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.

REPLY OF APPELLANT

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I. REPLY OF APPELLANT TO RESPONDENT'S BRIEF

The parties herein are identified in the same manner as prior briefing. The plaintiffs in the original action and appellants herein are referred to collectively as "McCandless." The defendants to the original action and respondents herein are referred to collectively as "The State." In no particular order, McCandless replies to the State's brief as follows.

A. The State's position regarding "harmful placement decisions" was rejected by this court in *Lewis v. Whatcom County.*

The State repeatedly, and wrongly, insists that a cause of action for negligent investigation only arises when a "harmful placement decision" is made. According to the State and its briefing, the State must consciously decide to place or leave a child in a specific setting before the child (or a representative or estate of the child) can bring a claim for negligence. This notion that a "placement decision" must occur before a claim may arise was specifically rejected by this court in *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006).

The State relies upon the exact argument that was presented by Whatcom County as respondent in the *Lewis* case. In *Lewis*, a victim of sexual abuse sought a claim for negligence against Whatcom County when the sheriff's department failed to conduct an investigation despite receiving information from the abused individual's doctor that her uncle

was sexually abusing her. Id at 452-453. On appeal, Whatcom County relied upon the same quotation from *MW v. Dept' of Soc. & Health Servs.*that the State now cites in its briefing:

> [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....

Lewis, 136 Wn. App. 454-455, citing *MW v. Dept' of Soc. & Health Servs*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003); (Brief of Respondent, 9).

The court in *Lewis* specifically rejected this language from *MW* as a limitation on claims for negligent investigation. As the court in *Lewis* explained:

> This language does not preclude Lewis' negligent investigation claim. The County asserts that Lewis was not the subject of a "placement decision." It is true that DSHS was not responsible for placing Lewis. But the language on which the County relies does not limit the scope of the entire statute. Rather, it can fairly be read to address only the issues presented in *M.W.* The County also fails to explain how leaving a child in an abusive situation in which the parent sends her to an uncle who molests her is not a placement decision. Lewis' situation is indistinguishable from the one at issue in *Yonker*. There, the child lived with his non-abusive mother but had regular visitation with his abusive father. Because DSHS failed to investigate, visitation continued and so did the abuse. This was sufficient to support a claim for negligent investigation. Similarly, Lewis is a child who remained in an abusive situation outside her primary residence because of an

> incomplete investigation by law enforcement. As such, she is within the class of persons who can bring a negligent investigation claim.
>
> The limitations of claims discussed in *M.W.* are inapplicable for another reason. The question in that case was not whether DSHS owed a duty to M.W., but rather what the scope of that duty was. Here, the issue is simply whether the County owed Lewis a duty at all. The answer, according to *M.W.*, is clearly yes, because "a child who was allegedly harmed" is "clearly within the class of persons the legislature intended to benefit when it passed chapter 26.44 RCW."
>
> *Id* at 458.

In both *Yonkers v. Dep't of Social and Health Servs.*, 85 Wn.App. 71, 81-82, 930 P.2d 958 (1997) and *Lewis*, an abused child sought claims based upon a complete failure by DSHS and a sheriff's department, respectively, to investigate allegations of child abuse. While McCandless's abuse was not sexual in nature, McCandless's complaint alleges that Hunter McCandless was left in a home where he his wellbeing and welfare were threatened. (CP 57, 59). This situation constitutes "a clear and present danger to a child's health, welfare, or safety" per RCW 26.44.020(16).

Paralleling the logic employed by the *Lewis* court, the State's failure to investigate and take action is the equivalent of a placement decision via inaction that resulted in Hunter remaining in the home. As in *Yonkers* and *Lewis*, McCandless's claim rests upon the well-pleaded fact

that the State did nothing in response to information from which the State should have concluded that Hunter McCandless was a victim of abuse and/or neglect.

B. Information received by the State should have triggered a mandatory report of abuse and neglect per RCW 26.44 *et seq.*

The State takes the position that it is absolved from mandatory reporting requirements when abuse or neglect results from a parent's medical condition. The legislature, however, indicated no such limitation on mandatory reporting obligations. RCW 26.44.030 does not qualify or limit the basis for a mandatory reporter's belief that a child has been neglected. The statute itself identifies a wide range of individuals who are mandatory reporters including medical practitioners, psychologists, school personnel, and law enforcement. RCW 26.44.030.

The legislature indicates that intervention into the parent-child relationship is necessary when "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." RCW. 26.44.010. When these circumstances are present, "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." *Id.*

The legislature also defines "negligent treatment" 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." As the State indicates in its briefing, "mandatory reporting is triggered when there is reasonable cause to believe a child has been subjected to abuse or negligent treatment." The State notably does not cite to the definition of "negligent treatment" when parsing the words used in McCandless's complaint.

A plain reading of the RCW 26.44.030 indicates that State employees must report instances in which they have a reasonable belief that a child is subject to negligent treatment. The State's policy concerns regarding intrusion into the lives of persons with medical problems is not relevant to this matter given the legislature's clear intent to encourage reporting of child abuse and neglect. The legislature is in the best position to make such policy determinations, and the court should not judicially create exceptions to mandatory reporting requirements created by the legislature. *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 109, 285

P.3d 34 (2012) ("The legislature, not this court, is in the best position to assess policy considerations.").

Even assuming such policy considerations, the life of a child surely is paramount to the possible inconvenience to parents resulting from an investigation. In this instance, parents were subjecting their infant child to a dangerous and neglectful home environment by leaving the infant child in the care of an individual whose epilepsy creates a dangerous situation that risks harm to the infant. Moreover, the McCandless parents themselves provided a doctor's report confirming the danger to Hunter's wellbeing due to his father's condition and were reaching out for assistance rather than trying to avoid intervention by the State.

C. Leave should have been given to amend the complaint if the wording of Plaintiff's complaint could have been amended to cure any defects that led to dismissal under CR 12(c)

The State's briefing on this matter is largely procedural and addressed in *Rodriguez v. Loudeye Corp*, 144 Wn. App. 709, 729, 189 P.3d 168 (2008). As in this matter, the appellant in *Rodriguez* asked for leave per CR 15(a) to amend a complaint during oral arguments when the trial court made it clear that it was going to grant a motion to dismiss. *Id.* This court held that the request for leave, even if made at the hearing, was sufficient to put the matter before the trial court for consideration rather

than permitting the trial court to simply ignore such a request because it is not before the court. *Id.*

In this instance, the leave to amend is a request made to cure any pleading deficiencies that may form the basis for the trial court granting the motion to dismiss or this Court agreeing that the language used in Plaintiff's complaint may be insufficient to state a claim upon which relief may be granted under CR 12. McCandless asks that this Court consider the option of remanding this matter to the trial court if it finds that an amended complaint would cure whatever defects may underlie dismissal under CR 12(c).

D. The State's arguments are not sufficient to justify dismissal of McCandless's complaint under CR 12(c)

"[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). McCandless clearly pleaded sufficient facts to state a claim for failure to investigate and failure to report under RCW 26.44.030. Both claims have been recognized in Washington. *See C.J.C. v. Corp. of the Catholic Bishop*, 138 Wn.2d 699, 727, 985 P.2d 262 (1999); *and see Yonkers v.*

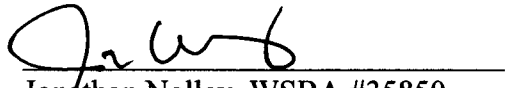
Dep't of Social and Health Servs., 85 Wn.App. 71, 81-82, 930 P.2d 958 (1997).

McCandless pleaded facts sufficient to establish a claim for negligence based upon the State's inaction, inaction that consisted of failure to report instances of abuse and neglect and failure to investigate.

II. CONCLUSION

McCandless respectfully requests that this Court reverse the trial court's order dismissing the complaint in this matter.

Respectfully submitted this 29th day of April 2015.



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Of Attorneys for Appellant

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:

REPLY OF APPELLANT

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

Kent Liu
Assistant Attorney General
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Torts Division
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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 29th day of April 2015.

EMERALD LAW GROUP, PLLC

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