No. 101294-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

VAN B. HICKS,

Petitioner,

v.

KLICKITAT COUNTY SHERRIF'S OFFICE, SHIRLEY DeARMOND, and THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Respondents,

Court of Appeals Case No. 55014-8-II
Consolidated with 55554-9-II and 55654-5-II

PETITIONER'S ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS CURIAE MEMORANDUM

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INTRODUCTION

As set forth in the Washington State Association of Justice's (WSAJ) Amicus Memorandum the case of *Hicks v. Klickitat County Sheriff's Office,* 23 Wn. App. 2d 236, 515 P.3d 556 (2022), invites Washington courts to misapply basic tort principles and compound errors antithetical to this Court's prior holdings. This Court should accept review to address the multiple errors of law that, if not corrected, will be applied in other cases.

ARGUMENT

WSAJ's Amicus Memorandum correctly amplifies the ways in which RAP 13.4(b), considerations 1, 2, and 4 apply and why it is crucial for this Court to accept review of this case.

I. There is no scope of employment requirement for a negligent retention claim. There is, however, a clear conflict between the *Hicks* opinion, this Court's opinions, and other Division II opinions.

WSAJ supports Mr. Hicks' contention that, under *Anderson v. Soap Lake,* 191 Wn.2d 343, 423 P.3d 197 (2018), a

negligent retention claim does not require an employee to act outside the scope of her employment. Further, WSAJ's analysis of the evolution of the relevant Restatements also supports the necessity for this Court to accept review.

The Restatement *Anderson* attributed to negligent **retention,** Restatement (Second) of Torts § 307, includes no scope of employment requirement. The Restatement *Anderson* attributed to negligent **supervision**, Restatement (Second) of Torts § 317, originally included a scope of employment analysis. Accordingly, in *Anderson,* this Court analyzed negligent retention and supervision separately and adopted separate tests.

However, as WSAJ argues, the modern Restatement abandoned any scope of employment requirement for either claim. *See* Restatement (Third) of Torts §41 (2012). Therefore, when an employer is liable for its own negligence, there is no scope of employment requirement. The modern Restatements suggest an employer is liable for its own negligence in hiring, retaining, supervising, or training an employee it knows or

reasonably should know will cause harm during the course of employment.

The *Hicks* opinion, which claims an employee must act outside of the scope of employment for an employer to be liable for negligent retention, effectively overrules this Court's holding in *Anderson* and ignores the relevant Restatements. *Hicks* invites other courts to amplify this error.

The origin of the *Hicks* error stems from cases which miscite this Court's opinion in *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997). *See, e.g., LaPlant v. Snohomish County,* 162 Wn. App. 476, 479-80 & n.7, 271 P.3d 254 (2011) from Division I and *Evans v. Tacoma Sch. Dist.,* 195 Wn. App. 25, 47, 380 P.3d 553 (2016) from Division II. *LaPlant* and *Evans,* which the *Hicks* court relied on, claim *Niece* requires an employee to act outside the scope of her employment for a negligent retention claim.

However, *Niece* only established that the scope of employment does not limit an employer's liability for a breach

of its own duty of care. *Niece,* 131 Wn.2d at 48. Specifically, an employer can be liable for its own negligence "even where the employee is acting outside the scope of employment." *Id.* at 51.

Niece, and later, *Anderson,* confirmed that "negligent hiring, retention, and supervision are "based on the theory that 'such negligence on the part of the employer is a wrong to [the injured party], **entirely independent of the liability of the employer under the doctrine of respondeat superior.**'" *Id.* 48 (emphasis added).

Courts derive conflicting conclusions from the *Niece* and *Anderson* holdings. For example, in this case, the trial court concluded that, based on *Niece,* an employee may act "in or outside the scope of their employment" because the scope of employment "is not a limit on an employer's own liability for a breach of its own duty of care." CP 659-666. Reversing the trial court, the *Hicks* court relied on the same precedent to reach the opposite conclusion. *Hicks,* 23 Wn. App. 2d at 248-249.

Washington courts should not look to *Niece* to reimpose a requirement that was not included in either *Anderson* or the Restatements. In *Niece,* this Court did not address a negligent retention claim and explicitly said it would not "determine the precise boundaries of a cause of action based on the theory of negligent supervision." *Niece,* 131 Wn.2d at 42. In contrast, in *Anderson*, this Court explicitly adopted a negligent retention test:

> **We now adopt:** to hold an employer liable for negligently hiring or retaining an employee who is incompetent or unfit, a plaintiff must show that the employer had knowledge of the employee's unfitness or failed to exercise reasonable care to discover unfitness before hiring or retaining the employee.

Anderson, 191 Wn.2d at 356 (emphasis added). *See also Preston v. Boyer,* Case No. C16-1106-JCC-MAT at n.3 (W.D. Wash. 2019) ("The Court relies on the specific statements in *Anderson* over the general statements in *Niece*.").

This Court's *Anderson* opinion, and the Restatement it relies upon, accurately states the law. As WSAJ highlights, *Hicks* incorrectly interprets both. This Court must accept review to

confirm *Anderson* controls and negligent retention includes no scope of employment analysis.

II. A negligent retention claim does not require a harmful placement.

In a footnote, the *Hicks* Court concludes, regardless of the scope of employment issue, Hicks' "negligent retention claim would still fail" because it is "rooted in the alleged negligent investigation" which requires a "harmful placement decision." *Hicks,* 23 Wn. App. At n.10. Defendant DCYF similarly contends Mr. Hicks' claim fails for lack of "harmful placement." This conclusion is legally and factually inaccurate.

As WSAJ explains, "harmful placement" is not an element of negligent retention. No Washington case law requires harmful placement for a negligent retention claim.

This may be the *Hicks* court concluding negligent investigation and negligent retention are duplicative claims. *See, e.g., Rodriguez v. Perez,* 99 Wn. App. 439, 451, 994 P.2d 874 (2000) (Claiming negligent supervision and negligent investigation are duplicative). However, these claims are not

duplicative. Further, no legal principle prohibits a plaintiff from proving all the defendant's wrongs. Instead, cases like *LaPlant* cite a rule that has no basis in the law. *See LaPlant,* 162 Wn. App. at 480.

By examining the cases that claim a plaintiff cannot assert duplicative claims, it is apparent there is no legal basis that gives rise to this rule. No legal principle prevents the plaintiff from proving all the wrongs committed by defendants. Rather cases, like *LaPlant,* simply repeat the rule without ever explaining its origin. *Id.* This Court must accept review to clarify that negligent retention and negligent investigation claims are not factually or legally duplicative.

Public policy considerations support a plaintiff's ability to plead and prove all the wrongdoing in a case. The plaintiff's claims should reflect the scope and breadth of the tortfeasor's wrongs. Tort policy seeks to deter wrongdoing. Allowing multiple claims to account for multiple wrongs serves an important public purpose.

The records in this case, including DCYF employment records and deposition testimony, all indicate that, as an investigator, Ms. DeArmond has a long history of improper actions that harmed families, community partners, and the community itself. These records also indicate that DCYF was aware of Ms. DeArmond's ongoing performance issues. CP 423-424, 443, 445-446, 464-470, 569-573, 576-580. However, DCYF chose to keep her in a position of power, where she could and did cause great harm.

Thus, the facts that support a negligent retention claim are (1) not duplicative of the facts necessary to prove a negligent investigation claim, and (2) do not involve whether a harmful placement has occurred. This Court should not permit Division II to ignore basic tort principles, invent tort law contrary to public policy, and effectively overrule this Court's holding in *Anderson.*

III. The narrow interpretation of "harmful placement" in *Hicks* is contrary to case law, basic tort law principles, and the legislative purpose behind a negligent investigation claim.

The *Hicks* court erroneously concluded that Mr. Hicks negligent investigation claim failed because he could not prove a "harmful placement." This is so, according to *Hicks,* because Mr. Hicks was separated from his children pursuant to a criminal court order rather than a dependency court order.[1] WSAJ correctly states that this conclusion is contrary to established case law. *See M.W. v. Dep't of Soc. & Health Servs.,* 149 Wn.2d 589, 70 P.3d 954 (2003) and *Tyner v. Dep't of Soc. & Health Servs.,* 141 Wn.2d 68, 1 P.3d 1148 (2000). Additionally, the *Hicks* court's narrow interpretation of a "harmful placement" runs contrary to basic tort principles and the legislative purpose behind RCW 26.44.050. The *Hicks* decision converts the tort of

[1] This assertion is factually wrong as well. Mr. Hicks was separated from his children because of the grossly negligent investigation, which, in turn, caused his arrest and separation from his children.

negligent investigation into a claim of negligent placement decision making.

The *Hicks* court also claims that criminal court orders do not have the purpose of addressing the parent-child relationship. This is plainly wrong. No contact orders have as an express purpose limiting of eliminating contact between a parent and a child. These orders then supersede parenting plans or other parenting arrangements. That they are entered in a criminal court as opposed to a dependency court is a distinction without a difference.

The *Hicks* court claims, if a non-abusive parent is separated from their child(ren) pursuant to a criminal court order, DCYF and law enforcement did not owe this parent a duty to refrain from negligent investigation, and the parent's claim fails for lack of harmful placement. *See Hicks,* 23 Wn. App. at 247 (quoting *McCarthy v. Clark County,* 193 Wn. App. 314, 333, 376 P.3d 1127 (2016)).

WSAJ correctly argues that this blanket limitation on a negligent investigation claim ignores the integrated nature of the child welfare and legal systems. By statute and in practice, law enforcement and DCYF work together to investigate reports of child abuse.

Further, the *Hicks* rule that the mechanism of separation limits the Defendants' duty, is backwards. A duty owed to a plaintiff is not determined by which type of order a court used to separate parents and children. Rather, the duty is statutorily imposed. A negligent investigation claim should not hinge on the mechanism of separation, but the foreseeability of the separation.

Foreseeability speaks to duty, and, accordingly, informs the "harmful placement" analysis. This Court confirmed:

> In a negligence action, foreseeability plays a role in both the legal and factual inquiries regarding duty and its scope: it can be a question of whether duty exists as a matter of law and also a question of whether the harm is within the scope of the duty owed as a matter of fact.

Pacheo v. United States, 200 Wn.2d 171, 190, 515 P.3d 510 (2022).

It was and is foreseeable that a grossly negligent investigation would lead to a biased report of that investigation. It is further foreseeable that the prosecutor and judge would rely on that biased report[2], without knowledge of its bias, and that report would lead to an arrest of the parent and consequent separation of the parent and child(ren). That is exactly what happened to Mr. Hicks.

Mr. Hicks was a foreseeable victim of DCYF and KCSO's grossly negligent investigation and was, foreseeably, wrongfully separated from his children as a result. Therefore, Mr. Hicks experienced a harmful placement. It should not matter what the mechanism of separation was, whether it was wrongful incarceration, a criminal court order, or a dependency order.

[2] The Plaintiff submitted expert testimony supporting this conclusion. CP 303-311, 316-335, 397-398, 455-458, 700-701, 780.

The legislative intent of RCW 26.44.050 includes protecting parents from "unwarranted separation from their children." *Tyner,* 141 Wn.2d at 78-79; *See also Desmet v. State by & through Dep't of Soc. & Health Servs.*, 200 Wn.2d 145, 162-163, 514 P.3d 1217 (2022). As WSAJ points out, the harm to the Hicks family, and families similarly situated, is the same whether the separation is from a dependency order or criminal order. This Court must accept review to correct the harmful placement error propagated by the *Hicks* decision.

IV. Where, like here, a court has dismissed the Plaintiff's negligent investigation claim, a plaintiff should be able to bring a common law negligence claim based on the negligent investigation.

This Court should consider if, in cases where the Court dismisses a plaintiff's negligent investigation claim, a plaintiff can make a common law negligence claim based on a negligent investigation.

Mr. Hicks pled a common law negligence claim in his complaint. CP 65-73. However, this claim was dismissed on summary judgment as "duplicative" because Mr. Hicks also pled

negligent investigation under RCW 26.44.050. CP 657-666. It is nonsensical for the Court to prohibit Mr. Hicks' common law negligence claim as duplicative when the Court dismissed his statutory claim.

WSAJ correctly argues that this Court's opinion in *Mancini v. City of Tacoma,* 196 Wn.2d 864, 479 P.3d 656 (2021) supports a common law negligence claim against state actors who may otherwise have immunity, like law enforcement and DCYF, based on facts that involve a negligent investigation.

This Court determined, "police, just like other people, must exercise ordinary reasonable care 'to refrain from causing foreseeable harm in interactions with others.' This duty…encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance.'" *Mancini,* 196 Wn.2d at 886.

Mr. Hicks' case exemplifies what happens when DCYF and law enforcement do not follow their training or act reasonably in their positions of power. It is foreseeable that a

butchered sexual abuse investigation could result in sex offense charges and parent-child separation. This Court should consider whether Mr. Hicks can pursue his common law negligence claim.

CONCLUSION

As evidenced by the WSAJ's Amicus Brief, it is crucial for this Court to accept review of this case because RAP 13.4(b) considerations 1, 2, and 4 apply.

DATED this 8th day of December, 2022.

VAN SICLEN, STOCKS & FIRKINS

/s/ Tyler K. Firkins

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CERTIFICATE OF COMPLIANCE

I, Tyler K. Firkins, certify that this brief contains 2,432 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images.

DATED December 8, 2022.

VAN SICLEN, STOCKS & FIRKINS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on December 8, 2022, I caused a true and correct copy of the foregoing to be served on the parties mentioned below as indicated:

All Counsel of Record via ECF.

Diana Butler

Diana Butler, Paralegal

VAN SICLEN STOCKS & FIRKINS

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