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No. 102795-8

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.

MEMORANDUM OF *AMICUS CURIAE*
RESSLER & TESH ON REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii-iii
A. INTRODUCTION	1
B. IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	2
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	3
(1) <u>Division III’s Opinion Is Published and Has Statewide Implications</u>	4
(2) <u>The Case Involves a First Impression Issue of Statutory Interpretation</u>	5
(3) <u>The Issue in the Case Involves Government Agency Liability</u>	7
E. CONCLUSION.....	8

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Table of Cases</u>	
 <u>State Cases</u>	
<i>Ass’n of Wash. Bus. v. Wash. State Dep’t of Ecology</i> , 195 Wn.2d 1, 455 P.3d 1126 (2020).....	6
<i>Beltran-Serrano v. City of Tacoma</i> , 193 Wn.2d 537, 442 P.3d 608 (2019).....	6
<i>Birrueta v. Dep’t of Soc. & Health Servs.</i> , 186 Wn.2d 537, 379 P.3d 120 (2016).....	7
<i>Boeing Co. v. State</i> , 89 Wn.2d 443, 572 P.2d 8 (1978).....	7
<i>Bostain v. Food Express, Inc.</i> , 159 Wn.2d 700, 153 P.3d 846, <i>cert. denied</i> , 552 U.S. 1040 (2007).....	6
<i>Desmet v. State</i> , 200 Wn.2d 145, 514 P.3d 1217 (2022).....	2, 5, 9
<i>Glass v. Stahl Specialty Co.</i> , 97 Wn.2d 880, 652 P.2d 948 (1982).....	6
<i>In re Pet. of Arnold</i> , 190 Wn.2d 136, 410 P.3d 1133 (2018).....	5
<i>M.N. v. Multicare Health Sys., Inc.</i> , __ Wn.3d __, 541 P.3d 346 (2024).....	6
<i>M.W. v. Dep’t of Soc. & Health Servs.</i> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	1, 2, 4
<i>McGinn v. No. Coast Stevedoring Co.</i> , 149 Wash. 1, 270 Pac. 113 (1928).....	8
<i>Potter v. Wash. State Patrol</i> , 165 Wn.2d 67, 196 P.3d 691 (2008).....	8
<i>State v. Grocery Manufacturers Ass’n</i> , 195 Wn.2d 442, 461 P.3d 334 (2020).....	7

<i>State v. Jones</i> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	7
<i>Tyner v. Department of Soc. & Health Servs.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	1, 2, 3, 9
<i>Wash. State Council of County and City Employees v. City of Spokane</i> , 200 Wn.2d 678, 520 P.3d 991 (2022).....	6

State Statutes

RCW 4.24.595	1
RCW 4.24.595(1)	2, 4, 9
RCW 4.24.595(2)	5, 9
RCW 26.44.010/.050.....	1, 3

State Rules

GR 14.1(a).....	5
RAP 4.2(a).....	5
RAP 13.4(b).....	2, 9
RAP 13.4(b)(1).....	4
RAP 13.4(b)(4).....	4, 6, 7, 8

A. INTRODUCTION

Washington law mandates that the State's Department of Social and Health Services ("DSHS"), now the Department of Children, Youth, and Families ("DCYF"), through Child Protective Services ("CPS"), must investigate reported child abuse. RCW 26.44.010/.050.

This Court since *Tyner v. Department of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), has recognized an implied right of action arising out of those statutes if, after a report of abuse or neglect, the State conducts an incomplete or biased investigation that results in a harmful placement decision for the child. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003). That test was met here.

But the 2012 Legislature enacted RCW 4.24.595 to elevate the burden of proof for such an implied right of action against government agencies, but only in *narrow* circumstances involving investigations of what the Legislature described as emergent placement decisions, and then defined such situations

to focus specifically on shelter care hearings. This Court in *Desmet v. State*, 200 Wn.2d 145, 514 P.3d 1217 (2022), made clear that this legislation, in derogation of common law, was to be *narrow* in its scope.

Division III's published opinion here condones a broad sweep to RCW 4.24.595(1), holding that DCYF/CPS are subject to a gross negligence standard in essentially *all* abuse investigations, a decision that is so at odds with this state's public policy of protecting kids from abuse by mandating the proper investigation of reported child abuse. Division III's opinion effectively overruled this Court's decisions in *Tyner* and *M.W.* when that was never intended by the Legislature. Review is critical for Washington's abused or neglected kids. RAP 13.4(b).

B. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of Ressler & Tesh ("R&T") is set forth in detail in its motion for leave to submit this memorandum. That information is incorporated by reference.

C. STATEMENT OF THE CASE

R&T adopts the Statement of the Case as set forth in Division III's published opinion, op. at 3-12, as refined in the Estate's petition for review. Pet. at 2-8.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The State ignores this Court's direction in *Tyner*, 141 Wn.2d at 79, that the State owes a family-based duty to children to investigate reported abuse with the goal of protecting children from abuse: "During its investigation [of abuse] the State has the duty to act reasonably in relation to all members of the family." In recognizing an implied right of action against the State arising out of RCW 26.44.010/.050, of course, the principal focus is on protecting children from abuse.

The Estate met the requirements this Court has established for an action against the State – there was a report of Rustin's abuse; DCYF/CPS's negligent investigation was woefully incomplete; it did not include interviews of medical professionals reporting abuse, exploration of the mother's

cohabitation with a known abuser, and the lack of any safety plan for the little boy in the face of physical evidence of his abuse; the incomplete investigation resulted in an obviously harmful placement decision as to a two and a half year old non-verbal toddler, and Rustin's death by abuse. *M.W., supra*.

As the Estate correctly observes, Division III's published opinion is at odds with this Court's decision in *Desmet* as to the proper interpretation of the statute, RAP 13.4(b)(1), and contravenes the express language of RCW 4.24.595(1) and its legislative history pertinent to what the Legislature intended as to an "emergent placement decision." These are issues of substantial public importance worthy of this Court's review. RAP 13.4(b)(4).

But this Court should accept review for a series of additional reasons that animate this Court's RAP 13.4(b)(4) jurisprudence.

- (1) Division III's Opinion Is Published and Has Statewide Implications

Because Division III’s opinion is published and therefore “precedential,” GR 14.1(a), it has the potential of adversely affecting trial court decisions throughout Eastern Washington, if erroneous; it will also be considered as significant persuasive authority in the areas served by Divisions I and II of the Court of Appeals. *In re Pet. of Arnold*, 190 Wn.2d 136, 410 P.3d 1133 (2018) (no horizontal stare decisis as to Court of Appeals decisions).

The application of a gross negligence standard will be argued by DCYF/CPS in all abuse cases in Washington. As seasoned trial lawyers who often litigate childhood sexual abuse cases, both firms have already seen this occur. It is highly likely that this statewide impact factor motivated the Court to grant review in *Desmet* as to the interpretation of RCW 4.24.595(2).

(2) The Case Involves a First Impression Issue of Statutory Interpretation

This Court has frequently concluded that issues of first impression qualify for its review whether under RAP 4.2(a) or

RAP 13.4(b)(4). *M.N. v. Multicare Health Sys., Inc.*, ___ Wn.3d ___, 541 P.3d 346 (2024) (first impression issues involving health care claims involving exposure to disease); *Wash. State Council of County and City Employees v. City of Spokane*, 200 Wn.2d 678, 520 P.3d 991 (2022) (validity of local open bargaining ordinance); *Ass'n of Wash. Bus. v. Wash. State Dep't of Ecology*, 195 Wn.2d 1, 455 P.3d 1126 (2020) (severance of portions of rule found invalid); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019) (common law negligence in use of deadly force). This is particularly true as to issues of statutory interpretation.

This Court is the ultimate source on the meaning of statutes enacted by the Legislature. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007). Thus, this Court has often chosen to take cases to address far-reaching statutory interpretation questions of first impression. *See, e.g., Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982) (interpretation of 1981 Tort Reform

Act); *State v. Grocery Manufacturers Ass'n*, 195 Wn.2d 442, 461 P.3d 334 (2020) (whether trade association was FCPA political committee); *Birrueta v. Dep't of Soc. & Health Servs.*, 186 Wn.2d 537, 379 P.3d 120 (2016) (repayment of worker compensation benefits).

A statutory interpretation issue that potentially makes it more difficult for child abuse victims to recover against the State for deaths and injuries of children is one that *only* this Court should make.

(3) The Issue in the Case Involves Government Agency Liability

This case involves an action against the State and, as such, it meets the criteria of RAP 13.4(b)(4). *See, e.g. Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978); *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981). The State is frequently party to lawsuits involving DCYF/CPS for their potential liability. Review of this published decision is necessary to set the proper standards for liability that will be applied by courts across

Washington.

Moreover, the issue here involves the diminution of a common law duty. Because this Court is the ultimate exponent of whether a duty exists under Washington's common law, particularly in so publicly-significant a context as the investigation of child abuse, this Court should be the one that decides whether a common law duty is present. *McGinn v. No. Coast Stevedoring Co.*, 149 Wash. 1, 12, 270 Pac. 113 (1928) (“...we determine the common law within our jurisdiction for ourselves...”).

This first impression statutory interpretation case involves a potential diminution in common law protection to abused or neglected children. This Court, not Division III, should determine if a statutory interpretation in derogation of the common law is merited. *See Potter v. Wash. State Patrol*, 165 Wn.2d 67, 196 P.3d 691 (2008).

Review is proper under RAP 13.4(b)(4).

E. CONCLUSION

For the foregoing reasons, this Court should grant review. RAP 13.4(b). This is a case for the Supreme Court. This Court has an important responsibility to see that the Legislature's vital goal of preventing abuse of children is not undermined by Division III's interpretation of RCW 4.24.595(1) that effectively overrules *Tyner*, contrary to the express statutory language, and, if the Court reaches its legislative history of the statute. Moreover, Division III's published opinion contravenes this Court's interpretation of RCW 4.24.595(2) in *Desmet*.

Ultimately, Division III's interpretation of RCW 4.24.595(1) will free DCYF/CPS to engage in lackadaisical, negligent child abuse and neglect investigations. This Court should not condone such conduct.

This document contains 1,366 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of April, 2024.

Respectfully submitted,

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