No. 39483-2-III

102795-8

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

IAN ATKERSON, individually and as
Personal Representative of the Estate of Rustin Atkerson,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF CHILDREN, YOUTH, AND
FAMILIES, John and Jane Doe 1-10,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ian Atkerson, individually and as the personal representative of Rustin Atkerson's Estate, seeks this Court's review of the decision set forth in Part B.

B. COURT OF APPEALS DECISION

After denying Atkerson's motion to transfer the case to this Court, Division III filed its published decision terminating review on January 30, 2024. A copy is in the Appendix. This case presents two significant first impression issues pertinent to liability in child abuse investigations – the interpretation of RCW 4.24.595(1), and the admissibility of a former judge's legal opinion under ER 403 as an expert witness.

C. ISSUES PRESENTED FOR REVIEW

1. Where the Department of Children, Youth, and Families ("DCYF") Child Protective Services ("CPS") caseworkers did not establish a safety plan for the child, had not scheduled an emergent shelter care hearing for an abused two-year-old child, and contemplated completing their abuse investigation in 30-60 days, did Division III err in concluding that a gross negligence standard under RCW 4.24.595(1) applied to DCYF's negligent, incomplete investigation of the child's abuse

that led to his death?

2. Did Division III err in overriding the trial court's ER 403 decision that a former judge's legal opinion on what a "reasonable judge" would have done in a shelter care hearing (that never occurred) was unfairly prejudicial?

D. STATEMENT OF THE CASE

Division III's published opinion sets forth the facts and procedures in the case, op. at 3-12, but it glides past critical facts that bear emphasis for this Court's review decision.

First, Rustin was two years old and largely nonverbal. He could not report his own abuse.

Second, Hurd had very serious anger issues. She displayed aggressive, violent outbursts toward Ian and B.B., Rustin's stepbrother, supp. CP 84, losing control and screaming at both boys. CP 863. In the parties' dissolution, the court commissioner *sua sponte* ordered an anger evaluation for Hurd, supp. CP 467, and that evaluation confirmed the seriousness of her frequent uncontrolled outbursts. Supp. CP 348-54.

Third, Rustin's *multiple* bruises while in Hurd's care were

more serious than Division III described. Op. at 3-4. Rustin had a large, circular bruise on his right cheek after a May 21, 2017 visit with Hurd. CP 348-54. On June 4, he had bruises on his right upper arm, shoulder, and collarbone; the collarbone bruises by his neck looked like a handprint, as photos documented. CP 864-65. The bruise on the inside of his arm (where the elbow bends) was the size of a half-dollar. *Id.*

Rustin's grandmother called CPS on June 11 to report new bruising on Rustin after he returned from a June 7-11 stay with Hurd. CP 523. Photos provided to CPS showed that Rustin's new injuries included a scratch on his left eye and an injury to his left foot/ankle. CP 866; Supp. CP 102-04. The photos confirmed the handprint-like bruise on Rustin's collarbone/shoulder (first noticed on June 4). CP 867.

On June 18, Rustin's father, Ian, contacted the police again when Rustin returned from Hurd's house with about a two-inch by one-inch bruise at the base of his skull, going down his spine, where the neck and the back come together. CP 868. Ian

reported this new bruising to CPS on June 19.

Fourth, on June 7, Rustin sustained a broken arm while in Hurd's care; Ian reported that injury to CPS. Supp. CP 70-71; CP 134-38. That same day, the E.R. Physician's Assistant, Casey Wyatt, called CPS independently to report Rustin's broken arm. CP 865. Wyatt noted a 19-hour delay in seeking care for Rustin's broken arm. *Id.* Wyatt's concerns about Rustin's broken arm were confirmed by orthopedic surgeon Dr. Richard Brownlee after Rustin's June 15 examination. Supp. CP 74, 192-96. Dr. Brownlee noted that Rustin kept saying: "I'm sorry," an important fact in abuse cases where little children often blame themselves for their own abuse. CP 898. After this appointment, Dr. Brownlee called CPS. *Id.* CPS took no action on that referral, *id*, or on Wyatt's and Ian's earlier reports. Supp. CP 127-38.[1]

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[1] Rustin's fracture is very uncommon in a two-year-old child. CP 898; they are extremely painful and required significant force to inflict. Supp. CP 460.

Fifth, CPS knew that Hurd was not living at her reported residence. Veronica Mabee, the CPS caseworker assigned to Rustin's case, met face-to-face with Hurd, Rustin, and Hurd's older son B.B. on June 9. CP 561-62. She observed Hurd hit 2-year-old Rustin at that meeting for taking something from her purse. CP 561. B.B. specifically told Mabee that Hurd did not come home certain nights and spent days with her friends; he had not seen his mother for *three days*. *Id.* Mabee never asked where Hurd was staying or with whom; instead, she simply accepted Hurd's father's characterizing of Hurd's residential arrangement as Hurd "occasionally leaving the house." CP 562. Mabee was told by Rustin's grandmother on June 11 that she was living with her boyfriend in East Wenatchee. Supp. CP 184.

Hurd revealed to Mabee on June 15 that she was living with friends with kids in Wenatchee. CP 563. She also reported "dating around." *Id.* Despite this knowledge, Mabee made no effort to follow up on a precise address for Hurd's new residential arrangement or the identity of these "friends" or

persons with whom she was "dating around." Supp. CP 211-12.[2]

Sixth, Mabee had concerns that Hurd was dishonest, might be using drugs, and had mental health issues. Op. at 6-7, 8.

Seventh, the record documents that Mabee paid little attention to Ian's reports; she was too busy to contact Dr. Brownlee. Supp. CP 1244. She told Ian he would be arrested if he violated the parenting plan to protect Rustin. Supp. CP 813.

As of June 21, before Rustin's horrible injury, op. at 8, Mabee and CPS knew of Hurd's anger issues, her bogus complaints against Ian, her possible mental health and drug issues, her likely residence with some unknown third person, independent reports of likely abuse by two medical professionals, and, most of all, the reports of serious, obvious physical harm to Rustin. Mabee did *nothing* to remove Rustin

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[2] DCYF stated that the "first time" Mabee learned of Steven Rowe was after the fatal blow to Rustin. Br. of Appellants at 10. That was false; Mabee knew that Hurd was with a third person, as noted above.

from the obviously unsafe placement with Hurd. CPS did not create a safety plan for two-year-old Rustin despite his bruises and broken arm. CP 310-12. *Compare*, *Albertson v. State*, 191 Wn. App. 284, 291, 361 P.3d 808 (2015) (safety plan). CPS made no effort to seek Rustin's voluntary placement in a safe, third party residential setting, as the Estate's expert, Jane Ramon, testified was the standard of care. CP 901, 902-03. It is undisputed that CPS never petitioned a court for a shelter care hearing.

On June 22, while in Hurd's custody, Rustin suffered a severe head injury that necessitated an emergency craniotomy and ultimately a life flight to Harborview Hospital for specialized care. Supp. CP 77. Despite the severity of Rustin's head injury, Hurd waited until the next day to call 911. Rustin died from his injuries on August 3, 2017. *Id.*

Suddenly energized from her lethargy by the severity of Rustin's traumatic injuries, Mabee finally faxed a request for

Rustin's medical records,[3] interviewed Hurd in earnest and discovered information about Steven Rowe, Hurd's live-in boyfriend who had a long criminal and CPS history and abuse of his own children. Supp. CP 475. Mabee finally told Ian to take emergency protective custody of Rustin. CP 566. This belated flurry of activity was too little, too late.[4]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) Division III Incorrectly Interpreted RCW 4.24.595(1)[5]

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[3] The fax seeking the records is date stamped June 22. Supp. CP 1465.

[4] Law enforcement officials later concluded that Rustin's injuries were not consistent with accidental falls, as Hurd had previously claimed. Supp. CP 458-65.

[5] The central goal of any statutory interpretation is to carry out legislative intent. *State, Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). This Court's analysis begins by looking at the words of the statute. *Federal Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) reaffirmed that (the "bedrock principle of statutory interpretation" is the statute's "plain language."); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999) ("the legislature means exactly what it says.").

Division III's published opinion applied a gross negligence standard in this case even though DCYF adduced *no evidence* that an emergency placement investigation was at issue. Op. at 13. That decision defies this Court's interpretation of RCW 4.24.595(2) in *Desmet v. State*, 200 Wn.2d 145, 514 P.3d 1217 (2022), the facts, and common sense. In effect, Division III overrules this Court's line of cases on negligent child abuse investigations by CPS in a published opinion. Review is merited, particularly where it is highly likely that DCYF will rely on Division III's opinion in pending child abuse cases against it. RAP 13.4(b)(1), (4).

(a) Actions Against DCYF for Negligent Child Abuse Investigations

An overarching *right* of children in Washington to a healthy and safe placement, free of abuse. RCW 13.34.020; RCW 26.44.010. *See* Appendix.[6] To implement that

[6] These statutes "safeguard, protect, and contribute to the welfare of the children of the state," and the guiding principle of our child welfare system is that 'the child's health and safety

overarching policy, the Legislature mandates that child abuse or neglect be reported. RCW 26.44.030 (requiring that when a child's physical or mental health is at risk, "the health and safety interests of the child should prevail." RCW 26.44.010). *See* Appendix. Such reports of abuse or neglect must be properly investigated by CPS or law enforcement. RCW 26.44.050.

This Court implied a right of action for inadequate child abuse investigations under RCW 26.44.050. *Tyner v. Department of Social & Health Services, Child Protective Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (adopting implied right of action and ruling that caseworkers' failure to interview collateral sources for the court created fact issues for jury to resolve); *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003) (the essential elements of

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shall be the paramount concern.'" *H.B.H. v. State*, 192 Wn.2d 154, 164, 429 P.3d 484 (2018) (quoting RCW 13.34.020 and 74.13.010); *C.J.C. v. Corp. of the Cath. Bishop of Yakima*, 138 Wn.2d 699, 717, 985 P.2d 262 (1999) (recognizing the overriding and paramount legislative intent to protect children from physical and sexual abuse).

the claim are: the investigation must gather incomplete or biased information and such inadequate investigation must result in a harmful placement decision).

The Estate met the *Tyner*/*M.W. prima facie* claim elements. CPS received multiple reports of Rustin's abuse. CPS's incomplete investigation failed to appreciate Hurd's anger issues, to interview medical practitioners as to Rustin's obvious abuse, to heed photographs from family members of Rustin's abuse, or to interview the persons with whom Hurd was living, resulting in Rustin's harmful placement with Hurd and Rowe, and his consequent death.

The 2012 Legislature enacted RCW 4.24.595(1) to amend *Tyner*/*M.W.* in a limited fashion. Division III misread RCW 4.24.595(1).[7]

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[7] As Division III recognized, op. at 19, when changing the common law, any statute purporting to abrogate a common law principle requires the Legislature to do so *expressly*, *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008), and such statute is *strictly construed*. *In re EM Property Holdings LLC v. Epic Solutions, Inc.*, 199 Wn.2d 725, 734, 511 P.3d 1258

(b) Division III Defied the Plain Language of RCW 4.24.595 and This Court's Treatment of the Statute

Division III's published opinion avoids the express language of RCW 4.24.595(1) limiting DCYF's immunity only to *emergent placement decisions* defined as those decisions "conducted prior to a shelter care hearing under RCW 13.34.065." Instead, it effectively overrules *Tyner*/*M.W*. Op. at 17-20.

The Legislature pegged RCW 4.24.595(1)'s application to emergent situations and shelter care hearings,[8] by its terms. Division III read the term "emergent" and "shelter care hearings" out of the statute despite the rule that when, in interpreting a statute, a court must give meaning to *all* words the Legislature used. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d

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(2022).

[8] RCW 13.34.065(1)(a) states that "[t]he primary 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."

912, 919, 215 P.3d 185 (2009).

Division III fails to analyze the significance of the Legislature's reference to a shelter care hearing; dismissing without analysis the 72-hour time frame for shelter care proceedings. Op. at 19-20.

Shelter care has a *specific* meaning. When a child has been removed from the family or removal is sought, a shelter care hearing is required within 72 hours. RCW 13.34.060(1); RCW 13.34.065. CPS's investigation is an "emergent placement investigation" under RCW 4.24.595(1) only if it is connected to such a time-sensitive court decision. By incorporating the shelter care statute into the definition of an "emergent placement investigation," RCW 4.24.595(1) necessarily restricts the gross negligence standard to: (1) accelerated investigations (2) conducted within the 72-hour period before a shelter care hearing (3) when a child is removed from the parents pending the hearing, or removal is sought.

Similarly, the term "emergent," too, has an express

meaning. Bryan A. Garner (ed.), *Black's Law Dictionary* (11th ed.) at 660 (defining an "emergency" as a "sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm."). *See City of Yakima v. Johnson*, 16 Wn. App. 143, 146, 553 P.2d 1104 (1976), *review denied*, 88 Wn.2d 1004 (1977) (in absence of a statutory definition, words should be construed with their general dictionary meaning).

Nothing CPS's caseworkers did here connotes an "emergent" placement decision. They never set up a safety plan for Rustin, as noted *supra*. CPS never removed Rustin from his parents nor did it seek his removal. Rather, after his broken arm, he was released from the hospital to his mother, allowing him to remain in an abusive home. Supp. CP 70-74. CPS's own staff confirmed that their investigation was not "emergent" and they never contemplated a shelter care hearing, since they testified that their investigation would take 30 or 60 days to complete. Supp. CP 1189, 1225, 1235, 1339. CPS's investigation between

the end of May and mid-June betrays no hint of any "emergency" in addressing reports of Rustin's repeated physical trauma.[9]

Nothing in RCW 4.24.595(1) evidences an intent to totally overrule *Tyner*/*M.W.* Division III rewrites RCW 4.24.595(1) to apply a gross negligence standard *far* more broadly than contemplated by the statute's express language, essentially extending immunity to virtually *any* child abuse investigation *if* that investigation might *theoretically* be relevant to an emergency placement. Op. at 19-20. The trial court properly rejected such a broad interpretation, noting the need for a shelter care hearing as a predicate to the statute's application. RP 72-

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[9] Division II's opinion in *Petersen v. State*, 9 Wn. App. 2d 1079, 2019 WL 3430537 (2019) (unpublished), does not help DCYF because the CPS investigation there *was* connected to a shelter care proceeding. Upon receipt of sexual abuse reports, CPS placed the child victim in emergency foster care and filed a dependency petition. RCW 4.24.595(1) applied because the CPS investigation was close in time to the shelter care hearing and there was a continuing investigation after that hearing. *Id*. at *5. The court was not concerned about the exact timing of the shelter care hearing, *id.*, but that did not eliminate the need for a connection to an emergent situation, as Division III's published opinion does.

73.

Division III's published opinion is contrary to this Court's *Desmet* decision where the Court concluded that RCW 4.24.595(2)[10] must be *narrowly* construed and did not afford the State immunity from false light and negligent infliction of emotional distress claims. Critically, the Court stated that *nothing* in the plain language of the statute indicated a legislative intent to overrule *Tyner* and to immunize the State from all tort claims, as DCYF specifically contended in that case. *Id*. at 161. Division III's opinion results in the very outcome the *Desmet* court rejected, holding that RCW 4.24.595(1) requires a gross negligence standard in all abuse investigation cases, overruling *Tyner*/*M.W.*[11]

Division III's published opinion disconnects the

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[10] RCW 4.24.595(2) provided complete immunity to DCYF and its staff for acts performed to comply with court shelter care or dependency orders.

[11] Such a statutory interpretation, overriding the common law, is not a *strict* interpretation of RCW 4.24.595(1).

interpretation of RCW 4.24.595(1) from emergent placements or shelter care. Op. at 19-20. Contrary to Division III's analysis that the Legislature placed no temporal restrictions on RCW 4.24.595(1)'s limited immunity, *id.*, the Legislature recognized that when DCYF must investigate in a compressed time frame, *i.e.*, during the mere 72 hours afforded under RCW 13.34.065, DCYF is afforded more latitude in the quality of its investigations, and is afforded limited relief by RCW 4.24.595(1). Here, CPS was not acting under the 72-hour compressed investigation timeline. It was going to take 30-60 days to act, hardly an emergency.

DCYF made a policy argument below to avoid the plain language of the statute, contending RCW 4.24.595(1) is designed to give DCYF staff "breathing room" to investigate, and that "[i]t would make no sense to insulate social workers with a gross negligence standard when they find sufficient information to support a shelter care hearing, but not in the absence of such information." CP 981. But that argument reads "emergent" and

"shelter care" out of the statute, defying the express statutory language that references an *emergent* placement investigation tied to a shelter care hearing. By its plain language, RCW 13.34.065 applies when a child is taken into custody, at which time a shelter care hearing must be scheduled. If CPS does not take a child into custody and no hearing is scheduled under RCW 13.34.065, by definition its investigation is not emergent.

Division III's statutory interpretation represents bad public policy. RCW 13.34 and 26.44 protect kids, not CPS caseworkers. In effectively immunizing DCYF for negligently performing its primary protective function, the competent investigation of reports of child abuse and neglect, Division III incentivizes the kind of cavalier investigation Mabee conducted here.

RCW 4.24.595(1) does not apply to Rustin.

(c) Division III Contravened the Legislative History of RCW 4.24.595(1)

Division III's interpretation of the statute is contrary to its

legislative history.[12] The 2012 Legislature's intent to address government liability when a child was removed from the family home on an *emergent* basis only was clear from the final bill report and committee testimony on the bill, including that of DCYF's own representative. That testimony focused on a narrow window of time for CPS caseworker special limited immunity; the Legislature did not intend to overrule *Tyner*/*M.W.* *See* Appendix.[13] The *Desmet* court confirmed that the 2012 legislation was not intended to nullify *Tyner* and afford DCYF "absolute liability" in its investigations of child abuse and neglect. *Desmet*, 200 Wn.2d at 161. Division III's analysis is exactly the contrary. This Court should provide the ultimate

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[12] Where the statute is "susceptible to two or more reasonable interpretations," the statute is ambiguous, *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005), and this Court may then look to extrinsic construction aids like legislative history materials to determine legislative intent. *Dep't of Ecology*, 146 Wn.2d at 11.

[13] The bill was the product of agreement by multiple organizations, many of which would not have agreed to as broad an immunity bill as Division III now condones.

interpretation of RCW 4.24.595(1), as it did for RCW 4.24.595(2) in *Desmet*. This Court must ultimately decide what RCW 4.24.595(1) means. *State v. Elgin*, 118 Wn.2d 551, 558, 825 P.2d 314 (1992) (Supreme Court ultimately decides the meaning of statutes). Review is merited. RAP 13.4(b)(1), (4).[14]

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[14] Division III avoided the question of whether a genuine issue of material fact foreclosed summary judgment, op. at 27 n.6, even though DCYF first raised an entitlement of such relief. Br. of Appellants at 21-29. Taking the facts and reasonable inferences, in a light most favorable to the Estate as the non-moving party on summary judgment, CPS failed to exercise slight care in Rustin's case. Jane Ramon's comprehensive declaration, based on her equally comprehensive report, documents in detail how DCYF's cavalier investigation was incomplete. CP 889-957. *Swank v. Valley Christian School*, 188 Wn.2d 663, 685, 398 P.3d 1108 (2017). *See also*, WPI 10.07; *Lennox v. Lourdes Health Network*, 195 Wn. App. 1003, 2016 WL 3854589 (2016) (unpublished), *review denied*, 187 Wn.2d 1013 (2017) (reversing summary judgment on whether outpatient treatment facility was grossly negligent in failing to take more aggressive steps to detain patient); *Schulte v. Mullan*, 195 Wn. App. 1004, 2016 WL 3919695 (2016) (unpublished), *review denied*, 187 Wn.2d 1004 (2017) (gross negligence is a jury question); *Kelly v. County of Snohomish*, 8 Wn. App. 2d 1038, 2019 WL 1772329 (unpublished), *review denied,* 194 Wn.2d 1011 (2019) at *3-4 (same). Ramon appropriately concluded that DCYF's staff "failed to exercise slight care during their investigation, risk assessment, and safety planning while handling multiple CPS referrals regarding Rustin

(2) Division III Erred in Concluding That the Trial Court Improperly Limited the Van Doorninck Testimony under ER 403

Division III's published opinion concludes that former Pierce County Superior Court Judge Kitty Van Doorninck could offer her opinion as to what a "reasonable judge" would have decided to do in a dependency hearing as to Rustin (despite the fact that CPS never even sought such hearing). Op. at 20-27. In doing so, the court overrode the trial court's expansive ER 403 authority to exclude otherwise admissible evidence that is unfairly prejudicial, disregarding the unfairness of the "aura of the robe." The issue is not an isolated one.[15] DCYF's practice

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Atkerson." CP 892. That expert testimony created a genuine issue of material fact, forestalling summary judgment. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) ("Generally speaking, expert opinion on an ultimate question of fact is sufficient to establish a triable issue and defeat summary judgment."). Gross negligence is a factually-rich issue for a jury.

[15] The State's practice is to use the testimony of former judges to lend credence to its arguments in child abuse cases. CP 37-38 (DCYF offered the testimony of Judge Jay Roof in *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015)). That declaration was essentially identical to Judge Van Doorninck's

of using former judicial officers to render legal opinions in child abuse will recur. This Court needs to articulate an appropriate standard for the testimony of former judges on legal issues. RAP 13.4(b)(4).

Washington courts regularly uphold the wide discretion of trial courts in making ER 403 decisions. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010) (evidence of the plaintiff's immigration status in a personal injuries case excluded because of its potential for unfair prejudice); *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 481 P.3d 181 (2020) (evidence of intoxicated plaintiff's blood alcohol test excluded because of its prejudicial effect on the jury); *Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 490 P.3d 200 (2021) (testimony of an expert on the decedent's life expectancy due to

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here. CP 204. Moreover, DCYF here tried to use the testimony of Commissioner Bart Vandegrift, before abandoning that effort in the face of Atkerson's opposition. CP 27-28; Supp. CP 1-10. Van Doorninck's testimony mirrored the Vandegrift testimony. CP 28.

alcohol consumption excluded). *See also*, *Cox v. State, Dep't of Soc. & Health Servs.*, 26 Wn. App. 2d 1022, 2023 WL 2983116 (2023) (unpublished) at *7, 23 (State's attempt to provide the testimony of the dependency court judge in the notorious Powell murder case excluded as irrelevant); *Allread v. City of Burien*, __ Wn. App. 2d __, 2024 WL 166925 (2024) (unpublished) (trial judge is better positioned to assess unfair prejudice under ER 403 than appellate court).

The trial court did not entirely exclude the Van Doorninck testimony, but rather precluded DCYF's effort to offer her *legal opinion* regarding Rustin's case. CP 973. DCYF *conceded* below that Judge Doorninck could not testify to legal conclusions, CP 35, but DCYF claims that judges may provide expert testimony on "what a reasonable judicial officer might have done" in deciding what course to take in Rustin's case. CP 39. That is wrong.

A judge, for example, may testify about *the procedures* to be employed in deciding a case. That is why Judge Soule's

testimony was relevant and admissible in *Petersen v. State*, 100 Wn.2d 421, 442-43, 671 P.2d 230 (1983). Op. at 24-25. He responded to a hypothetical question about "whether a hearing [on parole revocation] would be held." *Id.* at 443. The judge was not asked to testify if he would have revoked the parole. *Id.* That is a critical distinction.

In *Schulte*, *supra*, Division I concluded that enough causation evidence had been presented, including testimony from a retired judge, as to what a court likely would have done *procedurally* when confronted with an offender's actions in breach of his supervision.

The limited value of the Van Doorninck testimony is *far* outweighed by its potential unfair prejudice; the judge's legal opinion, with the aura of the robe attached to it, is unfairly prejudicial, just as the BAC results were in *Gerlach*. Moreover, jurors will be confused as to whether the retired judge's legal opinion or the trial court's instructions on the law govern their decision-making.

Division III merely adopted DCYF's contention that the Van Doorninck testimony addressed that of Atkerson's expert, Jane Ramon, rather than analyzing the specific content of the Van Doorninck testimony. Op. at 23-24. The Ramon testimony largely involved her opinion about CPS's incomplete, flawed investigation of Rustin's abuse. CP 891-901. Judge Van Doorninck's *legal conclusion* about what another judge would do is irrelevant to the ER 403 test. Moreover, if Ramon's testimony involved a legal conclusion, it could be excluded.

Moreover, Division III discounts the "aura of the robe" attached to a judge's opinion by jurors, op. at 25, but this was a reality considered by the trial court. RP 36-37. Ethical rules for judges, and the case law limiting the ability of judges to testify[16]

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[16] CJC Rule 1.3 bars a judicial officer from using the prestige of his/her office to advance another's economic interest. Judge Van Doorninck's proposed testimony illicitly uses the prestige of her former judicial position in a fashion intended by DCYF to convey "court support" for its position. It is too great a temptation for lay jurors to believe that a judge is "impartial," when, in fact, as here, that former judicial officer is a paid partisan. Under the common law, only in "the rarest of

or to vouch for the character of witnesses are meant to avoid the "aura of the robe."[17] It is no different when a judge, albeit a retired one, offers her view on the law.

Judge Von Doorninck's testimony, if admitted,[18] was

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circumstances" should a judge give evidence. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 20-21, 482 P.2d 775 (1971); *In re Disciplinary Proceedings Against Sanai*, 167 Wn.2d 740, 752, 225 P.3d 203 (2009) (noting that evidence rules and codes for judicial conduct reflect a presumption against judicial testimony). *See also*, ER 605 ("The judge presiding at a trial may not testify in that trial as a witness.").

[17] Rule 3.3 precludes a judicial officer from acting as a character witness or vouching for the character of a person. *Joachim v. Chambers*, 815 S.W.2d 234, 238-39 (Tex. 1991) ("The entrance of a judge into the litigation arena in aid of a combatant impacts not only the outcome of that conflict but the very idea of judicial impartiality.").

[18] Division III punted on addressing the admissibility of the Van Doorninck testimony under ER 702-04. Op. at 20 n.3. It was an inadmissible legal opinion. *Stenger v. State*, 104 Wn. App. 393, 408-09, 16 P.3d 655, *review denied*, 144 Wn.2d 1006 (2001). In excluding the legal opinion of a lawyer on DSHS/DCYF's obligations to a dependent child under state and federal law, Division I stated: "Expert opinion that consists solely of legal conclusions is not admissible under the Rules of Evidence and it cannot, by its very nature, create an issue of material fact when it contains only legal conclusions."

properly limited, as the trial court did here under ER 403. Review is merited. RAP 13.4(b)(1), (2).

F. CONCLUSION

This Court's review of Division III's published opinion is imperative for Washington's children. The Court should affirm the trial court's November 14, 2022 order denying summary judgment to DCYF. Costs on appeal should be awarded to the Estate.

This document contains 4,805 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 14th day of February, 2024.

Respectfully submitted,

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APPENDIX

APPENDIX TO PETITION FOR REVIEW

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RCW 4.24.595:

(1) Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

(2) 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. In providing reports and recommendations to the court, employees of the department of children, youth, and families are entitled to the same witness immunity as would be provided to any other witness.

RCW 13.34.020:

…the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. 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. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern.

RCW 26.44.010:

The Washington state legislature finds and declares: The bond

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

ER 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IAN ATKERSON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RUSTIN ATKERSON, Respondent, v. STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, John and Jane Doe 1-10, Petitioner.	)	No. 39483-2-III PUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — RCW 4.24.595(1) insulates governmental entities and their officers, agents, employees, and volunteers from liability in tort for their acts or omissions in emergent placement investigations of child abuse or neglect, unless the acts or omissions constitute gross negligence. The statute defines "emergent placement investigations" as investigations conducted prior to a shelter care hearing.

Here, the Department of Children, Youth, and Families (DCYF) began an investigation to determine whether 23-month-old Rustin Atkerson's broken arm and bruises were the result of child abuse or neglect. Two weeks later, and prior to DCYF's determination, Rustin sustained a fatal head injury from his mother's boyfriend.

The young boy's estate and his father brought suit against DCYF for negligent investigation. DCYF moved for summary judgment dismissal. The parties presented the trial court with dueling expert opinions as to whether the evidence DCYF knew or should have known would have resulted in Rustin being removed from his mother's care. The trial court struck the opinion of DCYF's expert, a retired superior court judge, on the basis that the danger of the opinion's unfair prejudice substantially outweighed its probative value. Yet it considered the opposing opinion from Atkerson's expert, a licensed independent clinical social worker. The trial court denied DCYF's summary judgment motion after concluding that RCW 4.24.595(1)'s gross negligence standard did not apply because DCYF's investigation did not result in a shelter care hearing.

After denying summary judgment, the trial court certified three questions to this court, and we granted certification of two—one involving the proper standard of liability and the other involving the stricken opinion. We conclude that RCW 4.24.595(1)'s gross negligence standard applies, even though no shelter care hearing occurred. We further conclude that the trial court erred by striking the opinion of DCYF's expert, apparently on the basis that a jury would attach too much weight to the retired judge's opinion. We remand for further proceedings consistent with this opinion.

FACTS

Elaine Hurd, who had a young son, Ben, began dating Ian Atkerson in 2012. Soon after, the three began living together. Hurd became pregnant, and Rustin was born on June 19, 2015.

Hurd had explosive outbursts toward Atkerson and Ben. In 2016, after the couple separated, Hurd refused to allow Atkerson to see Ben and Rustin.

In October 2016, Atkerson petitioned for custody of Rustin and filed a declaration critical of Hurd's parenting and mental health issues, along with declarations from witnesses concerning Hurd's disturbing behaviors. A court commissioner issued a temporary parenting plan and ordered Hurd to undergo an anger management evaluation. During her evaluation, Hurd admitted to lashing out and becoming uncontrollable when angry and having a problem with her temper. The court entered another temporary parenting plan in December 2016. The plan gave Hurd primary residential placement of Rustin and allowed Atkerson residential time with his son.

In early May 2017, Hurd and Atkerson participated in family court mediation. The mediation resulted in a signed agreement for shared residential time with Rustin. Soon after signing the agreement, Atkerson began noticing bruises on Rustin whenever Hurd

returned Rustin to him. In late May or early June, Atkerson called DCYF and reported Rustin's bruises, but the agency had no record of his call.

On June 8, Hurd brought Rustin to a medical clinic. X-rays showed that Rustin had fractures in his lower right arm, both to his ulna and his radius bones. An emergency room physician's assistant (PA) reported the injury to DCYF. In the PA's report, she noted that Rustin's arm was obviously broken because the deformity was detectable. The PA reported that Hurd could not explain how Rustin was injured but Hurd said she got Rustin from his father around 4:00 p.m. the day before, that Rustin said his right arm hurt, but otherwise he "seemed fairly normal." Clerk's Papers (CP) at 570. The PA also reported that Atkerson came to the hospital and said Rustin was fine when he gave Rustin to Hurd the day before. The PA noted that a fall on an outstretched hand may have caused the fractures but referred the matter to DCYF for parental neglect because "neither parent knows how the break was caused and there was a delay in care for the break." CP at 570. Atkerson also called DCYF and reported Rustin's broken arm, said that Rustin broke his arm in Hurd's care, and that Rustin was fine before Hurd took him.

On June 8, DCYF assigned social worker Veronica Mabee to investigate Rustin's injury. That day, Mabee screened in both the PA's and Atkerson's reports and forwarded them to law enforcement. DCYF also received a report that day from Hurd. Hurd

reported that she was concerned Atkerson was not supervising Rustin because she had noticed previous scratches, bumps, and bruises when she got Rustin from Atkerson.

On June 9, Mabee went with a police officer to Hurd's Entiat address but could not locate her. Mabee spoke with Hurd's father who told her that Hurd, Ben, and Rustin all lived there. Later that day, Mabee was able to meet with Hurd at the local Child Protective Services (CPS) office. Hurd brought Rustin and Ben to the office.

Hurd explained that after she got Rustin from Atkerson on June 7, she noticed that Rustin's elbow was red and he was whiny, and the next day he was in distress. This differed from what Hurd told the PA the day before.

During the interview, Mabee saw Hurd accidentally smack Rustin in the face after he grabbed something out of her purse. Hurd did not acknowledge she had smacked Rustin and instead continued to speak with Mabee. This made Mabee suspicious of Hurd.

During the interview, Mabee spoke in private with Ben, who was almost eight years old. Ben told her that he was at school and did not know how Rustin broke his arm. He said his mother sometimes spends the night with friends and brings Rustin with her, and he had not seen his mother in the last three days. Mabee did not ask Hurd where she had been staying on June 7 or 8, even though those dates coincided with Rustin's broken arm.

On Sunday, June 11, Atkerson's mother called DCYF to report two new bruises on Rustin after Hurd delivered Rustin to Atkerson. According to the report, Hurd would not tell Atkerson where she was staying, but Hurd's current boyfriend might live in East Wenatchee.

The next morning, June 12, Mabee learned of Atkerson's mother's report. Mabee's supervisor, Jennifer Andrade, joined the case that day. Mabee forwarded the new report to law enforcement and called Atkerson's mother to follow up. That day, Atkerson left a voicemail with Mabee telling her of Rustin's new bruises and that he was not comfortable returning Rustin to Hurd.

On June 12, Mabee and a police detective went to Atkerson's home to visit Rustin and view the reported injuries. After speaking with Atkerson and viewing the new injuries, Mabee decided to meet again with Hurd.

On June 15, Mabee and a police detective met with Hurd at the local CPS office. According to her case note, Mabee and the detective were "even more convinced today that [Hurd] has some significant [mental health] issues . . . ." CP at 635. Hurd had no explanation for Rustin's recent injuries and only wanted to talk about Atkerson. Hurd claimed she had video evidence on her phone of Atkerson assaulting her. But when Hurd played the video, it showed nothing. When confronted with the lack of evidence, Hurd

rewound the video and told them to look closer. "However, even with a second look, the allegations of physical assault that [Hurd] is alleging that [Atkerson] did, is simply not supported by her video. There is no evidence that [Atkerson] even attempted to hurt her." CP at 635.

Mabee asked Hurd about Rustin's broken arm the week before. According to the case note, after getting Rustin from Atkerson, she and Rustin went home. Once there, she noticed that Rustin's elbow was red and suspected he had a bee sting. She told Mabee that it was not until the next day when, after meeting with her lawyer, she decided to take Rustin to a doctor.

In the June 15 case note, Mabee remarked that Hurd's physical appearance was concerning for drug use. Despite this, Mabee still did not ask Hurd where and with whom she stayed in East Wenatchee.

On June 15, Hurd took Rustin to an orthopedic surgeon, Dr. Richard Brownlee. Following that appointment, Dr. Brownlee called DCYF and reported that after reviewing Rustin's medical records he believed Rustin's bone fractures would have taken a significant force, much more than just falling down. Dr. Brownlee also reported that both parents blamed each other for Rustin's lower arm fractures but that someone must have known what happened because the type of injury that Rustin suffered would have caused

him to cry a lot. Dr. Brownlee also was concerned that when he was putting a new splint on Rustin, Rustin kept apologizing "as if he was doing something bad." CP at 640.

The next day, on June 16, Mabee and Andrade received Dr. Brownlee's report, and his opinion that Rustin's injury was caused by a significant force, not from falling down. He was unclear whether he thought Rustin's broken arm was caused by abuse. Mabee knew that Hurd had anger issues, she knew that Hurd's complaints against Atkerson were not credible, and she suspected that Hurd was dishonest, on drugs, and had mental health problems. Although Dr. Brownlee's opinion was unclear and a telephone call could clarify it, Mabee decided to follow up with him, "likely in about a week." CP at 564.

On June 22, Mabee learned that Rustin had suffered severe head trauma and had been taken to a local hospital. She went to the hospital. Once there, Mabee learned that Hurd was at a "'friend's house'" in East Wenatchee when Rustin was injured the day before, on June 21. CP at 566. Mabee then went to the sheriff's office to speak with Hurd. Hurd told Mabee she had been staying with her boyfriend, Steven Rowe. She giggled when she told Mabee she would have taken Rustin to the hospital earlier had she known he was bleeding in his brain.

That day, Mabee looked into Rowe's CPS history. In a June 22 chart note, Andrade wrote: "'[Social worker] Mabee was able to see that Mr. Rowe has some

concerning CPS history regarding his own children and a current NO contact order.'" CP at 931. Rowe's history involved violence and abuse against women and children. He had gone to prison for assaulting one of his daughters. Civil protection orders had been entered restraining him from contacting some of his ex-girlfriends and his own children.

In the days that followed, Rustin was flown to Harborview Hospital in Seattle for specialized care. During July, Rustin's condition worsened. Based on interviews after Rustin's injury, it became apparent to Mabee that Hurd failed to protect Rustin from harm at Rowe's house. Mabee learned that Hurd had left Rustin with Rowe at some point on June 21 to get groceries and returned later that evening. Hurd claimed she was not with Rustin at the time of his head injury and waited to call 911 until the next day.

Rustin died on August 3. The sheriff's office continued to investigate Rustin's death and the prosecutor's office charged Hurd with manslaughter in the second degree and criminal mistreatment in the fourth degree. Hurd pleaded guilty to a reduced charge of criminal mistreatment in the second degree and was sentenced to 12 months of confinement. Rowe was arrested and charged with assault of a child in the first degree.

In October 2017, DCYF determined that the allegations of physical child abuse and negligent treatment of Rustin were founded as to Hurd and Rowe.

Procedure

In May 2020, Atkerson, individually and on behalf of his son's estate, sued DCYF, claiming that its negligent investigation resulted in its failure to remove Rustin from Hurd's care, causing Rustin to suffer abuse and death. In September 2022, DCYF moved for summary judgment dismissal of Atkerson's negligent investigation claim. It raised two arguments pertinent to this appeal: first, Atkerson's negligent investigation claim must be dismissed because he could not prove, in accordance with RCW 4.24.595(1), that DCYF acted grossly negligent; and second, the information Atkerson asserted it should have known before Rustin's head injury would have been insufficient for it to remove Rustin from Hurd's care. In support of this second argument, DCYF submitted a declaration from its expert, retired Superior Court Judge Kitty-Ann Van Doorninck, who had served on the Pierce County bench for 24 years. Judge Van Doorninck opined that no reasonable judge would have authorized a pickup order for Rustin before June 21, even if DCYF knew the information Atkerson asserted it should have known.

Atkerson responded that RCW 4.24.595(1) and its gross negligence standard did not apply because DCYF had not conducted an "emergent placement investigation," as described by the subsection. Atkerson argued that an emergent placement investigation occurs during the 72 hours between when DCYF removes a child from a parent and the

shelter care hearing. Alternatively, he argued even if the gross negligence standard applied, it was a question of fact whether DCYF acted grossly negligent.

Atkerson produced a declaration from his own expert witness, Jane Ramon, a licensed independent clinical social worker. In her opinion, DCYF fell far below the required standard of care in its investigation and failed to exercise even slight care, resulting in Rustin's death. She opined that had DCYF adequately investigated the case, it would have discovered facts sufficient for a judge to have Rustin removed from his mother's care prior to his fatal head injury.

Atkerson moved to strike Judge Van Doorninck's declaration. He argued that the Code of Judicial Conduct, Rules of Professional Conduct, court rules, and the common law establish a policy banning the testimony of retired judges. He also argued that the evidence was inadmissible under ER 702 and ER 704 because it consisted of improper legal conclusions.

The trial court held a hearing on Atkerson's motion to strike. Following argument, the court granted the motion, but relied on ER 403:

> So in terms of the motion to strike the testimony of Judge Van Doornick [sic]—and I already informed the parties at the hearing that it's a little unusual for a summary judgment motion to have a declaration from a judge telling a judge what a reasonable judge would do. And—but understanding that, there is also a request to strike her testimony for the purposes of the jury trial. . . . I am going to strike her testimony as it

> pertains to what a reasonable judge would do . . . . And I'm actually going to do it under ER 403, which wasn't argued . . . .
>
> *But the Court's concern is that the probative value is substantially outweighed by the danger of unfair prejudice when you have a judge explaining what a reasonable judge would do, as opposed to another witness who would testify as to what they have seen judges do in these circumstances.* It is quite prejudicial, and frankly, these are discretionary decisions to quite a bit of degree. And it's difficult for one judge to say what any other judge would do. . . . ER 403 I think is the appropriate rule here for exclusion.

Rep. of Proc. (RP) at 36-37 (emphasis added).

A few days later, the court heard argument and denied DCYF's motion for summary judgment. It concluded that the ordinary negligence standard applied to DCYF's investigation, not the gross negligence standard found in RCW 4.24.595(1). It further concluded that Atkerson presented genuine issues of material fact on its negligent investigation claim.

The trial court denied DCYF's motion for reconsideration, but it did certify three questions for appellate review, pursuant to RAP 2.3(b)(4). We granted review of two questions: "(1) whether the trial court erroneously refused to apply RCW 4.24.595(1) and its gross negligence standard; and (2) whether the trial court erroneously excluded retired Judge Van Doorninck's 'reasonable judge' testimony under ER 403." Comm'r's Ruling, *Atkerson v. DCYF*, No. 39483-2-III (Wash. Ct. App. Feb. 17, 2023).

ANALYSIS

APPLICABLE NEGLIGENCE STANDARD

DCYF contends the trial court erred by not applying the gross negligence standard of RCW 4.24.595(1). We agree.

Standard of review

We review denial of a summary judgment motion de novo. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Child abuse and dependency statutes

Chapter 26.44 RCW governs the duty to report child abuse or neglect. *Desmet v. Dep't of Soc. & Health Servs.*, 17 Wn. App. 2d 300, 307, 485 P.3d 356 (2021), *aff'd*, 200 Wn.2d 145, 514 P.3d 1217 (2022). Chapter 13.34 RCW governs dependency actions. *Id.* 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. *Id.* (citing RCW 26.44.010; RCW 13.34.020;

H.B.H. v. State, 192 Wn.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.'" *Id.* (quoting RCW 13.34.020).

When CPS social workers 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 DCYF. *Id.* at 308 (citing 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.'" *Id.* (quoting former RCW 26.44.050 (2020)). Once a report has been filed, RCW 26.44.050 requires law enforcement or DCYF to investigate and "where necessary to refer such report to the court."

Negligent investigation cause of action

In *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000), our Supreme Court recognized that parents have an implied cause of action against the Department under RCW 26.44.050 for negligent investigation of child abuse allegations. *Desmet*, 17 Wn. App. 2d at 309. This cause of action is a "narrow

exception" to the rule that there is no general tort claim for negligent investigation. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003).

To prevail on a negligent investigation claim, the claimant must show that DCYF "gathered incomplete or biased information that results in a harmful placement decision, such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *Id.* at 602. A claimant also must show that the faulty investigation was a proximate cause of the harmful placement decision. *McCarthy v. Clark County*, 193 Wn. App. 314, 329, 376 P.3d 1127 (2016).

However, the legislature, by later enacting RCW 4.24.595(1), limited the scope of this cause of action by granting DCYF immunity for emergent placement investigations and decisions, unless its actions or omissions were grossly negligent. That statutory subsection provides:

> Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. *Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.*

RCW 4.24.595(1) (emphasis added).

Under RCW 13.34.065(1)(a), when a child is removed from their parents' custody, or when CPS seeks removal, "the court shall hold a shelter care hearing within 72 hours." "The primary 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." *Id.*

Here, the trial court concluded that RCW 4.24.595(1) and its gross negligence standard do not apply. The court reasoned:

> [G]ross negligence doesn't apply in this case because there was no shelter care hearing. The statute is intended to protect CPS and [the Department] when it makes a decision to remove a child from a home, and that's just not what happened here.
>
> So I'm not going to apply the gross negligence standard; I don't think it's appropriate in this case.

RP at 72-73.[1]

[1] The trial court based its decision on *Peterson v. Department of Social and Health Services*, noted at 9 Wn. App. 2d 1079, 2019 WL 3430537 at *5, where the court interpreted RCW 4.24.595(1) to "grant the Department immunity for investigations that result in an emergent removal and shelter care hearing regardless of the exact timing of any of the particular events." In *Peterson*, CPS placed a child in emergency foster care after receiving reports of sexual abuse and filed a dependency petition. *Id.* at *2. On appeal from the Department's summary judgment motion, the court held that the Department had conducted an "emergent placement investigation" because of the "closeness in time of its investigation preceding the shelter care hearing." *Id.* at *5. Although the *Peterson* court analyzed many of the same arguments that Mr. Atkerson advances in this appeal, it noted that it was not defining "the parameters of what constitutes an emergent placement investigation beyond the facts of this case." *Id.* at *6 n.5.

The gross negligence standard applies to DCYF's investigation

This appeal requires us to interpret RCW 4.24.595(1). We review questions of statutory interpretation de novo. *Jametsky v. Olsen*, 179 Wn.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 Wn.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 under the guise of construction." *McColl v. Anderson*, 6 Wn. 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 & Sewer Dist.*, 196 Wn.2d 353, 364, 474 P.3d 547 (2020).

Under Atkerson's interpretation, application of the gross negligence standard is predicated on the removal of the child and the scheduling of a shelter care hearing. He points to the statute's reference to the shelter care statute, RCW 13.34.065, and argues that the statutes, when read together, define "emergent placement investigation" as one that occurs within the 72-hour period after a child is taken into custody and before a shelter care hearing.

DCYF responds that the statute does not condition application of the gross negligence standard on an investigation that results in taking the child from their parents and scheduling a shelter care hearing. It points to the plain language of the statute. For the reason explained below, we agree with DCYF.

RCW 4.24.595(1) limits the liability of governmental entities and its agents for acts or omissions "in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW," including "any determination to leave a child with a parent." Thus, the legislature chose to limit liability even for DCYF determinations resulting in a child being left with a parent. And, because such determinations would not result in a shelter care hearing, RCW 4.24.595(1) applies even when an investigation results in no shelter care hearing.

This conclusion is not inconsistent with later language in RCW 4.24.595(1), which defines "emergent placement investigations" as "those conducted prior to a shelter care hearing." A review of both RCW 4.24.595 subsections shows that the legislature created a temporal divide between when tort liability would be premised on a gross negligence standard, RCW 4.24.595(1), and when tort liability would be either precluded or premised

on a witness immunity standard, RCW 4.24.595(2).[2] The temporal divide is the shelter care hearing, when court orders are often first issued.

Atkerson, argues that RCW 4.24.595(1) is in derogation of the common law negligence standard, as confirmed in *Tyner*, so the statute must be strictly construed to limit its application to those situations clearly within its scope. We agree, and our strict construction of the statute's scope is based on the statute's express language.

Atkerson also argues that "emergent" means "expeditious," and there is nothing expeditious about an investigation that spans two weeks, such as the investigation in this case. In a similar vein, he argues that an emergent placement investigation must be limited to an investigation conducted within the 72-hour window between when a child is removed from a parent and the shelter care hearing. We disagree.

First, with respect to Atkerson's "expeditious" argument, an investigation into child abuse or neglect often requires contacting several witnesses—including family members, teachers, and doctors; it also requires obtaining reports—including police, medical, and court records. Given the scope of information required for an accurate

[2] RCW 4.24.595(2) provides: "[DCYF] 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. In providing reports and recommendations to the court, employees of [DCYF] are entitled to the same witness immunity as would be provided to any other witness."

investigation, an expeditious investigation can take several days, if not weeks. Second, with respect to his 72-hour argument, if the legislature intended to limit an emergent placement investigation to the 72 hours prior to a shelter care hearing, it could have said so. It did not. Nothing in the subsection mentions this 72-hour window.

We conclude that DCYF's investigation into Rustin's abuse and neglect was an emergent placement investigation, as contemplated by RCW 4.24.595(1), and its liability and the liability of its agents are premised on gross negligence.

REASONABLE JUDGE TESTIMONY UNDER ER 403[3]

The Department contends the trial court erred by excluding the opinion of retired Judge Van Doorninck under ER 403. We agree.

Standard of review

The parties dispute the applicable standard of review. DCYF contends we should review the trial court's evidentiary decision for an abuse of discretion. Atkerson argues we should review the decision under a de novo standard, a standard that would more easily allow reversal. Atkerson is correct.

[3] In their briefing, the parties additionally raise the arguments raised below, whether Judge Van Doorninck's opinion is admissible under ER 702 and ER 704. However, the trial court excluded the retired judge's testimony under ER 403, and we did not accept review of any broader evidentiary issue.

"An appellate court would not be properly accomplishing its charge if the appellate court did not examine ***all*** the evidence presented to the trial court, including evidence that had been redacted. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This standard is consistent with an appellate court's charge of conducting the same inquiry as the trial court. *Id.*

ER 403

Under ER 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Under the rule, there is a presumption favoring admissibility, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994). The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is "'quite slim'" where the evidence is undeniably probative of a central issue in the case. *Id.* at 224.

Nearly all evidence will prejudice one side or the other. *Id.* Evidence is not rendered inadmissible under ER 403 just because it is prejudicial. *Id.* Rather, ER 403 is concerned with what is termed "unfair prejudice," usually meaning prejudice caused by evidence that is more likely to arouse an emotional response than a rational decision among the jurors. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *Id.*

Here, DCYF retained retired Judge Van Doorninck as an expert witness and sought to have her declaration admitted in support of its summary judgment motion. Her testimony consisted of her opinion that a reasonable judge would have denied DCYF's attempts to remove Rustin from his parents' care based on the evidence Atkerson claimed DCYF should have known. In the retired judge's opinion:

> [T]he available evidence that would have been provided to the court in a dependency proceeding if initiated between June 8 and 21, 2017 was insufficient, on a more probable than not basis, for a reasonable judge to make the statutorily-required findings of a risk of imminent harm and a continuing threat of substantial harm following Rustin's disclosed arm injury and reported bruises.
>
> My opinion would be maintained even if a reasonable judge had considered information about Rustin's injury relayed to CPS from surgeon Dr. Richard Brownlee, because there was no indication of a risk of imminent harm resulting from uncertainty about how the earlier fracture occurred and who might have known the reason.

> Moreover, my opinion would also be maintained even if a reasonable judge had been made aware that Rustin's mother was dating a man named Steven Rowe, because Rustin was legally in the care of his parents and not Mr. Rowe, and there was no indication Rustin's health, safety and welfare were being seriously endangered by Mr. Rowe prior to June 21, 2017. Further, on a more probable than not basis, a reasonable judge would have found the mere identity of Mr. Rowe, and even a history of CPS involvement involving other minors, too speculative to suggest a risk of imminent harm to Rustin while in his mother's lawful custody.
>
> To summarize the foregoing analysis, it is my opinion that a reasonable judge would have more probably than not denied a "pickup order" brought by the State and disallowed Rustin's removal from his parents' joint custody between June 8 and 21, 2017. A ruling to the contrary would have been inconsistent with the agreed terms of a final Parenting Plan that the court entered within that same timeframe, and not supported by facts sufficient to make required findings under RCW 13.34.050.

CP at 750-51.

In response, Atkerson submitted a declaration from his own expert, Jane Ramon. In comprehensive detail, Ramon's declaration discusses significant omissions in Mabee's investigation that violated DCYF's policies and constitute "egregious violation[s] of the standard of care." CP at 898. She faults Mabee for not treating Dr. Brownlee's referral with the urgency required. She points to the warning signs of Hurd's mental illness, drug use, and dishonesty, her known anger issues, and faults Mabee for not further investigating when Hurd told her on June 16 that she stayed in Wenatchee rather than with her father in Entiat. She notes that Mabee, in her deposition, admitted she should

have asked questions that would have elicited useful responses from Hurd about where she was living.

Similar to Judge Van Doorninck, Ramon provided an opinion on whether a judge would have authorized Rustin's removal:

> Steven Rowe's disturbing criminal and CPS history is one of the more astounding set of facts I have seen in all my professional years. The State's witnesses claim that even if a judge was presented with evidence that Rustin (who had unexplained broken bones and bruising) was staying with Steven Rowe, a convicted felon with an extensive CPS history and criminal history related to abuse of his own children, and who was not even allowed to see his own children, that the judge would still not have taken action to protect Rustin. I have never once in my career experienced a judge who would be given all of these facts, and asked to protect a toddler, and then refused my request.

CP at 900.

DCYF argues that retired judges can serve as expert witnesses and that the trial court misapplied ER 403 by allowing Atkerson's expert to proffer an opinion on the same issue it precluded its expert. We agree.

Our Supreme Court has permitted even a sitting judge to testify as an expert witness and to respond to hypothetical questions. In *Petersen v. State*, 100 Wn.2d 421, 443, 671 P.2d 230 (1983), the Supreme Court held that the trial court did not abuse its discretion by allowing a sentencing judge to respond to a hypothetical question by plaintiff's counsel about how he would have ruled. There, "[p]laintiff's counsel posed a

hypothetical question assuming a number of facts previously presented as evidence and asked whether, assuming those facts, [the judge] would have ordered a probation revocation hearing." *Id.* at 442.

In addition, our Supreme Court has made clear that ER 403 is concerned with "unfair prejudice," which "is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors." *Carson*, 123 Wn.2d at 223. And as noted previously, the ability for unfair prejudice to substantially outweigh the probative value of evidence is "'quite slim'" where the evidence is undeniably probative of a central issue in the case. *Id.* at 224. Further, ER 403 must be administered in an evenhanded manner. *Id.* at 225.

Here, Judge Van Doorninck's opinion is not likely to arouse an emotional response from jurors; rather, it appeals to rational thinking about whether a reasonable judge would have authorized a pickup order. Moreover, the retired judge's opinion concerns a central issue in the case, i.e., whether DCYF's omissions in investigating Rustin's abuse were a proximate cause of his fatal injury. Finally, the trial court's decision was not evenhanded because it considered Jane Ramon's declaration on the same issues it excluded Judge Van Doorninck's, seemingly because a jury would attach too much weight to a retired judge's opinion.

Atkerson additionally argues that Judge Van Doorninck's testimony should be restricted under ER 403. He contends the Code of Judicial Conduct (CJC), the Rules of Professional Conduct (RPCs), court rules, and common law establish a policy that narrows the circumstances in which a "former or present judge" can be a witness.[4] Br. of Resp't at 53. We are not persuaded.

Atkerson's argument that the CJC and its policy apply to Judge Van Doorninck's testimony is without merit. As he acknowledges in his brief, the CJCs apply only to "judges," which is defined as "anyone who is authorized to perform judicial functions, including an officer such as a magistrate, court commissioner, part-time judge or judge pro tempore." CJC, Application, I(A). Atkerson provides no authority that the CJCs or the underlying policies apply to a retired judge.[5] Where no authority for an assertion is made, we may presume none exists. *DeHeer*, 60 Wn.2d at 126.

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[4] Although Atkerson points to the RPCs and court rules to support his argument, he cites to no specific RPC or court rule. Nor does he provide any supportive argument for his assertion that the RPCs and court rules establish a policy to narrow the circumstances when a former or present judge can be a witness. We decline to address these arguments. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Where no authority for an assertion is made, we may presume none exists. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

[5] Atkerson's citation to the Texas Supreme Court's interpretation of its code of judicial conduct is also unavailing. First, Texas's code of judicial conduct is not

We conclude that the trial court erred when, under ER 403, it excluded Judge Van Doorninck's opinion. We reverse and remand for proceedings consistent with this opinion.[6]

Lawrence-Berrey, A.C.J.
Lawrence-Berrey, A.C.J.

WE CONCUR:

Staab, J.

Cooney, J.

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applicable to judges in Washington. Second, the case concerns the testimony of a retired judge who continued to sit on cases. *Joachim v. Chambers*, 815 S.W.2d 234, 235-41 (Tex. 1991). Here, there is no evidence that Judge Van Doorninck continues to sit on cases.

[6] The parties briefed and orally argued whether, if we decided the two certified issues in DCYF's favor, Atkerson's evidence was sufficient to defeat summary judgment. Although briefed and argued, the question was not certified to us, and we decline to address it.

FINAL BILL REPORT
ESSB 6555

C 259 L 12
Synopsis as Enacted

Brief Description: Implementing provisions relating to child protection.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Shin and Roach).

Senate Committee on Human Services & Corrections
Senate Committee on Ways & Means
House Committee on Early Learning & Human Services
House Committee on Ways & Means

Background: Child Protective Services (CPS) in Washington. CPS are services provided by the Department of Social and Health Services (DSHS) designed to protect children from child abuse and neglect, safeguard such children from future abuse and neglect, and to investigation reports of child abuse and neglect. Investigations may be conducted regardless of the location of the alleged abuse or neglect. CPS includes a referral to services to ameliorate conditions that endanger the welfare of children; the coordination of necessary programs and services relevant to the prevention, intervention, and treatment of child abuse and neglect; and services to children to ensure that each child has a permanent home.

Duty to Investigate. A number of professionals who regularly work with children are mandated reporters in Washington State. If the mandated reporter has reasonable cause to suspect that a child has been abused or neglected the fact must be reported to DSHS or law enforcement. DSHS must investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation or that presents an imminent risk of serious harm. On the basis of the findings of such investigation, DSHS or law enforcement must offer child welfare services to such parents, legal custodians, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court or other community agency. An investigation is not required of non-accidental injuries that clearly do not result from a lack of care or supervision by the child's parents, legal custodians, or persons serving in loco parentis. If the investigation reveals that a crime against a child may have been committed, DSHS must notify an appropriate law enforcement agency.

Appeal of a Finding of Child Abuse or Neglect. A person named as an alleged perpetrator in a founded allegation of child abuse or neglect has the right to seek review and amendment of the finding. Within 20 days of receiving such notice, the person must notify DSHS in writing

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

that he or she wishes to contest the finding. If the request is not made within the 20-day time period, the person has no right to agency review or further administrative or court review of the finding. After receipt of notification of the results of DSHS's review, the person has 30 days within which to ask for an adjudicative hearing with an administrative law judge. If the request is not made within the 30-day period, the person has no right to further review

Alternative Response System in Washington. In 1997 the Legislature authorized an alternative response system (ARS). ARS was a voluntary family-centered service provided by a contracted entity with the intention to increase the strength and cohesiveness of families that DSHS has determined to present a low risk of child abuse or neglect. The families referred to ARS were families that would not have been screened in for investigation. In 2006 DSHS redesigned ARS because a study of ARS determined that it was not producing good outcomes. The new program was called Early Family Support Services (EFSS). The stated goals of this program included the implementation of a standardized assessment tool, development of service delivery standards, and integration of promising or evidence-based programs. Again, families referred to this program were those not likely to be screened in for an investigation.

Consideration of Differential Response in Washington. In 2008 DSHS issued a legislative report regarding its consideration of a differential response system. The report described pros and cons associated with implementing differential response, which are summarized below.

Pros:

1. Social workers could concentrate on family assessment and case planning rather than the outcome of an investigation.
2. Investigative findings may become more consistent, due to a narrower focus.
3. Families that are chronically reported to CPS may receive more therapeutic interventions that are motivational in nature.

Cons:

1. In order for change to succeed the total agenda must be staged and doable, organizational capacity must be addressed given the number of change initiatives underway.
2. Funding, service levels, and ability to meet the basic needs of families would limit the outcomes of a differential response system.
3. The Children's Administration (CA) would likely not have the ability to respond to families in an assessment track with immediate services to meet their basic living needs and if Washington prioritized services for the most at-risk children, then lower risk families in the assessment track would receive fewer services paid by the DSHS/ CA.
4. All social work staff must be trained in engaging families and assessing safety and risk factors.
5. Implementation of non-contracted differential response system would require further specialization of staff and additional categorization of families.
6. Agencies serving vulnerable adults and children would not learn about some potential CPS concerns regarding persons applying to be employed or licensed since CPS investigative findings in some cases involving maltreatment would no longer occur for families diverted to the assessment track.

7. Research does not clearly indicate that referring moderate risk families to differential response would improve outcomes (some states limit an alternate response to low risk cases).

Differential Response In Other States. Approximately 18 other states have implemented a differential response system. Minnesota has the longest running differential response system. In a differential response system, a family's strengths and weaknesses and child safety are assessed and no investigation is conducted nor findings of child abuse made for cases that would otherwise be screened in and investigated. If the family does not wish to participate in the assessment, the case is referred for investigation, unless no child safety issues are presented.

Under the state's child abuse statutes, DSHS is responsible for investigating and responding to allegations of child abuse or neglect. In some cases of alleged abuse or neglect, a child may be immediately removed from a parent or guardian and taken into protective custody.

A court may order law enforcement or CPS to take a child into custody when the child's health, safety, and welfare would be seriously endangered if the child is not taken into custody. A child may be taken into custody without a court order when law enforcement has probable cause to believe that the child has been abused or neglected and the child would be injured or could not be taken into custody if it were necessary to first obtain a court order. A child may also be detained and taken into custody without a court order when a hospital administrator has reasonable cause to believe that allowing the child to return home would present an imminent danger to the child's safety.

A shelter-care hearing must be held within 72 hours of a child being taken into custody and placed under state care, excluding Saturdays, Sundays, and holidays. At the shelter-care hearing, the court determines whether the child can safely be returned home while the dependency is being adjudicated, or whether there is further need for an out-of-home placement of the child.

Washington courts have interpreted the child abuse investigation statute as creating an implied right of action for negligent investigation. In *Tyner v. DSHS*, the Washington Supreme Court found that the child abuse investigation statute creates a duty not only to the child who is potentially abused or neglected, but also to the parents of the child, even if a parent is suspected of the abuse. The court based this holding in part on legislative intent statements in the child abuse statutes describing the importance of the family unit and the parent-child bond. There are three types of negligent investigation claims recognized by the courts: (1) wrongful removal of a child from a non-abusive home; (2) placement of a child in an abusive home; and (3) failure to remove a child from an abusive home.

Witness immunity is a common law doctrine that provides witnesses in judicial proceedings with immunity from suit based on their testimony. The purpose of witness immunity is to preserve the integrity of the judicial process by encouraging full and frank disclosure of all pertinent information within the witness's knowledge. The rule is based on the safeguards in judicial proceedings that help to ensure reliable testimony, such as the witness's oath, the hazards of cross examination, and the threat of prosecution for perjury.

Summary: Family Assessment Response (FAR). When DSHS receives a report of child abuse or neglect, it must use one of two responses for reports that are screened in and accepted for response: an investigation or a family assessment. A family assessment is defined as a comprehensive assessment of child safety, risk of subsequent child abuse or neglect, and family strengths and needs that is applied to a child abuse or neglect report. The assessment does not include a determination as to whether child abuse or neglect occurred but does determine the need for services to address the safety of the child and the risk of subsequent maltreatment. FAR is defined as a way of responding to certain reports of child abuse or neglect using a differential response approach to child protective services. FAR must focus on the safety of the child, the integrity and preservation of the family, and assessment of the status of the child and family in terms of risk of abuse and neglect, including a parent's or guardian's capacity and willingness to protect the child. No one is named as a perpetrator and no investigative finding is entered in DSHS's database as a result of the FAR.

In responding to a report of child abuse or neglect, DSHS must:

1. use a method by which to assign cases to investigation or family assessment that are based on an array of factors which may include the presence of imminent danger, level of risk, number of previous child abuse or neglect reports, or other presenting case characteristics.
2. allow for a change in response assignment based on new information that alters risk or safety level;
3. allow families assigned to FAR to choose to receive an investigation rather than a family assessment;
4. provide a full investigation if a family refuses the initial family assessment;
5. provide voluntary services to families based upon the results of the initial family assessment; however, if the family refuses the services and DSHS cannot identify specific facts related to risk or safety that warrant assignment to an investigation, and there is no history of child abuse or neglect reports related to the family, then DSHS must close the case; or
6. conduct an investigation in response to allegations that:
    a. pose a risk of imminent harm to the child;
    b. pose a serious threat of substantial harm to the child;
    c. constitute conduct that is a criminal offense and the child is the victim; or
    d. the child is an abandoned or adjudicated dependent child.

DSHS must develop a plan to implement FAR in consultation with stakeholders, including tribes. The plan must be submitted to the appropriate legislative committees by December 31, 2012. The following must be developed before implementation and submitted in the report to the Legislature:

1. description of the FAR practice model;
2. identification of possible additional non-investigative responses or pathways;
3. development of an intake and family assessment tool specifically to use for FAR;
4. delineation of staff training requirements;
5. development of strategies to reduce disproportionality;
6. development of strategies to assist and connect families with the appropriate private- or public-housing support agencies;

7. identification of methods by which to involve community partners in the development of community-based resources to meet families' needs;
8. delineation of procedures to ensure continuous quality assurance;
9. identification of current DSHS expenditures for services appropriate to FAR;
10. identification of philanthropic funding available to supplement public resources;
11. mechanisms to involve the child's Washington state tribe, if any, in FAR;
12. creation of a potential phase-in schedule, if proposed; and
13. recommendations for legislative action necessary to implement the plan.

DSHS is not liable for using FAR to respond to an allegation of child abuse or neglect unless the response choice was made with reckless disregard.

DSHS must implement FAR no later than December 1, 2013. DSHS may phase-in implementation of FAR basis by geographic area. DSHS must develop an implementation plan in consultation with stakeholders, including tribes. DSHS must submit a report of its implementation plan to the Legislature by December 31, 2012.

For allegations that are placed in FAR, DSHS must:

1. provide the family with a written explanation of the procedure for assessment of the child and family and its purpose;
2. collaborate with the family to identify family strengths, resources and service needs, and develop a service plan with the goal of reducing risk of harm to the child and improving or restoring family well-being;
3. complete the family assessment within 45 days of receiving the report. Upon parental agreement, this time period may be extended to 90 days;
4. offer services to the family in a manner that makes it clear acceptance of the services is voluntary;
5. implement the family assessment response in a consistent and cooperative manner;
6. conduct an interview with the child's parent, guardian, or other adult residing in the home who serves in a parental role. The interview must focus on ensuring the immediate safety of the child and mitigating risk of future harm to the child in the home environment;
7. conduct an interview with other persons suggested by the family or persons DSHS believes has valuable information; and
8. conduct an evaluation of the safety of the child and any other children living in the same home. The evaluation may include an interview with or observation of the child.

The Washington State Institute for Public Policy (WSIPP) must conduct an evaluation of the implementation of FAR. WSIPP must define the data to be gathered and maintained. At a minimum, the evaluation must address child safety measures, out of home placement rates, re-referral rates and caseload sizes and demographics. WSIPP's first report is due December 1, 2014, and its final report is due December 1, 2016.

DSHS must conduct two client satisfaction surveys of families that have been placed in FAR. The first survey results must be reported by December 1, 2014, and the second survey results by December 1, 2016.

Appeal of a Finding of Child Abuse or Neglect. A person named as an alleged perpetrator in a founded allegation of child abuse or neglect has the right to seek review of the finding. Within 30 days of receiving notice from DSHS, the person must notify DSHS in writing that the person wishes to contest the finding. The written notice provided by DSHS to the alleged perpetrator must contain the following:

1. information about DSHS's investigative finding as it relates to the alleged perpetrator;
2. sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded allegation;
3. the right of the alleged perpetrator to submit a written response regarding the finding, which DSHS must file in the records;
4. that information in DSHS records may be considered in a later investigation or proceeding related to a different allegation of child abuse or neglect;
5. that founded allegations of abuse or neglect may be used in determining;
    a. whether the person is qualified to be licensed or approved for care of children or vulnerable adults;
    b. whether the person is qualified to be employed by DSHS in a position having unsupervised access to children or vulnerable adults.
6. that the alleged perpetrator has the right to challenge the founded allegation of abuse or neglect.

If the request is not made within the 30-day time period, the person has no right to agency review or further administrative or court review of the finding, unless the person can show that DSHS did not comply with the notice requirements of RCW 26.44.100. After receiving notification of the results of DSHS's review, the person has 30 days within which to ask for an adjudicative hearing with an administrative law judge. If the request is not made within the 30-day period, the person has no right to further review.

Government Liability. The purpose section of the child abuse or neglect statute is amended to provide that a child's health and safety interests should prevail over conflicting legal rights of a parent and that the safety of the child is DSHS's paramount concern when determining whether a parent and child should be separated during or immediately following investigation of alleged abuse or neglect.

Governmental entities, and their officers, agents, employees, and volunteers, are not liable for acts or omissions in emergent placement investigations of child abuse or neglect unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing. A new section is added to the child abuse or neglect statute stating that the liability of governmental entities to parents, custodians, or guardians accused of abuse or neglect is limited as provided in the bill, consistent with the paramount concern of DSHS to protect the child's health and safety interest of basic nurture, health, and safety, and the requirement that the child's interests prevail over conflicting legal interests of a parent, custodian, or guardian.

DSHS and its employees must comply with orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, DSHS employees are entitled to the same witness immunity as would be provided to any other witness.

Votes on Final Passage:

Senate	46	0	
House	97	0	(House amended)
Senate			(Senate refused)
House	80	17	(House receded/amended)
Senate	49	0	(Senate concurred)

Effective: June 7, 2012
December 1, 2013 (Sections 1 and 3-10)

Appendix 36

House Judiciary Committee Hearing
January 25, 2012, 8:00 a.m.
HB 2510
Limiting government liability
during preshelter care investigations of child abuse or neglect

https://www.tvw.org/watch/?clientID=9375922947&eventID=2012011124&startStreamAt=3060&stopStreamAt=4440&autoStartStream=true, From 0:51-1:15.

Staffperson Edie Adams: House Bill 2510 deals with an issue that has come before the Committee on a number of occasions in the past, dealing with the liability of the Department of Social and Health Services with respect to child abuse and neglect investigations.

Under the State's child abuse and neglect statutes, the Department is responsible for investigating and responding to allegations of abuse or neglect of a child. In some cases of alleged abuse or neglect, a child may be immediately removed from his or her parent or guardian and taken into protective custody if there's reason to believe that the child's health, safety or welfare will be seriously endangered. And in those cases, what is called a shelter care hearing must be held within 72 hours of a child being taken into custody. That period excludes Saturdays, Sundays and holidays. And at the shelter care hearing, the court will determine whether the child can safely be returned home while any dependency is being adjudicated with respect to the child, or whether there's further need for out-of-home placement of the child.

As this Committee has heard before, Washington courts have interpreted the child abuse and neglect statutes as creating an implied right of action for negligent investigation, and the case that is often talked about is the case *Tyner v. Department of Social and Health Services*. And in that case, the court found that the child abuse and neglect statute creates a duty not only to the child who is potentially abused or neglected, but also to the parents of the child, even if the parent is suspected of the alleged abuse or neglect. The court based this

holding in part on the legislative intent and purpose sections of the child abuse statute, which provides that -- which describes the importance of the family unit and the parent-child bond as one of the important issues to be taken into consideration.

House Bill 2510 has three main provisions. First, it amends the purpose section of the child abuse and neglect statute to state that a child's interests of basic nurture, physical and mental health and safety should prevail over conflicting interests of a parent and that the child's safety is the Department's paramount concern when determining whether or not a child should be separated during or immediately following an investigation of alleged abuse or neglect.

Second, the Bill provides a limitation on the liability of governmental entities and their officers, agents and employees in this context in -- so that those entities and agents are immune from liability for acts or omissions in emergent placement investigations of child abuse or neglect unless the investigation was done with gross negligence of whether there was reason to believe the child was in danger of abuse or neglect.

And finally, the Bill provides that the Department and its employees are responsible for carrying out court orders including shelter care and dependency orders and are not liable for acts performed to comply with those court orders, and that Department employees are entitled to the same witness immunity as other witnesses.

I'd be happy to answer any questions.

Chair Pedersen: Edie, what does "gross negligence of whether" mean?

Adams: I was afraid you were going to ask me that. [laughter] That -- that standard is not one that is used before, so it's not one that's been interpreted and so it's hard for me to say exactly how a court would interpret that. I think, and when I read that, I think it's failing to exercise even slight care in arriving at the determination of whether there's reason to believe

there was actual abuse or neglect in the investigation, and making that determination to proceed.

Chair: So perhaps we'll do some wordsmithing. Okay. We are joined by the gentle lady from the 32nd District. Welcome, Representative Kagi.

Rep. Kagi: Thank you very much Mr. Chair, thank you so much for hearing this Bill. My name is Ruth Kagi. I am the State Representative from the 32nd District and this is an issue that has been before this Committee before.

I don't know how many of you have gone out with Child Protective Service workers, but they walk into homes where there are tremendous issues and often following a violent exchange between caregivers, and they have to make a decision about whether that child can safely remain home. And I see them really very similar to a police function where you walk into a situation as a policeman and have to make a decision.

And under the way the Court has interpreted the law, the State can be sued if they remove the child. The State can be sued if they leave the child in the home and I think we need to make it clear that the duty of that caseworker, the primary duty is to the child. And then the judge at the shelter care hearing will decide whether that child should be returned home or should remain out of the home. But the safety of the child is the reason the CPS worker is in that home and to have the ability to have that…the Department sued as a result of their decision I think is inappropriate.

Chair: Representative Chandler.

[Inaudible]

Rep. Kagi: Well, the number of suits being filed against the State in the child welfare arena has steadily increased and I should have brought that number with me. I can get that for

you, but I think the law needs to have clarity about what the primary duty is when a caseworker goes into a home. And the *Tyner* decision that staff mentioned, the Supreme Court recognized the rights of the parents and this is really to clarify that the primary duty is to the child. And I'm sure it does impact individual decisions going in the homes, but I don't have specifics around that.

Chair: Representative Klippert.

Rep. Klippert: Thank you, thank you, Mr. Chair. Do you have a copy of the Bill in front of you?

Rep. Kagi: Yes, I do.

Rep. Klippert: I was wondering if we could go over just the very last line or the last sentence of the Bill in "providing reports and recommendations to the court, caseworkers are entitled to the same witness immunity as would be provided to any other witness." Just trying to get your perspective on that, what exactly that means cause I know they are agents of the State, so I'm wondering why they would get special immunity.

Rep. Kagi: Can you address that, Edie?

Rep. Klippert: Thank you.

Adams: I'll try. Well, I think it's not different immunity, it's the same immunity that would apply to any other witness in a judicial proceeding. Generally, witnesses in cases are entitled to immunity for their testimony. This is based on the rationale that there are other safeguards in the proceeding to ensure reliable testimony, such as the ability for the parties to cross-examine the witness and the threat of potential perjury charges if the witness is not testifying truthfully in the hearing. So, the Bill is saying that caseworkers in hearings before

the court are entitled to the same witness immunity as other witnesses with respect to the information they provide to the court.

This issue has not been addressed head-on in the child abuse investigation cases, but I know that the Department has in cases -- a variety of cases -- argued that that the liability should not be there for the Department when the court has actually ordered, issued an order with respect to the placement of the child, and cases have talked about -- well, if the caseworker has not provided complete information to the court for the court to make that decision, then there still can be liability.

Rep. Klippert: Mr. Chair, may I further clarify my question?

Chair: Sure.

Rep. Klippert: Here's what I'm trying to understand. So, oftentimes as a law enforcement officer, Child Protective Services will ask me to accompany them on these cases, so if we go to such a case and now this case goes to court, that agent of the State would have immunity, but I as a law enforcement officer would not. And they were both officers of the State.

Adams: Well, I think potentially you would, under the common law witness immunity rule, to the extent that this Bill might bring that into question, because it specifically calls out caseworkers and not law enforcement officers. Is that your concern, potentially?

Rep. Klippert: Yes, in the interest of time, maybe I'll sit down with you afterwards and we'll try to work this all out. Thank you.

Rep. Kagi: And I would be happy to work with you also. I might also have sat on three different fatality reviews, and I'm aware that much of the reporting of information regarding a case is publicly disclosable. So I'd like to pursue the immunity issue.

Rep. Klippert: Thank you very much, I would like to work with you on that. Thank you, Mr. Chair.

Chair: Okay, do we have any further questions for the prime sponsor? Okay, thank you very much.

Rep. Kagi: Thank you very much.

Chair: Thank you. Let's bring up Rene Tomisser from Attorney General's office first, along with Frank O'Dell from the State Employees.

Rene Tomisser: Thank you, Mr. Chair. For the record, my name is Rene Tomisser. I am with the Office of the Attorney General and have worked in the public liability arena for more than 20 years now, and I'm currently the Chief of Complex Litigation for the State of Washington.

This Bill has been presented before, and the driving purpose as Edie explained, and as the Prime Sponsor explained, is under current case law caseworkers are placed in a real dilemma. When they walk into a home after having received a report that a child may be in danger of abuse or neglect, the caseworker is faced with having to make a decision -- is there a reason to believe that this child is in danger or not? If the caseworker says that they think there is reason to believe, they make a decision -- they make that decision, but if the parent is there and the parent is saying "no nothing happened this was, was accidental, the child is not in danger," we immediately have a conflict. And we have a conflict very, very early in the case before there was a lot of information available, but yet the caseworker has to make a decision. The child may be in danger, the parent denies. As soon as that denial from the parent happens, there's potential conflict between -- is the child safe or not -- and the interests of the parent.

Under current case law, what the -- what the law provides is that the caseworker is charged with an equal duty to both the parent and the child.

And so as Representative Kagi mentioned, they can be sued, kind of no matter which decision they make. And what this Bill would do, would actually restore what the law was prior to the *Tyner* decision in which this body, the legislative body had declared that the primary duty of the caseworker in that situation runs to the protection of the child.

And that isn't, of course, the final word, because in order for the child to actually be removed from the home and separated from the home by the recommendation of CPS, that has to come before a court. And the judge will hear from the caseworker, hear from the parent, hear from the attorneys on both sides and then make a decision on what to do with that child. Should the child be separated, should not? We need to have a further investigation, reviews, psychologists, whoever might be appropriate at that point. And then the court issues an order as to what would happen at that juncture.

And what this Bill does is restore the clarity in terms of, who does that caseworker owe the primary duty to when they walk in that door? So that the caseworker doesn't have to wonder, essentially, why am I here? And has then the discretion to exercise their judgment in finding whether or not there is reason to believe that the child is in danger.

The witness immunity question that Representative Klippert raised, I do want to address, because I think this is frequently misunderstood. In a perfect world, this language wouldn't be necessary, because every witness, whether you're a State employee or a private citizen, should be protected by ordinary witness immunity. But what the Department is seeing in these cases is, years after the case is presented to the judge, a tort lawsuit gets filed and the plaintiffs claim, "well, if you had done the investigation in the way that we think you should

have, your recommendation to the court would have been different. And we would have a different result if you hadn't told the court, you know, something that we wish you hadn't." And no other situation that I'm aware of is that allowed to be evidence in a case against a party later on.

The way witness immunity should operate is, you come to court, provide your opinion, provide your facts and then the court makes a decision. You don't get to then have a lawsuit years later saying you should have told the court something else. This would restore that protection by actual practice in the course of litigation has largely been eviscerated. So we shouldn't need it, but in practice it is necessary, because caseworkers are being sued later for the recommendations that they give. What this language does not do is a caseworker who fabricates evidence, caseworkers who perjure themselves, would not be entitled to immunity just as nobody is entitled to do that in a court of law. We encourage this Committee to pass this legislation.

Chair: Please proceed.

Frank O'Dell: Thank you, Mr. Chairman and Committee. My name is Frank O'Dell. I'm here today as representative of the Washington Federation of State Employees, but I'm also an employee of Department of Social Health Services Children Administration, capacity of supervisor for Child Protective Services.

As you are aware, legislation has mandated the State address allegations of child abuse and neglect in the communities within the State, and in doing so we are faced with many, many challenges. We have to weigh the parents' rights and interests along with the child's rights and interests in regards to the child's well-being and safety, but first and foremost safety is paramount. That is the primary goal of our interventions with the family and addressing the

child's well-being. In doing so, we're also faced with various hazards, whether may be environmental or you know domestic, known felons, drugs, issues of that nature.

I'm here to speak in support of House Bill 2510 and limiting government liability for the pre-shelter care investigations. It's very difficult when we're assessing the well-being of a child because we do try and strive towards keeping the family together. If there's issues, risk or concerns that we are assessing and are indicated in regards to a child's well-being, we try and provide reasonable efforts within the family to keep the child within that nucleus and element, but if that's not feasible then we're still charged with the well-being and safety of the child and we do petition the courts to seek custody and care of the children in those aspects. And I would thank you for your consideration and supporting this Bill limiting the government liability during pre-shelter investigations.

Chair: Thank you, do you have any questions for the panel? Okay, thank you very much.

[Unidentified]: Thank you very much. Coming forward, we have three from the Washington Association of Justice. Larry Shannon, Darrell Cochran this time, and Becky Roe.

Larry Shannon: Thank you, Mr. Chair and members of the Committee. For the record, my name is Larry Shannon, representing the Washington State Association for Justice and we're here to speak in support of 2510.

It's somewhat unusual for us to be here in support, I think as this Committee knows, of a limitation on liability, but we think that in this particular instance, this is carefully thought-out focused, and perhaps in this instance warranted, because everyone involved in this process shares the same goal. And that is trying to figure out the best way to protect vulnerable children.

This Bill is somewhat of a product of a work group your former colleague, Representative Frockt, convened with the – the prime sponsor and got together in a couple different sessions during the course of the fall and came up with this piece of legislation.

I would add on a technical note, Mr. Chair made the comment about that -- I believe it's the "of whether" language. There's actually an amendment floating around that is, because hoping to, I believe, tighten up and really there's three things I think do need to be tightened up in the draft, Mr. Chair. The "of whether" language, there's a statutory cross-reference that I think is improper, and that we would change and the Prime Sponsor had one additional clarification that she wanted on the decision to place children back into their original residence during that pre-shelter care setting -- and so all of those, I think we're very agreeable, and will serve to both tighten and clarify and make this hopefully a sharp and focused piece. So, with that let me turn it over and I'm happy to answer any questions when we're done.

Darrell Cochran: Thank you, Mr. Chair, my name is Darrell Cochran, an attorney up in Tacoma. I've represented children for many, many years who had the terrible misfortune of being in a situation where they have an emergent abusive situation at home. I've also been asked by parents over the years to look at whether they have a lawsuit where they've been in a situation where they had children removed. I've never been in a situation where -- been interested in taking one of those cases and that's because my feeling and most of the feelings of my colleagues, is that children's safety is the number one priority. This Bill that we've been asked to look at and work at and work on, achieves what we would like to see, which is the safety of the children, is a first priority.

It came to our attention that social workers were concerned that there were mixed messages both from the courts and from the legislature about this balancing act between

children's rights and parental custody rights. And it's our opinion that children's rights should be reemphasized with this Bill, and that this carefully achieves that.

I wanted to address Representative Klippert's questions for a second. We have a different perspective than the State. The immunity for witnesses typically in a situation like that is first of all, that there -- they have good faith, good faith immunity for reporting a situation like an abusive situation.

And second, in testimony and particularly in a situation where it's so sensitive and there's allegations of abuse going around that there is immunity in a legal proceeding from slander from libel from that type of situation, and that's the type of immunity that's considered by this Bill.

Rebecca Roe: And law enforcement has their own independent immunity in that kind of a situation they have a qualifying --

Chair: I'm sorry, can you introduce yourself?

Rebecca Roe: Oh I'm sorry, I'm Becky Roe. I'm a lawyer in Seattle, and I was previously, in my prior life, a prosecutor and head of the Special Assault Unit in King County from '79 to 1994.

And from the historical perspective, I think everyone believed back in those days that it was clear that the duty to investigate child abuse was to protect children. Along came the *Tyner* decision that said there is also a duty creating this conflict that may – CPS workers indicate that it does affect their freedom to act. We accept that and strongly encourage you to clarify in statute that it is the paramount interest in protecting the children.

The narrow exception for that raises not quite immunity, but almost immunity of gross negligence standard for those emergent investigations is again part of this legislation that we

agree with, because people are expected to act very quickly in very difficult situations and we're not opposed to a higher standard of liability.

Chair: Do you have any questions for the panel? Okay, thank you all very much for coming forward. That will conclude our public hearing on House Bill 2510.

Sen. Committee on Human Services and Corrections Committee
2/23/12

Mr. Chair, member of the Committee, Engrossed Substitute House Bill 2510 deals with liability of the Department of Social and Health Services. The bill clarifies that when a child's physical or mental health is jeopardized or the safety of the child conflicts with the legal rights of a parent, custodian or guardian, the health and safety interests of the child should prevail. When determining if the child, parent or guardian or custodian should be separated during, or immediately after a child abuse and neglect investigation, the safety of the child is the Department's paramount concern. The bill also provides that governmental entities, their officers, agents, employees and volunteers are not liable in tort for acts or omissions in emergent placement investigations of child abuse or neglect unless the act constitutes gross negligence. Emergent placement investigations are defined as those conducted before a shelter care hearing occurs. The Department of Social and Health Services and its employees must comply with court orders entered in dependency cases and are not liable for acts performed to comply with a court order. In providing reports and recommendations to the court, the Department employees are entitled to the same witness immunity as would be provided to any other witness. There is a fiscal note in your books and it shows an indeterminate savings cost. I'd be happy to answer any questions.

Chair Hargove: Senator Padden (?)

Sen. Padden: Do we have any history of how much has been paid out by the State on claims....

Woman: That would be affected by this bill?

Sen. Padden: Right.

Woman: Yes we do. I do not have that with me but, um, there is somebody from the Attorney General's office who's going to testify. He may have that. If he doesn't, I will get it for you.

Sen Padden: Thank you.

Woman: Ummhm.

Chair Hargrove: Okay, Ruth. I'm glad you came by today. We're making progress.

Rep. Kagy: We are. For which I am very grateful. Um, thank you Senator Hargrove and members of the Committee. For the record, I'm Ruth Kagy from the 32nd District and thank you very much for hearing this bill. This is really a very narrow, targeted focus on pre-shelter care hearings to deal with the issue of the Department having basically dual responsibilities for protecting the child and respecting the parents' rights in a circumstance where CPS workers are frequently walking into very volatile situations and their primary job is to assure that that child is safe. And we want to make sure that they are focused on that in the situations and in the first 72-hours before the pre-shelter care hearing that they are protected from being second guessed on a decision they make, unless they have...their decision was made with gross negligence. So, it really addresses a very small part of the Tyner decision, but I think is an important step forward.

Chair Hargrove: Senator Padden.

Sen. Padden: So, this is sort of a balancing now and we're tipping the scales a little bit more towards the parents, or away from the parents I guess, and towards the Department. Is that...by the standard of proof being...or standard...

Rep. Kagy: Well, it clarifies that the primary duty of that CPS worker is to the safety of the child until a judge can hear the case in 72 hours.

Sen Padden: It's just some experience I've had when I was in the Legislature previously is that there's different philosophies of different caseworkers on dealing with this and I'm just a little concerned as to how objective they're going to be. Some idea of the safety of the child is going to be different than some other caseworkers and I'm concerned to some extent on the minor incidents where they may go in and take a child out cuz...I don't know...maybe they don't like their religious practices of the parents.

Rep. Kagy: Well, the Supreme Court ruling in Tyner, because it did, it shifted to protecting the rights of the parent. It has left CPS workers in real dilemma because their duty, when they are called to investigate a CPS complaint, is to determine whether the child is safe. There will be a hearing within 72 hours if a child is removed. So, a judge will be making that decision. But there should be no confusion going into that home that the safety of the child is the paramount concern of the CPS worker.

Chair Hargrove: We've done a lot of work since you left and came back. All these parents have representation now. In fact, our Parents Representation project that OPD runs is very aggressive about representing parents at these various hearings. And this is about the civil liability that would follow from a missed decision for only 72 hours. So this isn't about how you keep the kid out of the home or whether the parents get their kid back or any of that. This is only about going and finding a trial lawyer and suing the State for millions of dollars if they make the decision wrong. Correct?

Rep. Kagy: Correct.

Chair Hargrove: So, yeah. So it's not about due process or any of those things that we put in...

Sen. Padden: I just noticed there was a fair amount of opposition in the House from some of the attorneys on our side of the aisle. So anyway, I'm just...I'm sure they had some concerns. But we'll wait...

Chair Hargrove: I'd love to hear those isolated, but...Senator Carrell.

Sen. Carrell: Well, that was sort of my question. This was not a slam dunk and I'm kind of looking at it and saying I like the concept but I'm just a little concerned seeing that there was a significant level of opposition....

Chair Hargrove: Probably the sponsor was the problem.

[laughter]

Sen. Carrell: I don't think so. I don't think so.

Rep. Kagy: Thank you Senator.

Female Senator: Ruth, before you leave. I think that one of the issues here is that we have moved from that expanded period of time where the children were yanked out of the home and kept for a long, long time. Now we've narrowed it to 72 hours, you have to prove your case within 72 hours. And I think that might be what the judge is concerned about, is that narrowing of that 72 hours gets to decisions much faster. But the main thing is that if we take the children out, we either put them back within 72 hours because we didn't prove that they were really in jeopardy or we make decisions as to some kind of solution there. So, I understand what you're doing.

Rep. Kagy: Yeah, the issue is really the liability for that decision made before...

Female: ...exactly.

Rep. Kagy: ...72 hours. Thank you.

Chair Hargrove: Okay. Thank you. Frank O'Dell and, let's just bring everyone up. Rene Tomisser and Larry Shannon. And just tell us who you are representing.

O'Dell: Good morning Mr. Chair and Committee members. My name is Frank O'Dell and I'm representing Washington Federation of State Employees, but I'm also employed by the Department of Social and Health Services Children's Administration in the capacity of a supervisor for Child Protective Services. As you know, we are charged...the State is charged to investigation allegations of child abuse and neglect that meet the merits and the threshold to do so. In those endeavors, we face various challenges, whether it may be environmental - walking into a home that has been manufacturing drugs - a volatile situation where there's domestic violence or other means, weapons and things of that nature. In doing so, we do so to address the allegations, to look and assess the safety and well-being of the child or children in that home. Through those endeavors, we do various assessments in regards to the allegations and the parents. Culpabilities of providing the well-being for that child. When we're doing our assessments, we look at the aspects is it safe for the child or children to remain in the home. If there are concerns the Department, as well as putting together a safety plan together to try to ensure that the child will remain safe as long as service arrays for the parents to either better hone their skills or their abilities to provide for that child. In our assessments if we assess that it's not safe for the children to remain in the home, we don't have the legal authority to just swoop in and remove the children. That's done through a protective custody order, whether maybe through administrator of the hospital, law enforcement or we petition the courts through a petition and the causes of concern of the Department for the child to remain in that home. And in doing so, whenever the child is removed through those means, if they're not safe to

remain in the home, we first and foremost look to relatives and extended family because it is traumatic for the children and also the parents or legal guardian. It's...

Chair Hargrove: I think we're fairly familiar with the...

O'Dell: Right.

Chair Hargrove: ...process. And the clear thing here is that it doesn't change any of that process...

O'Dell: Hmmhmm.

Chair Hargrove: This only deals with the liability for a decision...

O'Dell: First and foremost we look at the welfare and the safety of the child. We don't remove the children frivolously or negligently. There's a cause and concern there and we do it in an act of good faith. And I just wanted to state that I'd appreciate your support for this bill.

Chair Hargrove: Okay, thanks. Let's go with the AG next. We need to get Larry a razor.

[laughter]

Tomisser: Good morning Mr. Chair, my name is Rene Tomisser, here on behalf of the Office of the Attorney General. Here to testify in support of 2510. This bill is designed to cure what is currently an anomaly in Washington law where we have these conflicting duties under the Tyner decision, so that in that very immediate situation where the caseworker is first called to a situation, it can be conflicting information, very confusing. What this bill does is give clarification as to where that primary, not the exclusive, but where that primary duty of that caseworker lies, which is with the child in that initial 72-hours until the parties can get in front of a judge and have representation and a decision made on what is now in the best interest of that child and have a court make that determination on behalf of the parties. We think this clarification is important in that process to achieve that. There's a...

Chair Hargrove: You just misspoke. The judge doesn't determine what is the best interest of the child at 72 hours, but whether there's a safety risk to return the child home.

Tomisser: That's correct.

Chair Hargrove: Okay. I would hope our Attorneys General are a little more accurate. That's a significant point.

Tomisser: In terms of the earlier question, in terms of the potential savings with the fiscal note, we can collect as much data as possible in terms of what the payouts in this area have been and provide it to the Committee. Calculating the actual savings though is something we haven't been able to do at this time and have a number we're confident in putting out as what a savings number would be that can actually be relied upon.

Sen. Padden: Mr. Chairman.

Chair Hargrove: Senator Padden.

Sen. Padden: Well, have there been a lot of cases since the Tyner decision came out? A lot of decisions by the courts or lawsuits filed? I mean, what are we talking about here?

Tomisser: Those are the kind of numbers that we can get for the Committee in terms of how many have actually come up that would be affected by this bill.

Sen Padden: Have you been involved in any cases yourself?

Tomisser: Years ago I was. I was directly involved in the Tyner case itself.

Sen. Padden: Thank you.

Chair Hargrove: Val's question was the same, so go ahead Larry.

Shannon: Thank you Mr. Chair, members of the Committee. For the record, my name is Larry Shannon representing the Washington State Association for Justice. Here to speak in favor of this bill. It's somewhat unusual I think as the Committee knows for us to be in favor of a

liability limitation, if you will. We believe that this was carefully worked and structured to do exactly as the Committee has been discussing, which is to tip the balance in favor of erring on the side of the safety of the child. In response perhaps, I think the other issues in the elements of the bill have already been brought out, so if I may just address one or two of the questions that have come up. I thought the dialogue with the prime sponsor really got right to the heart frankly of some of discussions we had on this. And if I may say, Senator Padden, we did have concerns about that balance and we wanted to make sure there was still some balance, you know, for the rights of the parent as well. We think that this bill reflects that. We think that we hit a good sweet spot, if you will, in the sense that the gross negligence provision will not allow for any kind of, you know, willful or wanton kind of decision making, but at the same time will give a little added confidence and flexibility in making sure that the decisions are made on behalf of the child. With that, other than to note that you've been working us too hard for me to get my beard trimmed Mr. Chair [laughter], we're happy to answer any questions.

Chair Hargrove: Well, we appreciate your help on those two other bills with the decision points we put in at a slightly different standard even. And I really don't see this as a change in our policy. I think we...our policy always wanted that initial decision to err on the side of the child. It's just that the courts screwed it up again and so we're having to help them a little bit.

Shannon: As Mr. Tomisser noted, I think this clearly puts us back in the good place that the Legislature intended...

Chair Hargrove: It was my understanding all along. So, I don't think we're changing policy here. But it is making it work correctly. Okay, any other questions for this panel. No. Okay thank you.

DECLARATION OF SERVICE

On said day below I electronically delivered a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division III Cause No. 39483-2-III to the following:

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

DATED: February 14, 2024 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

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