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STATE OF WASHINGTON
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NO. 101294-2

SUPREME COURT OF THE STATE OF WASHINGTON

VAN B. HICKS,

Petitioner,

v.

KLICKITAT COUNTY SHERIFF'S OFFICE, SHIRLEY DeARMOND, and THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondents.

STATE RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals correctly followed controlling precedent and determined that the Department of Social and Health Services (DSHS) was entitled to summary judgment on Plaintiff Hicks's negligent investigation and negligent retention claims. Because no conflict exists between that opinion and any other opinion of the Court of Appeals or this Court, and because this case does not present an issue of substantial public interest when it applies settled law to case-specific facts, review by this Court is not warranted. *See* RAP 13.4(b)(1)-(2), (4).

There is no broad, implied cause of action under RCW 26.44.050 for all potential harms allegedly sustained as a result of a negligent investigation into reported child abuse or neglect. *M.W. v. Dep't of Soc. & Health Servs*., 149 Wn.2d 589, 601-02, 70 P.3d 954 (2003). Rather, the implied statutory cause of action "unequivocally" requires a biased or incomplete investigation leading to a "harmful placement decision." *Roberson v. Perez*, 156 Wn.2d 33, 46, 123 P.3d 844 (2005).

Harmful placement decisions include removing a child from a nonabusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home. *M.W.*, 149 Wn.2d at 601-02.

This Court and the Court of Appeals have consistently followed those decisions, including below where the court rejected Plaintiff's negligent investigation claim premised on his arrest, incarceration, and sexual assault protection orders issued by a criminal court. *See Hicks v. Klickitat Cnty. Sheriff's Office,* No. 55014-8-II, slip op. at 7-11 (Wash. Aug. 16, 2022). This Court's recent opinion in *Desmet v. Department of Social & Health Services*, 514 P.3d 1217 (2022), on which Plaintiff relies, does not depart from precedent requiring a "harmful placement decision"; nor does it expand what constitutes such a decision. Moreover, *Desmet* is inapposite here because it concerned the interpretation and application of the statutory immunity in RCW 4.24.595(2), which is not at issue in this case.

As to Plaintiff's negligent retention claim, precedent

likewise dictated dismissal when it is undisputed that, at all times, DSHS's social worker acted within the scope of her employment. *See, e.g., Evans v. Tacoma Sch. Dist. 10*, 195 Wn. App. 25, 47, 380 P.3d 553 (2016). Additionally, Plaintiff cannot circumvent the deficiency in his negligent investigation claim – lack of a cognizable "harmful placement decision" – by repackaging the same allegations into a negligent retention claim. Both rationales support the Court of Appeals' opinion here. *See Hicks*, slip op. at 12-13 & nn.9-10.

Ultimately, Plaintiff's petition cloaks a request for this Court to reconsider and adopt expansive formulations of negligent investigation and negligent retention claims. This case, however, is not a rare occasion where this Court should reconsider its prior rulings. Review should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does a parent fail to establish a negligent investigation claim under RCW 26.44.050, where the alleged "harmful placement decision" is the parent's criminal arrest or

incarceration, or sexual assault protection orders issued by the criminal court, rather than any proceedings to determine the parent-child relationship or children's residence?

2. Does Plaintiff's claim against DSHS for negligent retention of its social worker fail as a matter of law where it is undisputed that the social worker acted within the scope of her employment and where the claim is premised on a negligent investigation without a cognizable "harmful placement decision"?

III. COUNTERSTATEMENT OF THE CASE

A. Background on Plaintiff and His Children

Plaintiff and his former wife, Chelsey Moss, have two children: P.H. and F.H. CP 66. In June 2012, Plaintiff and Moss separated, and Plaintiff left the family home. CP 191-92. While divorce was imminent, Plaintiff and Moss shared custody under a verbal agreement. *Id.*

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B. Upon Receiving a Report That Plaintiff Had Possibly Sexually Abused F.H., Sgt. Anderson and Social Worker DeArmond Promptly Investigated

On December 27, 2012, Lorraine Madian, the family's counselor, called in a referral to Child Protective Services (CPS) of possible sexual misconduct by Plaintiff based on a disclosure by F.H. CP 914-19. Moss followed up with a phone call to CPS intake that same day. CP 917.

DSHS screened in the referral for investigation and forwarded the referral to the Klickitat County Sheriff's Office. CP 198, 972. The same day, CPS social worker Shirley DeArmond and Detective Sergeant Erik Anderson went to Moss's home to check on the welfare of both children. CP 198, 973-74. DeArmond and Sgt. Anderson discussed the allegations with Moss without the children present.[1] CP 232, 750. Moss agreed to bring her children in for a forensic interview in a few

[1] DeArmond's granddaughter, a playmate of Moss's children, was at Moss's home at the time of the initial face-to-face contact. CP 232, 748-49. F.H. and P.H. were not interviewed at that initial face-to-face visit. CP 233, 973-74.

days' time. CP 198, 973-74.

Four days later, Sgt. Anderson and DeArmond together conducted forensic interviews of F.H. and P.H. at a DSHS office. CP 198, 921-70, 976-77. P.H. disclosed no sexual abuse. CP 198. F.H. made multiple disclosures. CP 198, 936-64.

C. Sgt. Anderson Arrested Plaintiff, the Prosecuting Attorney Criminally Charged Him, and the Criminal Court Entered Sexual Assault Protection Orders

After F.H.'s interview, Sgt. Anderson determined he had probable cause to arrest Plaintiff. CP 198-99. Sgt. Anderson testified that he independently, without assistance from anyone, created his affidavit of probable cause based on his recollection of the children's interviews and that he, solely, without the influence of anyone else, decided to forward it to the prosecuting attorney for review. CP 226.

On December 31, 2012, Plaintiff was booked into jail. CP 199. Two days later, based solely on Sgt. Anderson's probable cause statement, the prosecuting attorney filed an Information against Plaintiff for Child Molestation in the First

Degree. CP 69, 203-06. At the request of the prosecutor, the Klickitat County Superior Court entered Sexual Assault Protection Orders as to F.H. and P.H., respectively. CP 203-08, 211-16. Neither DSHS nor DeArmond was involved in Plaintiff's arraignment or the request for and issuance of the protection orders. CP 207-08.

D. DSHS Continued Its Investigation and Ultimately Issued an Unfounded Finding

From January through April 2013, DeArmond made routine health and safety checks with F.H. and P.H. at Moss's residence. CP 978-83. Plaintiff refused to make himself available for an interview related to the CPS investigation. CP 645-46, 982-83. As the children remained under the care of their mother, the State never initiated a dependency. CP 978-83.

In June 2013, CPS Supervisor Robert Rodriguez sent a letter to Plaintiff notifying him that CPS had concluded the investigation and determined the allegations of sexual abuse were "Founded." CP 559-63. Plaintiff appealed this decision

asserting that the forensic interview of F.H. was conducted improperly with leading questions. CP 985-86. After Area Administrator Berta Norton reviewed DeArmond's investigation and resulting finding, Norton sent a letter to Plaintiff advising him that she had concluded that the finding should be changed to "unfounded." CP 567. Her stated reason for the change was that "[e]vidence in the file did not support the finding therefore the Founded finding will be changed to Unfounded." *Id.* In September 2013, the prosecutor dropped the criminal charge and the superior court lifted the related protection orders. CP 70, 596.

E. Procedural History in the Trial Court

Plaintiff sued DSHS, DeArmond, and Klickitat County. CP 65-73. He asserted negligent investigation claims solely against DSHS and the County, and he brought a negligent retention claim against DSHS. CP 70-71. Importantly, Plaintiff alleged that DSHS's employees were, at all times material, acting within the scope and course of their employment. CP 66. DSHS

admitted the same in its answer. CP 76. The only claims asserted against DeArmond are not part of this appeal. CP 71-72.

Defendants moved for summary judgment on all claims. CP 162-82. State Defendants argued the negligent investigation claim should be dismissed because there was no harmful placement decision. CP 170-73. They also argued that, because Plaintiff admitted that DSHS employees were, at all times, acting within the scope of employment, no action for negligent retention could be maintained. CP 177-78.

Plaintiff responded that a harmful placement decision is not a necessary part of a claim for negligent investigation and that, even if it were, a harmful placement decision occurred either when he was arrested or when the criminal court entered its sexual assault protection order. CP 282-93. He further argued that a claim for negligent retention could be maintained even if the actions of an employee occurred within the scope of employment. CP 298-99.

The trial court dismissed all claims except the negligent

retention claim against DSHS and denied motions for reconsideration. CP 659-66, 676-77, 1216. Thereafter, the County sought and obtained a CR 54(b) order as to its dismissal. CP 1219-20.

F. Procedural History in the Appellate Courts

DSHS successfully sought discretionary review before the Court of Appeals as to the remaining negligent retention claim. CP 678-89. Plaintiff, meanwhile, sought direct review before this Court of the dismissal of his negligent investigation claim. CP 1232-54. Supreme Court Commissioner Johnston denied Plaintiff's request for direct review, ruling that there "are no conflicts warranting direct review," and transferred the matter to the Court of Appeals. Transfer Ruling, Case No. 98799-8 at 3, 5 (Oct. 23, 2020). Plaintiff sought modification of the Commissioner's order, which this Court denied. Order, Case No. 98799-8 (Feb. 3, 2021). Thereafter, the Court of Appeals accepted discretionary review of Plaintiff's negligent investigation claim against DSHS and consolidated the cases for

review. Ruling Granting Review and Consolidating Cases, Case No. 55554-9-II, at 9 (Apr. 26, 2021).

The Court of Appeals unanimously affirmed summary judgment for DSHS and the County on Plaintiff's negligent investigation claim, and reversed the denial of summary judgment on Plaintiff's negligent retention claim against DSHS. *Hicks,* slip op. at 2.

The court, relying on *M.W.*, *Tyner v. Dep't of Social & Health Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000), and *McCarthy v. County of Clark*, 193 Wn. App. 314, 376 P.3d 1127, review denied, 186 Wn.2d 1018 (2016), declined to "reapply the *Bennett v. Hardy*[2] test to RCW 26.44.050" and "instead follow[ed] our Supreme Court's precedent by holding that negligent investigation claims unequivocally require harmful placement decisions for the child." *Hicks*, slip op. at 9. The court concluded, "[l]ike the no-contact order entered in *McCarthy*,

[2] 113 Wn.2d 912, 920, 784 P.2d 1258 (1990).

[Plaintiff's] arrest, incarceration, and sexual assault protection orders were not designed to address the parent-child relationship or the child's residence" and "as a matter of law . . . cannot satisfy RCW 26.44.050's requirement for a 'harmful placement decision.'" *Hicks*, slip op. at 11.

In addition, the court, relying on *Evans*, determined that because Plaintiff "has failed to allege facts that show DeArmond acted outside the scope of employment, [his] negligent retention claim fails as a matter of law." *Id.* at 12-13. The court further concluded that claim also fails because it is rooted in a negligent investigation claim without a harmful placement decision. *Id.* at 13 n.10.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Opinion Adheres to Controlling Authority Requiring a "Harmful Placement Decision" in Negligent Investigation Claims under RCW 26.44.050

In affirming summary judgment on Plaintiff's negligent investigation claim, the Court of Appeals properly relied on well-

established precedent in requiring evidence of a "harmful placement decision" and in determining what does and does *not* constitute such a decision. *See Hicks*, slip op. at 7-11 (citing *Bennett, Tyner, M.W.,* and *McCarthy*). Plaintiff now appears to have abandoned his prior argument that a harmful placement decision is not required for claims of negligent investigation. Instead, he contends that the Court of Appeals' analysis (1) misunderstands what constitutes a harmful placement decision and why it is important to negligent investigation claims, and (2) improperly attempts to weave the harmful placement decision requirement into the element of duty rather than causation. Pet. at 12. He is incorrect as a matter of law on both points.

1. The requirement of a harmful placement decision ensures the implied cause of action falls within the scope of the statutory duty owed

Plaintiff's negligent investigation claim fails without a cognizable harmful placement decision. In order to prevail on the limited, implied statutory cause of action under RCW 26.44.050,

M.W. provides that a claimant must prove that DSHS conducted an incomplete or biased investigation that resulted in a "harmful placement decision," which includes removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home. 149 Wn.2d at 601-02.

The *M.W.* Court crafted this rule by analyzing the third prong of the *Bennett* test for implied causes of action: whether the underlying purpose of RCW 26.44.050 was consistent with inferring a remedy. 149 Wn.2d at 597-602. This was an analysis of *duty*, not proximate cause. The *M.W.* Court noted that the statute's statement of purpose encompassed two concerns: "the integrity of the family and the safety of children within the family." *Id.* at 597 (citing *Tyner*, 141 Wn.2d at 80). Accordingly, the Court declared:

> Consistent with these concerns, we have recognized that this statute creates *an actionable duty* that flows from DSHS to both children and parents who are harmed by DSHS negligence *that results in wrongfully removing a child from a nonabusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home*.

Id. at 597-98 (citing *Tyner*, 141 Wn.2d at 77-82) (emphasis added).

The issue before the Court in *M.W.* was "whether these statutory concerns also support a *broader duty* to protect children from harm that is the result of direct negligence by DSHS investigators during the course of an investigation, such as dropping a child or negligently inflicting emotional harm of the kind [the plaintiff] alleges." *Id.* at 598 (emphasis added). The Court answered that question in the negative and determined that the negligent investigation claim, having originated from the statute, "is necessarily limited to remedying the injuries the statute was meant to address." *Id.*

In other words, the scope of a negligent investigation claim is coextensive with the scope of the duty owed, which is to prevent "harmful placement decision[s]." *M.W.*, 149 Wn.2d at 601; *Roberson*, 156 Wn.2d at 46. The Court of Appeals has duly followed that precedent over the years. *Hicks*, slip op. at 7-9; *M.E. through McKasy v. City of Tacoma*, 15 Wn. App. 2d 21, 23,

471 P.3d 950 (2020); *McCarthy*, 193 Wn. App. at 329; *Albertson v. State*, 191 Wn. App. 284, 300-01, 361 P.3d 808 (2015).

Plaintiff, however, continues to conflate the issue of the scope of the duty owed with the issue of proximate cause by taking the proximate cause analyses from the *Tyner* and *Bender v. City of Seattle* decisions out of context. *See* Pet. at 12-14; *Bender v City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983). The only issues addressed in *Tyner* were (1) whether to recognize a duty of care under RCW 26.44.050 owed to a child's parents and (2) whether a civil court's no-contact orders broke the chain of legal causation. *Tyner,* 141 Wn.2d at 76, 82. Importantly, *not* disputed by the parties in *Tyner* was whether the alleged injury – a father's separation from his children based on shelter care and civil no-contact orders – fell within the scope of the duty owed to the father. Nor did the *Tyner* Court further elaborate on the scope of the duty owed to parents once it generally recognized a duty was owed. That elaboration came four years later in *M.W.*

The issue in *Bender* was whether, in an action for false arrest or imprisonment, an officer who executed a warrant could rely on the facial validity of a warrant as a defense if the officer had also provided the information to obtain the warrant to the issuing court. 99 Wn.2d 582, 591-93, 664 P2d 492 (1983). The *Bender* Court held that the officer could not rely on the warrant's facial validity, but could still establish a defense by proving the existence of probable cause to arrest under the circumstances. *Id.* at 593. That too is an analysis of causation, not duty. *See Tyner*, 141 Wn.2d at 84-86 (discussing *Bender* as part of the analysis of legal causation).

To be sure, whether an allegedly negligent investigation "lead[s] to" or "results in" a harmful placement decision is a separate inquiry of causation, distinct from whether there is a harmful placement decision (and thus a potential claim within the scope of the duty owed) in the first place. *See Roberson*, 156 Wn.2d at 46; *M.W.*, 149 Wn.2d at 602. The fact that proximate cause analyses may reference a harmful placement decision is

not surprising, but such references do not mean that proximate cause is the legal underpinning of *M.W.*'s requirement that there be a harmful placement decision in order to proceed on a negligent investigation claim.

In the instant case, the Court of Appeals addressed only Plaintiff's arguments as to whether a harmful placement decision was a requirement of negligent investigation claims and, if so, whether Plaintiff had met that requirement. *Hicks*, slip op. at 7-11. Finding Plaintiff's arguments failed, the court expressly did not address issues of proximate and superseding cause. *Id.* at 11 n.8. Accordingly, Plaintiff's continued reliance on arguments related to causation in his petition is misplaced and cannot be grounds to grant review. *See* Pet. at 12-16.

2. Harmful placement decisions are those intended to address the parent-child relationship or where the child resides

The Court of Appeals, having correctly applied decades of precedent to conclude that Plaintiff needed evidence of a harmful

placement decision, also correctly concluded that Plaintiff failed to meet his burden. *Hicks*, slip op. at 7-11.

The potential "harmful placement decisions" proffered by Plaintiff on appeal were the sexual assault protection orders entered by the criminal court and his arrest and incarceration by Sgt. Anderson. *Hicks*, slip op. at 9. These contentions were plainly foreclosed by the reasoning in *McCarthy*, on which the Court of Appeals relied. *Id.* at 9-11. Plaintiff, however, fails to address *McCarthy* in his petition.

In *McCarthy*, the Court of Appeals held that "the no-contact orders *issued in [the father's] criminal proceedings* do not constitute 'harmful placement decisions' for the purpose of a negligent investigation claim under RCW 26.44.050." 193 Wn. App. at 321, 325, 330 (footnote omitted; emphasis added). The court noted that the no-contact order arose from the district court's arraignment, "which was designed to address the criminal charges and not the parent-child relationship." *Id.* at 333. The court then reasoned, "There is no indication in the limited case

law in this area that a no-contact order issued in criminal proceedings that is not designed to address the parent-child relationship and the child's residence can trigger liability under RCW 26.44.050." *Id.*

In the instant case, the Court of Appeals correctly affirmed dismissal of Plaintiff's negligent investigation claim because Plaintiff's arrest, incarceration, and the sexual assault protection orders entered by the criminal court, like the no-contact orders in *McCarthy*, did not constitute "harmful placement decisions." *Hicks*, slip op. at 11. Like the orders in *McCarthy*, Plaintiff's restrictions stemmed from his criminal charge and "were not the results of a dependency petition or *any proceedings* regarding residency issues." *Id.* (emphasis added).

Plaintiff inaccurately contends that the opinion here forecloses negligent investigation claims unless premised on orders issued in a dependency court. *See* Pet. at 10-12, 16-17. This is not what the court plainly says in its opinion, which quotes the *McCarthy* court's reasoning at length and

distinguishes criminal proceedings from "any proceedings regarding residency issues." *Hicks*, slip op. at 10-11. Both the *Hicks* and *McCarthy* courts focused on what the relevant court proceedings were, and were not, meant to address. Indeed, the *McCarthy* court later analyzed the issuance of protection and restraining orders in *civil* proceedings – largely dissolution proceedings – through the lens of proximate cause, presumably because such orders were unlike the no-contact orders issued in the *criminal* proceedings brought against the plaintiff. 193 Wn. App. at 334-36.

Further, Plaintiff's reliance on *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006), is inapt. *See* Pet. at 16. In *Lewis*, a child sued a county sheriff's department after she was left in an abusive home. Such decisions are explicitly recognized under *M.W.* as being harmful placement decisions. 149 Wn.2d at 602. Indeed, the *Lewis* court observed that the question before it was whether the County owed the child a duty at all, unlike *M.W.*,

in which the question was the scope of the duty. 136 Wn. App. at 458.

Plaintiff also mischaracterizes this Court's opinion in *Desmet*. *See* Pet. at 11-12, 16. There, the "sole question before [the Court was] whether RCW 4.24.595(2) grants the Department immunity for its *post-placement* conduct such that the parents cannot not pursue their claims for negligent investigation, NIED, and false light at trial." 514 P.3d at 1221 (emphasis added).

Plaintiff incorrectly describes *Desmet* as focused on whether a negligent investigation claim resulted in the separation of a non-abusive parent from their child, "regardless of the mechanism that caused the separation." *See* Pet. at 11. But, unlike here, whether there had been an alleged harmful placement decision was not at issue in *Desmet*, as the children had been placed out-of-home during a dependency proceeding. 514 P.3d at 1219-21.

Thus, there was no need for the Court to address that aspect of the parents' negligent investigation claim. Instead, the *Desmet* Court properly turned its attention to the "sole question" before it: analyzing DSHS's liability for its post-placement conduct under RCW 4.24.595(2). In doing so, the Court rejected DSHS's argument that the statute entitled DSHS to absolute immunity for its post-placement investigation of the alleged child abuse/neglect. *Id.* at 1225. In analyzing that limited issue, the Court examined principles of proximate and superseding cause. *Id.* at 1225-26. Contrary to Plaintiff's arguments, it is cause-in-fact that is often a question for trial, *see Desmet*, 514 P.3d 1226; *Tyner*, 141 Wn.2d at 86-87, not whether there has been a "harmful placement decision." *See* Pet. at 16.

Where the immunity afforded in RCW 4.24.595(2) was never at issue in the instant appeal and where causation was never addressed by the instant opinion, *Desmet* is inapposite and not a basis for review.

In sum, Plaintiff's arguments in his petition reveal a thinly-veiled invitation to revisit and overturn *M.W.* and *Roberson*, both of which constitute controlling precedent that the lower courts appropriately followed. There is no reason for this Court to reconsider its sound reasoning and decisions in those cases. *See W.H. v. Olympia Sch. Dist.*, 195 Wn.2d 779, 787, 465 P.3d 322 (2020) (discussing stare decisis principles).

Finally, Plaintiff's argument that law enforcement and, by extension, DSHS now enjoy immunity in all cases exposes Plaintiff's fundamental misunderstanding of the *Hicks* decision. *See* Pet. at 17. Nothing about *Hicks* stands for that premise. Nor does *Hicks* contravene the purpose of RCW 26.44.050. Indeed, like the *McCarthy* decision, *Hicks* is concerned with whether the claimed injury falls within the scope of the duty contemplated by the statute. For that reason, both opinions discuss the purpose and nature of the criminal proceedings resulting in the no-contact and sexual assault protection orders. Those orders simply do not

constitute "harmful placement decisions," as contemplated by *M.W.* and its progeny.

This Court should decline Plaintiff's veiled invitation to revisit its prior holdings. Review of Plaintiff's negligent investigation claim is not warranted under RAP 13.4(b)(1)-(2), or (4).

B. The Opinion Adheres to Precedent Governing Negligent Retention Claims

The Court of Appeals appropriately affirmed dismissal of Plaintiff's negligent retention claim for two reasons. First, no claim for negligent retention was cognizable here because DSHS faced potential vicariously liability for DeArmond's conduct under the doctrine of respondeat superior. Second, like the negligent investigation claim upon which Plaintiff's negligent retention claim is premised, the negligent retention claim failed for lack of a harmful placement decision.

1. A negligent retention claim is not cognizable where vicarious liability applies

As to the first basis, the Court of Appeals correctly

observed that (1) negligent retention claims generally arise when an employee acts *outside* the scope of employment, (2) such claims are analytically different than those based on vicarious liability for an employee's conduct *within* the scope of employment under the doctrine of respondeat superior, and (3) DeArmond's actions were indisputably performed *within* the scope of her employment. *Hicks*, slip op. at 12-13 & n.9 (relying on *Evans*, 195 Wn. App. at 37, 47). Contrary to Plaintiff's arguments, the opinion below relied on and is entirely consistent with *Anderson v. Soap Lake School District*, 191 Wn.2d 343, 356, 423 P.3d 197 (2018) (cited by *Hicks*, slip op. at 12).

This Court in *Anderson* did not need to discuss scope of employment in considering the plaintiff's negligent retention claim because it affirmed the dismissal of that claim on an alternative basis – namely, whether the employer had any way of knowing that its employee was unfit. *See* 191 Wn.2d at 358. Indeed, in *Anderson*, this Court determined that the defendant school district's employee was acting *outside* the scope of his

employment when he served alcohol to students at his house. *Id.* at 363. While that determination was made in the context of the plaintiff's negligent supervision claim, the plaintiff's negligent retention claim was premised on that same conduct by the employee. *Id.* at 348-49, 363. Thus, *Anderson* itself is a case in which a negligent retention claim might have been appropriate had the Court not already determined there was no evidence that the defendant school district knew or should have known its employee was unfit. *Id.* at 358.

Further, Plaintiff artificially seeks to limit each cause of action to the *Restatement* sections discussed by the *Anderson* Court when separately analyzing each tort: § 307 for negligent retention claims and § 317 for negligent supervision claims. *See* Pet. at 18-19; *Anderson*, 191 Wn.2d at 356, 361. But multiple *Restatement* sections frequently guide this Court's analyses of particular areas of tort law. Silence on whether a particular *Restatement* section applies to a given tort is not tantamount to a conclusion that such section is inapplicable. In other words, just

because § 307 informed this Court's analysis of the issues in *Anderson* on the claim of negligent retention, does not mean that § 317 cannot also be instructive in analyzing the different issue presented in the instant case.

Notably, *Anderson* favorably quoted § 317 Comment a in discussing negligent supervision. 191 Wn.2d at 361. While Comment a addresses a master's duty to control the conduct of a servant while acting outside the scope of employment, Comment c to § 317 builds on that foundational principle and specifically addresses a master's liability for "[r]etention in employment of servants known to misconduct themselves." *Restatement (Second) of Torts* § 317 cmt. c. Thus, viewing the *Restatement* more comprehensively, claims for negligent retention, like claims for negligent supervision, arise when employees act outside the scope of employment.

Plaintiff's arguments based on *Scott v. Blanchet High School*, 50 Wn. App. 37, 747 P.2d 1124 (1987), *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 988 P.2d 1031 (1999), and

Peck v. Siau, 65 Wn. App. 285, 827 P.2d 1108 (1992), should likewise be rejected as those cases are readily distinguishable. *See* Pet. at 19, 23. In all three cases, the employees were acting outside the scope of their employment by engaging in sexual misconduct with the plaintiffs. *Scott*, 50 Wn. App. at 47; *Betty Y.*, 98 Wn. App. at 147; *Peck*, 65 Wn. App. at 287. For that reason, it was appropriate for the courts in those cases to consider whether there was evidence supporting other elements of claims for negligent hiring or retention.

Additionally, because there is substantial Washington case law on this issue, this Court should summarily reject Plaintiff's references to extra-jurisdictional case law. *See* Pet. at 19-20, 24 (citing cases). The dearth of Washington case law holding an employer liable for negligent retention when the employee acts within the scope of employment makes sense because such a claim would be superfluous to that for vicarious liability. *E.g.*, *Shielee v. Hill*, 47 Wn.2d 362, 366, 287 P.2d 479 (1955) (holding that "respondents, under the doctrine of respondeat superior,

were responsible for [the employee's] misconduct, if any, irrespective of how careful or careless respondents may have been in selecting, him for the job or retaining him in their employment"); *LaPlant v. Snohomish Cnty.F30*, 162 Wn. App. 476, 481, 271 P.3d 254 (2011) (stating that "LaPlant's claim for negligent supervision, under these facts, is not only improper because the County did not disclaim liability for the deputies' actions, it is also superfluous").

2. Allowing a negligent retention claim premised on a negligent investigation to proceed without a harmful placement decision would be inconsistent with the limited cause of action under RCW 26.44.050

Finally, Plaintiff fails to acknowledge the Court of Appeals' alternative rationale for dismissing his negligent retention claim: that a claim premised on allegations of negligent investigation necessarily has the same limitations as the negligent investigation claim, including the requirement of a "harmful placement decision." *Hicks*, slip op. at 13 n.10. Thus, even if Plaintiff was correct as to scope of employment, which

he is not, review of the decision here would not gain him reinstatement of his negligent retention claim.

The Court of Appeals was well aware that, if it were to allow the negligent retention claim to proceed here, where no resulting harmful placement decision occurred, it would be imposing liability on DSHS that exceeds the scope of liability under statutory claims for negligent investigation. As the court recognized, "the negligent retention claim would allow an end run around the carefully limited negligent investigation claim." *See Hicks*, slip op. at 13 n.10. The Court of Appeals appropriately refused to stretch the negligent retention claim in this case to be at odds with the public policy that underlies RCW 26.44.050.

V. CONCLUSION

For all the above reasons, review should be denied.

This document contains 4,998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 7th day of November, 2022.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the STATE RESPONDENTS' ANSWER TO PETITION FOR REVIEW with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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

EXECUTED this 7th day of November 2022, at Olympia, Washington.

s/ Annya Ritchie
ANNYA RITCHIE
Legal Assistant
Torts Division

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

November 07, 2022 - 12:06 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,294-2
Appellate Court Case Title:	Van B. Hicks v. Klickitat County Sheriff's Office, et al.
Superior Court Case Number:	15-2-02834-4

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