No. 100370-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

R.N., individually, J.W., individually, and S.C., individually,

Respondents,

vs.

CHARLES MCCARTHY, an individual, LEE COUMBS, an individual, SAM C. MOREHEAD, an individual, EDWARD HOPKINGS, an individual, and LEWIS PATTON, an individual,

Petitioners,

and,

KIWANIS INTERNATIONAL, a non-profit entity; KIWANIS PACIFIC NORTHWEST DISTRICT, a non-profit entity; KIWANISOF TUMWATER, a non-profit corporation; KIWANIS OF CHEHALIS, a non-profit entity; KIWANIS OF GRANDMOUND ROCHESTER, a non-profit entity; KIWANIS OF GRAND-MOUND, a nonprofit entity; KIWANIS OF ROCHESTER, a non-profit entity; KIWANIS OF CENTRALIA, a non-profit entity; KIWANIS OF CENTRALIACHEHALIS, a non-profit entity; HENRY MEISTER, an individual; B. DALE SHANNON, an individual; and GUY CORNWELL, an individual; and KIWANIS OF CHEHALIS, a non-profit corporation,
Defendants

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondents R.N., J.W., and S.C., survivors of sexual abuse while placed in a group home, Kiwanis Vocational Home for Youth ("KVH"), ask this Court to deny review of Division Two of the Court of Appeals' published opinion, *R.N. v. Kiwanis Int'l*, ___ Wn. App. 2d__, 496 P.3d 748 (2021).

II. RESTATEMENT OF ISSUES

1. Do Petitioners fail to demonstrate a conflict with this Court's precedent regarding the personal liability of corporate officers and employees—which has always imposed liability for a corporate officer's own tortious conduct committed within the scope of official responsibilities and employment or agency or other sufficient "participation" in tortious conduct—and liability for breaches of special relationship duties—which has always imposed liability for failing to act to protect children from foreseeable risks of abuse by third parties—when the Court of Appeals held Petitioners may be personally liable if they "participated" in the corporation's negligence by breaching direct responsibilities or failing to exercise their own direct authority within the corporation to prevent child abuse?

2. Do Petitioners fail to demonstrate a conflict with this Court's and the Court of Appeals' precedent regarding the personal liability of corporate officers where this Court has always imposed liability for officers' personal "participation" in breaches of tort duties committed in the exercise of their official corporate responsibilities or authority; this Court has only imposed affirmative act, knowledge, or intentional requirements on officers' liability for ***other*** corporate agents or employees' tortious conduct; and the Court of Appeals applied these correct standards to the Survivor's claims?

3. Do Petitioners fail to demonstrate an issue of "substantial public interest" warranting review under RAP 13.4(b)(4) where they failed to raise the nonprofit volunteer immunity statute, RCW 4.24.670, before the Court of Appeals, the statute was enacted decades after the events in this case, neither the trial court nor the Court of Appeals was asked to analyze the effect of this statute and whether it applies retroactively, and neither the Court of Appeals nor the trial court were asked to evaluate whether the facts of this case fall under the exceptions identified in the statute?

4. Do Petitioners fail to demonstrate an issue of "substantial public interest" warranting review under RAP 13.4(b)(4) where the Court of Appeals applied over a century of Washington law regarding corporate officers' and employees' personal liability for torts committed within the scope of their official responsibilities or employment?

III. RESTATEMENT OF THE CASE

A. Underlying Facts

KVH was operated by a non-profit corporation, Lewis County Youth Enterprises ("LYCE"). During their placement at KVH, each of the Survivors was sexually abused and raped by KVH employees John and Peggy Halvorsen between 1988 and 1989.[1]

KVH dissolved in 2010. Between 2015 and 2018, the Survivors sued LCYE; Kiwanis International and regional and local Kiwanis entities, including Kiwanis Pacific Northwest District; and several corporate officers and directors, including Petitioners, in a series of amended complaints.

Petitioner Charles McCarthy was the director of KVH and a member of the board of LCYE. Petitioners Lee Coumbs, Sam Hopkins, Lewis Patton, and Edward Hopkins were

[1] Because this appeal arises from petitioners' summary judgment motion, the Survivors state the facts in the light most favorable to them, as did the Court of Appeals.

members of the Board of LCYE.

The trial court granted Petitioners' motions for summary judgment and dismissed the Survivors' claims against them. The trial court ruled that, due to Petitioners' status as corporate officers or employees, as a matter of law, the corporate dissolution survival of remedy statute, RCW 23B.14.340, categorically barred claims against Petitioners based on tortious conduct they individually committed in the scope of their corporate employment or agency. The trial court did not reach the issue of whether genuine issues of material fact existed as to whether Petitioners individually owed and breached duties to the Survivors.

B. The Court of Appeals' Opinion

On appeal, the Court of Appeals held that RCW 23B.14.340 did not apply to claims against Petitioners based on "breaches of duties owed by individuals, apart from their role in the corporation, simply because those individuals happen to be directors, officers, or shareholders of the dissolved corporation." *R.N.*, 496 P.3d at 759. It rested this holding on decades of over a century of Washington precedent holding that "persons are and always have been liable for the torts they commit." *Id.*

Applying that same century-plus of precedent, the Court of Appeals also held that Petitioners can be personally liable for

"participating" in a corporation's negligence if that duty was within the scope of their corporate responsibilities, authority, or employment and they breached that duty.

It further held that LCYE had a "special relationship to protect the children in its care," including the Survivors, "from foreseeable harms." *Id.* at 758. Accordingly, it identified that the relevant tort duty requires a defendant "to not only conform to a standard of care in their affirmative acts but also to not omit those acts reasonably necessary for the protection of the plaintiff in guarding against foreseeable harm from third parties." *Id.* at 761-62 (citing *H.B.H. v. State*, 192 Wash.2d 154, 169, 429 P.3d 484 (2018)).[2]

Accordingly, it remanded to the trial court with the following instructions:

> First, whether any of the individual defendants had the direct responsibility or authority to prevent abuse against the children. And, if so, whether they failed in the performance of that duty where they knew or should have known such abuse would occur and failed to take reasonably necessary action to protect the children.

Id. at 762.

[2] Petitioners do not contest any of these holdings regarding LCYE's special relationship with the Survivors or the specific duties that it imposed.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Review of the Court of Appeals' Decision is Unwarranted under RAP 13.4(b)(1) Because it Correctly Applied Over a Century of this Court's Precedent Holding Corporate Officers and Employees Personally Liable for Torts They Committed Within the Scope of Their Official Responsibilities and Authority and Applied the Correct Washington Substantive Standards Regarding the Personal Liability of Corporate Officers and Employees

RAP 13.4(b) limits review of decisions by the Court of Appeals to a narrow set of circumstances. Petitioners first contend that review is warranted under RAP 13.4(b)(1) because it conflicts with this Court's decisions, as well as decisions of the Court of Appeals, regarding the "participation theory" by creating a new theory of tort liability for corporations in a special relationship with a third party. PFR at 16. Particularly, Petitioners assert that the Court of Appeals created an exception to the general rule that corporate officers are not liable for acts of nonfeasance for cases in which the corporation is in a special relationship with a third party or a foreseeable victim of a third party's conduct. But the Petitioners misread both Washington law and the Court of Appeals opinion.

Washington has adopted the *Restatement (Third) of Agency* §§ 7.01-7.02 to govern the personal liability of

employees or agents for torts committed within the scope of employment or agency. *Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012). Relying on the *Restatement*, the Court has held that "[a]n employee or agent is ***personally liable*** to a third party injured by his or her ***tortious*** conduct, ***even if that conduct occurs within the scope of employment or agency***." *Annechino*, 175 Wn.2d at 638 (emphasis added) (citing *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 400, 241 P.3d 1256 (2010); RESTATEMENT (THIRD) OF AGENCY § 7.02 (2006)). Contrary to Petitioners' misrepresentation, the mere fact that an employee or agent personally commits a tort arising from performance of their specific job duties or their specific authority and responsibilities as an agent does not shield them from personal liability. Rather, personal liability attaches where "'the agent's conduct breaches a duty that the agent owes to the third party.'" *Annechino*, 175 Wn.2d at 638 (quoting RESTATEMENT (THIRD) OF AGENCY § 7.02).

All employees and agents owe duties to third parties inherent in the exercise of job responsibilities, their authority as an agent, or otherwise delegated to them by their employer or corporation. For example, employees and agents owe "a duty to exercise reasonable care in rendering services to a third person when the agent undertakes to do so to perform a duty

owed by the principal to the third party." RESTATEMENT (THIRD) OF AGENCY § 7.02. Indeed, as the Court has held since at least 1902:

> "But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts."
>
> . . . .
>
> "It is difficult . . . to give a sound reason why a person who, acting as a principal, would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as a servant or agent. The tort is none the less a tort to the third person, whether suffered from one acting as a principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury."

Lough v. John Davis & Co., 30 Wash. 204, 212, 70 P. 491 (1902) (quoting with approval *Osborne v. Morgan*, 130 Mass. 102, 103, 39 Am. Rep. 437 (1880) and *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 622, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88 (1894)).

The sort of "omissions" within the scope of employment or agency for which employees or agents may be personally liable includes "'the omission to do something which ought to be done,—as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that

degree of care which due regard for the rights of others requires.'" *Lough*, 30 Wash. at 215. Indeed, the Court more recently has held that "an agent whose negligent acts or omissions in the performances of the duties entrusted to him renders his principal liable in damages, is also liable for his own negligence." *Russell v. City of Grandview*, 39 Wn.2d 551, 556, 236 P.2d 1061 (1951).

Accordingly, consistent with both the modern *Restatement* and this long-established precedent, Washington law permits individuals to sue both principals and agents in the same lawsuit for torts committed within the scope of employment or agency. *See Dishman v. Whitney*, 121 Wash. 157, 209 P. 12 (1922) (personal injury action against both employer and employee to recover damages for negligence); *Wilson v. Times Printing Co.*, 158 Wn. 95, 290 P. 691 (1930) (same); *Gattavara v. Lundin*, 166 Wn. 548, 7 P.2d 958 (1932) (school district and teacher sued for injuries to a schoolboy when teacher hit him with car during recess); *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993) (estate of deceased 13-year-old student sued district and bus driver alleging negligence).

Washington extends no lesser personal liability to employees or agents simply based on the fact that they are a corporate officer. "The liability of an officer of a corporation

for his own tort committed within the scope of his official duties is the same as the liability for tort of any other agent or servant." *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 752-53, 489 P.2d 923 (1971) (quoting *Dodson v Econ. Equip. Co.*, 188 Wn. 340, 343, 62 P.2d 708 (1936)).

In this case, the Court of Appeals held that LCYE had a special relationship duty with the Survivors to protect them from harm by third parties. It further held that this particular corporate duty at issue required LCYE "not only to conform to a standard of care in their affirmative acts but also to not omit those acts reasonably necessary for the protection of the plaintiff in guarding against foreseeable harm from third parties." 496 P.3d at 761-62. Finally, it held that Petitioners can be liable for breaches of this duty if its performance was entrusted to them as part of their responsibilities or authority and they "knew or should have known such abuse would occur and failed to take reasonably necessary action to protect the children." *Id.* at 762. These holdings were in lockstep with the *Restatement* and over one hundred years of the Court's precedent.

Nonetheless, in an attempt to manufacture a conflict warranting review, Petitioners misrepresent decisions of this Court and of the Court of Appeals by asserting they established that corporate employees or agents cannot be held liable for

their nonfeasance committed within the scope of their employment or agency.[3] Petitioners claim that the Court of Appeals expanded liability in conflict with the Court's decisions in *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.,* 87 Wn.2d 298, 553 P.2d 423 (1976); *Johnson*, 79 Wn.2d at 745; and *Messenger v. Frye*, 176 Wash. 291, 295, 28 P.2d 1023 (1934). Petitioners also assert the decision is in conflict with the decisions of the Court of Appeals in *Schwarzmann v. Ass'n of Apartment owners of Bridgehaven*, 33 Wn. App. 397, 655 P.2d 1177 (1992), and in *Peterick v. State*, 22 Wn. App. 163, 183, 589 P.2d 250 (1977), *overruled on other grounds by*, *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985). However, Petitioners fail to demonstrate any conflict.[4]

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[3] Petitioners provide virtually no analysis of the decisions they claim support their position, instead simply presenting a string of citations to various decisions without any actual analysis. PFR at 15. In particular, the Petitioners assert that the Court of Appeals decision conflicts with *Annechino v. Worthy*, 175 Wn.2d 630, 638 (2012), but presents no analysis at all of that decision. This Court does not consider conclusory assertions unsupported by sufficient argument or authority. RAP 10.3(a)(6), 10.4. "Such '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

[4] Indeed, the *Schwarzmann* decision is distinguishable as that decision considered the proper interpretation and

Petitioners contend that the Court of Appeals' holding conflicts with *Ralph Williams N.W.*, *Johnson*, and *Messenger*. PFR at 11. They assert that corporate officers' "participation" in a tort for purposes of personal liability is limited to "knowledge, active misfeasance, or malfeasance" and excludes "nonfeasance" such as inaction under a "should have known" standard.[5] PFR at 17.

Under Washington law corporate officers are liable for tortious conduct in which they "'participate[] . . . or with

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application of RCW 64.32.240, a statute regarding the liability of condominium associations and barring actions against their board of directors. 33 Wn. App. at 400-01. Furthermore, the *Schwarzmann* court noted that the trial court had found no evidence establishing that the directors had themselves breached any duty owed by them to the plaintiffs. 33 Wn. App. at 403-04. Petitioners acknowledge that this is not the case herein, as the Court of Appeals specifically remanded to determine whether the Petitioners had direct responsibilities to prevent abuse against children. PFR, at 21.

[5] That Defendants were in a special relationship with the Survivors makes the effort to distinguish nonfeasance from misfeasance irrelevant, as Washington courts have noted that misfeasance "may involve the omission to do something which ought to be done,—as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others required." *Lough*, 30 Wash. at 215. In the special relationship context, if the individual Defendants had a duty to engage in affirmative acts to protect the Survivors, the failure to act to protect the Survivors would, under Washington law, constitute misfeasance.

knowledge approve.'" PFR at 14 (quoting *Ralph Williams' N.W.*, 87 Wn.2d at 322). In the purest sense, corporate officers "participate" in a corporation's tort when they personally breach a duty. The tort belongs to the "corporation"—in the sense that the corporation is vicariously liable for the officer's tort—yet the officer also is liable for that same tortious conduct within the scope of his corporate responsibilities or authority. *See Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 303, 788 A.2d 268 (2002) ("[T]he essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct."). As the Court of Appeals correctly held, that is the scenario presented in this case: LCYE owed a special relationship duty to protect the Survivors from abuse by third parties, that duty includes liability for failure to take affirmative actions to protect them from abuse when they knew or should have known it was a risk, and Petitioners sufficiently "participated" in the tort if preventing abuse was within the scope of their particular responsibilities or authority.

In contrast, corporate officers may also be liable for torts

committed by the "corporation" in the sense that they were committed by corporate agents or employees ***other*** than the director—after all, corporations are artificial, intangible entities that can commit acts, including torts, only through their individual agents and employees. *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 428, 195 P.3d 985 (2008); *see also Saltiel*, 170 N.J. at 303 (quoting 3A William M. Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137 (rev.perm. ed.1994) (footnotes omitted) (emphasis added)) ("'An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable for resulting injuries; but an officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of ***other*** agents, officers or employees of the corporation.'")).

That is the scenario addressed by *Ralph Williams' N.W.*, *Johnson*, and *Messenger*. *See* 87 Wn.2d at 305-11, 322 (corporate officer personally liable for car dealership's numerous unlawful practices formulated and supervised by officer and performed by other corporate agents); 79 Wn.2d at 753-54 (corporate officer personally liable for participation in fraudulent sales program by providing sales personnel with and directing false statements to be given to customers and overall "control, management, and direction" over sales program");

176 Wn.2d at 297-98 (corporate officer personally liable for knowing failure to correct others employees' wrongful diversion of water and personal direction to agents to wrongfully build a dam). It is also the scenario addressed by *Peterick v. State*, 22 Wn. App. 163, 183, 589 P.2d 250 (1977), *overruled on other grounds by*, *Stenberg v. Pacific Power & Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985) ("It is held that directors cannot be held liable ***for the acts of subordinate officers*** which they neither participated in nor sanctioned, and where they could not, in the exercise of ordinary and reasonable supervision, have detected the wrongdoing of such subordinate officers.").

It is in ***these*** circumstances—a corporate officer's personal liability for breaches of corporate duties by other corporate agents—that the law imposes different "participation" requirements for personal liability, such as affirmative misfeasance, knowledge, direction, or intentionality, and excludes liability for "nonfeasance." And it imposes these requirements in order to shield unwitting corporate officers and agents who fail to take action to prevent the corporation from a tort for which they had no responsibility or knowledge. *See Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 622, 470 A.2d 86 (1983); *Lough*, 30 Wash. at 218 (agent not personally liable for injuries to third parties whose only causal connection with the

agent is the agent's principal). And as the Court of Appeals correctly held, such requirements were inapplicable to corporate torts that Petitioners ***themselves*** committed in performing duties within their corporate responsibilities or authority. In that scenario, the basic rule of Washington law that has stood for over one hundred years applies: "persons are and have always been liable for the torts they commit." *R.N.*, 496 P.3d at 759. Accordingly, Petitioners fail to demonstrate any conflict with *Ralph Williams' N.W.*, *Johnson*, *Messenger*, or *Peterick* warranting review under RAP 13.4(b)(1).

B. Petitioners Failed to Raise the Non-Profit Volunteer Immunity Statute, RCW 4.24.670, Before the Court of Appeals, Failed to Present Any Analysis Supporting Application of this Statute Enacted in 2001 to Conduct from the 1980s and 1990s, and Cannot Obtain Review of These New Issues Raised for the First Time in their Petition for Review

In their Petition for Review, Petitioners raise a brand-new issue, not presented to the Court of Appeals or the trial court for analysis or consideration, regarding the applicability of RCW 4.24.670, which concerns immunity for volunteers for certain acts or omissions that cause harm. This is an improper basis to seek review, as this Court "does not generally consider issues raised for the first time in a petition for review." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). Indeed, without raising the issue before the Court of Appeals,

there is nothing for the Court to review.

Further compounding this failure, Petitioners also fail to present in their petition for review (1) any analysis whatsoever regarding the applicability of RCW 4.24.670, which was enacted in 2001, Laws of 2001, ch. 209, § 1, codified at RCW 4.24.670, to the conduct of volunteers which occurred in the 1980s, and (2) any analysis of the factual considerations which pertain to the various exceptions to immunity contained within the statute so as to demonstrate the asserted conflict with the Court of Appeals opinion. Additionally, it should be noted that RAP 13.4 does not identify conflict between a Court of Appeals decision and a statute as a basis for review. In sum, Petitioners' effort to obtain Supreme Court consideration of this new issue is contrary to longstanding Supreme Court precedent requiring parties to raise issues in the lower courts before seeking Supreme Court review and is contrary to RAP 13.4; review should be denied.

C. Petitioners Fail to Demonstrate an Issue of "Substantial Public Interest Warranting Review under RAP 13.4(b)(4) where the Court of Appeals' Opinion Merely Applied a Century of Established Washington Law and Presents a Highly Fact-Contingent Issue

Finally, Petitioners argue that review is warranted under RAP 13.4(b)(4)'s "substantial public interest" standard because

the Court of Appeals' opinion expands tort liability in Washington State. As discussed however, it does not. Merely reiterating what has been Washington State law for a century does not warrant review under RAP 13.4(b)(4).

Moreover, the specific issue presented by this case is whether the specific corporate responsibility and authority delegated by this specific, defunct corporation to these particular corporate officers and employees encompassed the corporation's special relationship duties to the Survivors, rendering Petitioners personally liable for any breaches of those duties. The highly fact-specific nature of this issue inherently demonstrates that it is "private," not "public" and does not warrant review under RAP 13.4(b)(4).

V. CONCLUSION

For the foregoing reasons, the Survivors respectfully ask the Court to deny this petition for review.

RESPECTFULLY SUBMITTED this 10th day of December 2021.

The undersigned certifies that the number of words contained in this document is 3,925.

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CERTIFICATE OF SERVICE

I, **Sarah Awes**, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on December 10, 2021, I delivered via the Court's Appellate Portal a true and correct copy of the above document, directed to:

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DATED this 10th day of December 2021.

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December 10, 2021 - 11:59 AM

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