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* KING COUNTY SEXUAL ASSAULT RESOURCE CENTER

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I. INTRODUCTION

Amicus King County Sexual Assault Resource Center (KCSARC) supports discretionary review under RAP 13.4(b)(1) due to a purported conflict between a Court of Appeals and Supreme Court decision. KCSARC Mem. at 4. Yet, KSCARC identifies no Court of Appeals or Supreme Court case wherein such a conflict exists. Accordingly, KCSARC's reliance on RAP 13.4(b)(1) does not advance its argument for accepting review.

KCSARC also contends that review should be granted under RAP 13.4(b)(4) because it believes this case involves an issue of substantial public interest. Mem. at 3, 5, 7. But KCSARC fails to discuss 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. KCSARC'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.

Here, KCSARC specifically asks this Court to decide whether "the civil-justice system can provide the accountability and redress that this pernicious problem [belatedly testing rape kits] requires." KCSARC Mem. at 3. This is a moot question because in 2015 the Legislature redressed the "pernicious problem" by passing the Victims of Sexual Assault Act, which requires that newly collected and untested/stored kits be submitted to the Washington State Patrol crime lab within certain timeframes. *See* RCW 5.70.040 & .050.

The Legislature expressly declined to create a private right of action associated with the timeliness of testing untested/stored kits. *See* RCW 5.70.040(6); 5.70.050(6). If KCSARC seeks additional redress, then it should be directed to the Legislature, not this Court.

KCSARC argues that a special relationship exception to the public duty doctrine should "attach as soon as a sexual-assault victim like Rogerson submits to the forensic examination" due to the grueling nature of the exam. Mem. at 10.

However, the doctor's examination—to which the victim consents—is for the purpose of collecting evidence for the perpetrator's criminal prosecution. KCSARC submits no facts or law supporting the proposition that the forensic examination creates a special relationship with law enforcement officers.

Further, prosecuting an alleged rape requires the victim's cooperation with officers to strategically advance the investigation. 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. This choice was within her own discretion. KCSARC agrees: "[v]ictims of such trauma often want to put the events behind them, not relive them by talking about them over and over again with police officers." Mem. at 15.

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

KCSARC 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.

Similarly, KCSARC asks this Court to accept review and apply the voluntary rescue doctrine to this case. Mem. at 13. This theory was never advanced in the trial court, thus it is outside the purview of RAP 9.1 and RAP 9.12. Further, KCSARC does not contextually or analytically apply this doctrine to this case.

KCSARC improperly cites and relies on an internal police department memorandum regarding staffing issues and various newspaper articles regarding state actors—documents that are completely outside the composition of the record before this Court under RAP 9.1. KCSARC does not request that the Court take judicial notice under ER 201 of these extraneous documents that are arguably not adjudicative facts as contemplated by ER 201. The City of Seattle (City) respectfully requests that the Court strike these documents and decline to consider them.

II. ARGUMENT IN ANSWER TO *AMICUS CURIAE*

A. The Legislature expressly declined to create a cause of action for acts or omissions regarding backlogged rape kits.

In support of discretionary review, KCSARC contends that this Court should spontaneously create liability and a remedy for injuries arising from belatedly tested SAKs. KCSARC Mem. at 3. However, the Legislature has already created a remedy by instructing that all testing of stored/untested SAKs occur within a certain timeframe.

In 2015, the Washington Legislature passed the Victims of Sexual Assault Act, requiring that all newly collected kits 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);

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.").

The City complied with the statute and submitted Rogerson's kit for testing on June 21, 2016. CP 972. To the extent that KCSARC seeks additional redress for victims against law enforcement agencies, toxicology labs, or other entities for failing to timely test backlogged rape kits, such a request should be directed to the Legislature, not the Supreme Court. KCSARC has not met the criteria of either RAP 13.4(b)1, or (4).

B. The special relationship exception to the public duty doctrine does not apply.

KCSARC argues that a special relationship exception to the public duty doctrine should "attach as soon as a sexual-assault victim like Rogerson submits to the forensic examination" due to the grueling nature of the exam. Mem. at

10. Presumably this special relationship would exist between the victim and law enforcement officer. However, the doctor, not the law enforcement officer, conducts the medical examination. The grueling nature of the forensic examination is best addressed between the victim and the medical provider conducting the exam—not the victim and a law enforcement officer.

The examination—to which the victim consents—is for the purpose of collecting evidence for the perpetrator's criminal prosecution. KCSARC admits that "a professionally administered sexual-assault examination is the only realistic and safe method for collecting rape kits." Mem. at 11.

KCSARC does not explain how the medical examination purportedly creates a special relationship with law enforcement officers. Instead, KCSARC cites RESTATEMENT (SECOND) OF TORTS § 315, wherein the existence of a special relationship may give rise to a duty to protect a plaintiff from harm caused by third person. Mem. at 13.

There is no admissible evidence in the record that supports Rogerson's contention that she was in a protective, custodial, or entrustment relationship with SPD or a third-party. The exception does not apply. *See Barlow v. State*, ___Wn.2d ___, 540 P.3d 783 (2024) (rejecting argument for special relationship protective duty arising under RESTATEMENT (SECOND) OF TORTS § 315 in the context of a university and student, noting that such relationship requires "traits of dependence and control").

C. The voluntary rescue doctrine was not briefed in the trial or appellate court, nor does KCSARC apply it here.

KCSARC references the voluntary rescue doctrine, Mem. at 13, but neither applies nor analyzes the doctrine. It should not be considered by this Court because it was not part of "evidence and issues called to the attention of the trial court." RAP 9.12. Second, the doctrine was never alleged, addressed, discussed, or applied in the Court of Appeals briefing.

D. There is no duty to complete an investigation after testing.

KCSARC argues that law enforcement officers should "have a continuing duty to use reasonable care to complete the investigation after testing." Mem. at 7. It submits no facts or law to support a "continuing duty" argument. First, this position ignores the necessity of a victim's participation in the investigation. Criminal prosecution of rape does not occur in a vacuum. Second, this position disregards a victim's decision to not participate or stop participating. Third, it usurps the officers' "broad discretion to allocate limited resources among the competing demands." *Dever v. Fowler*, 63 Wn. App. 35, 45, 816 P.2d 1237 (1991).

The Court of Appeals correctly affirmed dismissal of Rogerson's negligent investigation claim based on 30 years of consistent and well-reasoned jurisprudence. KSCARC identifies no conflict between the Court of Appeals decision and any Supreme Court case supporting review under RAP 13.4(b)(1).

III. CONCLUSION

The Court should deny discretionary review. The issues raised by KCSARC are unsupported by both the facts and law in the record, and do not meet the threshold criteria of RAP 13.4(b)(1), (4). KCSARC's memo is devoid of any authority or legal argument supporting review under RAP 13.4(b)(1).

Outside the record, KCSARC submits no legal authority for the proposition that (1) a special relationship between a victim and law enforcement officer attaches when a victim undergoes a medical forensic examination; or (2) despite a victim's choice to not participate in an investigation, a law enforcement officer nevertheless has a duty to continue the investigation.

This document contains 1,542 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 20th day of March, 2024.

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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:

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

DATED at Seattle, Washington on March 20, 2024.

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March 20, 2024 - 11:57 AM

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