NO. 99068-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

M.E. and J.E., minors, through JOHN R. WILSON,
as Litigation Guardian *ad Litem*;
and JOSHUA EDDO, individually,

Plaintiffs/Petitioners,

v.

CITY OF TACOMA

Defendant/Respondent.

ANSWER TO BRIEF OF *AMICUS CURIAE* KING COUNTY SEXUAL ASSAULT RESOURCE CENTER IN SUPPORT OF REVIEW

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I. INTRODUCTION

Amicus King County Sexual Assault Resource Center (KCSARC) urges this Court to accept review, arguing that Division II's opinion in this matter is contrary to Washington's "public policy of preventing child abuse," as set forth in RCW 26.44.050. As addressed herein, *Amicus* KCSARC's arguments in support of review are based on a fundamental misunderstanding of both the facts of this case and the limitations on law enforcement's ability to act under the statute. Moreover, contrary to *Amicus's* argument, RCW 26.44.050 does not create a duty to "prevent child abuse," nor is prevention of child abuse the public policy that this statute serves.[1] Precedent from this Court makes clear that RCW 26.44.050 triggers a duty to investigate only when there is past or current conduct suggesting abuse or neglect, conduct that was wholly absent from this case.

While *Amicus's* desire to prevent child abuse is sincere and laudable, the arguments advanced by *Amicus* are not supported by the law and are not grounds for granting review in this case. As outlined in the City's answer to the petition for review, Division II carefully and thoughtfully analyzed the undisputed facts of this case and applied controlling precedent. There are simply no grounds to grant review of

[1] See Yonker v. Dep't of Soc. & Health Svcs., 85 Wn. App. 71, 81, 930 P.2d 958 (1997)(RCW 26.44.050 does not create duty to prevent every case of child abuse).

Division II's opinion and nothing in the *amicus* brief changes that conclusion.

II. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Division II correctly found that, absent probable cause, a law enforcement officer has no legal authority to take action and is unable to make a harmful placement decision.

A claim for negligent investigation under RCW 26.44.050 is a "narrow exception" to the rule that Washington does not recognize a general tort claim for negligent investigation. M.W. v. Dep't of Soc. & Health Svcs., 149 Wn.2d 589, 601, 70 P.3d 954 (2003). "A claim of negligent investigation is available only when law enforcement or DSHS conducts an incomplete or biased investigation that 'resulted in a harmful placement decision.'" McCarthy v. Clark County, 193 Wn. App. 314, 328-29, 376 P.3d 1127 (2016) (citing M.W., 149 Wn.2d at 602).

Implicit in the requirement of showing a harmful placement decision is the concept of choice – that the alleged tortfeasor had a choice of placement decisions, and made a choice between various options. With regard to placement decisions, DSHS and law enforcement are not similarly situated. DSHS has greater latitude and far more choices about placement decisions than does law enforcement. For police, the *only* placement decision an officer can make is to take the child into protective custody and that can occur *only* when the officer can meet the *express terms of the*

statute. Under the statute, an officer can take a child into protective custody, without a court order, *only* when "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[.]" (emphasis added) RCW 26.44.050 (2018).

When viewed through the limited scope of law enforcement's legal authority, the arguments advanced by *Amicus* lose all force. *Amicus* argues that Division II's opinion mistakenly assumes that simply because a child has not disclosed abuse, it does not mean that abuse is not occurring. That is not true. Division II's opinion does not assume that the abuse was not occurring because the children did not disclose abuse. Instead, Division II correctly found that the police had not made a harmful placement decision because there was no evidence of abuse. Again, as outlined above, in order to take a child into protective custody, the officer must have probable cause to believe the child has been abused and probable cause to believe that the child is in imminent danger. As outlined by Division II, the officers did not have probable cause in either October 2011 or January 2012 to believe that the children had been abused or to believe that the children were in imminent danger.[2] M.E. v. City of Tacoma, No. 53011-2-II, 2020 Wash.

[2] It cannot be disputed that if a police officer does not have probable cause to act, the officer does not have authority to make a placement decision. It would stretch the boundaries of liability beyond all reason to say that any time an officer is unable to develop facts

App. LEXIS 2426, 2020 WL 5223232 (Wash. Ct. App. Sept. 1, 2020), as contained in the Appendix to the Petition for Review, at p. A-12 to A-13. Because the police did not have probable cause sufficient to establish abuse, the police, *a fortiari*, could not – and did not – make a harmful placement decision.

B. Division II's opinion included proper consideration of the undisputed evidence and this Court's decision in Wrigley.

Amicus also argues that instead of focusing on the lack of disclosures by the children, Division II should have been focused on the failure to perform a background check on all adults living in the home, and that leaving the children in a residence with "a convicted child molester" is a harmful placement decision. *Amicus* Memorandum, p. 4-5. *Amicus's* argument is premised on the incorrect assumption that a national background check would have shown that Karlan was a convicted child molester, and there is no evidence in the record to support such an assumption.

To begin, the record establishes that Detective Brooks likely ran a local criminal background check on Karlan. CP 158. Detective Brooks

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sufficient to establish probable cause to believe that the child has been abused and is in imminent danger, the officer is making a *de facto* placement decision and incurring liability for negligent investigation.

testified that while she did not have an independent recollection of doing so, it is her normal practice to run a local criminal background check and had there been anything in the local background check that was significant or caused her concern, she would have noted it in her report. Id.

Second, even if Detective Brooks had run a national criminal background check (commonly known as a III) in January of 2012, the information contained in the III would *not* have created probable cause or changed the officer's ability to act. Contrary to *Amicus's* claims, a III would *not* have shown that Karlan was a convicted child molester. CP 125. The evidence establishes that a III ran in August of 2013, showed only that Karlan was arrested in California *when he was a minor* (15 years old) and charged with something to the effect of "indecent liberties with a minor." Id. The detective who ran the III does not recall the disposition on this charge being included in the III, which is not uncommon given that Karlan was a minor at the time he was charged. Id. Moreover, the III did *not* identify Karlan as a convicted or registered sex offender and there is nothing in the record showing that Karlan had been required to register as a sex offender in Washington, or in any other state. Id. Thus, even if Detective Brooks had known in January of 2012 that Karlan had been arrested in 1997, when Karlan was a minor, for lewd acts with another minor, such knowledge would not have given Detective Brooks probable cause to believe that M.E.

or J.E. were being abused by Karlan. Moreover, such knowledge would not have given Detective Brooks probable cause to take M.E. or J.E. into protective custody in 2012, and without probable cause, the officer was unable to make a harmful placement decision.

Finally, in support of its argument that leaving a child in a residence with a convicted child molester is a harmful placement decision, *Amicus* also cites to this Court's decision in Wrigley v. Dep't of Soc. & Health Servs., 195 Wn.2d 65, 77, 455 P.3d 1138 (2020), for the proposition that "RCW 26.44.050 does not require officials to 'wait for the child to be harmed before taking any action.'" *Amicus* Memorandum, p. 5. *Amicus's* representation of Wrigley is a gross misstatement of the Wrigley court's analysis and holding. As Wrigley made clear, "the duty to investigate of former RCW 26.44.050, which implicates tort liability, also requires an allegation of past or current conduct." Wrigley, 195 Wn.2d at 77. In Wrigley, because "DSHS did not receive a report of any past or current conduct indicating abuse or neglect by Viles of A.A., the duty to investigate was not triggered." Id. at 77-78. Thus, contrary to *Amicus's* argument, Division II's decision in this case (based on the absence of any report or disclosure of abuse) does not "condone authorities leaving children in … a dangerous environment, and does not "violate public policy or RCW

26.44's definition of abuse or neglect[.]" Rather, Division II's analysis in this case is in lockstep with this Court's decision in Wrigley.

C. *Amicus*'s argument that TPD had a duty to investigate abuse against M.E. and J.E. in April 2013 is contrary to law, and does not provide grounds for review.

Amicus KCSARC also appears to be arguing that police had a duty to investigate possible abuse of M.E. and J.E. in April 2013, when J.B. disclosed that Karlan was abusing him. Implicit in this argument is the conclusion that Division II erred in not so holding. This argument, however, is contrary to several appellate opinions, both published and unpublished. See M.M.S. v. Dep't of Soc. & Health Servs., Child Protective Servs., 1 Wn. App. 2d 320, 404 P.3d 1163 (2017), rev. denied, 190 Wn.2d 1009 (2018); Boone v. Dep't of Soc. & Health Servs., 200 Wn. App 723, 403 P.3d 873 (2017); Estate of Linnik v. State, No. 67475-7-I, 2013 Wash. App. LEXIS 709, at *14-17 (Ct. App., April 1, 2013).

For example, in M.M.S., Division II soundly rejected the argument that a report of abuse or neglect of one child created a duty to investigate possible abuse or neglect of another child:

> Under the plain language of RCW 26.44.050, neither Crystal nor M.M.S. is within the class of persons for whose benefit RCW 26.44.050 was enacted. RCW 26.44.050 imposes a duty to investigate "upon the receipt of a report concerning the possible occurrence of abuse or neglect . …" Based on this language, RCW 26.44.050 was enacted to

> benefit children *who are subjects of reports concerning possible abuse or neglect*.

Id. at 331. Similarly, in Boone v. Dep't of Soc. & Health Servs., 200 Wn. App 723, 403 P.3d 873 (2017), the Boone plaintiffs made the same argument, based on the same authority, as the plaintiffs in the instant case, and the argument was again rejected:

> As it relates to the investigations done in 1992, 1997, and January 2006, the Boone children are not within the class of persons for whose benefit RCW 26.44.050 was enacted. The Boones allege that they are within the class of persons because RCW 26.44.050 was enacted to protect all abused children. Br. of Appellant at 19-20. But, the Boones' reading of the class of persons for whose benefit RCW 26.44.050 was enacted is too broad. Under RCW 26.44.050, the the duty to investigate with reasonable care is triggered by "a report concerning the possible occurrence of abuse or neglect." Therefore, the class of persons protected by the duty to investigate are the children ***who are the subjects*** of a report of possible abuse or neglect. Insofar as the Boones rely on the investigations into the abuse of other children in the day care in 1992, 1997, and January 2006, the Boones are not within the class of persons for whose benefit RCW 26.44.050 was enacted because the Boone children were not the subjects of the reports of alleged abuse that triggered those investigations.
>
> The Boones cite to two cases, *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006) and *Yonker v. Department of Social & Health Services*, 85 Wn. App. 71, 930 P.2d 958 (1997). However, neither case supports the conclusion that children and families who were not the subject of the report triggering the investigation are within the class of persons for whose benefit RCW 26.44.050 was enacted.

(emphasis added) Id. at 734.

The courts' holdings in M.M.S. and Boone are dispositive of plaintiffs' RCW 26.44.050 claims based on the April 2013, CPS referral concerning J.B. *Amicus* KCSARC's arguments notwithstanding, the April 2013, referral did not give rise to a duty owed to M.E. or J.E. as they were not the subject of this referral and therefore, not within the class of persons for whose benefit the statute was enacted.

Finally, contrary to the arguments made by *Amicus* KCSARC, Tacoma police did take action to protect M.E. and J.E. as soon as it was physically possible following the disclosure of abuse by J.B. in April 2013. By May 2013, Detective Quilio had developed probable cause to arrest Karlan for abuse of J.B., and immediately undertook great efforts to locate Karlan. CP 123-124; CP 1051. Karlan was arrested shortly before midnight on August 27, 2013 (CP 1054-55), and interviewed by Detective Quilio in the early morning hours of August 28, 2013 (CP 1043). The next day, on August 29, 2013, Detective Quilio contacted both Jocelyn Drayton (M.E.'s and J.E.'s mother) and Joshua Eddo (the girls' father), and advised them to talk to their girls to see whether they would disclose any abuse by Karlan, now that he was in custody and out of the home. CP 1043-1044; CP 1060. Both parents advised Detective Quilio that they had spoken to the girls and that neither girl disclosed abuse. Id.

It was not until October 29, 2013, eighteen months after Detective Brooks investigated the "ghost in the shower" incident, that M.E. disclosed abuse by Karlan. CP 144. as noted by Division II, plaintiffs' damage expert wrote a report, indicating that M.E. had claimed the abuse began in the first grade in the fall of 2012 and ended the summer before she began second grade in 2013. M.E., No. 53011-2-II, 2020 Wash. App. LEXIS 2426, 2020 WL 5223232 (Wash. Ct. App. Sept. 1, 2020), as contained in the Appendix to the Petition for Review, at p. A-8; CP 424-425. Thus, all available evidence in the record indicates that any abuse of M.E. by Karlan did not occur until *at least six months after* Detective Brooks completed her investigation into the "ghost in the shower" referral. J.E. never made a disclosure of abuse by Karlan.

In light of this undisputed evidence and this Court's decision in Wrigley, Division II corrected found that plaintiffs could not make their *prima facie* case, as there was no evidence in the record of current or past abuse at the time of the October 2011, welfare check or the January 2012, "ghost in the shower" investigation. Under the express language of the statute, without probable cause to believe that abuse had occurred or was occurring, the officers had no legal authority to take the children into protective custody and as a result, did not make a harmful placement decision. Thus, *Amicus's* arguments concerning the April 2013, referral are

both unsupported by the facts and are contrary to the law, and provide no basis for granting review of Division II's opinion.

III. CONCLUSION

As outlined herein and in the City's answer to the petition for review, there are no grounds for the Supreme Court to grant review of Division II's decision in this case. Decision II's opinion is well supported by both the law and the facts, and is consistent with this Court's teachings on the nature and scope of a negligent investigation claim under RCW 26.44.050. None of the arguments offered by *Amicus* KCSARC changes this conclusion.

DATED this 15th day of December, 2020.

/s/ Jean P. Homan
JEAN P. HOMAN, WSBA #27084
Deputy City Attorney
For Respondent

CERTIFICATE OF SERVICE

On said day below, I electronically served a true and accurate copy of the ANSWER TO BRIEF OF AMICUS CURIAE KING COUNTY SEXUAL ASSAULT RESOURCE CENTER IN SUPPORT OF REVIEW in the Supreme Court of the State of Washington, Cause No. 99068-9 to the following parties:

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EXECUTED this 15 day of December, 2020, at Tacoma, WA.

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