No. 102676-5

SUPREME COURT
OF THE STATE OF WASHINGTON

TERESA ROGERSON, individually,

Petitioner,
v.

CITY OF SEATTLE, a municipal corporation,

Respondent,

and

STATE OF WASHINGTON,

Defendant.

MEMORANDUM OF *AMICUS CURIAE* KING COUNTY SEXUAL ASSAULT RESOURCE CENTER IN SUPPORT OF GRANTING REVIEW

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MISCELLANEOUS:

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The King County Sexual Assault Resource Center ("KCSARC"), a nonprofit corporation, is the largest sexual assault services organization in Washington. Since 1976, KCSARC has worked to prevent sexual violence and to help victims and their families recover when it does occur.

In addition to providing mental health treatment and other services, KCSARC offers a Legal Advocates program that gives legal assistance to victims and their families. One of the largest program of its kind nationwide, Legal Advocates served 2,287 people in 2018 alone. KCSARC's perspective here is based on client experiences and academic research.

KCSARC has a particular interest in how respondent City of Seattle investigates sexual assaults. In April 2022, an internal Seattle Police Department ("SPD") memorandum revealed that the agency was not assigning adult sexual-assault cases to

detectives.[1] In response to the revelations in that memorandum, KCSARC, together with two advocacy organizations, wrote a letter to Seattle elected officials and the SPD chief to outline reforms to support victims of sexual assault.[2] Among other measures, KCSARC and its partners called for "[t]imely investigation of adult rape cases as outlined … in the King County Special Assault Network Protocol."[3] KCSARC and the co-signers also identified lingering problems with rape kits, calling on SPD "to submit a request to the Washington state patrol crime laboratory for prioritization testing within 30 days of receiving a rape kit."[4]

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[1] *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.

[2] https://www.kcsarc.org/wp-content/uploads/2022/07/SPD-LETTER-FINAL.pdf

[3] *Id.*

[4] *Id.*

II. ARGUMENT IN SUPPORT OF REVIEW

Given its interest in reducing sexual assault and in serving the victims of those crimes, KCSARC supports review in this case under RAP 13.4(b)(1) and (b)(4). This Court should decide whether the civil-justice system can provide the accountability and redress that this pernicious problem requires.

A. Police Failures to Submit Rape Kits for Testing and to Complete Sexual Assault Investigations Present a Serious Problem Warranting This Court's Consideration

Untested rape kits have been a serious public-safety problem in Washington for decades, with sexual-assault survivors suffering most painfully from the backlog. In an inventory lasting between 2015 and 2018, the Attorney General's Office discovered that there were at least 10,134 untested rape kits in this state.[5] Of those, at least 6,460 were sitting on shelves in Washington's local law-enforcement officers, just as Teresa

[5] https://www.atg.wa.gov/news/news-releases/all-backlogged-sexual-assault-kits-cleared-shelves-and-sent-testing.

Rogerson's was.[6] The rest had piled up in the Washington State Crime Lab.[7] The Attorney General's Office announced a few months ago that testing on these kits had been completed.[8]

This progress aside, the issue remains one of broad public importance. RAP 13.4(b)(1). While this case involves the claim of a single person against one municipality, the state's own statistics show that thousands of other sexual-assault survivors might not know that their rape kits had gone untested for many years. The petition for review thus calls on this Court to decide not only whether Rogerson has a remedy, but also whether over 10,000 other Washingtonians should have one as well if they can prove the factual elements of a negligence claim—breach, causation, and damages. This issue is a classic Supreme Court

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[6] Id.; https://www.atg.wa.gov/news/news-releases/ag-ferguson-statewide-inventory-unsubmitted-sexual-assault-kits-complete.

[7] https://www.atg.wa.gov/news/news-releases/ag-ferguson-statewide-inventory-unsubmitted-sexual-assault-kits-complete.

[8] https://www.atg.wa.gov/news/news-releases/all-backlogged-sexual-assault-kits-cleared-shelves-and-sent-testing.

question. *See* RAP 13.4(b)(4); *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976) ("'In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.'" (quoting W. Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 15 (1953))).

And this issue remains urgent, not just a matter of righting past wrongs. As the Attorney General's Office recent statement suggests, the existence of unsubmitted rape kits depends entirely on law-enforcement agencies' self-reporting.[9] A common-law duty of reasonable care would establish ongoing disincentives against agencies destroying rape kits or losing track of them because of poor recordkeeping. *Cf. Savage v. State*, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995) ("[M]aintaining the potential of state liability, as established in RCW 4.92, can be expected to

[9] https://www.atg.wa.gov/news/news-releases/all-backlogged-sexual-assault-kits-cleared-shelves-and-sent-testing

have the salutary effect of providing the State an incentive to ensure that reasonable care is used in fashioning guidelines and procedures for the supervision of parolees."). This Court should decide whether ongoing judicial and jury oversight is necessary to vindicate "the interest of the injured party to compensation," *Hunsley*, 87 Wn.2d at 435, and to maintain accountability for law-enforcement officers who might hesitate to submit a kit for testing.

While state officials claim progress on testing, the data show that follow-up investigations continue to stall. The Attorney General's Office reports that the testing of 10,000 backlogged rape kits from sexual assaults between 2002 and 2015 uncovered 2,100 matches in the CODIS database.[10] CODIS, which stands for the Combined DNA Index System, is an FBI-managed DNA database that draws on local, state, and national DNA samples taken from convicted offenders and from

[10] https://www.atg.wa.gov/news/news-releases/all-backlogged-sexual-assault-kits-cleared-shelves-and-sent-testing.

crime scenes.[11] Despite Washington law-enforcement officers receiving these leads in hundreds of cases, the Attorney General's Office has identified only 21 successful criminal prosecutions resulting from this new evidence.[12] That so many of these cases with DNA matches remain "unsolved" suggests that law-enforcement agencies are still not giving these cases the care that sexual-assault victims deserve. This problem underscores the importance of this Court deciding not only whether a common-law duty requires law-enforcement officers to use reasonable care to test rape kits but also whether they have a continuing duty to use reasonable care to complete the investigation after testing. *See* RAP 13.4(b)(4).

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[11] https://nij.ojp.gov/nij-hosted-online-training-courses/what-every-investigator-and-evidence-technician-should-know/codis; https://bjs.ojp.gov/taxonomy/term/combined-dna-index-system-codis.

[12] https://wasaki.atg.wa.gov/data-and-results/case-summaries; https://www.atg.wa.gov/news/news-releases/all-backlogged-sexual-assault-kits-cleared-shelves-and-sent-testing.

B. This Court Should Grant Review to Decide Whether a Special Relationship Attaches as Soon as a Sexual-Assault Survivor Submits to a Forensic Sexual-Assault Examination

KCSARC agrees with Rogerson, as a matter of legal doctrine, that Court of Appeals caselaw establishes a *de facto* government immunity for law-enforcement officers whenever they perform functions that has any connection to a criminal investigation. *See* Pet. for Rev. at 10-14. The public-duty doctrine "does not—cannot—provide immunity from liability." *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). That is because, under RCW 4.96.010, "[a]ll local governmental entities, whether acting in a *governmental* or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers." RCW 4.96.010(1) (emphasis added). The lower court's judicial bar against tort liability conflicts with this legislative waiver of sovereign immunity.

KCSARC also agrees with Rogerson that the Court of Appeals decisions on "negligent investigation" claims conflict

with this Court's more-recent precedents holding that government entities are liable in tort, notwithstanding the public-duty doctrine, when their officers have a common-law duty of care to the plaintiff. *See, e.g.*, *Norg v. City of Seattle*, 200 Wn.2d 749, 758, 522 P.3d 580 (2023); *Mancini v. City of Tacoma*, 196 Wn.2d 864, 885, 479 P.3d 656 (2021); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549-50, 442 P.3d 608 (2019); *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 888-89, 288 P.3d 328 (2012) (Chambers, J., concurring).

KCSARC has an interest in these doctrinal questions because the common law should not close the door to victims of sexual assault receiving compensation when treated negligently by the government agencies that are supposed to help them. That interest is most apparent in rape cases when the sexual-assault victim undergoes an invasive sexual-assault examination to collect a rape kit for testing. While this Court might accept review to decide whether a special relationship arose when the SPD detective promised Rogerson to have her rape kit tested, this

Court also should consider—and later hold "yes" on the merits—whether a special relationship attached as soon as a sexual-assault victim like Rogerson submits to the forensic examination. Put another way, a common-law duty of reasonable care should be recognized from the moment that the victim undergoes the examination.

That is because a sexual-assault forensic examination is a grueling, physically and emotionally invasive medical procedure unlike any other forensic investigation that a victim of any other crime will undergo. The entire process takes four to six hours. Performed at a hospital, the examination is led by specially trained sexual assault nurse examiners ("SANEs"). While most victims of sexual assault want to get clean as soon as possible, victims are encouraged to forego showering, changing their clothes brushing their teeth, and even using the bathroom before the examination. A SANE asks about the victim's medical history and completes an intake, which explores not only the assault but usually the victim's prior sexual activity in order to

discern any connection between unrelated sex and the assault. A SANE typically takes photos, swabs the skin, and does a pelvic exam, searching for the perpetrator's semen, skin cells, hair, and blood. The physical examination goes from head to toe, and the SANE usually must penetrate the very same parts of the body that were just assaulted—the vagina, anus, and mouth. Because these examinations occur within 72 hours of the assault and can duplicate aspects of the physical trauma, most sexual-assault victims find the experience to be re-traumatizing.

Importantly, a professionally administered sexual-assault examination is the only realistic and safe method for collecting rape kits. A few years ago, a for-profit company developed a product called a "MeToo" sexual assault evidence kit, and marketed it as a tool for collecting DNA evidence in the privacy of one's home. But if a victim does the collection on their own in their home, the process is highly unlikely to withstand the evidentiary rules and constitutional principles that constrain the admission of forensic DNA evidence in court. By contrast, when

a trained sexual assault nurse examiner performs the exam in a hospital, this professional uses gloves and swabs and carefully documents the process with photographs and written records. These procedures not only establish the DNA samples' reliability but also allow prosecutors to later establish a proper chain of custody between the hospital, the police station, and the crime lab. Specialist nurses also offer emotional support during the DNA collection process, whereas victims self-administering a kit at home would be on their own.

The emotional and physical invasion sets apart sexual-assault victims from the public as a whole and from other people who report crime. Survivors who undergo sexual-assault forensic examinations are not, as the City argues, mere members of "the public at large" or the "nebulous public." Ans. at 17, 22 (quotation omitted). This Court should grant review to decide whether instead a special relationship exists between law-enforcement agencies and sexual-assault victims who undergo sexual-assault forensic examinations. This relationship would

support a duty under so-called "special relationship exception" to the public-duty doctrine,[13] under *Restatement (Second) of Torts* § 315, or under the voluntary-rescue doctrine (which is both an "exception" to the public-duty doctrine[14] and its own freestanding common-law duty of care).

The City of Seattle's answer has urged this Court to consider only narrow legal theories for recognizing an actionable duty of care in this case's circumstances. Ans. at 20. This Court should decline that invitation, as it has before in government-liability cases when the record has been developed well enough to consider related arguments about duty. *See, e.g.*, *Turner v. Washington State Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 293 n.15, 493 P.3d 117 (2021). It seems unlikely that this case's record would have developed differently in the

[13] *Hoffer v. State*, 110 Wn.2d 415, 423, 755 P.2d 781, 786 (1988), *on reconsideration in part,* 113 Wn.2d 148, 776 P.2d 963 (1989).

[14] *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257, 753 P.2d 523 (1987); *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 299, 545 P.2d 13 (1975).

superior court, and these theories of duty interrelate. *See, e.g.*, *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 84 n.4, 328 P.3d 962 (2014) ("Though the voluntary rescue doctrine and a special relationship are distinct, we analyze them together because they are analogous and intertwined." (citing *Munich,* 175 Wn.2d at 894 (Chambers, J., concurring)).

C. This Court Should Review Whether a Sexual-Assault Victim's Purported Non-Cooperation Bears on the Existence of a Duty of Care

The City's answer perpetuates the unfortunate view that persists in some quarters of the law-enforcement community—namely, that victims should do more to "cooperate." Ans. at 2-3, 12, 18. First, the City is wrong about this case as a factual matter. Rogerson answered the responding officer's questions, rode in his patrol car to Harborview, and then submitted to a four-and-a-half hour examination. CP 473, 478, 552-54, 591-93, 867. That is cooperation. Second, it is not unusual for sexual-assault victims' level of participation in a police investigation to fluctuate, particularly when the victim is as vulnerable as

Rogerson was (a homeless woman living in a shelter). Victims 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. A duty of reasonable care in those circumstances could mean that a detective should do more, not less, to reconnect with the victim. Indeed, that's what the experts on policing said in this case. CP 639, 830. Third and finally, the City is wrong on the law. Even if a plaintiff bears some fault, that does not negate the defendant's own liability for negligence. Instead, a jury allocates that fault under the comparative-fault statute, RCW 4.22.070(1). Contributory negligence poses no bar to recovery. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 292, 840 P.2d 860 (1992).

This Court should grant review to address the City's incorrect and antiquated views about victim "cooperation" in sexual-assault cases. Indeed, those attitudes linger as one of the biggest barriers to police—and the municipalities like respondent that hire and supervise them—taking these cases seriously.

III. CONCLUSION

This is a Supreme Court case. KCSARC urges this Court to grant review.

This document contains **2,318** words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 26th day of February 2024.

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