NO. 99893-1

SUPREME COURT OF THE STATE OF WASHINGTON

MICHELLE A. DESMET and SANDOR KACSO, individually and as the General Guardians of their daughter, A.K., a minor,

Respondents,

v.

STATE OF WASHINGTON, by and through its agency the DEPARTMENT OF SOCIAL AND HEALTH SERVICES and the CHILD PROTECTIVE SERVICES DIVISION thereof, and YOLANDA A. DURALDE, M.D.,

Petitioners.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

RCW 4.24.595(2) directs that the Department of Children, Youth, and Families is "not liable for acts performed to comply" with shelter care and other dependency orders. Here, the Department complied with the juvenile court's order that Plaintiffs' baby be in out-of-home placement while the cause of her spiral femur fracture was investigated. Plaintiffs sued the Department based on their separation from their baby, alleging the Department's negligent investigation caused the separation. In defense, the Department asserted the immunity provided by RCW 4.24.595(2) because the baby's out-of-home placement was ordered by the juvenile court.

In the Court of Appeals published opinion, the two-judge majority held RCW 4.24.595(2) did not immunize the Department, reasoning that Plaintiffs' negligent investigation claim was focused on the investigation and information the Department provided (or did not provide) to the juvenile court, actions that were not court ordered. The dissent would have dismissed the claim, reasoning that court-ordered out-of-home placement cannot create Department liability under the statute's plain language, and relying on legislative history clearly expressing the intent "to use the immunity statute to ensure the Department errs on the side of child safety when placing children outside of the home." *Desmet v. State,* 17 Wn. App. 2d 300, 319, 485 P.3d 356, 367 (2021) (Glasgow, J., dissenting in part).

Review is warranted because the majority's construction of RCW 4.24.595(2) is contrary to its plain language, ignores legislative intent as shown by the legislative history, and renders meaningless the language directing that the Department is "not liable" for acts performed to comply with shelter care and other dependency orders. *See* RAP 13.4(b)(1), (4).

II. IDENTITY OF PETITIONER AND DECISION

Petitioner is the Washington State Department of Children, Youth, and Families.[1] The Department seeks review of the published decision in *Desmet v. State,* No. 53962-4-II (attached as Appendix).

III. ISSUE FOR REVIEW

RCW 4.24.595(2) states the Department is "not liable for acts performed to comply with" "shelter care and other dependency orders." Does RCW 4.24.595(2) immunize the Department from parents' claims for damages based on their baby's out-of-home placement where the juvenile court ordered the continuation of shelter care placement outside the home and the Department complied with that order?

IV. STATEMENT OF THE CASE

A. After Plaintiffs' Baby Suffered a Spiral Femur Fracture, the Juvenile Court Ordered Out-Of-Home Placement While the Cause of the Fracture was Investigated

A.K. was a three-month-old baby with a spiral fracture to her femur when law enforcement took her into protective custody in February 2016.

[1] Child Protective Services (CPS) transferred from the Department of Social and Health Services to the Department of Children, Youth, and Families in 2018. *Desmet*, 17 Wn. App. 2d at 302. This petition uses "Department" to refer to both agencies.

CP 1864-65. The Director of the Child Abuse Intervention Department at Mary Bridge Children's Hospital, Dr. Yolanda Duralde, assessed the broken femur as "'probable inflicted trauma'" and "stated that AK needed to be in a safe environment until an investigation could be done." *Desmet,* 17 Wn. App. 2d at 304 (quoting CP 986). A social worker at Mary Bridge reported the injury to CPS, which assigned a social worker to investigate. *Id.*; CP 990. That day, the social worker interviewed A.K.'s parents, Desmet and Kacso (Plaintiffs), and contacted King County Sheriff's Office (KCSO). *Id.* at 304. The social worker recorded Dr. Duralde's belief that the cause of injury "was most likely not the daycare." *Id*.; CP 990. KCSO took A.K. into protective custody. *Id.* On Kacso's suggestion, A.K. was released to Kacso's sister. CP 457-58, 488.

The Department petitioned the juvenile court for dependency of A.K. and requested out-of-home placement because "it is unknown how the injury occurred and it is most likely the injury occurred in the parents' care." CP 380. At the 72-hour shelter care hearing, Plaintiffs waived presentation of evidence. *Desmet,* 17 Wn. App. 2d at 304. The court entered an agreed shelter care order that placed A.K. with her aunt and authorized liberal supervised visitation to Plaintiffs. *Id*. at 305; CP 384-92. The agreed order stated A.K. was "in need of shelter care because there is reasonable cause to believe: [t]he release of the child would present a serious threat of

substantial harm to the child . . . as assessed by Petitioner." *Id.*; CP 386-87. Plaintiffs waived the 30-day shelter care hearing, so the order remained in effect. *Id.* Fact finding on the dependency petition was set for April 13. *Id.*

The next week, Plaintiffs moved to modify the shelter care order, asking the court to return A.K. to their home based on changed circumstances. CP 398-403. They filed results from polygraph tests and their experts' opinions interpreting the results. CP 114-20, 125-42. Their experts' opinions conflicted with that of the KCSO's expert. CP 1874. Plaintiffs also filed a report and an addendum by a forensic medical examiner who had reviewed A.K.'s chart and concluded A.K.'s injury likely did not result from child abuse. *Desmet*, 17 Wn. App. 2d at 305; CP 57-60.

The Department submitted Dr. Duralde's report from her March 15 physical examination of A.K. CP 1884-87. Dr. Duralde concluded: "It requires some force to break the femur and in this case, a twisting force resulting in a spiral fracture . . . . This injury is highly suspicious for physical abuse in an infant." CP 1886-87. The Department completed its investigation in late March but the law enforcement investigation remained open while the prosecutor decided whether to file criminal charges. CP 356, 442-45, 1861. That determination was made June 23, 2016. CP 1654.

Meanwhile, on April 12, the juvenile court heard argument on Plaintiffs' motion. *Id.* at 305. Plaintiffs, as well as the Department, had

submitted "voluminous documents," all of which the juvenile court considered in denying Plaintiffs' motion. *Id.;* CP 418. The court ruled that:

> [B]ased on the current evidence, the cause of [AK's] fracture remains unclear (whether forcible or accidental) and without a plausible explanation for same the court finds the reasonable cause standard for continuing shelter care (out of home placement) continues to be met.

Id. at 305 (quoting CP 419) (alteration in original). The order also ratified Plaintiffs' agreement to participate in a psychological evaluation. *Id*.

Plaintiffs subsequently agreed to two continuances of the dependency petition fact finding hearing. *Id.* at 305-06. They saw A.K. every day she was in her aunt's custody. CP 1104. On August 8, based on Plaintiffs' psychological evaluations, all parties agreed A.K. could return home. *Id.* at 306. After Plaintiffs completed court-ordered conditions, the court dismissed the dependency petition on October 24. *Id.* at 306.

B. Plaintiffs Sued the Department, Seeking Damages for Separation from Baby A.K.; the Trial Court Rejected Immunity Based on RCW 4.24.595(2)

Plaintiffs sued the Department, asserting negligent investigation, false light, and negligent infliction of emotional distress. CP 167-68. The Department moved for summary judgment, asserting immunity based on RCW 4.24.595(2).[2] *Desmet,* 17 Wn. App. 2d at 306. The trial court denied

[2] The Department also argued that Plaintiffs did not meet the elements of Plaintiffs' claims on the merits. CP 328-32, 337-39.

the motion, relying on *Petcu v. State,* 121 Wn. App. 36, 86 P.3d 1234 (2004), which it said it was "not aware [had] been superseded." CP 1841. *"Petcu* specifically says that this cause of action for negligent investigation can exist when there has been a harmful placement decision, and it doesn't matter if there has been [a court] order in place." CP 1841-42.

The Department moved for reconsideration on the ground that RCW 4.24.595 supersedes the cause of action in *Petcu* and *Tyner v. Dep't of Soc. & Health Servs.,* 141 Wn.2d 68, 1 P.3d 1148 (2000). The trial court entered final judgment under CR 54(b) to obtain appellate guidance on the scope of RCW 4.24.595(2) immunity on claims stemming from *Tyner.* CP 1981. The trial court concluded that all of Plaintiffs' claims, "regardless of their characterization, would be precluded by RCW 4.24.595" if the immunity in the statute applies to the facts of this case. CP 1980.

C. The Court of Appeals Majority and Dissent Interpreted "Acts Performed to Comply" with Court Orders Differently

In a published opinion, a two-judge majority of the Court of Appeals held that RCW 4.24.595(2) does not grant the Department immunity from Plaintiffs' negligent investigation claim because "the Department's investigation of the abuse claims against Desmet was not performed to comply with court orders." *Desmet,* 17 Wn. App. 2d at 313. The majority acknowledged that a claimant bringing a statutory negligent investigation

claim under RCW 26.44.050 "must show that the Department conducted an incomplete or biased investigation that resulted in a harmful placement decision." *Desmet,* 17 Wn. App. 2d at 309 (internal quotations removed). But it rejected the conclusion that RCW 4.24.595(2) grants immunity when "an alleged harmful placement decision results from a court order." *Desmet,* 17 Wn. App. 2d at 312. The majority declined to consider legislative history, dismissing it as "immaterial" because "the language actually used in RCW 4.24.595(2) is unambiguous." *Id.* at 313.

The dissent, relying in part on the legislative history of RCW 4.24.595, concluded: "[T]he Department is immune from payment of damages resulting from the placement of AK outside of her home as a result of a court order in this case[.]" *Desmet,* 17 Wn. App. 2d at 320 (Glasgow, J., dissenting in part). The dissent interpreted RCW 4.24.595(2)'s "acts performed to comply with" court orders to include the "agreed initial placement of AK outside of the Desmets' home with her aunt, and ongoing placement of AK with her aunt during the dependency[.]" *Id.* at 317. The dissent discussed the legislative history, including bill reports and committee testimony, and stated: "RCW 4.24.595(2) limits the *Tyner* negligent investigation cause of action, but that is exactly what the legislature intended the statute to do." *Id.* at 318.

The Department moved for reconsideration, urging the court to

consider RCW 4.24.595's legislative history because the differing constructions of the majority, the dissent, and the trial court showed that the statute's language could be ambiguous. Appellant's Mot. for Recons. (May 17, 2021). The motion was denied, leading to this petition for review.

V. THE PUBLISHED OPINION MERITS REVIEW UNDER RAP 13.4(b)(1) AND (4)

A. The Decision's Construction of RCW 4.24.595(2) Conflicts With This Court's Guidance on Effectuating Legislative Intent

RCW 4.24.595(2) provides: "The department of children, youth, and families and its employees *shall comply with the orders* of the court, including shelter care and other dependency orders, and *are not liable for acts performed to comply* with such court orders." (Emphasis added.) The Court of Appeals published decision warrants review because its construction of the statute conflicts with this Court's precedent guiding statutory construction and fails to effectuate the legislature's intent.

"The construction and meaning of a statute is also a question of law, which we review de novo." *Wash. Pub. Ports Ass'n v. Dep't of Rev.*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003). The purpose of statutory interpretation is to effectuate the legislature's intent. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). When possible, courts determine legislative intent solely from the plain language of the statute by considering the text of the provision, the context of the statute, related statutory provisions, and

the statutory scheme as a whole. *Id.* If the plain language is susceptible to more than one reasonable interpretation, it is ambiguous. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). To discern legislative intent when there is ambiguity, courts consider sources beyond the statute's plain language such as legislative history and relevant case law. *Id.*

1. RCW 4.24.595(2)'s plain language makes clear that the Department is not liable to Plaintiffs for damages due to A.K.'s court-ordered out-of-home placement

RCW 4.24.595(2) provides the Department is "not liable" for complying with placement orders of the juvenile court. This language plainly negates an essential element of Plaintiffs' negligent investigation cause of action—the harmful placement decision. The negligent investigation cause of action under RCW 26.44.050 requires an incomplete or biased investigation that results in a harmful placement decision, such as removing a child from a nonabusive home.[3] *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Where, as here, the Department complies with a court order to place a child in an out-of-home placement, the Department is "not liable" for that action.

The legislature's intent that RCW 4.24.595 limit the Department's liability is confirmed by RCW 26.44.280, enacted in the same bill:

[3] The other types of harmful placement decisions identified in *M.W.* are placing a child in an abusive home, or letting a child remain in an abusive home. *Id.* at 601.

> Consistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and mental health, and safety, and the requirement that the child's health and safety interests prevail over conflicting interests of a parent . . . the *liability* of [the Department] *to parents*, custodians, or guardians *accused of abuse of neglect is limited as provided in RCW 4.24.595*.

Engrossed Substitute Senate Bill (ESSB) 6555 § 14, 62nd Leg. Reg. Sess. (Wash. 2012) (codified at RCW 26.44.280) (emphasis added).

The Court of Appeals' unpublished decision in *Peterson* is probative. It recognized: "[T]he legislature has limited the scope of [the negligent investigation cause of action] by granting the Department immunity for emergent placement decisions and compliance with shelter care and dependency court orders." *Peterson v. Dep't of Soc. & Health Servs.*, 9 Wn. App. 2d 1079, 2019 WL 3430537 at *5 (July 30, 2019) (unpublished).[4] The *Peterson* court noted "the legislature is within its power to essentially overturn the court's creation of the negligent investigation cause of action by granting the Department immunity" because the cause of action is derived specifically from RCW 26.44.050. *Id.* at *6 (holding RCW 4.24.595(1) immunized Department from parent's negligent investigation claim based on alleged harmful placement prior to shelter care hearing). While this case involves RCW 4.24.595(2), *Peterson* is probative

[4] The *Peterson* decision is an unpublished, nonbinding authority that may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

because it shows the intent of the statute and recognizes the statute's plain meaning. The same analysis and conclusions apply to RCW 4.24.595(2).

In this case, the Department complied with the juvenile court's orders that A.K. be in out-of-home placement. The court's April order followed a full fact-finding hearing in which the court considered "voluminous documents" presented by both Plaintiffs and the Department. *Desmet*, 17 Wn. App. 2d at 305; CP 418. Under RCW 4.24.595(2)'s plain language, the Department is "not liable" for complying with the court's placement order. Thus, the statute immunizes the Department from Plaintiffs' claimed damages flowing from that out-of-home placement.

2. Legislative history confirms the legislature's intent for RCW 4.24.595(2) to address the conflict created by *Tyner*

At the very least, the plain language of RCW 4.24.595(2) is not unambiguous in the manner the majority decision determined, which renders the provision's language meaningless (see Section V.B below). "RCW 4.24.595(2) limits the *Tyner* negligent investigation cause of action, but that is exactly what the legislature intended the statute to do. . . . Legislative history, including bill reports and committee testimony . . . reflects that the legislature was concerned with eliminating the competing incentives that *Tyner* created." *Desmet,* 17 Wn. App. 2d at 318 (Glasgow, J., dissenting in part). The divergent analyses of the majority

and dissent illustrate potential ambiguity in RCW 4.24.595(2). *See also Peterson*, 219 WL 3430537 at *5 (recognizing RCW 4.24.595 creates some ambiguity). However, the statute's legislative history clearly demonstrates a strong, targeted legislative intent to reverse the expansion of Department liability effectuated by *Tyner*.

To understand the legislature's intent in enacting RCW 4.24.595, one must first understand the legal landscape prior to its enactment. RCW 26.44.050 requires investigation of allegations of child abuse or neglect (providing that "upon the receipt of a report alleging that abuse or neglect has occurred, the law enforcement agency or the department must investigate . . . ."). Implied from RCW 26.44.050 is the narrow negligent investigation claim applicable where the Department conducted an incomplete or biased investigation resulting in a harmful placement decision. *M.W.*, 149 Wn.2d at 601. As in all negligence claims, the plaintiff must establish the negligent conduct was the proximate cause of the damages. *See Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143 (1991).

In *Tyner*, a father brought a negligent investigation claim alleging damages for wrongful separation from his children. CPS had determined the allegations regarding sexual abuse by the father to be unfounded, but failed to provide their investigation finding to the juvenile court. Unaware of the finding, the court ordered the children to continue in shelter care. *Tyner,*

141 Wn.2d at 74. The *Tyner* Court recognized *for the first time* that the Department's duty to investigate under RCW 26.44.050 also extended to parents suspected of abuse or neglect as well as to the child victims. *Tyner,* 141 Wn.2d at 82. It then held that a court order "will act as superseding intervening cause, precluding liability of the State for negligent investigation, *only* if all material information has been presented to the court and reasonable minds could not differ as to this question." *Id.* at 88 (emphasis added); *see also Petcu,* 121 Wn. App. at 56 (Department can be legally responsible for a parent's court-ordered separation from a child if the court has been deprived of a material fact due to the caseworker's faulty investigation).

Tyner and *Petcu* created a conflict between the Department's responsibilities to a potentially abused or neglected child and to the parent suspected of potential abuse or neglect. The Department could be held liable for failing to remove the child from a harmful situation, or for removing the child if hindsight showed the situation had not been harmful, or for following a court order placing the child while CPS was still investigating.

3. The legislature enacted RCW 4.24.595 to resolve the conflicting priorities created by *Tyner* and to make clear that child safety is paramount

The legislative history of RCW 4.24.595 leaves no doubt that it was intended to respond to *Tyner*. As prime bill sponsor, Representative Ruth

Kagi and others expressed, "the intent behind the immunity language was to limit the impact of *Tyner* and to use the immunity statute to ensure the Department errs on the side of child safety when placing children outside of the home." *Desmet,* 17 Wn. App. 2d at 319 (Glasgow, J. dissenting in part).

Bill reports on ESSB 6555 specifically referenced the *Tyner* decision and the duty the *Tyner* Court found that runs to parents suspected of child abuse, as part of the background the bill addressed. *See* Final Bill Report ESSB 6555 at 3, 62nd Leg. Reg. Sess. (Wash. 2012). The legislature was informed of the procedures for law enforcement and the Department to respond to reports of alleged child abuse or neglect, including procedures for emergent removal of children and shelter care placement by the court. *Id.* In the section titled "Government Liability," the Report indicates the bill will "provide that a child's health and safety interests should prevail over conflicting legal rights of a parent . . . ." *Id.* at 6. It states the intent that "the safety of the child [be the Department's] paramount concern when determining whether a parent and child should be separated during or immediately following investigation of alleged abuse or neglect." *Id.* It also recites the language codified at RCW 4.24.595 and 26.44.280. *Id.*

The majority decision refused to consider or give effect to the legislative history. The dissent did consider it and concluded that "the legislature struck a balance by creating limited immunity that eliminates the

possibility of damages arising from placement of a child after allegations of child abuse . . . it removes the threat of having to pay damages if a jury later finds, with the benefit of hindsight, that the out-of-home placement was not actually necessary." *Desmet*, 17 Wn. App. 2d at 319 (Glasgow, J., dissenting in part).

That is precisely the Department's situation here: the Department acted on information known at the time in contesting Plaintiffs' motion for return of A.K. *Id.* at 305. In hindsight, a jury could find continued out-of-home placement was not necessary, as psychological evaluations ultimately concluded that Desmet and Kacso would not present a risk to A.K. if she returned home, the dependency petition was dismissed, and CPS reversed its investigation findings. Because the State's paramount duty is to the child, the legislature intended the Department be "not liable" for erring on the side of protecting baby A.K. while her injury was unexplained and the risk to her from her parents had not yet been evaluated to the court's satisfaction.

The majority decision's construction of RCW 4.24.595(2) invades the prerogative of the legislature to determine what suits may be brought against the Department. The Washington Constitution vests the legislature with the authority to "direct by law, in what manner, and in what courts, suits may be brought against the state." Const., art. II, § 26. The legislature has the power to restrict or eliminate causes of action derived from statute.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 651, 771 P.2d 711 (1989). Enacting a statute that limits the liability of a state agency lies squarely within the legislature's "sphere of authority." *Hale v. Wellpinit Sch. Dist. 49*, 165 Wn.2d 494, 509-10, 198 P.3d 1021, 1028-29 (2009).

The legislature intended RCW 4.24.595(2) to "restore what the law was prior to [the] *Tyner* decision." *Desmet*, 17 Wn. App. 2d at 319 (Glasgow, J., dissenting in part). This Court should grant review and effectuate the legislature's intent.

B. The Decision Renders RCW 4.24.595(2) Meaningless, in Conflict With This Court's Rules for Statutory Interpretation

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Spokane Cnty. v. Dep't of Fish & Wildlife,* 192 Wn.2d 453, 458, 430 P.3d 655 (2018). By making the Department "not liable" for acts performed to comply with shelter care orders and other dependency orders, RCW 4.24.595(2) negates the harmful placement element of the negligent investigation cause of action from the initial shelter care hearing through the adjudication of the dependency, creating immunity for such claims.

The majority concludes that RCW 4.24.595(2)'s "language is clear: immunity extends only to the Department's acts *performed to comply with court orders.*" *Desmet,* 17 Wn. App. 2d at 313. However, no stand-alone

cause of action imposes liability on the Department for the act of placing a child pursuant to court order. The majority's construction of the statutory language thus makes the Department "not liable" under circumstances where the Department already has no liability exposure. This renders the statute's grant of immunity effectively meaningless.

The majority further concludes that RCW 4.24.595(2) does not provide immunity for Plaintiffs' negligent investigation claim, because "the Department's investigation of the abuse claims against Desmet was not performed to comply with court orders." *Desmet,* 17 Wn. App. 2d at 313. While this statement is technically accurate, it ignores what the majority itself recognized, the "negligent investigation cause of action is an exception to the general rule that there is no tort claim for negligent investigation." *Id.* at 309. There is no stand-alone negligent investigation claim without a resulting harmful placement decision. *M.W.,* 149 Wn.2d at 602 (elements of negligent investigation claim are a biased or incomplete investigation resulting in a harmful placement decision). Plaintiffs' negligent investigation claim as contemplated by the majority—focused solely on the Department's investigatory conduct—is not cognizable.

Plaintiffs have argued that RCW 4.24.595(2) provides no immunity for negligent investigation where the Department misrepresented crucial evidence to the court resulting in the court's harmful placement decision.

Resp't Br. at 23-24 (Apr. 3, 2020). The legislature anticipated such an argument and addressed it by giving Department witnesses providing reports and recommendations to the court "the same witness immunity as would be provided to any other witness." RCW 4.24.595(2). The immunity for acts performed to comply with court orders "would not protect the Department or its employees if they fabricated evidence or committed perjury." *Desmet,* 17 Wn. App. 2d at 319 (Glasgow, J., dissenting in part). For misrepresenting evidence to the court, the remedy is a criminal charge of perjury, not a civil suit for damages related to harmful placement, *i.e.*, a negligent investigation claim. *See Bruce v. Byrne-Stevens & Assoc. Eng'rs., Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989) (witness's reliability is ensured by oath, cross-examination, and threat of perjury).

The negligent investigation cause of action requires the essential element of a harmful placement decision, proximately caused by the negligent breach of the duty to investigate. RCW 4.24.595(2) precludes establishing the harmful placement element by making the Department "not liable" for acts performed to comply with shelter care orders and other dependency orders, *i.e.*, court-ordered placements. "[P]lacement in compliance with shelter care and dependency orders cannot be the basis for liability for damages under the plain language of the statute." *Desmet,* 17 Wn. App. 2d at 317 (Glasgow, J., dissenting in part).

Under the majority's interpretation, the "not liable" language in RCW 4.24.595 is rendered meaningless because there is no basis to impose liability on the Department for the actions the majority suggests evade the statute's "not liable" language. Review of this published decision is warranted.

C. The Majority Decision Implicates the Substantial Public Interest in Ensuring Child Health and Safety is the Paramount Concern of the Department

More than 30 years ago the legislature declared a policy of making the child's health and safety the State's "paramount concern," above the legal rights of the parents. RCW 13.34.020. The legislature amended the Juvenile Court Act to prioritize child safety "[w]hen the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail." Laws of 1987, ch. 524, § 2. The legislature reaffirmed this policy choice after this Court's *Tyner* decision, once again making clear that the Department's paramount concern is protecting children. The legislature limited the Department's liability to parents, custodians, or guardians accused of child abuse or neglect "[c]onsistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and mental health, and safety. . . ." RCW 26.44.280. The majority's decision below thwarts the legislature's intent to make child safety the Department's

paramount concern by allowing accused parents to claim money damages after the fact, based on the Department's actions to protect a child from risks of harm *perceived at the time* and its compliance with court orders.

Other jurisdictions have recognized the crucial importance of immunizing social workers and their employer agencies from civil claims for damages. They express concerns regarding the potential for a "catastrophic effect" on persons in the "field of preventing child abuse," observing: "What reasonable DYFS employee, in deciding whether to pursue an allegation of child abuse, would fail to ask himself whether he wants to end up at risk in a similar lawsuit?" *N.E. for J.V. v. State Dep't of Children & Families, Div. of Youth & Family Servs.,* 449 N.J. Super. 379, 408, 158 A.3d 44 (2017) (quoting *Delbridge v. Shaeffer,* 238 N.J. Super. 323, 348-49, 569 A.2d 872 (1989)).

VI. CONCLUSION

This Court should grant review to effectuate the legislature's intent in enacting RCW 4.24.595(2), to give full meaning to the statute's language, and to ensure that the Department is able to implement the important policy of protecting child safety without later incurring damages for separation of the family.

RESPECTFULLY SUBMITTED this 9th day of August, 2021.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the original of the preceding "Petition for Review" with the Appendix to be electronically filed in the Washington Supreme, and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

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APPENDIX

17 Wash.App.2d 300
Court of Appeals of Washington, Division 2.

Michelle A. DESMET and Sandor Kacso, individually and as the General Guardians of their daughter, A.K., a minor, Respondents,
v.
STATE of Washington, BY AND THROUGH its agency the DEPARTMENT OF SOCIAL AND HEALTH SERVICES and the Child Protective Services Division thereof and Yolanda A. Duralde, M.D., Appellant.

No. 53962-4-II
|
Filed April 27, 2021

Synopsis

Background: Parents of child with a femur fracture who was placed into protective custody pending a dependency proceeding brought action against State, Department of Social and Health Services (DSHS), and Child Protective Services (CPS) division alleging negligent investigation, negligent infliction of emotional distress, and invasion of privacy by false light. The Superior Court, Pierce County, Shelly K. Speir, J., denied State's, DSHS's, and CPS's motions for summary judgment. State, DSHS, and CPS appealed.

Holdings: The Court of Appeals, Maxa, C.J., held that:

[1] DSHS was not immune from liability, under statute granting immunity to DSHS and its employees for acting to comply with court orders in dependency proceedings, for parents' negligent investigation claim;

[2] DSHS was not immune from liability, under statute granting immunity to DSHS and its employees for acting to comply with court orders in dependency proceedings, for parents' negligent infliction of emotional distress claim; and

[3] DSHS was not immune from liability, under statute granting immunity to DSHS and its employees for acting to comply with court orders in dependency proceedings, for parents' invasion of privacy by false light claim.

Affirmed and remanded.

Glasgow, J., filed separate opinion dissenting in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (22)

[1] **Appeal and Error** De novo review

When a summary judgment order is based on an issue of statutory interpretation, the Court of Appeals reviews the trial court's interpretation of the statute de novo.

[2] **Infants** Right of action, parties, and standing

A cause of action against the Department of Social and Health Services (DSHS) for negligent investigation of child abuse allegations is an exception to the general rule that there is no tort claim for negligent investigation. Wash. Rev. Code Ann. § 26.44.050.

[3] **Infants** Investigations, inspections, and entry therefor

To prevail on a negligent-investigation cause of action against Department of Social and Health Services (DSHS), the claimant must show that the DSHS conducted an incomplete or biased investigation that resulted in a harmful placement decision. Wash. Rev. Code Ann. § 26.44.050.

[4] **Infants** Investigations, inspections, and entry therefor

For purposes of a negligent-investigation cause of action, a "harmful placement decision" includes removing a child from a non-abusive home, placing a child in an abusive home, or letting a child remain in an abusive home. Wash. Rev. Code Ann. § 26.44.050.

[5] **Infants** Investigations, inspections, and entry therefor

To prevail on a negligent-investigation cause of action, a claimant must show that the Department of Social and Health Services' (DSHS) negligent investigation was a proximate cause of a harmful placement decision. Wash. Rev. Code Ann. § 26.44.050.

[6] **Infants** Investigations, inspections, and entry therefor

For purposes of a negligent-investigation cause of action, a negligent investigation may be the cause in fact of a harmful placement even when a court order imposes that placement. Wash. Rev. Code Ann. § 26.44.050.

[7] **Infants** Investigations, inspections, and entry therefor

Liability for negligent investigation by Department of Social and Health Services (DSHS) when a court order imposes a harmful placement depends upon what information DSHS provides to the court; namely, a court order will act as a superseding cause that cuts off liability only if all material information has been presented to the court. Wash. Rev. Code Ann. § 26.44.050.

[8] **Infants** Hearing; counsel

In a negligent investigation case against Department of Social and Health Services (DSHS), "materiality" of information presented to a court for an order leading to a harmful place in a dependency proceeding generally is a question of fact unless reasonable minds could only reach one conclusion. Wash. Rev. Code Ann. § 26.44.050.

[9] **Statutes** Construction based on multiple factors

To determine legislative intent for purposes of statutory interpretation, the Court of Appeals looks at the plain language of the statute, considers the text of the provision, the context of the statute, any related statutory provisions, and the statutory scheme as a whole.

[10] **Constitutional Law** Judicial rewriting or revision

Statutes Construction as written

The Court of Appeals must apply a statute as written; it cannot rewrite plain statutory language under the guise of construction.

[11] **Statutes** What constitutes ambiguity; how determined

For purposes of statutory interpretation, if the plain language of a statute is susceptible to more than one reasonable interpretation, then the statute is ambiguous.

[12] **Courts** Previous Decisions as Controlling or as Precedents

Statutes Purpose and intent; determination thereof

Statutes Plain, literal, or clear meaning; ambiguity

Court of Appeals resolves ambiguity in a statute by considering outside sources that may indicate legislative intent, including principles of statutory construction, legislative history, and relevant case law.

[13] **Infants** Immunity

States Particular Actions

Department of Social and Health Services (DSHS) was not immune from liability, under statute granting immunity to DSHS and its employees acting to comply with court orders in dependency proceedings, for parents' negligent investigation claim alleging failure to conduct a complete and accurate investigation and providing false information and misrepresenting

evidence to juvenile court, which then ordered child to be placed outside parents' home; DSHS's investigation of child abuse claims against parents whose three-month-old child was diagnosed with a femur fracture was not performed to comply with court orders, its duty to investigate those allegations arose statutorily, independent of any court order, and it did not provide information to court in order to comply with a court order. Wash. Rev. Code Ann. § 4.24.595(2).

[14] **Infants** Immunity
Public Employment Particular torts
States Particular Actions

Immunity from liability granted to Department of Social and Health Services (DSHS) and its employees acting to comply with court orders in dependency proceedings extends only to DSHS's acts performed to comply with those court orders, not investigations underlying the court orders. Wash. Rev. Code Ann. § 4.24.595(2).

[15] **Infants** Child abuse reports and investigations

Department of Social and Health Services' (DSHS) duty to investigate allegations of child abuse arises statutorily, independent of any court order. Wash. Rev. Code Ann. § 26.44.050.

[16] **Infants** Immunity
States Torts

Department of Social and Health Services (DSHS) was not immune from liability, under statute granting immunity to DSHS and its employees acting to comply with court orders in dependency proceedings, for parents' negligent infliction of emotional distress claim arising from DSHS's alleged negligent investigation into child abuse allegations involving parent's three-month-old child who was diagnosed with a femur fracture and a founded finding against mother which was later replaced with unfounded finding, where the alleged negligent conduct did not arise from compliance with a court order. Wash. Rev. Code Ann. § 4.24.595(2).

[17] **Infants** Immunity
States Torts

Department of Social and Health Services (DSHS) was not immune from liability, under statute granting immunity to DSHS and its employees acting to comply with court orders in dependency proceedings, for parents' invasion of privacy by false light claim arising from DSHS's presentment of a founded finding related to three-month-old child's femur fracture which was later replaced with unfounded finding, where DSHS's issuance of a founded finding against mother was not performed to comply with a court order. Wash. Rev. Code Ann. § 4.24.595(2).

[18] **Damages** Negligent Infliction of Emotional Distress

A negligent infliction of emotional distress claim requires proof of negligence, namely, duty, breach of the standard of care, proximate cause, and damage, and objective symptomatology.

[19] **Damages** Nature of Injury or Threat
Damages Mental suffering and emotional distress

For purposes of establishing negligent infliction of emotional distress, objective symptomology requires emotional distress that is susceptible to medical diagnosis and can be proved through medical evidence.

[20] **Torts** False Light

An invasion of privacy by false light claim arises when a defendant publishes statements that place a plaintiff in false light if (1) false light would be highly offensive and (2) defendant knew of or recklessly disregarded falsity of publication and subsequent false light it would place plaintiff in.

[21] **Infants** Judgment, remedies, and relief

Court of Appeals would decline to review Department of Social and Health Services' (DSHS) argument that to the extent its employees provided false testimony to juvenile court in dependency proceedings against parents, DSHS was immune from liability under the witness immunity provision of statute governing immunities in dependency proceedings, for parents' negligent investigation, negligent infliction of emotional distress claim, and invasion of privacy by false light claim, where the DSHS did not make that argument in the trial court, and DSHS did not raise that claim until its reply brief. Wash. Rev. Code Ann. § 4.24.595(2); Wash. R. App. P. 2.5(a).

[22] **Infants** Judgment, remedies, and relief

Court of Appeals would decline to review Department of Social and Health Services' (DSHS) argument that it was entitled to summary judgment on the merits of parents' negligent investigation claim following dependency proceedings involving their three-month-old child who was diagnosed with a fractured femur, where DSHS's arguments went beyond the scope of trial court's order, which was limited to whether DSHS had immunity against parents' claims under statute granting immunity to DSHS and its employees for acting to comply with court orders in dependency proceedings. Wash. Rev. Code Ann. § 4.24.595(2); Wash. Super. Ct. Civ. R. 54(b).

****359** Appeal from Pierce County Superior Court, Docket No: 18-2-10502-7, Honorable Shelly Speir, Judge

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PUBLISHED OPINION

Maxa, J.

***302** ¶ 1 The State of Washington, its agency the Department of Social and Health Services (DSHS), and the Child Protective Services (CPS) division (collectively the Department) [1] appeal the trial court's denial of their summary judgment motion seeking the dismissal of a lawsuit filed against the Department by Michelle Desmet and Sandor Kacso. The Department asserted that it had immunity under RCW 4.24.595(2) and therefore the lawsuit must be dismissed.

¶ 2 The lawsuit arose from a series of events that occurred after Desmet and Kacso's three-month-old daughter, AK, was diagnosed with a fracture of her femur. Because there was a concern that the injury was ****360** caused by nonaccidental trauma, the King County Sheriff's Office (KCSO) placed AK into protective custody and CPS initiated a dependency proceeding. At the 72-hour shelter care ***303** hearing, the juvenile court ordered that AK be placed in the care of Kacso's sister. The Department opposed Desmet and Kacso's subsequent motion to return AK to their home, and AK remained in shelter care for approximately six months. Meanwhile, CPS had issued a "founded" letter to Desmet stating that it was more likely than not that Desmet had abused AK. CPS ultimately dismissed the dependency proceeding and later replaced the founded finding with an unfounded finding.

¶ 3 Desmet and Kacso's lawsuit alleged that the Department's negligent investigation resulted in AK being prevented from returning to their home. They also asserted claims for negligent infliction of emotional distress and invasion of privacy by false light. The trial court denied the Department's summary judgment motion regarding immunity under RCW 4.24.595(2), which states that the Department and its employees are not liable for acts performed to comply with court shelter care and dependency orders. The court then entered an order under CR 54(b) directing entry of a final

judgment on the issue of the Department's claim of immunity under RCW 4.24.595(2).

¶ 4 We hold that RCW 4.24.595(2) does not apply to Desmet and Kacso's negligent investigation claim or to their negligent infliction of emotional distress and false light claims. We decline to address the Department's arguments that summary judgment is appropriate on the merits of the negligent investigation claim because that issue is beyond the scope of the trial court's CR 54(b) order. Accordingly, we affirm the trial court's order denying the Department's summary judgment motion on the issue of immunity under RCW 4.24.595(2) for Desmet and Kacso's claims and remand for further proceedings.

FACTS

Background

¶ 5 Desmet and Kacso were parents of a baby named AK who was born in October 2015. Desmet took maternity ***304** leave when AK was born. After Desmet went back to work on February 1, 2016, AK began to attend daycare.

¶ 6 After three days at daycare, AK became fussy and sick. Desmet and Kacso took AK to urgent care. The examining doctor diagnosed her with an upper respiratory infection. The musculoskeletal exam was normal. The next day, Desmet stayed home with AK instead of sending her back to daycare.

¶ 7 On February 5, Desmet noticed that AK's left leg looked swollen and felt firm to the touch. Desmet took AK to the emergency department at Mary Bridge Children's Hospital that morning. X-rays revealed that AK had a broken femur. Desmet and Kacso were unable to provide an explanation for AK's injury. Dr. Yolanda Duralde, the director of the Child Abuse Intervention Department at Mary Bridge, reviewed AK's chart and her assessment was "probable inflicted trauma." Clerk's Papers (CP) at 986. Dr. Duralde stated that AK needed to be in a safe environment until an investigation could be done.

¶ 8 A social worker at Mary Bridge reported the injury to CPS. CPS assigned Jennifer Schooler, a social worker, to the case. Schooler interviewed Desmet and Kacso that day. She also recorded Dr. Duralde's belief that the chance that the injury occurred at daycare was minimal.

¶ 9 The KCSO also was contacted. Officers arrived later that evening and interviewed Desmet and Kacso. The officers then decided to take AK into protective custody. Desmet and Kacso were very upset. Kacso's sister agreed to take AK into her custody.

Dependency Proceedings

¶ 10 On February 9, Schooler filed a dependency petition with the juvenile court and requested out-of-home placement. On February 10, Desmet and Kacso appeared in juvenile court for the 72-hour shelter care hearing and waived the presentation of evidence. The court entered an ***305** agreed shelter care order, which stated, "The child is in need of shelter care because there is reasonable cause to believe: [t]he release of the child would present a serious threat of substantial ****361** harm to the child ... as assessed by Petitioner." CP at 386-87. The shelter care order placed AK with Kacso's sister and authorized liberal supervised visitation rights to Desmet and Kacso.

¶ 11 Desmet and Kacso waived the 30-day shelter care hearing, scheduled for March 8. As a result, the February 10 shelter care order remained in effect. The fact-finding hearing for the dependency was scheduled for April 13.

¶ 12 Desmet and Kacso filed a motion to modify the shelter care order and to return AK to their home. Their supporting evidence included both parents passing polygraph tests, Dr. Duralde's notes stating that this type of injury could be caused by an accident, and an expert opinion from a pediatric orthopedic physician who concluded that AK's injury likely did not result from child abuse. DSHS opposed the motion. DSHS submitted the declaration of a DSHS supervisor on AK's case, and various exhibits.

¶ 13 On April 12, the juvenile court heard oral argument regarding Desmet and Kacso's motion to return AK home and denied the motion. The court's order noted the voluminous documents that both parties had submitted. The court stated that "based on the current evidence, the cause of [AK's] facture remains unclear (whether forcible or accidental) and without a plausible explanation for same the court finds the reasonable cause standard for continuing shelter care (out of home placement) continues to be met." CP at 419. The order stated that the shelter care order remained in full force and effect, and that Desmet and Kacso had agreed to participate in psychological evaluations as soon as possible.

¶ 14 Desmet and Kacso agreed to two continuances of the fact-finding hearing through August 8. They subsequently completed psychological evaluations. On August 8, all parties ***306** agreed that AK could return home based on the results of the evaluations.

¶ 15 The Department ultimately terminated the dependency action on October 24 based on Desmet and Kacso's completion of various court-ordered conditions.

CPS Founded Letter

¶ 16 Meanwhile in March, CPS officially had concluded that the allegations of negligent treatment or maltreatment were founded. On March 31, CPS sent a letter informing Desmet of the results of its investigation into AK's injury. The letter stated that CPS had found that Desmet's alleged abuse of AK had occurred. The letter explained that a "founded" determination meant that CPS determined that it was more likely than not that the abuse and/or neglect occurred and that Desmet was the person responsible for the abuse and/or neglect. The founded finding was "based on information collected during the CPS investigation including medical records, polygraph results, law enforcement reports, and expert testimony." CP at 443.

¶ 17 Desmet contested the founded determination in an administrative appeal. The Department eventually changed the founded letter to unfounded several months after the dependency action was dismissed.

Desmet and Kacso's Lawsuit

¶ 18 Desmet and Kacso filed a lawsuit against the State, the Department and CPS, asserting claims for negligent investigation, negligent infliction of emotional distress, and invasion of privacy by false light.

¶ 19 The Department filed a summary judgment motion to dismiss all claims, arguing among other things that it had complete immunity against all of Desmet and Kacso's claims under RCW 4.24.595(2). The trial court denied the Department's motion. In an order denying reconsideration, the court directed entry of a final judgment under CR 54(b) ***307** on the issue of the Department's claim of immunity under RCW 4.24.595(2). The Department appeals the trial court's denial of its summary judgment motion.

ANALYSIS

A. SUMMARY JUDGMENT STANDARD

[1] ¶ 20 We review summary judgment orders de novo. *Freedom Found. v. Bethel Sch. Dist.*, 14 Wash. App. 2d 75, 80, 469 P.3d 364 (2020). Similarly, when a summary judgment order is based on an issue of statutory ****362** interpretation, we review the trial court's interpretation of the statute de novo. *Guillen v. Pearson,* 195 Wash. App. 464, 470, 381 P.3d 149 (2016). This appeal turns on interpretation of RCW 4.24.595(2), not on any factual issues. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Freedom Foundation*, 14 Wash. App. 2d at 80, 469 P.3d 364; CR 56(c).

B. LEGAL BACKGROUND

¶ 21 Chapter 26.44 RCW governs the duty to report child abuse or neglect. Chapter 13.34 RCW governs dependency actions. The legislature enacted chapter 26.44 RCW and chapter 13.34 RCW as part of a comprehensive child welfare system that is guided by the principle that the child's health and safety is of paramount concern. *See* RCW 26.44.010; RCW 13.34.020; *see also* *H.B.H. v. State*, 192 Wash.2d 154, 164, 429 P.3d 484 (2018). "When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail." RCW 13.34.020.

1. Investigation of Child Abuse or Neglect

¶ 22 In 2016, the Department had certain responsibilities regarding the investigation of suspected child abuse or neglect. Former RCW 26.44.030(1)(a) (2015); former ***308** RCW 26.44.050 (2012). Currently, the Department of Children, Youth and Families (DCYF) has those responsibilities. RCW 26.44.020(10); RCW 26.44.030(13)(a); RCW 26.44.050.

¶ 23 When persons in certain listed positions, including nurses and social service counselors, have reasonable cause to believe that a child has been abused or neglected, they are required to report the incident to law enforcement or to the Department. RCW 26.44.030(1)(a). A law enforcement officer may take a child into custody without a court order

"if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order." RCW 26.44.050. Once a report has been filed, RCW 26.44.050 requires law enforcement or the Department to investigate and "where necessary to refer such report to the court."

¶ 24 After the investigation has been completed, the Department must make a finding that the report of child abuse or neglect is founded or unfounded. RCW 26.44.030(13)(a). "Founded" is defined as "the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur." RCW 26.44.020(13). "Unfounded" is defined as "the determination following an investigation by the department that available information indicates that, more likely than not, child abuse or neglect did not occur, or that there is insufficient evidence for the department to determine whether the alleged child abuse did or did not occur." RCW 26.44.020(28). The person named as an alleged perpetrator in the founded letter may challenge that finding. WAC 110-30-0220.

2. Dependency Actions

¶ 25 Under RCW 13.34.040(1), the Department may initiate a dependency action when a person suspects that a child has been abused or neglected by a legal parent, guardian, or other custodian. After a dependency petition has ***309** been filed, the juvenile court must set a fact-finding hearing within 75 days to determine if a child is dependent. RCW 13.34.070(1). A child is dependent when he or she has been abandoned, abused or neglected by his or her legal guardian, has no legal guardian who is capable of adequately caring for the child, or is receiving extended foster care services. RCW 13.34.030(6).

¶ 26 RCW 13.34.065(1)(a) requires that a shelter care hearing take place within 72 hours of a child's removal from his or her home. "The purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending." RCW 13.34.065(1)(a). At the shelter care hearing, all parties may present testimony regarding the need or lack of need for shelter care. RCW 13.34.065(2)(b). After the juvenile court determines that a child should ****363** be placed in shelter care, there is a 30-day second shelter care hearing to evaluate whether the shelter care order should be maintained. RCW 13.34.065(7)(a).

3. Negligent Investigation Cause of Action

[2] ¶ 27 The Supreme Court in *Tyner v. Department of Social and Health Services* recognized that parents suspected of child abuse have an implied cause of action against the Department under RCW 26.44.050 for negligent investigation of child abuse allegations. 141 Wash.2d 68, 82, 1 P.3d 1148 (2000). This negligent investigation cause of action is an exception to the general rule that there is no tort claim for negligent investigation. *McCarthy v. County of Clark*, 193 Wash. App. 314, 328-29, 376 P.3d 1127 (2016).

[3] **[4]** **[5]** ¶ 28 To prevail on a negligent investigation cause of action, the claimant must show that the Department conducted "an incomplete or biased investigation that 'resulted in a harmful placement decision.' " *Id.* at 329, 376 P.3d 1127 (quoting *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wash.2d 589, 601, 70 P.3d 954 (2003)). "A harmful placement decision includes 'removing a child from a nonabusive home, placing a child in an abusive ***310** home, or letting a child remain in an abusive home.' " *McCarthy*, 193 Wash. App. at 329, 376 P.3d 1127 (quoting *M.W.*, 149 Wash.2d at 602, 70 P.3d 954)). A claimant also must show that the Department's negligent investigation was a proximate cause of the harmful placement decision. *McCarthy*, 193 Wash. App. at 329, 376 P.3d 1127.

[6] **[7]** **[8]** ¶ 29 "A negligent investigation may be the cause in fact of a harmful placement even when a court order imposes that placement." *Id.* "Liability in this situation depends upon what information ... [the Department] provides to the court. [Citation omitted.] A court order will act as a superseding cause that cuts off liability 'only if all material information has been presented to the court.' " *Id.* at 329-30, 376 P.3d 1127 (quoting *Tyner*, 141 Wash.2d at 88, 1 P.3d 1148). Materiality of information generally is a question of fact unless reasonable minds could only reach one conclusion. *McCarthy*, 193 Wash. App. at 330, 376 P.3d 1127.

C. IMMUNITY UNDER RCW 4.24.525(2)

¶ 30 The Department argues that it is immune from liability for Desmet and Kacso's negligent investigation, negligent infliction of emotional distress and false light claims under RCW 4.24.595(2), which states that the Department and its employees are not liable for acts performed to comply with court shelter care and dependency orders. We disagree.

1. Statutory Interpretation

[9] **[10]** ¶ 31 We review questions of statutory interpretation de novo. *Jametsky v. Olsen*, 179 Wash.2d 756, 761, 317 P.3d 1003 (2014). The primary goal of statutory interpretation is to determine and give effect to the legislature's intent. *Gray v. Suttell & Assocs.*, 181 Wash.2d 329, 339, 334 P.3d 14 (2014). To determine legislative intent, we look at the plain language of the statute, consider the text of the provision, the context of the statute, any related statutory provisions, and the statutory scheme as a whole. *Id.* We must apply the statute as written; "we cannot rewrite plain statutory language ***311** under the guise of construction." *McColl v. Anderson*, 6 Wash. App. 2d 88, 91, 429 P.3d 1113 (2018). If the plain meaning of the statute is unambiguous, we apply that meaning. *Ronald Wastewater Dist. v. Olympic View Water and Sewer Dist.*, 196 Wash.2d 353, 364, 474 P.3d 547 (2020).

[11] **[12]** ¶ 32 If the plain language of the statute is susceptible to more than one reasonable interpretation, then the statute is ambiguous. *Jametsky v. Olsen*, 179 Wash.2d 756, 761, 317 P.3d 1003 (2014). We resolve ambiguity by considering outside sources that may indicate legislative intent, including principles of statutory construction, legislative history, and relevant case law. *Id.*

2. Statutory Language

¶ 33 RCW 4.24.595 grants immunity in two different situations. First, RCW 4.24.595(1) provides that absent gross negligence, governmental entities and their employees are "not liable in tort for any of their acts or ****364** omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW." The statute defines "emergent placement investigations" as "those conducted prior to a shelter care hearing." RCW 4.24.595(1). Desmet and Kacso's claims relate to the Department's actions after the initial shelter care hearing. Therefore, there is no dispute that RCW 4.24.595(1) does not apply here.

¶ 34 Second, RCW 4.24.595(2) states that the Department and its employees "shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for *acts performed to comply with such court orders*." (Emphasis added.) RCW 4.24.595(2) also states that "[i]n providing reports and recommendations to the court," the Department's employees "are entitled to the same witness immunity as would be provided to any other witness."

¶ 35 When the legislature enacted RCW 4.24.595 in 2012, it also enacted RCW 26.44.280. That statute states:

> Consistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and ***312** mental health, and safety, and the requirement that the child's health and safety interests prevail over conflicting legal interests of a parent, custodian, or guardian, the liability of governmental entities, and their officers, agents, employees, and volunteers, to parents, custodians, or guardians accused of abuse or neglect is limited as provided in RCW 4.24.595.

RCW 26.44.280.

3. Negligent Investigation Claim

[13] ¶ 36 RCW 4.24.595(2) grants immunity to the Department for "acts performed to comply" with court shelter care and dependency orders. The Department argues that this language provides immunity from negligent investigation liability any time an alleged harmful placement decision results from a court order.

¶ 37 But the plain language of RCW 4.24.595(2) is inconsistent with this argument. Desmet and Kacso's negligent investigation claim is not based on the Department's compliance with court orders. Instead, their claim is based on the Department's alleged failure to conduct a complete and accurate investigation of the abuse allegation against

Desmet and the Department's alleged act of providing false information and misrepresenting evidence to the juvenile court. No court order directed the Department to engage in such conduct.

¶ 38 The Department emphasizes that at all times it was complying with the juvenile court's orders regarding the out-of-home placement of AK and when she could return home. But Desmet and Kacso are not claiming that the Department should have disregarded the court's placement orders. They are claiming that the Department's negligent investigation caused the court to issue those orders.

¶ 39 The Department also argues that RCW 4.24.595(2) reflects the legislature's determination that child safety should prevail over the rights of the child's parents. The Department cites RCW 26.44.280, which states that because a child's health and safety interests prevail over the ***313** parents' conflicting legal interests, the liability of governmental entities to parents "is limited as provided in RCW 4.24.595." But RCW 26.44.280 does not state that the Department is immune from negligent investigation liability, only that RCW 4.24.595 limits liability. And as noted above, the plain language of RCW 4.24.595(2) does not eliminate negligent investigation liability.

¶ 40 Ultimately, the Department's argument and the dissent's analysis are based on what the Department *wishes* that RCW 4.24.595(2) stated. The Department suggests that RCW 4.24.595(2) eliminates the negligent investigation cause of action under *Tyner*. Similarly, the Department suggests that RCW 4.24.595(2) precludes the recovery of any damages that result from a court placement order. But if the legislature had intended those results, it certainly would have adopted more specific language. After all, RCW 4.24.595(1) does provide blanket immunity for *any* acts by the Department in emergent placement investigations. The legislature did not include similar language in RCW 4.24.595(2).

****365** ¶ 41 And the dissent's discussion of the legislative history is immaterial because the language actually used in RCW 4.24.595(2) is unambiguous. Therefore, we must apply the statute's plain language as written. *Ronald Wastewater Dist.*, 196 Wash.2d at 364, 474 P.3d 547. If the legislature had intended something different, it would have used different language.

[14] **[15]** ¶ 42 We conclude that RCW 4.24.595(2) unambiguously does not provide immunity for Desmet and Kacso's negligent investigation claim. The statutory language is clear: immunity extends only to the Department's acts *performed to comply with court orders*. Here, the Department's investigation of the abuse claims against Desmet was not performed to comply with court orders. The Department's duty to investigate arises under RCW 26.44.050, independent of any court order. *McCarthy*, 193 Wash. App. at 328, 376 P.3d 1127. And the Department did not provide information to the juvenile court in order to comply with a court order.

***314** ¶ 43 Accordingly, we hold that the trial court did not err in denying the Department's summary judgment motion regarding immunity under RCW 4.24.595(2) for that claim. [2]

4. Negligent Infliction of Emotional Distress and False Light Claims

[16] **[17]** ¶ 44 The Department argues that RCW 4.24.595(2) also applies to Desmet and Kacso's claims for negligent infliction of emotional distress and invasion of privacy by false light. We disagree.

[18] **[19]** ¶ 45 A negligent infliction of emotional distress requires proof of negligence (duty, breach of the standard of care, proximate cause, and damage) and objective symptomatology. *Kumar v. Gate Gourmet Inc.*, 180 Wash.2d 481, 505, 325 P.3d 193 (2014). Objective symptomology requires emotional distress that is susceptible to medical diagnosis and can be proved through medical evidence. *Id.* at 506, 325 P.3d 193.

[20] ¶ 46 An invasion of privacy by false light claim arises "when a defendant publishes statements that place a plaintiff in a false light if (1) the false light would be highly offensive and (2) the defendant knew of or recklessly disregarded the falsity of the publication and the subsequent false light it would place the plaintiff in." *Seaquist v. Caldier*, 8 Wash. App. 2d 556, 564, 438 P.3d 606, *review denied,* 193 Wash.2d 1041, 449 P.3d 657 (2019).

¶ 47 Desmet and Kacso base their emotional distress claim on their general allegations that the Department engaged in negligent conduct and possibly on the Department's founded finding. They base their false light claim on the

founded finding. For the same reasons discussed above, RCW 4.24.595(2) does not provide immunity for these claims. The statutory language extends immunity only to the Department's acts performed to comply with court ***315** orders. Here, the alleged negligence giving rise to the emotional distress claim did not arise from compliance with a court order. And the Department's issuance of a founded finding against Desmet was not performed to comply with a court order.

¶ 48 Accordingly, we hold that the trial court did not err in denying the Department's summary judgment motion regarding immunity under RCW 4.24.595(2) for Desmet and Kacso's negligent infliction of emotional distress and false light claims. [3]

5. Witness Immunity

[21] ¶ 49 In its reply brief, the Department suggests that to the extent its employees provided false testimony to the juvenile court, the Department is immune from liability under the witness immunity provision of RCW 4.24.595(2). We decline to address this argument.

¶ 50 As noted above, RCW 4.24.595(2) states that "[i]n providing reports and recommendations to the court," the Department's ****366** employees "are entitled to the same witness immunity as would be provided to any other witness." The Department appears to argue that even though this clause is expressly limited to its employees, witness immunity should extend to the Department as well.

¶ 51 We decline to address this argument for two reasons. First, the Department did not make this argument in the trial court. We generally do not consider arguments raised for the first time on appeal. RAP 2.5(a); *Kave v. McIntosh Ridge Primary Road Ass'n*, 198 Wash. App. 812, 823, 394 P.3d 446 (2017). Second, the Department did not raise this argument until its reply brief. We generally do not consider arguments raised for the first time in a reply brief. ***316** *In re Vulnerable Adult Petition for Winter*, 12 Wash. App. 2d 815, 842, 460 P.3d 667, *review denied,* 196 Wash.2d 1025, 476 P.3d 565 (2020).

D. LIABILITY ON THE MERITS

[22] ¶ 52 The Department argues in the alternative that even if there is no immunity under RCW 4.24.595(2) for Desmet and Kacso's negligent investigation claim, we should conclude that DSHS is entitled to summary judgment on the merits of that claim. The Department argues that (1) the Department did not present false testimony or misrepresent evidence to the juvenile court; (2) Desmet and Kacso's agreement to place AK with Kacso's sister precludes them from bringing a negligent investigation cause of action under *Roberson v. Perez*, 156 Wash.2d 33, 46, 123 P.3d 844 (2005); (3) the fact that Desmet and Kacso agreed to a number of the juvenile court's orders precludes them from claiming damages; and (4) the juvenile court had all available material facts, which breaks the chain of causation.

¶ 53 The Department also argues that Desmet and Kacso cannot recover damages for negligent infliction of emotional distress or false light based on DSHS's founded finding because (1) the founded finding did not cause any damages, (2) Desmet and Kacso obtained relief – removal of the founded finding – through their administrative appeal, and (3) there is no separate cause of action for any damages related to the founded finding.

¶ 54 We decline to address these arguments because they are beyond the scope of the trial court's CR 54(b) order, which is limited to whether the Department has immunity under RCW 4.24.595(2) against Desmet and Kacso's claims. *See Dreiling v. Jain*, 151 Wash.2d 900, 907, 918-19, 93 P.3d 861 (2004).

CONCLUSION

¶ 55 We affirm the trial court's denial of the Department's summary judgment motion on the issue of immunity ***317** under RCW 4.24.595(2) for Desmet and Kacso's claims and remand for further proceedings.

I concur:

SUTTON, A.C.J.

Glasgow, J. (dissenting in part)

¶ 56 I agree with the majority that RCW 4.24.595 does not bar Michelle A. Desmet's and Sandor Kacso's (Desmets) false light claim, nor does it entirely bar their negligent investigation claim established under *Tyner v. Department of Social & Health Services*, 141 Wash.2d 68, 82, 1 P.3d 1148 (2000). I would conclude, however, that the plain language of RCW 4.24.595 limits the Department's liability to a greater

extent than the majority concludes. I would recognize that while the Desmets may be entitled to damages based on other harms resulting from the Department's actions, they cannot recover for damages allegedly resulting from AK's continued placement outside of her home pursuant to court orders.

¶ 57 RCW 4.24.595(2) states that the Division of Children, Youth and Families and its employees "shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for *acts performed to comply with such court orders*." (Emphasis added.) The agreed initial placement of AK outside of the Desmets' home with her aunt, and ongoing placement of AK with her aunt during the dependency, were "acts performed to comply with [the trial court's] orders" under RCW 4.24.595(2). ****367** AK's placement in compliance with shelter care and dependency orders cannot be the basis for liability for damages under the plain language of the statute. [4]

¶ 58 Damages for other harms remain unimpeded by the immunity established in RCW 4.24.595(2). For example, the ***318** complaint alleges the Desmets suffered "false light in their community, their circle of friends, and their family from the unsupported and unfounded allegations alleged against them." Clerk's Papers at 168. The Desmets also claim that loss of employment and ongoing inability to obtain employment were harms that resulted from the Department's allegations. If they prevail on their claim of negligent investigation or false light, they could recover for damages to their reputation suffered as a result of the Department's allegations and its temporary founded finding that child abuse or neglect occurred. [5]

¶ 59 RCW 4.24.595(2) limits the *Tyner* negligent investigation cause of action, but that is exactly what the legislature intended the statute to do. The provisions codified in RCW 4.24.595 were proposed in Engrossed Substitute House Bill (ESHB) 2510, section 3, and the language from that bill was eventually incorporated in its entirety into a different bill, Engrossed Substitute Senate Bill (ESSB) 6555, on the house floor. ESHB 2510, 62nd Leg. Reg. Sess. (Wash. 2012); ESSB 6555, 62nd Leg. Reg. Sess. (Wash. 2012). Legislative history, including bill reports and committee testimony on ESHB 2510, reflects that the legislature was concerned with eliminating the competing incentives that *Tyner* created.

¶ 60 After *Tyner*, the legislature understood that the Department could be liable for negligently failing to remove a child from a dangerous home and for negligently removing a child from a home that turned out not to be dangerous. Hr'g on ESHB 2510 Before the H. Judiciary Comm., 62nd Leg. Reg. Sess. (Wash. Jan. 25, 2012), at 56 min., 0 sec., *audio recording by* TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?eventID=2012011124; S.B. REPORT ON ESHB 2510, 62nd Leg. Reg. Sess. (Wash. ***319** 2012), at 2. The legislature amended the child abuse statute's purpose section to emphasize that concern for the safety of children is paramount and child safety outweighs concerns for the rights of the parents. ESSB 6555, *supra*, § 12; ESHB 2510, *supra*, § 1. This amendment was intended to respond to the *Tyner* court's reliance on other language in that purpose section discussing the importance of the family unit and the parent child bond to create conflicting obligations to both parents and children when child abuse or neglect is reported. Hr'g on ESHB 2510, *supra*, at 53 min., 0 sec.

¶ 61 The prime sponsor of ESHB 2510, Representative Ruth Kagi, and others testifying in committee expressed that the intent behind the immunity language was to limit the impact of *Tyner* and to use the immunity statute to ensure the Department errs on the side of child safety when placing children outside of the home. *Id.* at 56 min., 0 sec. through 59 min., 0 sec. and 1 hr., 4 min., 3 sec. through 1 hr., 4 min., 6 sec. (explaining that the bill would "restore what the law was prior to [the] *Tyner*" decision, and emphasizing that immunity would not protect the Department or its employees if they fabricated evidence or committed perjury). [6]

¶ 62 Thus, the legislature struck a balance by creating limited immunity that eliminates the possibility of damages arising from placement of a child after allegations of abuse —either ****368** initial placement in response to a report of abuse or neglect or later placement ordered by a court. This balance emphasizes and protects child safety by removing a disincentive to temporarily place a child outside the home or to ask a court to approve temporary out-of-home placement. It removes the threat of having to pay damages if a jury later finds, with the benefit of hindsight, that the out-of-home placement was not actually necessary. But the legislature left intact a parent's ability to recover for other ***320** harms. And the immunity statute does not protect a social worker or other Department employee who fabricates evidence or lies in court.

¶ 63 I would hold that the Department is immune from payment of damages resulting from the placement of AK outside of her home as a result of a court order in this case, but if the Desmets prove their claims, they may be entitled to damages for other harms arising from false light or negligent investigation. I respectfully dissent in part.

All Citations

17 Wash.App.2d 300, 485 P.3d 356

Footnotes

1 In 2018, CPS was transferred from DSHS to the newly-created Department of Children, Youth, and Families (DCYF). RCW 43.216.906. This opinion also will use "the Department" to refer to both DSHS and DCYF.

2 We emphasize that we are addressing only immunity under RCW 4.24.595(2), not the merits of Desmet and Kacso's negligent investigation claim.

3 Again, we emphasize that we are addressing only immunity under RCW 4.24.595(2), not the merits of Desmet and Kacso's false light and negligent inflection of emotional distress claims.

4 An immunity statute can provide limited immunity against a particular type of damages or relief, rather than immunity against an entire claim. *See, e.g.*, *Cowell v. Good Samaritan Cmty. Health Care*, 153 Wash. App. 911, 924 n.15, 225 P.3d 294 (2009) (concluding that the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, provided immunity from damages but not from injunctive relief).

5 In contrast, the claim for negligent infliction of emotional distress in the complaint is currently based solely on the loss of the parent child relationship during the separation. This claim, based *solely* on AK's placement in compliance with court orders, is entirely barred by RCW 4.24.595(2).

6 Representatives of the Washington State Association for Justice also testified *in favor of* the immunity language because it was a reasonable way to ensure the safety of children. "Children's safety is the number one priority." Hr'g on ESHB 2510, *supra*, at 1 hr., 11 min., 0 sec.

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

August 09, 2021 - 1:34 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Michelle A. Desmet and Sandor Kacso v. State of Washington
Superior Court Case Number:	18-2-10502-7

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