72736-2

NO. 72736-2-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GREGORY TAYLOE MCCANDLESS, ET AL.

Appellant,

v.

STATE OF WASHINGTON, ET AL.,

Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CIVIL RULES

STATUTES

OTHER AUTHORITIES

I. ASSIGNMENTS OF ERROR

1. The Superior Court erred in granting a motion for dismissal under Civil Rule 12(c).

2. The Superior Court erred in denying leave of court to amend the complaint.

A. Issues

1. Has a plaintiff properly stated a claim upon which relief can be granted when the plaintiff alleges that a mandatory reporter had actual notice that an infant child was in danger if left alone with an epileptic father and the mandatory reporter failed to report the matter as required by statute or perform any investigation, resulting in the death of the child? (ASSIGNMENT OF ERROR NO. 1)

2. Did the trial court err in dismissing the complaint under CR 12(c) when the moving party argued in its briefing that no cause of action exists for failure to investigate child neglect despite controlling case law stating entirely the opposite conclusion? (ASSIGNMENT OF ERROR NO. 1)

3. Has a plaintiff stated a cause of action upon which relief may be granted when the plaintiff alleges negligence by the State based upon failure to initiate an investigation when notice of imminent harm to a

child is provided to a mandatory reporter? (ASSIGNMENT OF ERROR NO. 1)

4. Did the trial court abuse its discretion when it refused to consider a request made to the court for leave to amend the complaint to cure whatever defects may form the basis for the trial court's decision to dismiss the complaint under CR 12(c)? (ASSIGNMENT OF ERROR NO. 2)

II. STATEMENT OF THE CASE

A. Facts

Three-month old Hunter McCandless suffocated to death on May 26, 2010 when his father, Gregory Tayloe-McCandless, suffered a seizure and collapsed on top of Hunter. (CP 58). At the time of Hunter's death, Gregory was alone with Hunter at the family's home in Everett, Washington while Hunter's mother, Becky Gearhardt, was at work. (CP 57-58).

Prior to the Hunter's death, Tayloe-McCandless sought treatment for epilepsy, and his doctor warned that he should not be left alone with his children for fear that he could suffer a seizure and cause harm to his young children. (CP 57). Because Gearhardt's work schedule prevented her from being home with the children and because the family could not afford childcare, Gearhardt and Tayloe-McCandless applied for childcare

assistance through the State of Washington through Working Connections Childcare assistance, a program administered by the Department of Early Learning (DEL). (CP 13, 57).

As part of their application, Gearhardt and Tayloe-McCandless submitted a letter from Tayloe-McCandless's doctor indicating that Tayloe-McCandless should not be left alone to care for his children. (CP 13-14). The application was denied. (CP 57). According to the State of Washington, the application was denied because it was incomplete. (CP 51).

Tayloe-McCandless also separately applied for assistance through a program administered by the Department of Social and Health Services (DSHS) known as Community Options Program Entry System (COPES), which provides in-home care and assistance to adults. (CP 50). As part of his COPES application, Tayloe-McCandless included a letter from his doctor that indicated he should not be left alone to care for his young children due to his epilepsy. (CP 50). This application was also denied. (CP 51).

Despite receiving applications for benefits that included a doctor's letter stating that Tayloe-McCandless should not be left alone with his children due to his epilepsy, employees of the State of Washington did nothing. (CP 58). No investigation was made into the circumstances at

Tayloe-McCandless's home and nothing was done in response to information that clearly indicated that Tayloe-McCandless should not be left alone with his children due to his epilepsy. (CP 58). Because no action was taken by the State and its employees, Tayloe-McCandless remained alone caring for Hunter which directly resulted in the circumstances of Hunter's death on May 26, 2010. (CP 58-59).

B. Superior Court Proceedings

The Estate of Hunter McCandless was created by petition to the King County Superior Court, and Sara Anderson, Hunter's aunt, was appointed personal representative of the estate. (CP 56).

Tayloe-McCandless and Gearhardt filed an action in Snohomish County Superior Court for wrongful death against the State of Washington and alleged that the State's negligence caused Hunter's death. (CP 63-67). The complaint was later amended to add the Estate of Hunter McCandless as a plaintiff. (CP 55-60). Plaintiff's complaint alleges that the State of Washington was aware of Tayloe-McCandless's epilepsy and knew that the home environment created by his condition posed a risk to Hunter's wellbeing and threatened his welfare. (CP 57, 59). Despite this knowledge, the State did nothing. (CP 58). Facts were also pled regarding failure to extend benefits to McCandless and Gearhardt as a basis for the State's negligence. (CP 59).

Defendant filed an answer to the amended complaint and later filed a motion to dismiss under CR 12(c). (CP 48-54; CP 24-47). Defendant's motion argued two basic points: (1) that no cause of action exists for negligent failure to extend benefits; and (2) no cause of action exists for failure to investigate "apart from a child abuse neglect investigation." (CP 25).

Plaintiff filed a response brief which is largely recited in argument below regarding the standards for dismissal under CR 12(c) and the reporting and investigative duties owed by the State when state employees become aware that a child is neglected. (CP 12-13).

On October 23, 2014, Defendant's motion was heard by Judge Ellen J. Fair. (CP 3). No court reporter was present and no transcript of the hearing is available. After oral arguments, Judge Fair granted the motion to dismiss and signed an order dismissing the complaint. (CP 1-2). Plaintiff's counsel moved at the hearing for leave to amend the complaint, and the court denied this motion because, according to the court, such a motion was not before the court. (CP 3).

For the purposes of brevity and simplicity, all plaintiffs from the original action shall be referred to herein as "McCandless." The State of Washington and its subsidiaries, including DSHS and DEL, shall be referred to as the "State."

III. ARGUMENT

1. Standard of review regarding Civil Rule 12(c)

A motion brought under CR 12(c) is treated the same as a motion brought under CR 12(b)(6). *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987). Review of a trial court's ruling upon a 12(c) motion is de novo. *Parrilla v. King County,* 138 Wn.App. 427, 431, 157 P.3d 879 (2007). Such motions should generally be denied absent the "the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Under the generous standard of CR 12(b)(6), "[a]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff's claim." *Parmelee v. O'Neel*, 145 Wn.App. 223, 232, 186 P.3d 1094 (2008), *rev'd in part*, 168 Wn.2d 515, 229 P.3d 723 (2010).

Notice pleadings requires that a complaint need contain only "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which [a party] is entitled." CR 8(a). "Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims." *Putman v. Wenatchee Valley Med. Ctr., PS*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009).

2. McCandless's complaint properly states a cause of action for negligence on part of the State of Washington

a. Washington law requires employees of the Department of Social and Health Services and Department of Early Learning to report instances of neglect and to investigate such reports

RCW 26.44.030 establishes reporting duties for certain individuals and state employees. According to RCW 26.44.030(1)(a), all employees of the Department of Social and Health Services (DSHS) and the Department of Early Learning (DEL) are mandatory reporters who are required when with "reasonable cause to believe that a child has suffered abuse or neglect" to report the suspected abuse or neglect to DSHS or the proper law enforcement agency.

"Abuse or neglect" are defined in RCW 26.44.020(1) to include "the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." "Negligence treatment" is further defined in RCW 26.44.020(16) as:

> an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight.

Mandatory reporters must comply with RCW 26.44.040. RCW 26.44.040 requires that an immediate oral report be made to law enforcement or to DSHS and include information regarding the names and addresses of the parents and children and the nature of the alleged neglect. Such reports must be made within forty-eight (48) hours from the time that a mandatory reporter develops reasonable cause to believe neglect has occurred. RCW 26.44.030(1)(g).

RCW 26.44.030 requires DSHS, local law enforcement and prosecutors to respond to reports of child neglect through an array of options. Such options include working with the family to direct the family toward social services and voluntary services, performing family assessments, investigating the matter by interviewing witnesses, and assessing the risks of harm to a child.

While RCW 26.44.030 controls reporting requirements, RCW 26.44.050 requires DSHS to investigate and provide the protective services section with a report. Thereafter, the matter can be referred to a prosecutor or, if sufficient cause exists, law enforcement is authorized to intervene and remove the child into custody without a court order. Both RCW 26.44.030 and 26.44.050 statutorily create duties that DSHS and other entities must follow to protect the welfare of children.

The general purpose of RCW 26.44 *et seq* is set out by the legislature in RCW 26.44.010 as follows:

> The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; *however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information*; and therefore *the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children.* When the child's physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail. *When determining whether a child and a parent, custodian, or guardian should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department's paramount concern.*
>
> [Emphasis added]

Though the vast majority of cases litigated in Washington regarding this issue, as reflected in appellate decisions to date, concern reports and investigations of sexual abuse, the statute is broadly worded to protect children from non-accidental injury and death and to protect and safeguard such children's safety and health. RCW 26.44.010.

b. McCandless properly alleged a cause of action based on the State's failure to make a report regarding neglect and abuse

The Washington State Supreme Court in *C.J.C. v. Corp. of the Catholic Bishop,* 138 Wn.2d 699, 727, 985 P.2d 262 (1999), explained the purpose of the mandatory reporting statute: "[T]he [l]egislature has made clear that the prevention of child abuse is of the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take appropriate action." (Quoting LAWS of 1985, ch. 259 (legislative findings appended to RCW 26.44.030)). Washington encourages the reporting of child abuse--even suspected child abuse. *Whaley v. State*, 90 Wn.App. 658, 668, 956 P.2d 1100 (1998).

RCW 26.44.030 implies a civil remedy against a mandatory reporter who fails to report suspected abuse. *Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn.App. 407, 423, 167 P.3d 1193 (2007). Citing this court's decision in *Tyner v. Department of Social & Health Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000), the court stated, "If the legislature intended a remedy for parent victims of negligent child abuse investigations, it is reasonable to imply an intended remedy for child victims of sexual abuse when those required to report the abuse fail to do so." 141 Wn.App. at 422.

The court have extended this cause of action to include neglect of a non-sexual nature, including damages resulting from a doctor's failure to report that a child was suffering from dehydration and malnourishment. *See Beggs v. DSHS et al.*, 171 Wn. 2d 69, 247 P.3d 421 (2001)(claim permitted under RCW 26.44.030 for doctor's failure to report neglect when seven-year-old child was dehydrated and suffered malnourishment ultimately causing his death).

McCandless alleges in the complaint that the State did nothing after being presented with information and becoming aware that Tayloe-McCandless posed a threat to the welfare and wellbeing of his children. For the purpose of a 12(c) motion, the trial court is to take the allegations in the complaint and any hypothetical facts that support a cause of action as verities when ruling on the motion. The trial court should have assumed that the allegations pled by McCandless were true, including that the State knew that Tayloe-McCandless posed a threat to the welfare and well-being of his children based upon information obtained in applications for benefits. While McCandless's complaint provides notice of the causes of action for wrongful death, the court should also accept as true that the State and its employees had a duty to report under RCW 26.44.030 but failed to do.

The motion brought under CR 12(c) and the reply submitted in support of the motion gloss over the reporting requirements and never

addresses the State and its employee's failure to report. According to the State, "the duty [to investigate] only arises after the police or CPS receives a report of child abuse or neglect." (CP 29-30). This same point is at the heart of McCandless's complaint – the State and its employees had a statutory duty to report the neglect, which then should have prompted an investigation.

The law requires that mandatory reports, such as the State's employees, report such instances of neglect. Failure to do so is recognized as a cause of action in Washington. The trial court erred in dismissing McCandless's complaint despite allegations that the State did nothing, be it reporting or investigating the situation in the McCandless home.

c. McCandless also has a cognizable cause of action for failure to investigate neglect and abuse of Hunter McCandless

This court has recognized that an abused or neglected child may bring a claim against DSHS based on failure to investigate allegations of abuse or neglect. *Yonkers v. Dep't of Social and Health Servs.*, 85 Wn.App. 71, 81-82, 930 P.2d 958 (1997). The court in *Yonkers* found the legislature implied a cause of action which could be brought by, or on behalf of, a neglected or abused children because such children "fall within the particular and circumscribed class of individuals the Legislature intended to protect" in enacting RCW 26.44.050. *Id* at 80-81.

In *Yonkers*, DSHS failed to investigate a mother's report that her ex-husband and father of her child was sexually abusing her son. The father later confessed to sexually abusing the child despite DSHS's failure to investigate the allegations. *Id* at 73-74. As the court in *Tyner* stated in summarizing the court's holding in *Yonkers*, "a cause of action arises not only when the State performs a negligent investigation, but also when the State negligently fails to initiate an investigation." 141 Wn.2d at n6.

McCandless's complaint alleges causes of action for failure to investigate rather than negligent investigation. The State's motion to dismiss wrongly paints McCandless's claims as negligent investigation claim and seeks to carve out a distinction between circumstances in which the State investigates reports of child abuse from the complete lack of response or investigation alleged by McCandless. McCandless, instead, alleges that the State did nothing: its employees failed to report the neglect and failed to investigate the situation.

c. Defendants' argument for a "narrow exception" based upon *MW v. DSHS* is misplaced and inapplicable to the facts in this case

Defendant relies on one sentence from *M.W. v. Dep't of Social and Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003) to argue that no duty was owed to Plaintiff. In *MW*, a claim was brought for negligent investigation under RCW 26.44.050 based not on a failure to adequately

investigate neglectful parents or guardians but based upon "harm that is the result of direct negligence by DSHS investigators during the course of an investigation, such as dropping a child or negligently inflicting emotional harm." *Id* at 598. In rejecting MW's cause of action, the court states:

> a claim for negligent investigation against DSHS is available only to children, parents, and guardians of children who are harmed because DSHS has gathered incomplete or biased information that results in a harmful placement decision, such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home....

Id at 162.

In *Lewis v. Whatcom County*, 136 Wn. App. 450, 459, 149 P.3d 686 (2006), the court specifically rejected this same language from *MW* as setting a limit or creating some hard parameters on claims for negligent investigation. Specifically, the court rejected the notion that an investigation without a placement decision precluded DSHS from owing a duty toward an abused child or that the language from MW would limit obligations imposed by statute. *Id.*

According to the court, the limitation implied in the *MW* decision only applied to the facts of that specific case in which the plaintiff alleged an intrusive physical examination caused damages. *Id.* In this instance, as in *Lewis*, the decedent was a child and in class of persons that was owed a duty under RCW 26.44.050. *Id.*

Even assuming *arguendo* that *MW* does limit causes of action for negligent investigation, this limitation would have no bearing on the present action. Plaintiff's cause of action rests on Defendant's failure to investigate and failure to intervene. As in *Yonkers v. DSHS*, *supra*, Plaintiff alleges that the State, including DEL as a mandatory reporter, did nothing to report or investigate the circumstances of neglect or Hunter's welfare and that damages were proximately caused by that failure to investigate. This circumstance is distinguishable from genre of negligent investigation claims rejected in *MW*.

3. The court erred in denying McCandless's motion to amend the complaint

CR 15(a) permits a plaintiff to amend a complaint only by leave of court, which "shall be freely given when justice so requires." The amendment of pleadings is addressed to the sound discretion of the trial court, whose determination will be overturned on review only for abuse of such discretion. *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978). An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure by the trial court to indicate its reason for denying a motion to amend

may amount to an abuse of discretion. *Rodriguez v. Loudeye Corp*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008).

In deciding whether to grant a motion to amend, "the court may consider the probable merit or futility of the amendments requested." *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn.App. 126, 131, 639 P.2d 240 (1982). Leave to amend should be granted, however, "in lieu of granting a dismissal, if it appears that by amending the complaint the plaintiff may be able to state a cause of action." 15A Karl B. Tegland & Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure ch. 2, § 27.2 at 284 (2009-2010 ed.) *citing* CR 15(a); *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehouseman and Helpers of America*, 100 Wn.2d 343, 670 P.2d 240 (1983).

According to the trial court's minute order, the motion to amend was not before the court and was therefore denied. (CP 3). The court in *Rodriguez v. Loudeye Corp.* faced this same situation and similar facts in which a party moved at the motion hearing for leave to amend despite never filing and serving a formal motion or proposed amended complaint. 144 Wn. App. at 729. According to the *Rodriguez* court, such a request made at the hearing was sufficient to put the matter before the court and raise the issue on appeal. *Id.*

Rather than dismissing McCandless's complaint, the trial court should have permitted McCandless to amend the complaint to cure whatever defects may have prompted the trial court to grant the State's motion. If McCandless's claims were not pled with sufficient specificity or were without sufficient factual basis to articulate a cognizable claim, McCandless should have the opportunity to remedy these shortcomings rather than face the harshest of results – complete dismissal of the complaint with prejudice.

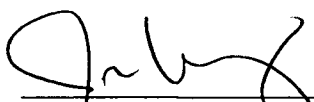
IV. CONCLUSION

The trial court committed error when it granted the motion brought under 12(c). The facts alleged in McCandless's complaint and amended complaint are sufficient to state a claim for negligence against the State. If, hypothetically, state employees had knowledge that Hunter was neglected by his parents because he was left alone with his severely epileptic and should have made a report or investigated the matter further, McCandless certainly has a claim under RCW 26.44.030 and RCW 26.44.050 and should be allowed to pursue this matter.

The trial court also abused its discretion by refusing to permit McCandless to amend the complaint. If the only reason for denying such a motion was because the matter was not before the trial court, such a reason is not a sufficient basis for denying McCandless the ability to remedy whatever defects may underlie the trial court's reasoning for determining that

McCandless's complaint failed to state a claim upon which relief may be granted.

Respectfully submitted this 27th day of February 2015.



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PROOF OF SERVICE

I, Jonathan Nolley, hereby declare that I am and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party nor interested in the above-entitled action, and am competent to be a witness herein.

On this day, I filed with the State of Washington Court of Appeals the following document:

BRIEF OF APPELLANT

And served the same document via HAND DELIVERY to the party below:

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

DATED this 27th day of February 2015.

EMERALD LAW GROUP, PLLC

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