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**Washington State Supreme Court**

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NO. 90844-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KELSEY BREITUNG,

Petitioner,

v.

STATE OF WASHINGTON and COMMUNITY COUNSELING  
INSTITUTE, a Washington non-profit corporation,

Respondents.

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**RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES' ANSWER TO PETITION FOR REVIEW**

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ROBERT W. FERGUSON  
Attorney General

STEVE PUZ  
Senior Counsel  
WSBA No. 17407  
PO Box 40126  
Olympia, WA 98504-0126  
(360) 586-6300  
OID No. 91023

**ORIGINAL**

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## I. INTRODUCTION

Petitioner Kelsey Breitung (Breitung) seeks to hold Respondent Department of Social and Health Services (DSHS) liable for the injuries she attributes to her court ordered placement with Andrew and Betsy Phillips, a dependency placement Breitung requested. Breitung assured the juvenile court that she did not have an inappropriate relationship with Andrew Phillips, even though she knew this was not true, and even though the juvenile court offered to meet with her privately to discuss this question. As the Court of Appeals observed, except for the information Breitung knew and intentionally concealed, the juvenile court possessed all material facts concerning the Phillips when it made its placement decision. *Breitung v. State*, No. 45123-9 at 20 (Wash. Sept. 3, 2014). Applying *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 86-88, 1 P.3d 1148 (2000), to these undisputed facts, the Court of Appeals correctly held the juvenile court's placement order operated as "a superseding cause that absolved DSHS from potential liability," and affirmed the order that granted partial summary judgment to DSHS. *Breitung*, 45123-9, slip op. at 19-21. Because the Court of Appeals did nothing more than apply longstanding Washington law to the unchallenged material facts, review is not appropriate under RAP 13.4(b)(1)-(2).

Further, in an attempt to create an issue of substantial public interest under RAP 13.4(b)(4), Breitung focuses on DSHS' alternative defenses—the statutory immunity provided by RCW 4.24.595(2) and judicial estoppel. But the Court of Appeals expressly declined to address these defenses. *Breitung*, 45123-9, slip op. at 18 (“Thus, we do not address her separate immunity and judicial estoppel arguments.”). As a result, the Court of Appeals' limited reference to these issues cannot “conflict” with the decisions of this Court as Breitung misleadingly claims in her petition. Petition for Review (Pet. for Review) at 2 (issues 2 and 3). DSHS' alternative defenses, unaddressed in the Court of Appeals unpublished decision, are not issues of substantial public interest justifying review by this Court. RAP 13.4(b)(4).

For each of these reasons, this Court should deny Breitung's petition for review of the portion of the Court of Appeals' decision that affirmed the grant of partial summary judgment to DSHS.<sup>1</sup> RAP 13.4(b).

## **II. COUNTERSTATEMENT OF THE ISSUES PRESENTED**

1. Applying long established Washington law to the undisputed facts in the record, the Court of Appeals held the juvenile

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<sup>1</sup> Breitung also sued Respondent Community Counseling Inc. (CCI) for negligent hiring, training, and supervision. By separate order, the trial court granted CCI's motion for summary judgment and dismissed it from this lawsuit. CP at 1126-27. The Court of Appeals affirmed that order, and Breitung now seeks review of that holding as well. Pet. for Review at 13-17. The negligent hiring, training, and supervision claims are separate from Breitung's claims against DSHS and are not addressed further in this brief. For each of the reasons stated herein, even if this Court grants review of Breitung's claims against CCI, it should deny review of the portion of the Court of Appeals' decision that affirmed the grant of partial summary judgment to DSHS.

court's placement order was a superseding, intervening act that severed DSHS' liability. Where the Court of Appeals followed existing law and created no precedent with its decision, is review by this Court warranted under RAP 13.4(b)(1)-(2)?

2. The Court of Appeals did not address the statutory immunity or judicial estoppel defenses in its unpublished decision. Are legal defenses that were not addressed by the Court of Appeals, and which have no impact on Breitung's remaining claims against DSHS, issues of substantial public interest that warrant review by this state's highest court under RAP 13.4(b)(4)?

### **III. COUNTERSTATEMENT OF THE CASE**

The material facts relied upon by the Court of Appeals were not disputed below, and are primarily established by Breitung's own admissions, the juvenile court orders, and the transcripts of her dependency proceedings.

Breitung ran away from the home of her abusive mother, April Breitung, and "couch surfed" with various acquaintances for several months. She was eventually taken into protective custody by the Tacoma Police Department and placed at the South King County Youth Shelter (SKYS) group home. CP at 459-61. DSHS filed a dependency petition pursuant to chapter 13.34 RCW. CP at 462. The next day a shelter care hearing was held. At that hearing, attorney Matt McCoy was appointed to represent Breitung in her dependency action.

Because the SKYS group home only provides short term placement, Breitung's social worker, Gabrielle Rosenthal, had to locate a more permanent living arrangement for Breitung. CP at 357. As the Court of Appeals correctly observed, Breitung repeatedly asked both DSHS and the juvenile court to be allowed to live with Andrew and Betsy Phillips. *Breitung*, No. 45123-9, slip op. at 4; CP at 358-59, 431-32. Breitung already had a good relationship with the Phillips. Andrew was Breitung's former drug/alcohol counselor and she attended church with the Phillips each week. In addition, the Phillips introduced Breitung to "Celebrate Recovery," a faith based 12-step substance abuse program held at their church, which Andrew and Betsy Phillips both helped lead. Breitung reported the Phillips were supportive and caring, and that they had expressed interest in having Breitung live with them after she turned 18. CP at 358-59.

Breitung's quickly approaching 18th birthday was an important factor in Rosenthal's analysis. Breitung had already demonstrated a willingness to run from placements she did not like. CP at 358. Rosenthal was concerned that, if placed with someone this independent 17½ year old teenager found objectionable, Breitung would run from the placement and/or refuse to participate in services. The timing was critical; DSHS only had less than seven months to assist Breitung before she turned 18 and her dependency action was dismissed by law. Accordingly, Rosenthal investigated the Phillips as a possible placement for Breitung. CP at 358-59.



Rosenthal spoke with the Phillips and visited their home. The home itself was clean, well kept, and provided Breitung with her own room and bathroom. CP at 359. As the Court of Appeals observed, the Phillips were also required to disclose whether they had been convicted of a crime; been accused of sexual abuse, physical abuse, neglect, abandonment, or exploitation of a child; and whether either had any protection or restraining orders entered against them. *Breitung*, No. 45123-9, slip op. at 4 n.2; CP at 359. The Phillips' fingerprints were processed through the Washington State Patrol database and the National Crime Information Center database maintained by the FBI. CP at 359-60. Rosenthal also confirmed there was nothing in DSHS' own database that disqualified either of the Phillips as a placement resource. CP at 360.

Still, Rosenthal questioned whether Andrew Phillips might have a professional conflict of interest serving as a placement resource given that he was Breitung's former drug/alcohol counselor, a question that was shared by Andrea Venier, Breitung's mental health counselor. It is undisputed this concern was reported to the juvenile court at the September 16, 2009 dependency hearing.<sup>2</sup> CP at 432. It is also undisputed that Rosenthal

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<sup>2</sup> Contrary to Breitung's assertions, Rosenthal did not assume responsibility for contacting CCI about this potential conflict of interest. Pet. for Review at 3-4. As the dependency hearing transcript shows, Rosenthal directed Andrew Phillips to "ask his employer and to double-check his code of ethics to make sure we can place Kelsey there." CP at 432. Neither the juvenile court nor any of the parties expressed any concern with the fact that Andrew Phillips was Breitung's former drug/alcohol counselor, or that Rosenthal asked Phillips to check with his employer about this potential professional conflict of interest.

followed up on this point directly with Andrew Phillips. CP at 360.

Rosenthal also asked Phillips to check whether any professional or ethical rule prevented him from serving as a placement resource for Breitung; Phillips responded that he checked and did not find any rule that prevented him from doing so.

*Breitung*, No. 45123-9, slip op. at 4.

On September 30, 2009, the juvenile court signed an agreed order of dependency as to Breitung's mother, April Breitung. *See* CP at 368-77. Again, the juvenile court was informed of Breitung's desire to live with the Phillips. However, April opposed her daughter living with the Phillips. In a written objection filed with the juvenile court, April claimed her daughter had an "unhealthy attachment and relationship" with Andrew Phillips, had dreams about him, and sprayed perfume in his office "so he thinks of her." CP at 378-79. It is undisputed that Breitung denied each of her mother's allegations, and repeatedly denied there was anything improper between her and Phillips. CP at 363. However, given April's objection, the juvenile court authorized the placement of Breitung with the Phillips in October, 2009, but scheduled a contested placement hearing for November 3, 2009, to address April's objections. CP at 368, 372. In accordance with that juvenile court order, Breitung moved in with the Phillips on October 16, 2009. CP at 361.

On October 21, 2009, dependency was established for Breitung's father, Robert Breitung. CP at 361-62, 388. At that hearing Rosenthal reported that Breitung moved in with the Phillips the previous weekend. CP at 436. Breitung was represented by her attorney at that hearing. Although the sexual abuse had already begun, neither Breitung nor her attorney raised any concerns or objections about her placement with the Phillips. CP at 436. Consistent with its September 30th order, the juvenile court continued Breitung's existing placement with the Phillips, but, again, made it subject to the November 3, 2009 contested placement hearing. CP at 437.

In anticipation of the November 3rd hearing, April filed additional declarations from Rose Sialana, with whom Breitung lived for a short time, and Debbie Jones, a family friend. Both opposed Breitung living with the Phillips. In her declaration Sialana claimed it would be "unhealthy" for Breitung to live with her former drug/alcohol counselor. CP at 407. Jones also warned against allowing Breitung to live with the Phillips. CP at 409. Again, Breitung denied every allegation in these declarations, and further, she specifically denied there was anything improper about her relationship with Andrew Phillips.<sup>3</sup> CP at 372.

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<sup>3</sup> Rosenthal provided a 10 page declaration that detailed the numerous representations made by Breitung. CP at 356. Tellingly, Breitung did not dispute any of the statements attributed to her in Rosenthal's declaration.

At the time she made these statements, Andrew Phillips' inappropriate sexual relationship with Breitung had already begun. CP at 444-49.

At the November 3rd hearing, Breitung's attorney was the first to advocate for her placement with the Phillips:

MR. MCCOY: Your Honor, Kelsey is doing really well where she's at right now. Actually told me this, she's doing better than she's ever done in her life. She's close to school, she's doing good in school, she's ROTC. Friday she does her -- their meetings for --

KELSEY BREITUNG: Celebrate.

MR. MCCOY: -- for Celebrate Sobriety. She goes to church on Sundays. I met the people she's staying with. They seem to be wonderful people and she gets along really well with them. *They're -- and they just -- really good for her. And I think the allegations that her mother is bringing I think are unfounded. There's no evidence of any kind of impropriety there.* There's nothing any more than -- any -- any person that has a relationship with a counselor, if you're going to be in a close relationship with them but there's nothing more than that.

CP at 440 (emphasis added).

Breitung followed and immediately confirmed every representation her attorney had just made to the juvenile court:

KELSEY BREITUNG: I agree with everything my lawyer said. Everything is going really well. There is no reason for me to be moved or anything like that.

CP at 440.

The Commissioner gave Breitung every opportunity to share whatever concerns she had with the Phillips, and even offered her the opportunity to speak to him privately about this placement. She declined.

CP at 439-40. Breitung later admitted that she knew she was required to be truthful in her statements to the juvenile court commissioner, she just chose not to. CP 1082-83. Had Breitung disclosed the sexual contact with Phillips, Rosenthal would never have recommended, and the juvenile court would never have ordered this placement. CP at 363. This, too, is undisputed.

Unfortunately, Breitung's intentionally false statements to DSHS and the juvenile court cemented her placement with the Phillips, and facilitated the ongoing sexual abuse by Andrew Phillips. In its November 3, 2009 order, the juvenile court ruled that Breitung was "in an appropriate placement that adequately meets all of [her] physical, emotional and educational needs," that her continued placement with the Phillips was "in [Breitung's] best interest," and expressly approved her placement with the Phillips. CP at 414, 416, 441-42. Breitung lived with the Phillips until she disclosed the sexual abuse by Phillips on November 25, 2009. That same day Rosenthal removed her from the Phillips home as provided by the November 3, 2009 juvenile court order.<sup>4</sup> CP at 364-65, 417.

Breitung sued DSHS, in part, for the damages she attributes to her placement with the Phillips. The trial court granted DSHS' motion for

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<sup>4</sup> Breitung summarily concludes she was removed from the Phillips home by DSHS without a court order. Pet. for Review at 4 n.1. But in its November 3, 2009 order, the juvenile court specifically authorized DSHS to place Breitung in foster care should some unforeseeable problem arise with the Phillips placement. CP at 417, 1100-01. It is undisputed DSHS moved Breitung immediately after it learned of the sexual abuse by Andrew Phillips.

partial summary judgment and dismissed “all claims and damages asserted against DSHS that arise from [Breitung’s] placement in the home of Andrew and Betsy Phillips.”<sup>5</sup> CP 1124. Relying on well-established Washington law, the Court of Appeals affirmed the trial court’s decision, and this petition followed.

#### **IV. REASONS WHY REVIEW SHOULD BE DENIED**

RAP 13.4(b) provides for review when the Court of Appeals decision conflicts with another Washington appellate decision or involves an issue of substantial public interest. RAP 13.4(b)(1)-(2) and (4). None of these criteria are satisfied here. First, Breitung does not cite any published appellate decision that conflicts with the Court of Appeals decision here, nor does one exist. Rather, applying established Washington law to the undisputed material facts of this case, the Court of Appeals held that Breitung failed to establish the proximate cause element of her negligence claim. This holding is entirely consistent with long established Washington law, and Breitung cannot satisfy the criteria in RAP 13.4(b)(1)-(2).

In addition, the Court of Appeals affirmed DSHS’ motion for partial summary judgment without addressing the statutory immunity in RCW 4.24.595(2) or judicial estoppel, two alternative defenses DSHS advanced in support of its motion for partial summary judgment.

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<sup>5</sup> Breitung’s remaining claims against DSHS were stayed pending her appeal of the partial summary judgment order. CP at 1143-44.

The unaddressed issues in the Court of Appeals' unpublished opinion create no precedent, and are not issues of substantial public interest. Accordingly, this Court should deny review.<sup>6</sup> RAP 13.4(b)(4).

**A. The Court Of Appeals Correctly Applied Established Supreme Court Precedent To The Unique, Undisputed Material Facts**

The Court of Appeals held that the juvenile court's placement order operated as a superseding, intervening event that severed the proximate cause relationship between DSHS' alleged faulty investigation and Breitung's placement with the Phillips. *Breitung*, No. 45123-9, slip op. at 18-19. Because Breitung failed to establish this necessary proximate cause element of her negligence claim, the Court of Appeals properly affirmed the trial court's grant of partial summary judgment to DSHS. *Id.*, slip op. at 21; *see also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (if the non-moving party fails to produce admissible evidence that establishes a necessary element of that party's case "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."). This holding was consistent with, and indeed required by established precedent.

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<sup>6</sup> If this Court accepts review and reverses the issue decided by the Court of Appeals, DSHS respectfully asks this Court to remand the statutory immunity and judicial estoppel questions so the Court of Appeals may address them. RAP 13.7(b).

The narrow claim for negligent investigation arises from RCW 26.44.050, which creates an implied statutory duty for DSHS to investigate reports of child abuse brought to its attention. *Tyner*, 141 Wn.2d at 77. As the Court of Appeals held, a claim for negligent investigation “arises when the State conducts a biased or incomplete investigation that results in a harmful placement decision.” *Breitung*, No. 45123-9, slip op. at 18 (citing *M.W. v. Dept. of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003)). To establish a claim for negligent investigation, a plaintiff must prove the alleged faulty investigation was the proximate cause of the harmful placement. *Id.*, slip op. at 18-19; *see also Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004).

In a lawsuit based on negligent investigation, a caseworker may be legally responsible for a child’s placement if the court has been deprived of a material fact as a result of the caseworker’s faulty investigation. Otherwise, court intervention operates as a superseding intervening cause that cuts off the caseworker’s and his or her agency’s liability.

*Breitung*, No. 45123-9, slip op. at 19 (internal citations omitted).

Proximate cause may be decided as a matter of law “when the court is aware of all material information and reasonable minds could not differ on the issue.” *Petcu*, 121 Wn. App. at 58. A material fact is one that would have changed the outcome of the court’s decision. *Id.* at 56. As the Court of Appeals correctly pointed out, DSHS provided the



juvenile court with all material facts learned from its investigation. *Breitung*, No. 45123-9, slip op. at 20.

Ignoring the unchallenged material facts, *Breitung* argues that the text of the Court of Appeals' decision somehow "suggests" that it erroneously weighed conflicting evidence. She concludes the Court of Appeals improperly discounted counselor Andrea Venier's "concern" regarding Andrew Phillips' potential conflict of interest, and gave greater weight to the evidence *Breitung's* mother supplied to the juvenile court. Pet. for Review at 6. *Breitung* misreads the Court of Appeals decision. The Court of Appeals did not "weigh" Venier's concerns, nor did it attribute any particular weight to the objections expressed by *Breitung's* mother against other evidence. Rather, the Court of Appeals observed that Andrew Phillips' potential conflict of interest was disclosed to the juvenile court by Rosenthal at a dependency hearing, as were the objections advanced by her mother all of which is undisputed. CP at 407, 409, 432. Thus, the juvenile court was apprised of these facts.<sup>7</sup> *Breitung*, No. 45123-9, slip op. at 20 n.14.

*Breitung* also contends the Court of Appeals did not consider Barbara Stone's criticisms of DSHS' investigation. Yet, the Court of Appeals considered each of Stone's concerns and concluded, correctly,

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<sup>7</sup> *Breitung* did not submit a declaration from Venier. However, even the inadmissible notes she submitted from Venier do not state any objection to *Breitung's* placement with the Phillips.

that each of her substantive concerns were brought to the juvenile court's attention.<sup>8</sup> *Breitung*, No. 45123-9, slip op. at 20. *Breitung* also cites various administrative steps that Rosenthal allegedly failed to adhere to follow in her investigation. Pet. for Review at 4, 20. However, *Breitung* did not identify any material fact that would have been produced by those administrative steps, much less any evidence that would have impacted the juvenile court's placement decision. Thus, as the Court of Appeals correctly held, *Breitung* failed to establish any proximate cause connection between the alleged missteps in DSHS' investigation and the juvenile court's placement decision. *Breitung*, slip op. at 18. Unable to establish this required element, her negligent investigation claim necessarily fails as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 159-60, 531 P.2d 299 (1975).

Attempting to create an issue of fact where none exists, *Breitung* next asserts that the juvenile court never approved or ordered her placement with the Phillips. Indeed, she contends the purpose of the November 3rd hearing was "to review whether Kelsey continued to be dependent," a statement she was unable to support with citation to the record. Pet. for Review at 7. However, the transcript of the November 3rd dependency hearing establishes that *Breitung* never questioned whether her

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<sup>8</sup> *Breitung* also cites Stone's concerns about Phillips' "dual relationship" with *Breitung*. Pet. for Review at 4. But again, Phillips' dual relationship was repeatedly shared with the juvenile court. See, e.g., CP at 407, 409, 431-32, 436, 440.

dependency should continue, nor did any other party. Quite to the contrary, Breitung, her attorney, and each of the remaining parties focused on the one question at issue at that hearing—whether Breitung should live with the Phillips. CP at 368, 372, 437, 439-40, 1082-83. Furthermore, the juvenile court not only approved her placement with the Phillips, it specifically found that placement was in Breitung’s best interests. CP at 414, 416, 441-42. Breitung’s unsupported factual assertions and speculation do not create questions of fact, are insufficient to defeat summary judgment, and do not create issues that require review by this Court. *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The Court of Appeals correctly held that Breitung failed to present specific facts that tied the alleged shortcomings in DSHS’ investigation with the juvenile court’s placement decision.

We agree with DSHS that Breitung did not present evidence to show that DSHS’s allegedly negligent investigation was the proximate cause of her placement.

*Breitung*, No. 45123-9, slip op. at 18.

Following existing law, the Court of Appeals correctly held that the juvenile court order that placed Breitung with the Phillips “was a superseding cause that absolved DSHS from potential liability.” *Breitung*, No. 45123-9, slip op. at 21; *Tyner*, 141 Wn.2d at 86-88;

*Petcu*, 121 Wn. App. at 56. Because this holding is consistent with the decisions of this Court and the Court of Appeals, review should be denied. RAP 13.4(b)(1)-(2).

**B. DSHS' Two Alternative Defenses That Were Neither Addressed Nor Decided By The Court Of Appeals Are Not Issues Of Substantial Public Interest**

The Court of Appeals' decision did not establish any precedent concerning RCW 4.24.595(2) or judicial estoppel. Indeed, the Court of Appeals did not address either defense in its unpublished opinion. Furthermore, neither defense will have any impact on Breitung's remaining claims against DSHS. Breitung cannot establish that either defense presents an issue of substantial public interest, and, for this reason alone, review should be denied. RAP 13.4(b)(4).

In addition, in her discussion of RCW 4.24.595, Breitung's entire argument focuses on the wrong subsection of this statute. As Breitung points out, subsection (1) shields "government entities" from tort liability for their acts and omissions in "emergent placement investigations" conducted "*prior* to a shelter care hearing," except where the government's act or omission constitutes gross negligence. RCW 4.24.595(1) (emphasis added). However, DSHS did not move for partial summary judgment under subsection (1). DSHS' motion invoked the protection of subsection (2) of the statute, which applies to actions

taken by DSHS in compliance with dependency orders issued *at or after* a shelter care hearing:

The department of social and health services 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 social and health services are entitled to the same witness immunity as would be provided to any other witness.

RCW 4.24.595(2). Breitung does not cite or analyze the language in subsection (2) in her petition, nor does she identify any ambiguity in the plain language of this statute. If this Court even considers this issue, it should recognize that the straightforward application of subsection (2)'s plain language means the trial court properly granted DSHS' motion for partial summary judgment. *See Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Neither subsection (1) nor subsection (2) of RCW 4.24.595 creates an issue of substantial public interest in this case. RAP 13.4(b)(4). For this reason as well, review should be denied.

Breitung also asks this Court to review the trial court's application of judicial estoppel, which, if her petition is granted, would be reviewed for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Instead of addressing the legal elements of judicial estoppel, Breitung implies, without citation to the record, that the trial judge was predisposed to rule against her because of a "chauvinistic

‘Lolita’ myth” that led him to blame Breitung for the sexual abuse that occurred. Pet. for Review at 10-11. However, the trial court did not blame Breitung for the sexual abuse she suffered. Rather, the trial court held Breitung responsible for the intentional misrepresentations she made to the juvenile court. *See* RP at 53 (explaining that Breitung “stood there in front of that [juvenile court] and perjured herself. There’s no other way to put it. She flat out lied to that court . . .”).<sup>9</sup> The trial court’s application of judicial estoppel to the facts presented here was neither an abuse of discretion, nor is it an issue of substantial public interest warranting review by this Court. *See Miles v. State*, 102 Wn. App. 142, 153 n.21, 6 P.3d 112 (2000) (judicial estoppel precludes a party from taking a position in a dependency proceeding and then adopting a completely opposite position in a subsequent tort lawsuit); *see also Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006) (the purpose of judicial estoppel is to “preserve respect for judicial proceedings without the necessity of resorting to the perjury statutes”). Accordingly, review should be denied. RAP 13.4(b)(4).

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<sup>9</sup> Breitung argues that judicial estoppel does not apply absent evidence that her earlier knowing misrepresentations to the juvenile court were made with the “manipulative intent” to set up her present tort action. Pet. for Review at 11-12. However, both cases she cites for this proposition rejected the position she now advances, and held that manipulative intent is not an element of judicial estoppel. *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (2007); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 233-34, 108 P.3d 147 (2005).

**V. CONCLUSION**

Breitung's petition for review does not satisfy any of the criteria in RAP 13.4(b). Accordingly, for each of the reasons identified herein, this Court should deny review.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of December, 2014.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read 'Steve Puze', written over a horizontal line.

STEVE PUZE, WSBA #17407, OID #91023  
Senior Counsel  
Attorneys for Respondent DSHS

NO. 90844-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

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PROOF OF SERVICE

I, Amanda Trittin, hereby certify that on December 19, 2014, I caused to be serviced a copy of the RESPONDENT STATE OF WASHINGTON'S ANSWER TO PETITION FOR REVIEW on the attorney for Appellant, as set forth below:

Attorney for Plaintiff:

Rebecca J. Roe [ x ] FedEx  
Schroeter, Goldmark & Bender  
810 Third Ave, Ste 500  
Seattle, WA 98104

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

DATED this 19th day of December, 2014, at Tumwater, Washington.

  
AMANDA TRITTIN, Legal Assistant