

FILED
SUPREME COURT
STATE OF WASHINGTON
3/21/2024 3:05 PM
BY ERIN L. LENNON
CLERK

SUPREME COURT
OF THE STATE OF WASHINGTON

IAN ATKERSON,
individually and as Personal
Representative of the Estate of
Rustin Atkerson,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF
CHILDREN, YOUTH, AND
FAMILIES, John and Jane
Doe 1-10,

Respondents.

No. 102795-8

REPLY ON
MOTION TO
INCLUDE
EXTRARECORD
MATERIALS
IN APPENDIX

A. INTRODUCTION

The Department of Children, Youth, and Families (“DCYF”) offers a baseless opposition to the motion of the Estate of Rustin Atkerson (“Estate”) to include highly relevant legislative history materials in its petition for review to this Court. The Court should reject DCYF’s arguments and grant the Estate’s motion.

Reply on Motion to Include
Extrarecord Materials - 1

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

B. ARGUMENT

DCYF's argument is twofold. RAP 13.4(c), not RAP 10.3, governs the petition and the legislative history materials are unnecessary. Neither argument is meritorious.

First, on the procedural point, DCYF conveniently overlooks the fact that RAP 10.3 *does* apply. As noted in RAP 13.4(e), the requirements for the form of a brief in RAP 10.3 apply to petitions for review, except as otherwise provided in RAP 13.4. RAP 13.4(c)(9) provides that "statutes and constitutional provisions relevant to the issues presented for review" may be included in a petition's appendix. Legislative history materials are of a similar nature. Certainly, they are the type of "extrarecord" materials contemplated by RAP 10.3(a)(8), a more specific rule on appendix materials.

In a surplus of caution, the Estate accompanied its petition to this Court with a motion for leave to the Court the legislative history materials as to RCW 4.24.595. This was proper;

appellate courts frequently take “judicial notice of the legislative history of a statute” and “a party need not have filed the legislative history of a statute with the trial court...it can be properly appended to a party’s appellate brief.” *Tobin v. Dep’t of Labor & Indus.*, 145 Wn. App. 607, 616 n.7, 187 P.3d 780, 784 (2008), *aff’d*, 169 Wn.2d 396 (2010); *see also*, *Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980) (“legislative facts” are properly submitted for the first time on appeal and need not be part of the “trial record”).

This Court promotes considering all relevant facts and arguments because it must “inform itself, as best it can, of the probable impact its decision may have upon the affairs of the people of this state.” *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972) (cleaned up); *see also*, *e.g.*, *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 792, 357 P.3d 1040 (2015) (considering statutory authority submitted by amicus party for the first time on the appeal because

this Court has “inherent authority” to consider relevant issues in order to “reach a proper decision.”). Thus, this Court frequently takes notice of and considers legislative history on appeal. *See, e.g., Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 255 n.1, 661 P.2d 964, 966 (1983); *Washington State Farm Bureau Fed’n v. Reed*, 154 Wn.2d 668, 677, 115 P.3d 301 (2005); *Brown v. State*, 155 Wn.2d 254, 265, 119 P.3d 341 (2005).

Second, for all the reasons set forth in the Estate’s petition at 8-21, the legislative history materials are relevant. Not to be overlooked, this case involves the proper interpretation of RCW 4.24.595(1). Division III’s published opinion misinterpreted RCW 4.24.595(1), applying a gross negligence standard to the Estate’s implied right of action under case law interpreting RCW 26.44.050. RCW 4.24.595’s legislative history is relevant to this Court’s review decision. For example, in *Desmet v. State*, 200 Wn.2d 145, 157 n.12, 514 P.3d 1217 (2022), this Court held that legislative history was not necessary to construe a different

section of the same statute, RCW 4.24.595(2), but it analyzed legislative history nonetheless to ensure it reached an informed decision.

Pointedly, the legislative history submitted here reveals the legislative intent regarding RCW 4.24.595(1), contradicting Division III's statutory analysis. Proper, informed analysis of that statute is crucial because RCW 4.24.595 governs liability in the most sensitive context and the proper care of our state's most vulnerable citizens. Moreover, the State's own representative's expressed intent reflected in testimony on the bill contradicts Division III's analysis of RCW 4.24.595(1). Little wonder DCYF now wants to hide the legislative history from the Court.

This Court should allow the Estate to include these materials in the appendix to its petition for review.

This document contains 666 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 21st day of March, 2024.

/s/ Philip A. Talmadge
Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Bryan G. Smith, WSBA #29382
Megan Hale, WSBA #41823
Tamaki Law Offices
2820 Northup Way, Suite 235
Bellevue, WA 98004
(425) 272-9367

Attorneys for Petitioner

DECLARATION OF SERVICE

On said day below I electronically delivered a true and accurate copy of the ***Reply on Motion to Include Extrarecord Materials in Appendix*** in Supreme Court Cause No. 102795-8 to the following:

Joshua Schaer
Assistant Attorney General, OID #91019
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Bryan G. Smith
Megan Hale
Natalie McNeill
Tamaki Law Offices
2820 Northup Way, Suite 235
Bellevue, WA 98004

Original delivered by appellate portal to:
Supreme Court
Clerk's Office

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

DATED: March 21, 2024 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

March 21, 2024 - 3:05 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 102,795-8
Appellate Court Case Title: Ian Atkerson v. State of Washington Dept. of Children, Youth and Families, et al.
Superior Court Case Number: 20-2-00357-8

The following documents have been uploaded:

- 1027958_Answer_Reply_20240321150436SC888100_4450.pdf
This File Contains:
Answer/Reply - Reply to Answer to Motion
The Original File Name was Reply on Motion to Include Extrarecord Materials.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- TORTTAP@atg.wa.gov
- TorSeaEf@atg.wa.gov
- brad@tal-fitzlaw.com
- bsmith@tamakilaw.com
- joshua.schaer@atg.wa.gov
- matt@tal-fitzlaw.com
- mhale@tamakilaw.com

Comments:

Reply on Motion to Include Extrarecord Materials in Appendix

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20240321150436SC888100