

Sep 20, 2016, 4:37 pm

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WASHINGTON STATE SUPREME COURT  
NO. 93280-8

COURT OF APPEALS (DIV. II) NO. 46347-4-II

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FEARGHAL MCCARTHY, CCM MCCARTHY and CPM MCCARTHY,

Plaintiffs/Appellants,

-vs-

CLARK COUNTY, CITY OF VANCOUVER and STATE OF  
WASHINGTON,

Defendants/Respondents.

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**APPELLANT FEARGHAL MCCARTHY'S ANSWER TO  
RESPONDENTS' JOINT MOTION TO STRIKE CCM/CPM'S REPLY**

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 ORIGINAL

## **I. IDENTITY OF PETITIONER**

The Petitioner is Fearghal McCarthy, one of the plaintiffs in this case.

## **II. STATEMENT OF RELIEF SOUGHT**

Petitioner Fearghal McCarthy asks this Court to deny the motion to strike filed by the Respondents; or in the alternative to strike those portions of the Motion to Strike that contain improper argument.

## **III. ARGUMENT**

The purpose of a motion to strike is to alert the court to objectionable material contained in a written submission to the court. It is not to permit a party a chance for additional argument. In their combined motion to strike, Respondents assert various arguments about the propriety of the Court of Appeals' decision and whether this Court should accept review of the matter. Respondents already had the opportunity to assert these arguments, in their respective Responses to the Petitions for Discretionary Review. They do not get a second bite at the apple.

The meaning of the Court's holdings in *Roberson v. Perez*, 156 Wn.2d 33, 46–47, 123 P.3d 844 (2005), *Yonker v. DSHS*, 85 Wn. App. 71, 930 P.2d 958(1997), and *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006), have no bearing on whether CCM/CPM's reply brief is or isn't within the parameters of RAP 13.4(d). Similarly, the scope of

immunity under RCW 26.44.280 also has no bearing on whether CCM/CPM's reply brief is within the parameters of RAP 13.4(d). Furthermore, although the rules permit a petitioner to reply to new issues raised by the respondent, nothing in the rules permits a respondent to subsequently file a sur-reply refuting the petitioner's argument.

Respondents' presentation of *Roberson*, *Yonker*, *Lewis*, and RCW 26.44.280 is not only improper, but is also incorrect. Respondents cast *Yonker* and *Lewis* as decisions in where there was a "placement decision" to leave the children in an abusive home, entirely neglecting the *Lewis* Court's rejection of the "placement decision" limitation. Specifically, the Court stated as follows:

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.*

*Lewis*, 136 Wn. App. at 458.

With respect to RCW 26.44.280, Respondents represent that the statute legislatively narrows the implied cause of action of negligent investigation. RCW 26.44.280 applies only to emergent placement investigations, which did not even occur in this case. Furthermore, proper application of this statute was not something raised by either Petitioner, but

was instead an issue raised by Clark County in its response brief after the initial appeal decision.<sup>1</sup>

Finally, Respondents state that Mr. McCarthy (who did not even file a reply) is asking this Court to overturn its decision in *M.W. v. DSHS*, 149 Wn.2d 589, 70 P.3d 954 (2003). This is not what Petitioner asks. As articulated in his petition for review, Mr. McCarthy is asking that this Court clarify the relationship between *Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000), and *M.W.*, due to the sheer amount of confusion that these cases have engendered since decided. *Roberson* highlights this confusion, lumping together duty and specificity of damages.<sup>2</sup> 156 Wn.2d at 46.

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<sup>1</sup> “This case does not warrant this Court’s review, but, if review is granted, the court should address the following issues:

...


3. Even is a domestic violence arrest and/or no-contact order could constitute a “placement decision,” does RCW 26.44.280 afford immunity for “placement decisions” under such emergent conditions?

<sup>2</sup> As Justice Sanders pointed out in his dissent, this confusion also lumps factual questions in with issues of law, usurping the power of the jury. 156 Wn.2d at 52 (Sanders, J., dissenting).

#### IV. CONCLUSION

For the above reasons, Petitioner asks this Court to deny the Motion to strike, or alternatively to trike the improper argument submitted by the Respondents.

DATED this 20<sup>th</sup> day of September, 2016



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DECLARATION OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that I delivered the foregoing Answer to Repondents' Joint Motion to Strike CCM/CPM's Reply to the following by the means specified:

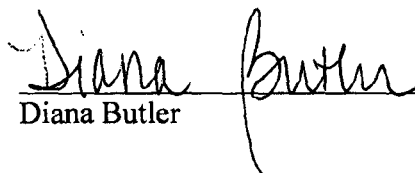
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DATED this 20<sup>th</sup> day of September, 2016 at Auburn, Washington.

  
\_\_\_\_\_  
Diana Butler

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Attached for filing please find Petitioner Fearghal McCarthy's Answer to Respondents' Joint Motion to Strike Reply.

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