No. 102676-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TERESA ROGERSON,

Plaintiff/Petitioner,

vs.

CITY OF SEATTLE, a municipal corporation

Respondent,

and

STATE OF WASHINGTON,

Defendant.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

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On behalf of
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I. IDENTITY AND INTEREST OF MOVING PARTY

The Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including a crime victim's right to recover for injuries caused by negligent law enforcement investigations.

II. INTRODUCTION AND STATEMENT OF THE CASE

In 2007, Teresa Rogerson was abducted and violently raped. Her abductor promised to kill her if she reported the attack, but Rogerson called 911 anyway. She identified her attacker by name, described his appearance, and underwent an invasive sexual assault exam. And then she waited. She waited, in fact, for nearly a decade. When the Seattle Police Department (SPD) finally tested her rape kit in 2016, it identified her attacker as John Lay, the same person Rogerson identified by name in 2007. Lay was arrested and convicted of rape.

Rogerson sued the City of Seattle under multiple negligence theories, but the trial court granted the City's motion for summary judgment on all of her claims. The Court of Appeals affirmed, stating simply "we have declined to recognize a cognizable claim for negligent investigation against law enforcement officials." *Rogerson v. State*, No. 84646-9-I, 2023 WL 8187594, at *4 (Nov. 27, 2023).

The Court of Appeals opinion is one in a long line of appellate decisions that have dismissed tort claims under the broad rule that "Washington common law does not recognize a claim for negligent investigation because of the chilling effect such claims would have on investigations." *Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013). While this Court has acknowledged this "no duty" rule, it has not examined its merits. *See Mancini v. City of Tacoma*, 196 Wn.2d 864, 878 & n.7, 479 P.3d 656 (2021).

It should do so here. The "no duty" rule disregards traditional tort duty analysis and bars otherwise cognizable claims if they are based on investigative acts. The public policy

offered in support of the rule cannot justify denying Washington and its citizens the benefits of tort liability. This Court should grant review and squarely address whether the "no duty" rule comports with Washington tort law.

III. BACKGROUND

Teresa Rogerson was forcibly abducted from a Seattle sidewalk in 2007. Brandishing a screwdriver, her abductor violently raped her, first in a vehicle and then in a wooded area. Rogerson was living at a homeless shelter at the time, and her attacker told her that he knew where she lived and would kill her if she reported the attack.

Despite her fear, Rogerson reported the rape. She described the incident to an SPD officer, giving a detailed description of her attacker and identifying him as "John Lay," based on identification that she saw fall from his pocket during the attack. *Rogerson,* 2023 WL 8187594, at *1. On the officer's urging, Rogerson endured an hours-long sexual assault examination so that law enforcement could obtain a rape kit.

A criminal history database revealed an arrest history report for a "Johnny Lay Jr." and indicated that he was a registered sex offender under Department of Corrections (DOC) supervision. The assigned detective noted that Lay's identifiers matched Rogerson's description of her assailant. However, the detective neither created a photo montage nor contacted the DOC officer assigned to supervise the suspect.

Rogerson repeatedly asked the detective whether the rape kit was being tested. *See id.* at 2. He assured her that "it's being taken care of." *Id.* In reality, he closed the case without testing the rape kit. *See id.*

In 2015, the Washington Legislature enacted statutes requiring testing of backlogged rape kits. *See* RCW 5.70.050. In March 2018, SPD received a report from the State Crime Patrol Laboratory that the DNA obtained from Rogerson's rape kit had been tested and matched to a "Johnny Lay." An SPD detective notified Rogerson. Lay was arrested and convicted of rape.

Rogerson sued, alleging the City violated three common law duties it owed to her: 1) the duty recognized under the

"special relationship" exception to the public duty doctrine; 2) the duty to refrain from conduct that creates a risk of harm; and 3) the duty to refrain from negligently inflicting emotional distress. *See* CP 53-56. The City moved for summary judgment, which the trial court granted. *See Rogerson* at *3.

Rogerson appealed. Without differentiating Rogerson's individual claims, the appellate court noted that "each of Rogerson's claims, as pleaded, encompass assertions that SPD officers were negligent in performing the evidence gathering aspects of their work." *Id.* at *4. On this basis, the court affirmed, stating simply that "negligent investigation" claims are "noncognizable." *Id.* at *1. It emphasized that this Court has heretofore "declined to accept any invitation to opine differently" *id.* at *4, and that "after 30 years of consistent appellate decisions . . . if a new path is to be set forth, only our Supreme Court may identify where that path lies." *Id.* at *5.

IV. ISSUE PRESENTED

> Does the broad rule foreclosing common law negligent investigation claims raise an issue of substantial public interest warranting review by this Court?

V. ARGUMENT IN SUPPORT OF REVIEW

A. The "No Duty" Rule Disregards Recognized Tort Duties And Bypasses Traditional Tort Duty Analysis.

Generally, whether a tort duty exists is an issue of law and depends on questions of logic, public policy, precedent and justice. *See Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010). Washington courts consider these factors and determine whether a set of facts, if true, implicate or fit within a common law duty. *See id.* (identifying the factors that guide tort duty analysis); *Mancini,* 196 Wn.2d at 879-86 (examining precedent and public policy surrounding sovereign immunity to hold law enforcement owes a duty of care in the exercise of official duties); *Norg v. City of Seattle,* 200 Wn.2d 749, 752, 522 P.3d 580 (2023) (holding precedent and public policy warranted the recognition of a duty owed by the City of Seattle in responding to a 911 call).

Principles of tort liability apply with full force to law enforcement:

> [C]laims of negligent law enforcement are not novel. Washington courts have long recognized the potential for tort liability based on the negligent performance of law enforcement activities. . . . [T]he determination whether a municipality has exercised reasonable care "must in each case necessarily depend on the surrounding circumstances."

Mancini, 196 Wn.2d at 879-80 (citations omitted; brackets added).

Under the "no duty" rule, courts ignore the "surrounding circumstances" in individual cases and disregard traditional tort duty analysis, broadly foreclosing claims if based on negligence in the performance of investigative acts. *See Dever v. Fowler,* 63 Wn. App. 35, 44-46, 816 P.2d 1237, *as amended,* 824 P.2d 1237, *review denied,* 118 Wn.2d 1028 (1992) (law enforcement); *Fondren* v. *Klickitat County,* 79 Wn. App. 850, 862-63, 905 P.2d 928 (l995) (same); *Pettis* v. *State,* 98 Wn. App. 553, 558, 990 P.2d 453 (1999) (child abuse); *Corbally* v. *Kennewick Sch. Dist.,* 94 Wn. App. 736, 740, 973 P.2d 1074 (1999) (employment), *Janaszak,* 173 Wn. App. at 725 (professional misconduct). These cases inquire only whether the allegedly negligent acts were

investigative in nature. If so, they are deemed "not cognizable." *Corbally,* 94 Wn. App. at 740.

Importantly, the "no duty" rule does not merely hold that there is no stand-alone claim for negligent investigation under Washington common law.[1] It goes further, barring claims even when they are asserted under recognized common law theories. This case offers an example. In Washington, a duty exists under the special relationship exception to the public duty doctrine where there is privity between the actor and the plaintiff, the actor makes an express assurance of aid, and the plaintiff justifiably relies thereon. *See Cummins v. Lewis County,* 156 Wn.2d 844, 854, 133 P.3d 458 (2006). Actors also have a duty to refrain from conduct that creates a risk of harm to others. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442

[1] Washington has not recognized an *affirmative duty to investigate*. But this is unremarkable; tort law *generally* imposes no affirmative duty to act. *See Peterson v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1999); *Restatement (Second) of Torts* § 315 (1984). This should have no bearing on whether tort duty factors warrant the recognition of a duty or whether a set of facts falls within a recognized common law theory.

P.3d 608 (2019); *Restatement (Second) of Torts* § 281 cmt. e (1965). Finally, Washington recognizes a claim of negligent infliction of emotional distress. *See Hunsley v. Giard,* 87 Wn.2d 424, 433-34, 553 P.2d 1096 (1976). Rogerson asserted claims under all of these theories, yet the appellate court deemed the "no duty" rule sufficient in and of itself to bar all three claims, without inquiry into their merits. *See Rogerson,* at *3. In this way, the "no duty" rule may foreclose otherwise cognizable claims, effectively immunizing defendants from liability.

B. Broadly Barring Claims Under Immunity Or "No Duty" Rules Must Be Justified By Compelling Considerations Of Public Policy.

In "exceptional cases," courts may conclude that no duty exists in a particular circumstance. *See Restatement (Third) of Torts* § 7(b) (2010). Such a conclusion should be reached, however, only when "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *Id*.

No duty rules are "closely related" and "operate in much the same way" as tort immunities. *See* Harry S. Gerla, *The Reasonableness Standard in the Law of Negligence: Can Abstract Values Receive Their Due*, 15 Univ. of Dayton L.R. 199, 201 (1990); *see also Smelser v. Paul,* 188 Wn.2d 648, 653-57, 398 P.3d 1086 (2017) (comparing no duty and immunity doctrines). Like "no duty" rules, immunities must be justified by important public policies. *See Restatement (Second) Of Torts*, § 45A Immunities Intro. Note (1979) (recognizing "the modern tendency has been to view immunities with a considerable degree of disapproval and to insist upon good reasons for their continued existence"); *Deatherage v. State,* 134 Wn.2d 131, 136, 948 P.2d 828 (1997) (immunity requires "compelling public policy justifications"). Whether labeled a "no duty" rule or an immunity, the law requires compelling justification for their existence.

And this makes sense. Tort liability serves important public policies. Fundamentally, it aims to compensate injured victims for losses caused by others' wrongdoing. *See Seattle-*

First Nat. Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 236, 588 P.2d 1308, 1312 (1978), *superseded by statute as stated in Kottler v. State,* 136 Wn.2d 437, 442-43, 963 P.2d 834 (1988) (recognizing the "cornerstone of tort law is the assurance of full compensation to the injured party"). Other benefits of tort liability include deterring harmful conduct and fairly allocating the risk of loss. *See Eastwood,* 170 Wn.2d at 407 (Chambers, J., concurring). The "no duty" rule denies these benefits to Washington and its citizens and must be justified by compelling public policies.

C. The Public Policy Justification For The No Duty Rule Is An Artifact Of Sovereign Immunity That Cannot Withstand Scrutiny.

Early court of appeals opinions extended immunity to public officials and their employers, reasoning that tort liability would chill the performance of official duties:

> Public servants would be unduly hampered and intimidated in the discharge of their duties, and an impossible burden would fall upon all our agencies of government if the immunity to private liability were not extended[.]

Clipse v. Gillis, 20 Wn. App. 691, 694, 582 P.2d 555 (1978) (brackets added; citations omitted); *see also Moloney v. Tribune Pub. Co.,* 26 Wn. App. 357, 360, 613 P.2d 1179 (1980).

In *Dever,* the court of appeals relied on these same public policies to adopt the "no duty" rule and bar claims it termed "negligent investigation." 63 Wn. App. at 45. Similar to *Clipse* and *Moloney,* it reasoned that "holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement." *Id.*

Yet this Court had already rejected the public policy arguments in *Clipse* and *Moloney. See Bender v. City of Seattle,* 99 Wn.2d 582, 590, 664 P.2d 492 (1983). Concluding public policy is better served by "[a]ccountability through tort liability," the Court emphasized:

> These fears [upon a rationale for personal liability of government officials for discretionary acts] are not founded upon fact, however, if it is the municipality and not the employee who faces liability. *The most promising way to correct the abuses, if a community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit*.

Bender, 99 Wn.2d at 590 (emphasis added; citation omitted).

As recognized in *Bender*, tort liability of public entities arguably *incentivizes* reasonable conduct. Negligence claims often rest on allegations that law enforcement investigations were negligent because they were *not* "vigorous." *See Dever*, 63 Wn. App. at 39 (investigator "did not conduct thorough or proper interviews …[and] failed to interview… individuals who possessed information"); *Mancini*, 196 Wn.2d at 876 (negligent investigation claim predicated on failure to verify information).

The facts in this case offer a good example. The SPD commenced, then effectively abandoned, its investigation. Rogerson's rapist could have easily been identified, yet she lived in fear for a decade. It is an unwarranted assumption that extending functional immunity to the City facilitated a vigorous investigation here.

The public policies for the "no duty" rule are the same policies underlying outdated theories of immunity. This Court has rejected the notion that immunity is an appropriate way to incentivize reasonable conduct by law enforcement. *See Bender,*

99 Wn.2d at 590; *King v. Seattle,* 84 Wn.2d 239, 244, 525 P.2d 228 (1974); *see also Mancini,* 864 Wn.2d at 884. The "no duty" rule does not serve the public policies it purports to serve and departs from well-established public policy considerations governing grants of immunity for public entities.

D. Whether The Public Policy Benefits Of Tort Liability Should Be Broadly Foreclosed For Negligent Investigative Acts Is A Matter Of Substantial Public Interest Warranting Review By This Court.

Review of a court of appeals decision is warranted if the case "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). This standard is satisfied when the "merits of the controversy are unsettled and a continuing question of great public importance exists." *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Courts also look to whether the issue is likely to recur. *See Randy Reynolds & Associates, Inc. v. Harmon,* 193 Wn.2d 143, 437 P.3d 677 (2019). Finally, consideration is given to the "level of adversity between the parties and the quality of the advocacy of the issues." *Id.* at 153.

These factors are met here. First, tort liability serves important public policies, the deprivation of which inflicts harm on Washington and its citizens. *See supra* § V.B. Second, this issue is unsettled. *See Mancini*, 196 Wn.2d at 878 n.7. Third, it has come up repeatedly in "30 years of consistent appellate decisions" and is almost certain to recur. *Rogerson* at *5; *supra* § V.A. Finally, the parties have thoroughly addressed the issue with quality advocacy, and it is squarely presented in this case.

VI. CONCLUSION

The Court should grant Review.

This document contains 2,488 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 23rd day of February 2024.

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On behalf of WSAJ Foundation

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February 2024, I electronically filed WSAJ Foundation's Amicus Curiae Memorandum in Support of Review with the Clerk of the Court using the Washington State Appellate Courts Portal, which caused it to be served on the following:

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Attached please find WSAJ Foundation's Motion for Leave to File Amicus Curiae Memorandum in Support of Review and the Accompanying Proposed Amicus Curiae Memorandum in Support of Review.

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