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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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MICHELLE A. DESMET and SANDOR KACSO, individually and as the  
General Guardians of their daughter, ASHLEY A. KACSO, a minor,

Respondents,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES and the  
CHILD PROTECTIVE SERVICES DIVISION thereof, and  
YOLANDA A. DURALDE, M.D.,

Appellants.

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**STATE APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

Washington statute makes the State immune for following court orders. That is exactly what happened here, yet the trial court did not apply this statutory immunity.

Respondents are the minor child A.K. and her parents, Michelle Desmet and Sandor Kacso. Appellant is a Washington State agency, the Department of Children, Youth, and Families<sup>1</sup> (Department or DCYF) and its division, Child Protective Services (CPS). Respondents seek recovery of monetary damages from the Appellants under negligent investigation, negligent infliction of emotional distress, and false light causes of action for the Respondent's adherence to a shelter care order issued by Pierce County Juvenile Court entered on February 10, 2016. Respondents allege that Appellant is liable for A.K. remaining in shelter care longer than necessary, even though A.K. remained in shelter care pursuant to multiple court orders.

Appellant moved the trial court for summary judgment based upon, *inter alia*, the immunity explicitly granted by RCW 4.24.595(2). The statute reads:

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

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<sup>1</sup> On July 1, 2018, CPS transferred from the Department of Social and Health Services to the newly-created DCYF.

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

The trial court denied Appellant's motion based on the narrow implied statutory cause of action of negligent investigation recognized in *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000), and its progeny. Appellant moved for reconsideration based upon the plain language of the statute, the legislative history that RCW 4.24.595 was designed to limit the *Tyner* cause of action, and this Court's decision in *Peterson v. State*, 9 Wn. App. 2d 1079, 2019 WL 3430537 (July 30, 2019) (unpublished).<sup>2</sup> The trial court denied this motion to reconsider and granted final judgment under CR 54(b).

Appellant has statutory immunity from Respondents' causes of action under RCW 4.24.595(2) as the Pierce County Juvenile Court ordered placement of A.K. in shelter care, and Appellant followed this Court order. The trial court's ruling renders RCW 4.24.595(2) ineffective. This Court should direct the trial court to follow the law.

## **II. ASSIGNMENT OF ERROR**

The trial court incorrectly denied the Department's motion for summary judgment to dismiss claims of negligent CPS investigation, false

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<sup>2</sup> See GR 14.1(a). The decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

light, and negligent infliction of emotional distress when it applied the limited statutory cause of action recognized by *Tyner*, 141 Wn.2d at 79-81, and its progeny, and not the subsequent immunity granted by RCW 4.24.595 for following court orders.

### **III. STATEMENT OF ISSUES ON APPEAL**

Whether the plain language of RCW 4.24.595(2) grants the Department immunity for following the shelter care and dependency orders of the court.

### **IV. FACTS**

Michelle Desmet and Sandor Kacso brought their three and one-half-month-old daughter, A.K., to Mary Bridge Children's Hospital (Mary Bridge) on the morning of Friday, February 5, 2016. CP 350. A.K. presented with a spiral fracture of her left femur. CP 350. Mary Bridge contacted the King County Sheriff's Office (KCSO), who initiated a criminal investigation. CP 350-56. By Ms. Desmet's admission, a doctor had evaluated A.K. on the night of Wednesday, February 3, 2016, for a cold, with no notation of a leg injury, and A.K. had been solely in Ms. Desmet's care since then. CP 350. KCSO placed A.K. into protective custody. CP 371.

Mary Bridge also notified CPS as Mary Bridge is a mandatory reporter of suspected child abuse. CP 368-69. CPS initiated an investigation

into neglect or maltreatment with Ms. Desmet as the subject. Per DCYF policy, the KCSO criminal investigation took priority over the CPS investigation. CPS filed a motion for shelter care and a dependency petition on February 9, 2016. CP 378-80.

Respondents did not contest the shelter care hearing, which was held before the Pierce County Juvenile Court on February 10, 2016. CP 384-92. Instead, they agreed that A.K. should be placed in shelter care with Mr. Kacso's sister. CP 384-92.

The Pierce County Juvenile Court scheduled a 30-day shelter care hearing on March 8, 2016, and a dependency trial for April 13, 2016. Respondents waived the 30-day shelter care hearing and filed a motion to return the child home, noted for March 22, 2016. CP 394-96, 398-403. The motion to return home included extensive briefing and evidence, including that Respondents allegedly passed polygraph examinations, a report contradicting the medical opinions of Mary Bridge physicians that A.K.'s injury was due to non-accidental trauma, and additional evidence calling into question the facts and circumstances of how and when A.K. received her femur fracture. In its response, DCYF included a declaration by Dr. Yolanda Duralde,<sup>3</sup> one of the Mary Bridge medical providers who

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<sup>3</sup> Dr. Duralde was listed as a defendant in the instant lawsuit. The trial court granted Dr. Duralde's Motion for Summary Judgment on grounds that she enjoyed immunity under RCW 26.44.060 as a reporter of suspected child abuse.

opined that A.K.'s injury was likely the result of non-accidental trauma. Dr. Duralde had specialized in treating child abuse victims since 1989, was the director of the Mary Bridge Child Abuse Intervention Department, and regularly contracted as an expert consultant with CPS in cases of suspected child abuse, although not on the instant case. Dr. Duralde did not opine as to the timing of the injury, only the possible causation of the injury.

The juvenile court considered this evidence and denied the motion to return A.K. to her parents' custody on April 13, 2016. CP 418-19. In denying the motion, the court reiterated that the pre-existing shelter care order remained in place and that Ms. Desmet and Mr. Kacso must "participate in a psychological evaluation with a mutually agreeable provider 'ASAP'" Before A.K. could return home. CP 418-19. Following this order, the parties also agreed to continue the trial date until June 20, 2016. CP 421.

DCYF "founded" the investigation into neglect or maltreatment by Ms. Desmet on March 31, 2016.<sup>4</sup> KCSO completed its investigation on April 18, 2016, and forwarded it to the Pierce County prosecutor for

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<sup>4</sup> This "founded" report was subject to numerous administrative appeals by Ms. Desmet, all of which were denied. By agreement of the parties on November 21, 2016, following the dismissal of the dependency action, DCYF agreed to change the investigation result from "founded" to "unfounded." The investigation was not designated "unfounded" until after A.K.'s return home.

potential criminal charges. CP 356. Pierce County declined prosecution on grounds that a conviction was unlikely.

The dependency trial was again continued by joint motion until August 8, 2016, specifically because Ms. Desmet and Mr. Kacso needed to complete the psychological examinations ordered by the juvenile court on April 13, 2016. CP 423. This examination was not completed until July 10, 2016.

On August 8, 2016, the juvenile court ordered A.K. to be returned home. The dependency remained until Ms. Desmet and Mr. Kacso met certain requirements ordered by the court at the agreed shelter care hearing and in its denial of Plaintiff's motion to return home.<sup>5</sup> CP 425-26. The juvenile court set the trial date for October 10, 2016, and that trial date was continued by agreement of the parties until October 24, 2016. CP 427, 429-30. DCYF agreed to terminate the dependency action on October 24, 2016, as all court-ordered requirements for A.K.'s return to her parents had been met. CP 423-33.

## V. ARGUMENT

Respondents' claims arise from A.K. remaining in shelter care pursuant to a court order. In 2012, the legislature granted complete statutory

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<sup>5</sup> Although the juvenile court ordered A.K. returned home, Ms. Desmet and Mr. Kacso did not take A.K. home immediately, instead choosing to transition A.K. home over the course of several weeks on their own accord.

immunity to DCYF and its employees under RCW 4.24.595(2) for following court orders. The language of RCW 4.24.595(2) is unambiguous and clear on its face. Even if this Court found it necessary to review the legislative history, it clearly establishes that the legislature intended to limit the risk that the liability created in the *Tyner* line of cases could make the Department liable, even when it was following court orders.

This statutory immunity applies here because at all times, DCYF was complying with court orders regarding the placement of A.K. and the timing of her return home. Pierce County Juvenile Court ordered that A.K. be placed in shelter care and ordered that Ms. Desmet and Mr. Kacso take certain steps before A.K. could return home. When Ms. Desmet and Mr. Kacso moved for A.K. to be returned home, they provided the court with the same facts they argue in this lawsuit, and Pierce County Juvenile Court determined that A.K. should remain in shelter care. In addition, the dependency judge determined that Ms. Desmet and Mr. Kacso had to complete a psychological evaluation by a mutually agreeable provider before A.K. could return home. DCYF could not return A.K. home until the court ordered it. DCYF could not commence a dependency trial until the court ordered it, and Respondents repeatedly sought and obtained continuances of that trial. DCYF is not liable for failing to return A.K. to her parents when a court ordered that A.K. remain in shelter care.

**A. The Immunity Language of RCW 4.24.595(2) is Unambiguous**

The language of RCW 4.24.595(2) is clear:

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 any other witness.

RCW 4.24.595(2) (2012) (emphasis added). “Statutory interpretation is a matter of law that [the Court] review[s] de novo.” *SEIU Healthcare 775 NW v. Dep’t of Soc. & Health Servs.*, 193 Wn. App. 377, 398, 377 P.3d 214 (2016). “When interpreting a statute, the court’s fundamental objective is to ascertain and give effect to the legislature’s intent.” *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). The Court considers “the language of the provision in question, the context of the statute in which the provision is found, and related statutes.” *SEIU Healthcare*, 193 Wn. App. at 398.

“If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)).

Respondents may argue that the statute is ambiguous because it could conceivably be interpreted to not limit the cause of action recognized in *Tyner*. A statute is ambiguous if it is “susceptible to two or more reasonable interpretations,’ but ‘a statute is not ambiguous merely because different interpretations are conceivable.’” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (quoting *Agrilink v. State*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005) (internal citations omitted)).

Further, this Court has already determined the application of the plain meaning of RCW 4.24.595(1) in *Peterson*, 9 Wn. App. 2d 1079. In *Peterson*, this Court determined that the legislature intended to modify the cause of action recognized by the *Tyner* line of cases deriving a cause of action from RCW 26.44.050. This Court determined that, specific to emergent placement decisions, the State enjoys statutory immunity under the plain meaning of RCW 4.24.595(1), absent a finding of gross negligence. While the instant case involves RCW 4.24.595(2), *Peterson* is probative as it shows the intent of the statute, recognizes the statute’s plain meaning, and analyzes the connection between the immunity granted and the cause of action recognized by *Tyner*. The same analysis and conclusions apply to RCW 4.24.595(2).

Here, the Court required Ms. Desmet and Mr. Kacso to undertake certain actions and evaluations before returning A.K. to the home. DCYF

facilitated the court requirements established by the February 10, 2016, and April 13, 2016, court orders. Thus, it has clear immunity for maintaining A.K. in the shelter care ordered by Pierce County Juvenile Court.

**B. The Legislative History of RCW 4.24.595 Shows a Clear Intent to Further Restrict the Cause of Action Recognized by the *Tyner* Line of Cases**

The statutory language itself is clear that the State is entitled to immunity. However, should this Court choose to examine the legislative history, it also supports this conclusion.

The legislature may restrict or eliminate statutory causes of action. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 651, 771 P.2d 711 (1989). This is precisely what it chose to do when it enacted a suite of legislation that included RCW 4.24.595. The *Tyner* line of cases had recognized a cause of action based on statute. The legislature chose to alter that cause of action by enacting legislation that clearly set forth DCYF's obligations and priorities for balancing its responsibilities to a potentially abused child, to the child's family, and to the courts overseeing the dependency process.

The Court in *Tyner* recognized that DCYF or its employees could be liable for a negligent investigation and that a court order may not sever the State's liability for a harmful placement decision if the State's negligence kept a material fact from the court's attention. 141 Wn.2d at 83. The Court later recognized that the *Tyner* cause of action could apply in

cases where DCYF removed a child from a non-abusive home. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003). And the Court of Appeals also later concluded that a court order would sever the causal link between a DCYF investigation and a wrongful placement decision, unless the court was denied information material to its decision. *Petcu v. State*, 121 Wn. App. 36, 86 P.3d 1234 (2004),

This line of cases created a conflict between DCYF's obligations to a potentially abused child, to the child's family, and to the court issuing orders regarding the child's placement. The State could potentially be liable for removing a child from a home under suspicion of abuse, not removing the same child, or following court orders while the suspected abuse was under investigation.

Recognizing these conflicts, the legislature passed legislation in 2012 to prioritize the safety of the child both in removing the child from the home and during the dependency process. It determined that the Department is only liable for emergent placement decisions if the Department were grossly negligent. RCW 4.24.595(1). It further required DCYF to comply with court orders and granted DCYF immunity for following those orders. RCW 4.24.595(2). Thus, the State's order of priorities were codified as: (1) the safety of the child; (2) the established dependency process; and (3) the integrity of the family. This codification necessarily and

intentionally modified the cause of action recognized by *Tyner, M.W.*, and *Petcu*.

There can be no question of the legislature's intent to modify this cause of action. First, RCW 4.24.595 post-dated *Petcu*, the last of the key *Tyner* cases, by eight years. "The legislature is presumed to know existing case law in areas in which it is legislating." *In re Foreclosure of Liens v. King Cty.*, 117 Wn.2d 77, 86, 811 P.2d 945 (1991). "The legislature is presumed to be aware of judicial interpretations of its enactments. *Friends of Snoqualmie Valley v. King Cty. Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992) (citation omitted). Second, the legislature specifically cited *Tyner* as creating the conflict it wished to address with legislation. House Bill Report ESSB 6555, at 4 (2012).

The legislature further articulated the proper prioritization of concerns when removing a child.

Even outside the legislative history, the legislature went so far as to codify its intent in passing the suite of bills that included RCW 4.24.595:

Consistent with the paramount concern of the department to protect the child's interest of basic nurture, physical and mental health, and safety, and the requirements that the child's health and safety interests prevail over conflicting legal interests of a parent, custodian, or guardian, **the liability of governmental entities, and their officers, agents, employees, and volunteers, to parents, custodians, or guardians accused of abuse or neglect is limited as provided in RCW 4.24.595.**

RCW 26.44.280 (emphasis added).

In an unpublished but persuasive opinion, this Court recognized this limiting effect, stating that “the legislature has limited the scope of this cause of action by granting the Department immunity for emergent placement decisions and compliance with shelter care and dependency court orders.” *Peterson*, 9 Wn. App. 2d 1079, 2019 WL 3430537 at \*5 (2019). This Court also specifically rejected a claim that application of RCW 4.24.595 would “eviscerate much of the existing law regarding negligent investigation” reasoning that the legislature had plenary authority to modify the statutory cause of action. *Id.* It also rejected arguments that the cause of action of negligent CPS investigation, as recognized by the cases the trial court relied upon in the instant action, survives RCW 4.24.595 unscathed. *Id.* While *Peterson* addressed RCW 4.24.595(1), its assessment of the impact to pre-existing case law is also applicable to RCW 4.24.595(2). Thus, this Court has already determined one of the primary issues at bar: whether RCW 4.24.595 supersedes the pre-existing cause of action. Similarly, the U.S. District Court for the Western District of Washington also has recognized that “[t]he legislature enacted RCW 4.24.595 in an apparent response to *Tyner’s* formulation of the implied cause of action for negligent investigation.” *Chen v. D’Amico*, No. C16-1877JLR, 2020 WL

363354, at \*9 (W.D. Wash. Jan. 22, 2020). The statute's limitation of the cause of action has been clearly established.

The legislature knew of the *Petcu* argument that DCYF could potentially be liable for upholding court orders and rejected it. Rather than continue the *Tyner* cause of action for negligent investigation or even limit immunity to cases of gross negligence, as it did with emergent placement decisions, the legislature chose to give full immunity for following court orders. As A.K. remained in shelter care due to court orders, and Respondents' causes of action all stem solely from A.K.'s time in shelter care, the decision of the trial court that DCYF does not have statutory immunity should be overturned.

## VI. CONCLUSION

The Court should direct the trial court to follow the law, overturn its ruling denying the State immunity under RCW 4.24.595(2), and not render the statute meaningless.

RESPECTFULLY SUBMITTED this 2nd day of March, 2020.

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