, 179, 473 P.2d 193 (1970) (recognizing that an insurer's duty to act in good faith encompasses a "duty to thoroughly investigate to determine the facts upon which good faith judgment . . . can be formulated").

864, 878 n.7, 479 P.3d 656 (2021) ("To be sure, the Court of Appeals has repeatedly denied recovery for negligent police investigation."). Our Supreme Court has declined to accept any invitation to opine differently. Mancini, 196 Wn.2d at 869 ("We do not reach the question of whether police may separately be liable for the tort that the parties label 'negligent investigation.'").[3] Thus, our decisional authority on this issue remains undisturbed.

We recently recognized that no Washington court had yet "set forth the precise boundaries of [the] forbidden claim" of negligent investigation. Mancini v. City of Tacoma, No. 77531-6-I (Wash. Ct. App. May 13, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/775316.pdf, reversed, 196 Wn.2d 864 (2021). Such a claim, we indicated, "must encompass, at minimum, assertions of negligence occurring during the authorized evidence gathering aspects of police work." Mancini, No. 77531-6-I, slip op. at 9. We imparted our view that, when the duty alleged to have been breached was the duty "to 'investigate better,'" "a negligence claim has become a negligent investigation claim." Mancini, No. 77531-6-I, slip op. at 9 n.9.

Here, each of Rogerson's claims, as pleaded, encompass assertions that SPD officers were negligent in performing the evidence gathering aspects of their work. Specifically, Rogerson alleged that the City, through the acts or omissions of its police officers, breached a duty to promptly submit the sexual assault kit for testing, to upload her assailant's DNA profile into a criminal database, to create

[3] In addition to explicitly declining to opine on the issue in Mancini, our Supreme Court has, as previously set forth, repeatedly denied review of appellate decisions holding that no such cognizable claim exists. See citations, supra, at 7.

and provide a "photo montage" from which she could identify her assailant, to contact the suspect and his probation officer, and to make more significant attempts to contact her following her report. SPD officers, she alleged, were negligent in "fail[ing] to investigate her rape case." Each of Rogerson's claims is premised on her assertion that the assigned detective's "'investigation' into the rape . . . was minimal," as the totality of his investigative actions took "less than an hour." Rogerson's experts similarly opined that a "reasonably prudent" detective would have taken additional steps to more thoroughly investigate the rape report. In short, Rogerson's claims, as pleaded, constitute assertions that SPD officers breached a duty to "'investigate better.'" Mancini, No. 77531-6-I, slip op. at 9 n.9. Such claims constitute negligent investigation claims that, pursuant to undisturbed appellate decisional authority, are noncognizable in our state. Accordingly, the superior court did not err by dismissing Rogerson's amended complaint.[4]

[4] CR 56 motions are analyzed based on the actual pleadings filed and the facts actually set forth in affidavits. CR 56(c) ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). Unlike CR 12(b)(6) motions, CR 56 motions do not contemplate resort to hypotheticals.

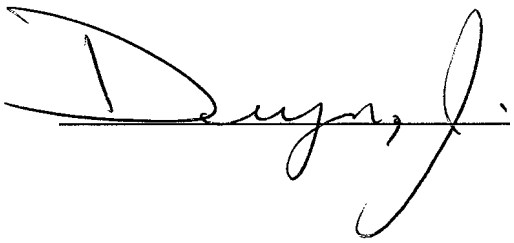
As discussed above, however, Rogerson pleaded her negligent infliction of emotional distress claim as arising from the breach of a duty to promptly test the sexual assault kit following an express assurance that such action would be taken. This is, in all respects, a claim of negligence based on an assertion that police should have "'investigate[d] better.'" Mancini, No. 77531-6-I, slip op. at 9 n.9. As such, it is a noncognizable claim.

We recognize a theoretical possibility that Rogerson might have pleaded a negligent infliction of emotional distress claim differently. For instance, by relying only upon the actions of the officer to whom she first reported the rape, she might have pleaded the breach of a duty in a manner designed to (at least from the plaintiff's perspective) fall within the scope of Garnett v. City of Bellevue, 59 Wn. App. 281, 796 P.2d 782 (1990). In such a case, however, proof of proximate causation would be limited solely to injuries arising from the breach of the duty pleaded. Here, those injuries appear likely to have been more limited than the injuries claimed in Rogerson's pleadings. And, of course, if her claim had been proved, the damages rightfully awarded would be accordingly limited.

III

There is little question that Rogerson experienced significant trauma resulting from both the rape and the subsequent collection of forensic evidence—an experience she endured only in order to facilitate the identification of her assailant. Nor do we doubt Rogerson's assertion that, for more than a decade, she endured additional trauma from believing—correctly—that her assailant had not been brought to justice. Nevertheless, it was the trial court's duty to rule consistent with undisturbed appellate authority. So it is with us. At this point, after over 30 years of consistent appellate decisions, stare decisis and the Supreme Court's paramount position in the common law decisional hierarchy mandate that, if a new path is to be set forth, only our Supreme Court may identify where that path lies.

Affirmed.



By engaging in these musings, we are not holding that Rogerson in fact possesses a viable claim of this type. To be clear, we today decide this case solely with regard to the pleadings actually filed and the order of dismissal actually entered.

WE CONCUR:

Birk, J. Mann, J.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I of the State of Washington Cause No. 84646-9-I to the following:

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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 27, 2023 at Seattle, Washington.

/s/ Matt J. Albers
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