NO. 102565-3

SUPREME COURT OF THE STATE OF WASHINGTON

C.R. and J.L., infants, by BRUCE A. WOLF,
their guardian ad litem,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Consistent with Washington law, the Department of Children, Youth, and Families[1] is committed to fulfilling its role to prevent and eliminate child sexual abuse. Washington law requires certain individuals to report suspected child abuse and requires the Department to investigate those reports. The Department can be liable if its investigation is negligent and leads to a harmful placement decision. And where, during the course of an investigation, Department employees have reasonable cause to believe others have been abused, they have a duty to report that abuse, leading to further investigation. The Court of Appeals' unanimous unpublished decision affirming summary judgment for the Department is consistent with these principles. *See C.R. v. State of Washington*, Case No. 84682-5-I (Oct. 23, 2023) (slip op.).

[1] On July 1, 2018, the powers, duties, and functions of the Children's Administration within the Department of Social and Health Services transferred to the Department of Children, Youth, and Families. RCW 43.216.906.

The Court of Appeals' decision is correct and does not conflict with any decision of this Court or with any published decision of the Court of Appeals. *See* RAP 13.4(b)(1), (2). In 2014, the Department received and investigated a report that Timothy Rowe had abused Plaintiffs' older sister, D.L. Neither the report nor the investigation by the Department and law enforcement identified any reason to believe that Plaintiffs were being abused. In addition, there is no evidence in the record that an affirmative act by the Department created or increased their peril. In this fact-specific context, the Department did not owe Plaintiffs a duty. Further, as an unpublished opinion that concerns an amended statute, the decision lacks any precedential value, and does not raise an issue of substantial public interest. *See* RAP 13.4(b)(4). Consistent with its denial of direct review, this Court should deny the petition for review.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, consistent with precedent and the plain language of former RCW 26.44.050 (2013), the Department's

statutory duty to investigate in 2014 was triggered only "upon the receipt of a report concerning the possible occurrence of abuse or neglect" and was owed only to the child that was the subject of the report and their parents.

2. Whether, consistent with precedent, there is no common law duty to investigate and the record does not establish that misfeasance by the Department exposed Plaintiffs to a new or increased peril to support a duty owed to them under *Restatement of Torts (Second)* §§ 281 and 302B.

III. COUNTERSTATEMENT OF THE CASE

A. In 2014, the Department Received a Report of Possible Abuse as to D.L.

Plaintiffs C.R. and J.L. grew up in blended home that included Timothy Rowe; his wife Brittany Rowe; Brittany's daughters, D.L. and J.L.; Timothy's daughter, C.R.; Timothy's son, H.R.; and Timothy and Brittany's son, L.R. CP 49-54. In November 2014, 15-year-old D.L. informed her mental health therapist that Timothy Rowe had touched her inappropriately. CP 49. Her therapist reported that information to the Department.

CP 49-54. No disclosure of abuse or neglect was made in the report as to C.R. or J.L., or as to any of the other children in the home besides D.L.[2] CP 49-54.

B. The Department and the Clark County Sheriff's Office Investigated the Report as to D.L.

In response to the report concerning D.L., both the Department and the Clark County Sheriff's Office investigated. CP 55-87, 141-209. Child Protective Services (CPS) investigator, Amie McKey, learned law enforcement had two options for the matter: (1) Timothy Rowe would move out until the investigation was concluded, or (2) D.L. would be placed in protective custody for the duration of the investigation or until a safe family member was identified for her to stay with. CP 182.

When interviewed by McKey later that morning, D.L. stated she was staying at a friend's house. CP169, 182. D.L. also

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[2] Plaintiffs state that "it is undisputed that the Department ... received a report of *J.L.'s* abuse by Rowe." Pet. at 2 (emphasis added; citing CP 49-54). This appears to be a scrivener's error, given the supporting record citation, and should have referred to the report of *D.L.*'s abuse by Rowe.

reported Rowe had admitted to touching her inappropriately. CP 144. She further stated that "everyone else is safe," that she was "the odd one out," that she had never heard of Rowe touching anybody else, and that she did not want her siblings to go into foster care for "no reason." CP 157, 174.

McKey also interviewed 10-year-old C.R., 8-year-old J.L., and 9-year-old H.R.[3] CP 55-85, 181-83. They reported they felt safe at home and none of them made any disclosures of inappropriate touching. CP 181. When McKey asked C.R. if she felt safe with her mom and safe with her dad, C.R. answered "Yeah." CP 74. McKey also twice asked J.L. if she felt safe at home, and both times J.L. answered "Mm-hm." CP 79, 84. McKey also asked J.L. if "[e]verything's good there?", and J.L.

[3] Plaintiffs refer to CPS Policy 2333 as mandating that McKey interview all children in the home where the abuse was alleged to occur. *See* Pet. at 2. That policy, however, originated in 2017, *after* the Department received the 2014 report as to D.L. *See* CPS Policy 2333, Interviewing a Victim or Identified Child (2021), *available at* https://www.dcyf.wa.gov/policies-and-procedures/2333-interviewing-victim-or-identified-child.

answered "Uh-huh." CP 84. Plaintiffs reported that they had been told someone would be interviewing them; that C.R. was told to tell the truth; and that J.L. was told to just talk to that person and, if she did not feel comfortable, to ask if her parents could come. CP 74, 83-84.

McKey then spoke with Brittany Rowe. CP 183. When McKey asked Ms. Rowe how she was going to keep D.L. safe throughout the Department's investigation, Ms. Rowe said D.L. could stay with her friend. CP 183. Ms. Rowe also verbally agreed to a safety plan that included Mr. Rowe being out of the home. CP 183.

Later that evening, after-hours social worker Troy Harris went to the family's home to have the safety plan signed. CP 85-87, 192, 213. The Rowes argued with Harris about the previously agreed to safety plan. CP 86, 213. Harris, who did not meet with the children and had no information as to specific issues in the home requiring Department intervention, advised the Rowes that, if they did not agree to and follow the current safety plan or

cooperate with the Department, the Department may need to place all five children into protective custody. CP 86, 213. Harris made that statement as a general advisement as to the full range of risks possible for noncompliance and to encourage compliance with the safety plan. CP 213. The Rowes would only agree to a 24-hour plan. CP 86, 192. Timothy Rowe left the house that night. CP 87, 192-93.

The next day, Brittany Rowe called CPS supervisor Rachel Whitney and informed Whitney that she could not uphold the safety plan. CP 193. D.L. was then placed into protective custody. CP 183, 193. One day later, D.L. returned to her mother's care and the family planned for D.L. to stay out of the home and with her father during the investigation. CP 183.

C. The Sheriff's Office and the Department Concluded the Report as to D.L. was "Unfounded"

At the conclusion of its investigation, the Clark County Sheriff's Office determined that the allegations against Rowe pertaining to D.L. were "unfounded" and "arose during a period of drama and conflict within her home." CP 202. The Sheriff's

Office noted, in part, that D.L. had made inconsistent statements describing the allegations to CPS, her therapist, and law enforcement. CP 202.

After review of the Sheriff's Office report, the Department also determined that the allegations against Rowe were "unfounded," CP 180, a determination that can mean that there is insufficient evidence that the alleged child abuse did or did not occur, RCW 26.44.020(29).

During the investigation of the allegations of child sexual abuse made by D.L., neither McKey nor Whitney suspected Plaintiffs were being abused. CP 204-09. In addition, Harris did not suspect Plaintiffs were being abused. CP 213.

D. In 2019, C.R. Disclosed Rowe Had Abused Her and J.L., and He Pled Guilty to Several Sex Offenses

Five years later, in 2019, C.R. disclosed that "she and J.L. had been repeatedly raped by Mr. Rowe since she was approximately 8 or 9 years old." CP 2-3, 6. Rowe pled guilty to four sex offenses. CP 88-111.

E. Procedural History in the Trial Court

Plaintiffs sued the State alleging claims of common law negligence and negligent investigation under RCW 26.44.050, CP 3, and moved for partial summary judgment on duty, CP 10-25. The Department opposed the motion, arguing that it owed no duty to Plaintiffs and the trial court should, instead, grant summary judgment to the Department. CP 114-32.

After oral argument, the trial court dismissed the case, CP 244-46, reasoning that the Department owed no duty to Plaintiffs because they had not reported abuse, they were not the subjects of a report of a abuse, and there was no misfeasance by the Department that created a new risk of harm to them, RP 32-37.

F. Procedural History in the Appellate Courts

Plaintiffs initially sought direct review of the dismissal order, which this Court denied. Order, Case No. 101258-6 (Nov. 9, 2022).

In a unanimous, unpublished opinion, the Court of Appeals affirmed. *See C.R.*, slip op. at 2. As to Plaintiffs' negligent investigation claim, the court concluded that "the statute plainly conditions the duty to investigate '*upon the receipt of a report concerning the possible occurrence of abuse or neglect*.'" *Id.* at 7 (quoting former RCW 26.44.050 (2013)) (emphasis added).[4] The court also followed this Court's precedent in concluding that, "while internal Department practices and policies may provide evidence of a standard of care, they cannot establish a duty." *Id.* (citing *Joyce v. Dep't of Corrs.*, 155 Wn.2d 306, 323-24, 119 P.3d 825 (2005)). Ultimately, after analyzing and applying additional precedent, the court held that "the Department was entitled to judgment as a matter of law because, absent a report of abuse about C.R. and

[4] The Court of Appeals relied on former RCW 26.44.050 (2013), which was in effect at the time of the 2014 CPS report as to D.L. The particular statutory phrase focused on by the Court of Appeals in its opinion has since been amended to condition the duty to investigate "upon the receipt of a report alleging that abuse or neglect has occurred." Laws of 2020, ch. 71, § 1.

J.L., they have no cause of action under RCW 26.44.050 for negligent investigation." *Id.* at 14 (footnote omitted).

Similarly, as to Plaintiffs' common law negligence claim, the Court of Appeals relied on precedent, and analyzed the record and briefing in search of evidence to support Plaintiffs' argument that their abuse had intensified following the 2014 CPS report as to D.L. Finding none, it affirmed. *Id.* at 20-21.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. This Court Should Disregard Plaintiffs' Improper and Unsupported Arguments in Their Statement of the Case

In their statement of the case, Plaintiffs contend the Court of Appeals (1) "ignored" the safety plan requiring Timothy Rowe to leave the home; (2) "choose not to address" CPS's conduct allegedly in breach of its duty; and (3) "glossed over" the facts of Plaintiffs' abuse, including its alleged escalation. *See* Pet. at 2-6.

First, the Court of Appeals did not ignore the safety plan; rather, in analyzing the Department's common law duty, the

court specifically considered and rejected Plaintiffs' argument related to the safety plan. *See C.R.*, slip op. at 15. Moreover, there is no evidence in the record to support Plaintiffs' factual assertions that "the caseworkers concluded Rowe was a hazard to C.R. and J.L.," that "CPS itself felt that the allegations lodged by D.L. against Rowe were sufficiently serious to warrant the protection of C.R./J.L.," and that "CPS staff were concerned about C.R./J.L.'s safety from Rowe's predatory conduct." *See* Pet. at 3-4. Rather, the only evidence in the record as to the subjective beliefs of the CPS caseworkers – their own testimony – is unrebutted and establishes they never suspected Rowe of abusing Plaintiffs. CP 204-09, 213.

Second, the Court of Appeals did not address breach because that issue was not before it. The scope of review on appeal is limited to the issues called to the attention of the trial court. *See* RAP 9.12. Duty, not breach, has only ever been the sole issue in this case. *See C.R.*, slip op. at 14 n.7. Further, the court would have erred to have considered breach when deciding

whether a duty was owed in the first place. *Cf. Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 291, 481 P.3d 1084 (2021) (explaining that conflating the duty inquiry with the separate legal cause inquiry was error).

Third, the facts Plaintiffs allege the Court of Appeals "glossed over" are not part of the record, and so the Court of Appeals correctly did not rely on them. In their petition, Plaintiffs cite to Clerk's Papers 13 as support for their factual statements that "Rowe's sexual abuse of C.R./J.L. escalated" and that, "[a]fter initially molesting the two girls, he now raped them" in horrific ways. *See* Pet. at 5-6. But Clerk's Papers 13 is to Plaintiffs' *briefing*, not evidence, below. Moreover, even that briefing, which earlier includes similar factual statements, does not cite to any supporting evidence. *See* CP 12 (stating, without evidentiary citation, that "Rowe's sexual abuse of C.R. and J.L. intensified. No longer satisfied with merely molesting the two girls, he began raping them."). Statements made in briefing do not constitute evidence sufficient to create a question of fact.

Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 299, 914 P.2d 119 (1996).

Further, the Court of Appeals did not err in declining to speculate under the guise of "inferring" facts that are not supported by the record. *See* Pet. at 5-6 n.3. Plaintiffs suggest that that prior to the Department's 2014 investigation of the reported abuse of D.L., Rowe's conduct was limited to molestation and, after the Department's investigation, progressed to rape. *Id.* at 5-6. The record does not support such an inference; Plaintiffs are inviting this Court to improperly speculate. Notably, in their complaint, Plaintiffs allege that they "had been repeatedly raped" – not molested – "by Mr. Rowe since [C.R.] was approximately 8 or 9 years old." CP 3.

This Court should disregard Plaintiffs' improper and unsupported arguments in their statement of the case.

B. The Court of Appeals' Opinion on the Scope of the Duty under Former RCW 26.44.050 Comports with Its Plain Language and Established Precedent

1. There is no conflict between the opinion and the statutory language at issue or its policy aims

The plain language of former RCW 26.44.050 (2013) is clear – unless there is a report, there is no duty to investigate: *"[U]pon the receipt of a report* concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate." (Emphasis added.)

This statute is one of several that work in harmony to balance preserving the integrity of the family from unwarranted separation and protecting the welfare of children within the family. *Wrigley v. State*, 195 Wn.2d 65, 76, 455 P.3d 1138 (2020) (discussing RCW 13.34.020, 26.44.010, and 26.44.050). Consequently, the implied cause of action under the statute is a "narrow exception." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Only those individuals within the class of persons the legislature intended

former RCW 26.44.050 to protect may sue for negligent investigation. *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 704, 222 P.3d 785 (2009).

The Court of Appeals' opinion recognized these policy objectives and limitations. *See C.R.*, slip op. at 6, 10. Contrary to Plaintiffs' argument, the opinion is neither an outlier nor does it undercut these important policy goals. *See* Pet. at 7-9. Rather, it furthers them.

"Parents have a fundamental, constitutional right to the care and custody of their children—a right that yields to the State's parens patriae right to intervene ... [w]hen a child's health, safety, and welfare are seriously jeopardized by parental deficiencies[.]" *Mathieu v. Dep't of Children, Youth, & Families,* 23 Wn. App. 2d 1025, 1044-45, 520 P.3d 1033 (2022). By recognizing the scope of former RCW 26.44.050 applied only to the subject of the report, the opinion maintains this balance.

At the same time, the opinion does not foreclose the potential that an investigation, once started, may discover

information to support a new report of possible abuse as to additional children. *See* RCW 26.44.030(1)(a). This, in turn, would support a new duty to investigate as to those children under RCW 26.44.050. Plaintiffs, however, have never claimed that the Department's caseworkers were negligent in failing to make a mandatory report as to them. *See* CP 1-4 (Complaint).

Nonetheless, in forecasting a parade of horribles, Plaintiffs absurdly claim that, without this Court's expansion of the Department's duty, the Department will not protect nonverbal children who are abused. Pet. at 19-20. Reports of abuse come to the Department in many ways beyond disclosure from the child, *e.g.*, based on the child's behavior, visible injuries, and other indicators.

The Court of Appeals' opinion is consistent with the plain language of former RCW 26.44.050, the entire statutory scheme in which it is placed, and the underlying policy. Review is not warranted under RAP 13.4(b)(4).

2. There is no conflict between the opinion and precedent of this Court

Plaintiffs seek review of their negligent investigation claim under RAP 13.4(b)(1) by arguing that: (1) the Court of Appeals' reasoning that internal policies cannot establish duty is wrong under *Joyce* and *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), and (2) the Court of Appeals' conclusion that only to subjects of a report are owed a duty is inconsistent with *Tyner* and *M.W. See* Pet. at 9-13. Neither argument has merit, as the Court of Appeals expressly and correctly applied all four cases. *See C.R.*, slip op. at 5-7, 10-11.

a. *Joyce*, *Tyner*, and the limited relevance of internal policies to breach and causation

Contrary to Plaintiffs' argument, there is no conflict between this Court's opinions in *Joyce* and *Tyner* and the Court of Appeals' opinion here. *See* Pet. at 9-10, 12. In *Joyce*, this Court unequivocally stated that "internal policies and directives generally do not create law" and, where "policy directives are not

promulgated pursuant to legislative delegation, they do not have the force of law." *Joyce*, 155 Wn.2d at 323 (internal citations omitted). The Court further recognized that "[i]nternal directives, department policies, and the like may provide evidence of the standard of care and therefore be evidence of negligence." *Id.* at 324.

There is a difference between establishing a legal duty, on the one hand, and establishing the standard of care and breach – i.e., negligence – on the other. *See Van Hook v. Anderson*, 64 Wn. App. 353, 358, 824 P.2d 509 (1992) ("[T]he legal duty of care and the medical standard of care are similar but not identical concepts."). It is well-established that internal policies may be evidence of the standard of care and breach. *See Joyce*, 155 Wn.2d at 324.

It is also well-established that internal policies may factor into the analysis of proximate cause. As Plaintiffs point out, in *Tyner*, CPS's own manual was given to the jury. *See* Pet. at 10. However, the *Tyner* Court found that evidence to be relevant to

proximate cause, *not* duty, 141 Wn.2d at 87-88. Similarly, the *Ferndale* Court discussed the defendant school's internal policies when analyzing legal cause, *not* duty. 197 Wn.2d at 295-96.

As to duty, *Joyce* is clear: internal policies not promulgated pursuant to legislative directive do not have the force of law and cannot establish a legal duty. 155 Wn.2d at 323. *Joyce* is controlling precedent that the lower courts appropriately followed.

b. *Ducote*'s clarification of *Tyner, M.W.*, and the scope of the duty in former RCW 26.44.050

As to Plaintiffs' second argument under *Tyner* and *M.W.*, in which they rely on statements that "the State has a duty to act reasonably in relation to all members of the family" and that "the safety of children within the family" is a primary legislative concern, Plaintiffs' mistakenly neglect the effect of subsequent precedent from this Court. Pet. at 12-13 (quoting *Tyner*, 141 Wn.2d at 79, and *M.W.*, 149 Wn.2d at 597 (quoting RCW

26.44.010)). The Court of Appeals did not make that mistake. Instead, it correctly considered the statements from *Tyner* and *M.W.* in their appropriate context. *See C.R.*, slip op. at 10-11.

First, the Court of Appeals noted that, after *Tyner*, "courts have established limits on who may bring an action for negligent investigation." *Id.* at 10. It then recognized a separate part of this Court's analysis in *M.W.*, explaining that "our Supreme Court has held that general statements of legislative intent do not support a general statutory duty of care for a claim of negligent investigation, and it is error for a court to imply a duty from such general statements rather than analyze a statute's stated purpose." *Id.* at 11.

Next, the Court of Appeals addressed this Court's opinion in *Ducote*, explaining: "the court rejected the argument that a stepparent had a cause of action based on broad language in *Tyner* that suggested the State had a 'duty to act reasonably in relation to all members of the family.'" *Id.* (cleaned up). The court further referenced *Ducote*'s holding that "'the class of

persons who may sue for negligent investigation is limited to those specifically mentioned in RCW 26.44.010, namely, parents, custodians, and guardians, and the child or children themselves.'" *Id.* (quoting *Ducote*, 167 Wn.2d at 704).

The Court of Appeals' ultimate holding here, that "there is no implied cause of action under RCW 26.44.050 for children about whom the State has received no report of suspected abuse," *see C.R.*, slip op. 2, fits squarely within the above precedent. Review is not warranted under RAP 13.4(b)(1).

3. There is no conflict between the opinion and published decisions of the Court of Appeals

The Court of Appeals' ultimate holding on the scope of the implied cause of action under RCW 26.44.050 also fits squarely within, and flows directly from, published cases of the Court of Appeals. The most notable of these are *Boone v. Department of Social & Health Services*, 200 Wn. App. 723, 403 P.3d 873 (2017), and *M.M.S. v. Department of Social & Health Services & Child Protective Services*, 1 Wn. App. 2d 320, 404 P.3d 1163

(2017). The Court of Appeals' opinion analyzed both at length. *See C.R.*, slip op. at 12-13.

In *Boone*, the court unequivocally declined to extend the Department's duty "to children who are not the subject of the reported abuse or neglect." 200 Wn. App. at 732-34. Despite attending daycare with a child who was the subject of a report of abuse at the daycare, the Boone children were "not within the class of persons for whose benefit RCW 26.44.050 was enacted because the Boone children were not the subjects of the reports of alleged abuse that triggered those investigation." *Id.* at 734.

Similarly, in *M.M.S.*, the court held that, where there was no report that M.M.S. was abused or neglected, she did not have a cause of action under RCW 26.44.050 based on the Department's failure to discover and disclose her stepbrother's prior sexualized behavior that had been documented in his earlier dependency proceedings. *Id.* at 322.

In addition, the opinion here considered and correctly distinguished the only two published Court of Appeals opinions

raised by Plaintiffs: *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000), and *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006). *See C.R.*, slip op. at 11, 13; Pet. at 14-15. In both *Rodriguez* and *Lewis*, there were allegations of abuse as to multiple children. *Rodriguez*, 99 Wn. App. at 441-42; *Lewis*, 136 Wn. App. at 452-53. Given the absence of any such allegations as to Plaintiffs in 2014, there is no conflict to support review under RAP 13.4(b)(2).

In seeking review, Plaintiffs also inaptly rely on the unpublished opinions of *Kirchoff v. City of Kelso*, 190 Wn. App. 1032, 2015 WL 5923455 (Oct. 12, 2015) (unpublished), and *K.C. v. State*, 10 Wn. App. 2d 1038, 2019 WL 4942457 (Oct. 8, 2019) (unpublished). *See* Pet. at 15. Not only is an alleged conflict with an *unpublished* opinion not grounds for review under RAP 13.4(b)(2), but both *Kirchoff* and *K.C.* are distinguishable.

Kirchoff contains no analysis or discussion of the scope of the duty under RCW 26.44.050. *See Kirchoff*, 2015 WL 5923455, at *3-6. Similarly, in *K.C.*, the court specifically stated,

"we need not decide whether DSHS' duty to investigate always extends to other children in a home when allegations of abuse are made by one child in the same home." *K.C.*, 2019 WL 4942457 at *5.

Further, Plaintiffs' reliance on an *extrajurisdictional* opinion is plainly not grounds for review under RAP 13.4(b)(2). *See* Pet. at 16 (citing *Gowens v. Tys. S. ex rel. Davis*, 948 So. 2d 513 (Ala. 2006)). Moreover, Plaintiffs' summary of the facts in *Gowens* is incorrect. There, the child abuse and neglect report did not concern just one child; rather, it "specifically listed three 'child victims'" and identified "the purported risk of harm to each child." *Gowens*, 948 So. 2d at 516. That is not the factual posture of this case.

Review is not warranted under RAP 13.4(b)(2).

C. The Court of Appeals' Decision on the Scope of the Department's Common Law Duty Comports with Established Precedent

Plaintiffs also seek review under RAP 13.4(b)(1) because they argue, generally, that the opinion misapplied this Court's

opinions on the common law duties owed under *Restatement* §§ 281 and 302B and the voluntary rescue doctrine. *See* Pet. at 23-26. They also argue that the court overlooked "critical facts" as to CPS's conduct. *See* Pet. at 21-22. Plaintiffs fail to demonstrate any specific conflict between the instant opinion and the precedent they cite. Further, not only did the Court of Appeals reference the facts they now raise in discussing duty under the common law, but nothing in those facts would change the analysis because there is no evidence that any affirmative conduct by the Department created a new or increased harm to Plaintiffs.

As to the case law, the Court of Appeals correctly recognized that "at common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others." *C.R.*, slip op. at 15 (citing *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019) (citing § 281)). The court then examined the facts in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d

1275 (2013), *Beltran-Serrano*, and *Mancini v. City of Tacoma*, 196 Wn.2d 864, 479 P.3d 656 (2021), all cases involving police conduct, before concluding:

> The Department's duty to conduct an investigation with reasonable care was limited by the scope of the [statutory] duty to investigate. Thus, unlike the police departments in *Washburn*, *Beltran-Serrano*, and *Mancini*, in the present case the Department had no duty to C.R. and J.L. for which it was required to exercise reasonable care.

Slip op. at 17.

This conclusion is correct. To hold otherwise and find a duty *owed to Plaintiffs* to act reasonably in investigating the report *as to D.L.*, would be contrary to this Court's statement in *M.W.* that, "Our courts have not recognized a general tort claim for negligent investigation. The negligent investigation cause of action against DSHS is a narrow exception that is based on, and limited to, the statutory duty and concerns." *M.W.*, 149 Wn.2d at 601.

The Court of Appeals also correctly rejected Plaintiffs' argument under *Restatement* § 302B by applying this Court's

precedent in *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013). *See C.R.*, slip op. at 18-20; Pet. at 23 n.12. *Robb* requires an affirmative act of misfeasance that creates a new harm and goes beyond failure to eliminate an already existing risk. 176 Wn.2d at 439. Assuming arguendo that Plaintiffs could identify some act of Departmental misfeasance, they still fail to identify a new or increased risk created by that conduct. It was this evidentiary gap, which they have not filled, that ultimately led the Court of Appeals to affirm dismissal of their claim. *See C.R.*, slip op. at 20.

This Court should also disregard Plaintiffs' argument under the voluntary rescue doctrine, which they raised for the first time in their reply brief below. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); Reply Br. at 19. Further, "the premise of the voluntary rescue doctrine is that the rescuer ... undertakes or promises to undertake to rescue the

plaintiff from a *known* danger." *Turner v. Washington State Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 294, 493 P.3d 117 (2021) (emphasis in original). There is no evidence that the Department suspected, let alone *knew*, that Rowe was abusing Plaintiffs in 2014. The doctrine is inapplicable, and there is no conflict to warrant review under RAP 13.4(b)(1).

V. CONCLUSION

This Court should deny review. The decision does not conflict with any precedential authority of this Court or the Court of Appeals. *See* RAP 13.4(b)(1), (2). The Court of Appeals decision is also consistent with preventing and eliminating child sexual abuse. Moreover, the Court of Appeals decision is unpublished and interprets a statute that has since been amended, further undermining Plaintiffs' suggestion that review is warranted under RAP 13.4(b)(4).

This document contains 4,984 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23rd day of January 2024.

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CERTIFICATE OF SERVICE

I certify that on the date below I cause to be electronically filed the ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 23rd day of January 2024, at Olympia, Washington.

s/ Beverly Cox
Beverly Cox
Paralegal

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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