NO. 92272-1

SUPREME COURT OF THE STATE OF WASHINGTON

GREGORY TAYLOE-MCCANDLESS, ET AL.,

Petitioners,

v.

STATE OF WASHINGTON, ET AL.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

The respondents in this case are the Department of Social and Health Services (DSHS) and the Department of Early Learning (DEL), agencies of the State of Washington (collectively DSHS).

Appellants, Gregory Tayloe-McCandless and Becky Gearhart were the parents of three-month-old Hunter McCandless (collectively "the Estate"). They applied to DSHS for child care benefits because Gearhart worked during the day while Tayloe-McCandless, who suffered from epilepsy, stayed home to care for Hunter. Tragically, Hunter died while under Tayloe-McCandless' care. The Estate filed suit, seeking to place blame for Hunter's death on DSHS by claiming DSHS was negligent in failing to make a report of abuse or neglect and failing to investigate when it received their application for child care benefits.

There is no legal basis for the Estate's claims. The Estate cannot establish that DSHS owed them a duty to report and investigate based solely on Tayloe-McCandless' disability. To recognize a cause of action under the facts of this case would create an expansion of governmental tort liability beyond what the Legislature intended and in a way that would adversely impact parents with disabilities. The death of Hunter was a tragic accident. However, under the facts of this case, Washington law recognizes no cause of action that would allow the Estate to hold DSHS liable for their

son's death.

II. COUNTERSTATEMENT OF ISSUES

Plaintiffs do not raise an issue that meets the criteria set forth in RAP 13.4(b). But if review were granted, the issues would be:

1. Did the Court of Appeals correctly hold DSHS did not owe the Estate a duty to report and investigate child abuse or neglect after applying the plain terms of an unambiguous statute, RCW 26.44.015(3)?

2. Did the Court Of Appeals correctly apply CR 12(c) to affirm the trial court's dismissal of the lawsuit?

III. COUNTERSTATEMENT OF THE CASE

A. Counterstatement Of Facts

1. Application for Child Care Assistance

Appellants, Gregory Tayloe-McCandless and Becky Gearhart, were the father and mother of Hunter McCandless. CP at 36. At the time of Hunter's accidental death, he was three months old and had been living with his parents and five-year-old sister in an apartment in Everett, Washington. CP at 36. Mr. Tayloe-McCandless stayed home and cared for Hunter while Ms. Gearhart worked during the day. CP at 36. Mr. Tayloe-McCandless suffered from epilepsy and experienced seizures. CP at 36. The family's application to DSHS for childcare assistance contained a note from Gregory's doctor that stated "this is to confirm

Mr. Tayloe-McCandless has epilepsy and should not be left solely caring for his young children." CP at 36, 43. DSHS denied their application for child-care assistance because Tayloe-McCandless and Gearhart did not complete the application process. Br. of Appellant at 3; CP at 44.[1]

The Estate alleges that on May 26, 2010, Mr. Tayloe-McCandless was home alone with Hunter. CP at 37. The Estate also alleges that on that day Mr. Tayloe-McCandless suffered a seizure and collapsed onto Hunter, accidentally killing his son. CP at 37.

B. The Proceedings Below

Three years later, the Estate filed a lawsuit against DSHS. CP at 34. The Estate's original complaint alleged DSHS was negligent in failing to "extend child care benefits and assistance to Plaintiffs." CP at 38. The complaint also claimed DSHS failed to "investigate and take action to remove Hunter from an environment threatening his wellbeing." CP at 38. The complaint alleged DSHS's failure to provide "appropriate benefits" and "failure to investigate" were the proximate causes of Hunter's death. CP at 38.

DSHS filed an answer, CP at 41, and a few weeks later, a motion for judgment on the pleadings under Civil Rule (CR) 12(c). CP at 24.

[1] At oral argument in the Court of Appeals, the Estate's counsel acknowledged that the parents failed to complete their application timely and failed to reapply for benefits after their application was denied. Appendix A, (slip op. at 3, n.3).

DSHS argued that the Estate's claim for "failure to extend child care benefits" was not a cognizable cause of action. CP at 24-31. Furthermore, DSHS argued that, even assuming the veracity of all well-pleaded factual allegations in this case, the Estate cannot satisfy the elements of the "negligent investigation" cause of action under RCW 26.44 because this case did not involve a harmful placement decision or allegations of child abuse or neglect. CP at 4-10, 24-31.

A hearing on DSHS's CR 12(c) motion was held before Snohomish County Superior Court Judge Ellen Fair.[2] CP at 1-3. After argument from the parties, the trial court granted DSHS's motion and dismissed McCandless' complaint. CP at 1-3. Counsel for McCandless then moved to amend the complaint but provided no information as to the nature of his proposed amendment. CP at 3. The trial court declined to rule on the motion to amend because the motion was not properly before the court. CP at 3. Notably, the Estate did not file a motion to amend the complaint any time prior to the CR 12(c) hearing, nor did McCandless make any attempt to amend the complaint after the hearing.

On appeal, the Estate argued the trial court erred in dismissing its claims against DSHS for "negligent investigation," and "failure to report"

[2] Unfortunately, no transcript or recording of the hearing is available The Snohomish County Superior Court does not automatically record civil motions.

under the mandatory reporting rules. Br. of Appellant at 1-2. However, the Estate did not assign error or advance any argument on its claim that DSHS "failed to extend child care benefits." CP at 66. Accordingly, the Court of Appeals determined that the Estate abandoned this claim.[3] Appendix A (slip op. at 4, n.4).

The Estate also argued on appeal that the trial court erred in denying their motion to amend the complaint. However, the Estate did not assign error or advance any argument on this claim in its Petition for Review. Thus, the Estate appears to have also abandoned this claim.

The Court of Appeals held that the primary issue in this case is whether DSHS owed the Estate a duty sufficient to support a cause of action in negligence. Appendix A (slip. op. at 5). The Court of Appeals held that, under RCW 26.44.015(3), the Estate pleaded no facts that triggered a duty on the part of DSHS to report or to investigate acts of alleged child abuse or neglect. *Id.*

IV. ARGUMENT AGAINST REVIEW

A. The Estate Fails To Establish That The Decision Of The Court Of Appeals Raises An Issue Of Substantial Public Interest Requiring A Determination By This Court

The Estate asserts this case involves an issue of substantial public

[3] A party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) explicitly abandoning the issue at oral argument. *Holder v. City of Vancouver*, 136 Wn. App. 104, 147 P.3d 641 (2006).

interest that warrants review by the Supreme Court. Petition for Review, p. 6. However, the Court of Appeals found, on the basis of an unambiguous statute and well-established precedent, that DSHS owed no duty to the Estate to report or investigate based on Tayloe-McCandless' seizure disorder. There is nothing in the Court of Appeals' narrow, fact based, unpublished decision that warrants review by this Court.

1. The Court Of Appeals Applied Well-Settled Legal Principles To Hold That Tayloe-McCandless' Seizure Disorder Did Not Give Rise To A Duty To Report And Investigate The Family For Child Abuse Or Neglect

The Estate claims that DSHS had a duty to report and conduct an investigation on learning that Tayloe-McCandless suffered a seizure disorder and was home alone caring for his children. Petition for Review, p. 12. McCandless' claim is based on a faulty premise that—given Tayloe-McCandless' epilepsy—leaving him alone to care for his son constituted child abuse or neglect. Under well-established law and clear legislative intent, the Court of Appeals correctly held that McCandless failed to establish DSHS had a duty to Tayloe-McCandless under the unique circumstances of this case.

The threshold question in a negligence action is one of law: whether the defendant owes an actionable tort duty to the plaintiff. *Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007). Where

the State, or a state agency, is a defendant, the primary focus for determining whether an actionable tort duty exists is on statutes which create governmental functions and corresponding tort liability. *Id.* at 208. This is because, at common law, the State was immune from negligence lawsuits. *Id. See also* Const. art. II, § 26 (the Legislature, not the courts, has the power to "direct by law" what lawsuits may be brought against the State). "Only where the legislature has expressly waived sovereign immunity by statute can there be the possibility of an actionable duty owed by the State." *Linville*, 137 Wn. App. at 208. If sovereign immunity is statutorily waived for the acts or omissions at issue, then the question becomes whether a statute or regulation expressly or implicitly creates an actionable tort duty. *Id.* This is because "State agencies are creatures of statute, and their legal duties are determined by the legislature . . . " *Murphy v. State,* 115 Wn. App. 297, 317, 62 P.3d 533, *review denied*, 149 Wn.2d 1035, 75 P.3d 968 (2003).

State statutes cannot be construed as imposing a duty unless that statute expressly imposes a duty or is found to contain an implied duty. *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). Here, the Estate failed to articulate either an express or implied duty owed to it by DSHS.

a. A Negligent Investigation Claim Is Narrowly Limited To Harmful Placement Decisions

Relying on Washington's Abuse of Children statute, RCW 26.44 *et. seq.*, the Estate claimed that DSHS was negligent in failing to report and investigate the family for child abuse or neglect. CP at 59, Br. of Appellant at 7. However, this Court recognized only one narrow circumstance in which child welfare statutes have been held to impose a tort duty on the State. This Court held that a private cause of action is available for a harmful placement decision resulting from a negligent investigation of a referral of child abuse or neglect conducted pursuant to RCW 26.44.050[4]. *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 77-82, 1 P.3d 1148 (2000); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 598-99, 601-02, 70 P.3d 954 (2003).

In explaining the duty, this Court clarified that there is no "general tort claim for negligent investigation." *M.W.*, 149 Wn.2d at 601. Instead, there is a narrow exception allowing a cause of action only when, during a child abuse or neglect investigation conducted pursuant to RCW 26.44.050, "DSHS has gathered incomplete or biased information that results in a harmful placement decision such as removing a child from a

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[4] RCW 26.44.050 provides:

Upon receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

non-abusive home, placing a child in an abusive home or letting a child remain in an abusive home." *M.W.*, 149 Wn.2d at 596, 602.[5] This Court declined to expand the negligent investigation cause of action beyond these bounds because the statute (RCW 26.44) from which the tort is implied does not contemplate other types of harms. *M.W.*, 149 Wn.2d at 599.

On appeal, the Estate relied on *Lewis v. Whatcom Cnty.*, 136 Wn. App. 450, 149 P.3d 686 (2006); *M.W. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 233, 255-56, 39 P.3d 993 (2002); and *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 930 P.2d 958 (1997). However, the Court of Appeals observed that unlike the unique facts in the present case, those cases all involved direct physical abuse or neglect of a child and therefore, they were not controlling. Appendix A (slip op. at 7-8). In *Yonker*, the plaintiff was sexually abused by her father; in *Lewis*, the plaintiff was molested by an uncle; in *M.W.*, the plaintiff alleged physical harm by DSHS investigators. All of them involved abuse that had already occurred. The potential harm to Hunter was both based upon illness and

[5] This Court's analysis in *M.W.* was based, in part, upon the analysis conducted by Judge Morgan in his lengthy dissent to *M.W. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 233, 255-56, 39 P.3d 993 (2002) (Morgan, J., dissenting). 149 Wn.2d at 594-95. Judge Morgan examined each of the twelve Washington cases (decided prior to *M.W.*) analyzing DSHS liability under RCW 26.44, et seq. and divided them into three categories: a decision to place, leave, or remove a child from a home. 110 Wn. App. at 255-56.

hypothetical.

Moreover, all of the cases the Estate relied on involved a placement decision. No placement decision was made in this case. DSHS did not remove Hunter from a non-abusive home; place him in an abusive home; or let Hunter remain in an abusive home. Here, DSHS received an application for childcare benefits. Its decision to grant or deny the application is clearly not a "placement decision" as defined by this Court in *M.W.* Here, no facts exist that would support a negligent investigation claim under the child abuse statutes. The Court of Appeals applied well-settled law and a clear statute; there is no reason for this Court to reconsider the reasoning of the Court of Appeals.

b. A Parent May Not Be Deemed Abusive Or Neglectful Based Solely On The Parent's Handicap Or Disability

Under the "limitations" section of the Abuse of Children statute, the Legislature expressed clearly its intent to insulate parents from allegations of abuse or neglect based solely on a parent's disability or handicap. The statute provides:

> No parent of guardian may be deemed abusive or neglectful solely by reason of the parent's or child's blindness, deafness, developmental disability, or other handicap.

RCW 26.44.015(3).[6]

Despite the clear language of RCW 26.44.015(3), the Estate argues the Court of Appeals incorrectly interpreted this section, offering instead their own strained interpretation of this provision. While acknowledging that, under the statute, a parent may not be deemed abusive or neglectful based solely on a disability, the Estate suggests that the statute does not actually prohibit DSHS from conducting an investigation. Pet. for Review, p. 8. The Estate suggests that "if after the investigation the only thing the State finds is a parent is sick," then a "finding of neglect cannot be maintained." *Id.* at 9. But, the Estate provides no supporting authority for this position, or for why this clear statute should be viewed as requiring additional action by DSHS.

Significantly, the Estate's reading of RCW 26.44.015(3) ignores the statutory requirement that, before intruding into the bond between parent and child, a mandatory reporter must have "reasonable cause" to believe that a child has suffered abuse or neglect before filing a report. RCW 26.44.030(1)(a). "Reasonable cause" is defined as "a person witnesses or receives a credible written or oral report alleging abuse, including sexual contact, or neglect of a child."

[6] In the same vein, in defining "negligent treatment," the Legislature provided that poverty and homelessness does not constitute negligent treatment or maltreatment in and of itself. RCW 26.44.020(16).

RCW 26.44.030(1)(b)(iii).

Under the clear language of RCW 26.44.015(3), Tayloe-McCandless cannot be deemed to be abusive or neglectful solely by reason of his epilepsy. Accordingly, under the facts of this case, DSHS did not have reasonable cause to report Tayloe-McCandless nor any basis to conduct an investigation of the family. Yet, under the Estate's strained interpretation of RCW 26.44.015(3), DSHS must investigate the family for abuse or neglect despite the fact that the "report" alleged only illness and failed to establish "reasonable cause." The Legislature clearly did not intend for such an absurd result.

The Legislature enacted RCW 26.44.015(3) to prevent unwarranted intrusion into the parent-child bond based solely on a parent's handicap or disability. This is the situation here. The Court of Appeals correctly determined that the statute applies in this case, and there is no basis for review by this Court.

c. This Case Does Not Involve Any Conflict Between The Rights Of The Child Versus The Rights Of The Parents

Citing to the declaration of purpose under RCW 26.44.010, the Estate contends that if there is a dispute between the rights of the child and the rights of the parents, the "safety of the child shall be the department's paramount concern." Pet. for Review, p. 7. The Estate's attempt to frame

the issue as a conflict between the rights of the parent versus those of the child is misguided. To trigger the mandatory reporting duty under RCW 26.44, the threshold question is whether reasonable cause exists to believe Hunter was subjected to abuse or neglect. The Estate is unable to make this showing in the first place because, simply put, this case involved accidental harm resulting from a parent's medical disability, not child abuse or neglect.

In fact, the declaration of purpose cited by the Estate expressed the Legislature's desire to protect children from instances of "non-accidental" injury, neglect, death, sexual abuse and cruelty. *See* RCW 26.44.010. As the Court of Appeals aptly observed, "Here, no party disputes that the death of Hunter was a tragic accident." Appendix A (slip op. at 7).

The Court of Appeals correctly held that "under the unique circumstances here, McCandless pleaded no facts, real or imagined, sufficient to trigger a duty on the part of DSHS to investigate and report." Appendix A (slip op. at 8).

To recognize a cause of action under the facts of this case would cause an unreasonable expansion of governmental tort liability by imposing a duty on DSHS to report and investigate families based solely on a parent's handicap or disability. The Court of Appeals correctly declined to do so because the intervention proposed by the Estate is

substantial. The Estate's proposal would result in the interference of the parent-child bond of disabled parents such as the blind, deaf, or seriously ill, even where there has been no harm to the child. The expansion proposed by McCandless is unwarranted and unsupported by legislative intent or case law.

2. The Court Of Appeals Correctly Applied CR 12(c) To Affirm The Trial Court's Dismissal Of The Estate's Lawsuit

For the first time, the Estate claims the trial court and Court of Appeals incorrectly reviewed this matter as a CR 56 motion rather than a CR 12 motion. Pet. for Review, p. 14. However, the Estate fails to clearly explain the court's error. Instead, the Estate asserts:

> The only issue with which the trial court and the Court of Appeals should have concerned itself was whether Petitioners had made upon which relief *could* be granted *[sic]*.

Pet. for Review at 14 (emphasis in original).

The Estate appears to claim that the trial court should have permitted discovery and speculates that had an investigation been conducted, DSHS would have found a "massively neglectful situation." Pet. for Review at 15. However, a motion for judgment on the pleadings admits only facts well pleaded and not mere conclusions, the pleader's interpretations of statutes involved, or his construction of the subject

matter. *City of Moses Lake v. Grant Cnty.*, 39 Wn. App. 256, 262, 693 P.2d 140 (1984).

The standard applicable to a CR 12(b)(6) motion also applies to a CR 12(c) motion. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012) (CR 12(c) motion for judgment on the pleadings is treated identically to a CR 12(b)(6) motion to dismiss for failure to state a claim); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987) (citing J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* § 294-95 (1985)). Dismissal under a CR 12(b)(6) claim is appropriate where it appears beyond a reasonable doubt that no facts exist that would justify recovery, even while accepting as true the allegations contained in plaintiff's complaint. *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

Here, the Court of Appeals determined, on the unique facts of this case, that the Estate pleaded no facts, real or hypothetical, sufficient to trigger a duty on the part of DSHS to investigate and report child neglect. Appendix A (slip op. at 8). The Estate's speculation and conclusions are insufficient to establish a duty by DSHS to report and investigate. The Court of Appeals' narrow, fact-based decision does not warrant review by this court.

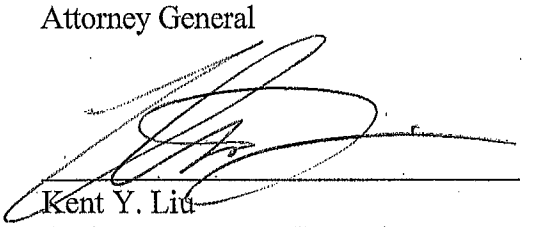
In sum, the Estate claims its petition involves an issue of substantial public interest. However, dismissal of this case was based on a plain, unambiguous statute; the Court of Appeals properly concluded that DSHS owed no duty to the Estate under RCW 26.44.015(3). Based on the unusual facts in this case, the issues here relate only to the Estate, not a wider public. There is no reason for this Court to accept review of this case.

V. CONCLUSION

The Estate's petition does not meet the standards for review specified in RAP 13.4(b) and should be denied by this Court.

RESPECTFULLY SUBMITTED this 16th day of November, 2015.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the preceding State of Washington's Answer to Petition for Review and Certificate of Service were filed by Electronic Mail at the following address:

Supreme Court of Washington – supreme@courts.wa.gov

And that a copy of the preceding State Of Washington's Answer To Petition For Review and Certificate Of Service was served on counsel at the following addresses by Jennifer Eng to:

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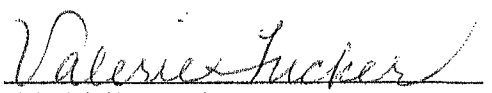
DATED this 16th day of November, 2015 at Seattle, Washington.



VALERIE TUCKER

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GREGORY TAYLOE-MCCANDLESS, individually, and BECKY GEARHART, individually, and SARA ANDERSON, Personal Representative for the Estate Of Hunter L. McCandless and on behalf of the Estate of Hunter L. McCandless, Appellants, v. STATE OF WASHINGTON, and its subsidiaries, THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES AND CHILD PROTECTIVE SERVICES, JOHN DOES, 1-10, JANE DOES, 1-10 and CORPORATIONS ABC, DEF & GHI, Respondents.	NO. 72736-2-I DIVISION ONE UNPUBLISHED OPINION FILED: August 17, 2015

LAU, J. — Gregory Tayloe-McCandless, Becky Gearhart,[1] and the estate of Hunter McCandless (collectively "McCandless") appeal the trial court's dismissal of their wrongful death negligence action against the State of Washington, the Department of

[1] Appellants' written submissions below and on appeal appear to misspell Gearhart's last name. In this opinion we use the spelling from the caption in the amended complaint.

Social and Health Services, and other respondents (collectively "DSHS") under Civil Rule 12(c). On appeal they claim that they properly pleaded causes of action against DSHS for negligent failure to make a report of child abuse and neglect and for negligent failure to conduct an investigation. They also contend the trial court improperly denied their motion to amend their complaint under CR 15. Because McCandless fails to show that DSHS owed them a duty to report or investigate alleged abuse or neglect of Hunter and because the trial court properly declined to rule on the oral motion to amend the complaint, we affirm.

FACTS

The first amended complaint for damages alleges the following: on May 26, 2010, three-month-old Hunter McCandless died while in the care of his father, Gregory Tayloe-McCandless.[2] The death occurred when Gregory suffered a seizure and collapsed on top of Hunter, suffocating him.

At the time of his death, Hunter was living with his parents and five-year-old sister at their apartment in Everett, Washington. Hunter's mother, Becky Gearhart, worked during the day while Gregory stayed at home to care for Hunter.

Gregory received medical care for epilepsy and suffered from seizures. His doctors cautioned that he should not be left alone with his children due to his risk of seizures.

Gregory and Gearhart applied to the State of Washington and DSHS for childcare assistance. To support their application, they submitted a doctor's letter

[2] We use first names for clarity.

stating, "this is to confirm Mr. Tayloe-McCandless has epilepsy and should not be left solely caring for his young children."

DSHS denied the application.[3]

In June 2013, McCandless, Gearhart, and the personal representative of Hunter's estate (McCandless) filed a lawsuit against DSHS alleging it was negligent in failing to extend childcare benefits. The complaint further alleged that DSHS:

> conducted no investigation into the home where Plaintiffs and their minor children resided and did not intervene to prevent Tayloe-McCandless from being alone at home with his child. Despite its knowledge that a child was in the sole custody of his father, an epileptic who posed an immediate danger to the child, Defendant did nothing.

Clerk's Papers (CP) at 58. In essence, McCandless alleges that DSHS owed them a duty to report, investigate, and remove Hunter from their home and its failure to do so proximately caused Hunter's death.

In September 2014, DSHS filed a motion for judgment on the pleadings under Civil Rule 12(c). DSHS argued that McCandless' claim for failure to extend childcare benefits is not a cognizable cause of action. DSHS also argued that even assuming the truth of each of McCandless' allegations, they failed to establish a cause of action under the Abuse of Children statute, chapter 26.44 RCW, because they alleged neither a harmful placement decision nor child abuse or neglect.

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[3] In its answer to McCandless' complaint, DSHS states this denial was based on the parents' failure to complete the application. At oral argument to this court, appellants' counsel acknowledged that the parents failed to complete their application timely and failed to reapply for benefits after their application was denied.

In October 2014, the trial court granted DSHS's motion and dismissed the complaint. The trial court also declined to rule at that time on McCandless' oral motion to amend the complaint.

McCandless appeals.[4]

ANALYSIS

Standard of Review

McCandless appeals from the trial court's dismissal of their claims for negligent failure to report abuse or neglect and negligent failure to investigate abuse or neglect under Civil Rule 12(c).

This court treats a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. P.E. Systems, LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012). "Like a CR 12(b)(6) motion, the purpose is to determine if a plaintiff can prove any set of facts that would justify relief." P.E. Systems, 176 Wn.2d at 203. Dismissal under a 12(b)(6) claim is appropriate where it appears beyond a reasonable doubt that no facts exist that would justify recovery, even when accepting as true the allegations contained in the plaintiff's complaint. P.E. Systems, 176 Wn.2d at 210-11. In performing this analysis, we "must take the facts alleged in the complaint, as well as hypothetical facts, in the light most favorable to the nonmoving party." M.H. v. Corp. of Catholic Archbishop of Seattle, 162

[4] McCandless does not assign error or present argument on their claim that DSHS failed to extend childcare benefits. A party abandons an issue on appeal by failing to brief the issue. Holder v. City of Vancouver, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). We decline to address this issue.

Wn. App. 183, 189, 252 P.3d 914 (2011). We review dismissal under CR 12(c) de novo. P.E. Systems, 176 Wn.2d at 203.

The primary issues in this appeal relate to whether DSHS owed McCandless a duty sufficient to support a cause of action in negligence. A claim for negligence requires a plaintiff to establish "(1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury." Lowman v. Wilbur, 178 Wn.2d 165, 169, 309 P.3d 387 (2013).

In a negligence action, courts first address the threshold question of whether the defendant owes a duty of care to the injured plaintiff. Estate of Kelly v. Falin, 127 Wn.2d 31, 36, 896 P.2d 1245 (1995). At common law, the State was immune from lawsuit. Linville v. State, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007). Thus, only where the legislature has expressly waived sovereign immunity by statute can there be the possibility of an actionable duty owed by the State. Linville, 137 Wn. App. at 208. That duty may be found in the language of the statutes. Tyner v. Dep't of Social and Health Serv's, 141 Wn.2d 68, 78, 1 P.3d 1148 (2000).

Existence of a Duty

McCandless argues that the trial court erred by dismissing their lawsuit because they pleaded a valid negligence cause of action in Washington. But McCandless' arguments merely assume that given Gregory's seizure disorder, leaving him alone to care for Hunter constitutes child abuse or neglect. McCandless pleaded no facts, actual and imagined, that trigger a duty on the part of DSHS to report or to investigate acts of alleged child abuse or neglect under the unique circumstances presented here.

The Abuse of Children statute contains mandatory reporting, investigation, and other procedures related to child abuse. In enacting this statute, the legislature stated its intent to safeguard children from abuse or neglect:

> 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. . . .

RCW 26.44.010 (emphasis added).

Under RCW 26.44.030, all DSHS employees are mandatory reporters required to report abuse when there is "reasonable cause to believe that a child has suffered abuse or neglect." "Abuse or neglect" are statutorily defined as:

> [S]exual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

RCW 26.44.020(1).

"Negligent treatment" is defined as:

> [A]n act or failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

RCW 26.44.020(16).

Mandatory reporters must report suspected abuse within 48 hours of developing reasonable cause to believe abuse or neglect has occurred. RCW 26.44.030(1)(g). Similarly, DSHS is required by statute to investigate and provide protective services when it receives a report alleging possible abuse or neglect. RCW 26.44.050.

The core of McCandless' contention is that the "State did nothing after being presented with information and becoming aware that [Gregory] posed a threat to the welfare and wellbeing of his children." Br. of Appellant at 11. Citing to the statement of legislative intent in RCW 26.44.010, McCandless argues that the child abuse statutes are "broadly worded to protect children from non-accidental injury and death and to protect and safeguard such children's safety and health." Br. of Appellant at 9.

RCW 26.44.010, quoted above, expresses the legislature's concern over abuse involving "nonaccidental" injury, among others, where a child is deprived of minimal nurture, health, and safety. Here, no party disputes that the death of Hunter was a tragic accident.

The Legislature also clearly expressed its intent to insulate a parent from allegations of child abuse or neglect based solely on the existence of a parent's disability or handicap.

> No parent or guardian may be deemed abusive or neglectful solely by reason of the parent's or child's blindness, deafness, developmental disability, or other handicap.

RCW 26.44.015(3).

This unambiguous language leaves no doubt that Gregory's epilepsy seizure disorder falls squarely within this statute's narrow limitation.

McCandless relies on Beggs v. Dep't of Social and Health Serv's, 171 Wn.2d 69, 247 P.3d 421 (2011), Yonkers v. Dep't of Social and Health Servs., 85 Wn. App. 71, 930 P.2d 958 (1997), M.W. v. Dep't of Social and Health Serv's, 149 Wn.2d 589, 70 P.3d 954 (2003), Lewis v. Whatcom County, 136 Wn. App. 450, 149 P.3d 686 (2006). But those cases do not control because unlike here, they undisputedly involve direct

physical abuse or neglect of a child. McCandless cites to no controlling authority extending the statutory duty to report and investigate child abuse and neglect to the unique circumstances presented here.

Likewise, nothing in chapter 26.44 RCW's statutory scheme indicates the legislature intended to expand the duty alleged here premised on a parent's diagnosed medical condition. Indeed, the legislature required "reasonable cause to believe that a child has suffered abuse or neglect" before the State may intrude in "[t]he bond between a child and his or her parent . . . any intervention into the life of a child is also an intervention into the life of the parent . . . ." RCW 26.44.010.

McCandless further contends that the trial court "should also accept as true that the State and its employees had a duty to report under RCW 26.44.030 but failed to do." Br. of Appellant at 11. This argument is equally misplaced. As discussed above, no duty runs to the DSHS as a matter of law. A motion for judgment on the pleadings admits only the facts well pleaded, not mere legal conclusions, the pleader's interpretation of the statute involved, or his construction of the subject matter. City of Moses Lake v. Grant County, 39 Wn. App. 256, 262, 693 P.2d 140 (1984). Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo. Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

We conclude that under the unique circumstances here, McCandless pleaded no facts, real and imagined, sufficient to trigger a duty on the part of DSHS to investigate and report.

Motion to Amend Complaint

McCandless contends that the trial court erred when it "denied" his motion to amend his complaint. Br. of Appellant at 15. We disagree. The record plainly shows the trial court declined to rule on the motion at that time.

Under CR 15(a), a plaintiff must obtain permission from the court or written consent of the adverse party to amend a complaint if an answer has been filed. The rule also provides that leave to amend "shall be freely given when justice so requires." CR 15(a). The decision to grant leave to amend the pleadings is within the discretion of the trial court. Wilson v. Horsley, 137 Wn.2d 500, 505, 947 P.2d 316 (1999). The trial court's decision will not be disturbed except where there is a clear showing of an abuse of discretion. Wilson, 137 Wn.2d at 505.

The trial court's minute entry states: "Plaintiff's motion to amend the complaint: not ruled upon as it is not before the court today." CP at 3. McCandless submitted no written motion to amend and attached no proposed amended pleading. CR 15(a). No signed order denying the oral motion to amend is included in our record.

McCandless relies on Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 189 P.3d 168 (2008). That case does not apply. There, the trial court denied plaintiffs' motion to amend the pleadings without an explicit explanation. We affirmed the denial because the apparent reason was futility of amendment.

Here, the trial court did not rule on the motion so there is no ruling for this court to review. See Mayekawa Mfg. Co. v. Sasaki, 76 Wn. App. 791, 796 n.6, 888 P.2d 183 (1995) (ruling must be final and definitive to preserve right to review). The trial court's explanation that McCandless' oral motion was not properly before it, left open the

opportunity for McCandless to note a subsequent motion to amend the complaint. McCandless made no motion to amend the complaint.

CONCLUSION

For the reasons discussed above, we affirm the CR 12(c) dismissal of McCandless' negligence lawsuit.

Ian, J

WE CONCUR:

Trickey, J

Applewick, J

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Gregory Tayloe-McCandless, et al. v. State of Washington, et al.
Case No. 92272-1
Filed by:
Valerie Tucker - Legal Assistant for Kent Liu, WSBA #21599
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Please find attached Respondents' Answering Brief (and attached appendix) regarding the Petition for Review.

Sincerely,

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"Count your age by friends, not years. Count your life by smiles, not tears." – John Lennon