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NO. 53962-4

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

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

Respondents,

v.

STATE OF WASHINGTON, by and through its agency the
DEPARTMENT OF SOCIAL AND HEALTH SERVICES and the
CHILD PROTECTIVE SERVICES DIVISION thereof, and
YOLANDA A. DURALDE, M.D.,

Appellants.

STATE APPELLANTS' REPLY BRIEF

ROBERT W. FERGUSON
Attorney General

CYNTHIA J. GADDIS
WSBA No. 49788; OID No. 90123
Assistant Attorney General
Attorneys for State Appellants
P.O. Box 40126
Olympia, WA 98504
(360) 584-2085
Email: cindy.gaddis@atg.wa.gov

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I. INTRODUCTION

The issue presented in this appeal is the trial court's erroneous ruling that, as a matter of law, RCW 4.24.595(2) did not apply to or provide any immunity from plaintiffs' claims of negligent investigation under RCW 26.44.050, and false light and negligent infliction of emotional distress under the common law. The statute at issue provides, in pertinent part:

The department of children, youth, and families and its employees shall comply with orders of the court, including shelter care *and other dependency orders*, and are not liable for acts performed to comply with such court orders.

RCW 4.24.595(2) (emphasis added).¹ At all times for which the parents claim damages, the State acted to comply with dependency court orders.

The trial court erroneously concluded RCW 4.24.595 did not apply to any of the parents' claims even though it clearly precludes all of them. The issue on appeal is not whether there are issues of fact, as asserted throughout the Brief of Respondents but, rather, whether RCW 4.24.595 governs and bars this lawsuit. This Court should clarify RCW 4.24.595(2) requires dismissal of all of the parents' claims.

¹ The full text of the statute is Appendix A to this Reply Brief.

II. PROCEDURAL HISTORY OF APPEAL

Michelle Desmet and Sandor Kacso, individually and on behalf of their daughter A.K., brought negligent investigation, false light, and negligent infliction of emotional distress claims against the State. CP 158-69. All of these claims arose from dependency actions related to the protection of A.K. after the unexplained spiral fracture of her femur. Pursuant to RCW 4.24.595(2), the State moved for summary judgment based on the undisputed fact that it was complying with shelter care and dependency orders at all times material to plaintiffs' claims. The trial court inexplicably concluded RCW 4.24.595(2) was inapplicable and denied summary judgment. Specifically, the trial court held: "[R]easonable minds could differ regarding materiality of the information available to the Dependency Court, so I am going to deny the motion." CP 1843.

The State timely moved the court for reconsideration. CP 1764-74. In the Motion for Reconsideration, the State raised an alternative argument: Parents' statements upon which the trial court relied in identifying a potential issue of material fact were not supported by the evidence. CP 1771-73. The State requested language consistent with CR 54(b), should the trial court deny reconsideration. CP 1774.

The trial court denied reconsideration and issued a CR 54(b) order. CP 1974-82. The court requested guidance from the Court of Appeals on

the scope of the applicability of RCW 4.24.595(2) as a matter of first impression. CP 1981. The trial court recognized that if the immunity applied, the State would be immune as to all three claims:

In deciding whether the case involves more than one claim for relief, the Court considered the underlying factual bases for plaintiffs' claims against the defendant State of Washington and has concluded that all of those claims, regardless of their characterization, would be precluded by RCW 4.24.595 if in fact that statute provides the defendant State of Washington with immunity from plaintiffs' claims.

CP 1980.

III. SUPPLEMENTAL FACTS

While the immunity granted by RCW 4.24.595(2) for following court orders applies irrespective of the parents' factual allegations, the State addresses the more significant factual inaccuracies contained in the Brief of Respondents and has attached a historical Chronology (Appendix B) to clarify what actually happened in this case.

Mary Bridge Children's Hospital called in referrals to King County Sheriff's Office and Child Protective Services (CPS) when Desmet and Kacso brought in three-month-old A.K. with a spiral fracture to her femur. CP 215, 1864. Law enforcement took A.K. into protective custody there per its protocol. CP 1865. "The law enforcement agency shall take the child into custody . . . when they deem that the child would be at imminent

risk of harm if the child was released to the parent, guardian, custodian, or other person.” CP 838.

Kacso called his sister, Katalin Simpson, who came to the hospital and spent the night with A.K. and the parents. CP 373-76. Kacso testified, “We have to find the best home for [A.K.]. And since my sister has a daughter, it’s the best place ever.” CP 458. With CPS’s approval, A.K. was released to Simpson’s custody the next day. CP 456-58.

At the shelter care hearing, Desmet and Kacso again agreed to placement of A.K. with Simpson and stipulated to the Shelter Care Order. CP 384-92. The following month, they moved for A.K.’s return home. CP 398-403. The Division of Child and Family Services (DCFS), who provides services to parents during dependencies, opposed the motion based on RCW 13.34.138(2).² CP 1875. DCFS identified multiple reasons for denying the motion: Desmet had not completed all of the requirements laid out by the court for A.K. to return home, the parents had not provided an explanation for A.K.’s leg injury, and law enforcement had not determined whether to refer the case to the prosecutor for filing charges. CP 1872-76.

² RCW 13.34.138(2) states: “A child shall not be returned home at the review hearing unless the court finds that the reason for removal as set forth in RCW 13.34.130 no longer exists.”

Yolanda Duralde, M.D., then Medical Director of the Child Abuse Intervention Department at Mary Bridge, reviewed A.K.'s medical records from February 3 and February 5, 2016, and examined A.K. in person on March 15, 2016. CP 978. She concluded:

[A.K.] had a cold prior to the injury. No one noted crying with diaper changes until Thursday 2/4/16. [A.K.] was seen by a physician on the evening of 2/3/16. There were no complaints of crying with diaper changes and the doctor did not note any anomalies or pain to the left leg. Femur fractures in infants do not occur spontaneously or from every day care and handling of a child. It requires some force to break the femur and in this case, a twisting force resulting in a spiral fracture. . . . The child would have felt a lot of pain and all diaper changes after that point would have caused crying and irritation. She had no other signs of physical abuse. At this time there is no history of trauma to explain the injury. This injury is highly suspicious for physical abuse in an infant.

CP 1886-87.

Contrary to the parents' portrayal in the motion for return home and the Brief of Respondents, results of Desmet's polygraph tests as interpreted by the sheriff's office expert Jason Brunson were inconclusive. Resp. Br. 7; CP 355-56, 400, 1288, 1517, 1519, 1525. "Our Polygraph examiner advised she was inconclusive on both polygraphs she took. Which means she did not pass." CP 1454. The parents declined to submit to polygraph testing by Brunson. CP 355-56. DCFS shared Brunson's interpretation of the results with the juvenile court in response to the

parents' motion. CP 1007, 1875.³ Since A.K. was at daycare on February 3, the two workers who cared for A.K. that day submitted to polygraph tests.⁴ DCFS also shared with the juvenile court that the daycare workers passed their polygraph tests. CP 1439, 1875. The parents offered the forensic opinion of John Handelsman, M.D., who believed the evidence suggested the fracture occurred February 3, 2016. CP 1172.

The assigned CPS worker investigated the referral, communicating with law enforcement and medical personnel, and logged her investigative activities into an internal database, FamLink. CP 1898-1910. CPS generated an investigative assessment based on the investigation.⁵ CP 542-43, 1284-92. On March 31, 2016, CPS issued a letter to Desmet with a Founded Finding for "negligent treatment or maltreatment" and her appeal rights. CP 879-82. The letter was returned undeliverable; Desmet did not learn of it until May 2016. CP 1097. CPS sent a new Founded letter June 3, 2016, which Desmet timely appealed. CP 884-87.

³ The parents provided the polygraph results from February 13, 2016, to the juvenile court with their memorandum supporting their motion for return. CP 115-18. The State provided results from both of Desmet's polygraph tests as Exhibit 4 to the Declaration of Linda Townsend-Whitman. CP 1007.

⁴ The daycare identified Yvonne Ramirez and Amber Daharsh as the two workers who provided care to A.K. February 1 through 3, 2016. CP 1867. Neither of them own the business, as the parents assert. *See* Resp. Br. 7.

⁵ The investigative assessment is generated in FamLink. The investigative assessment shows Jennifer Schooler as the assigned CPS worker. CP 1284. It does not credit Schooler as the "author" of the investigative assessment, as claimed by the parents. CP 1281; Resp. Br. 19. Schooler actually testified, "Oh, no, I couldn't have done it, probably, with 3/31." CP 1399.

The sheriff's office conducted a criminal investigation because "a baby cannot break its own leg." CP 1864. While law enforcement recognized a spiral fracture does not happen on its own, that does not mean they had a preconceived conclusion that Desmet committed the injury, as claimed by the parents. *See* Resp. Br. 5. King County's Special Assault Protocol requires the detective to forward the complete incident report to the appropriate prosecutor if there is probable cause that assault or neglect occurred. CP 840. The sheriff's office forwarded its investigation to the prosecutor April 18, 2016, for a filing decision on Assault of a Child. CP 1861-70.

The juvenile court had denied the parents' motion for return home on April 12, 2016, prior to the sheriff's office referral to the prosecutor. CP 418-19. The order reflects that the court denied the motion not because its decision hinged on the outcome of the criminal investigation but because the cause of A.K.'s fracture remained unclear. CP 419. Without a plausible explanation for the injury, the standard for continuing shelter care was met. CP 419.

On the day of the hearing on the parents' motion for return, the parents agreed to undergo psychological evaluation. CP 419. Michael O'Leary, Ph.D., completed his report July 10, 2016. CP 1543. Once this last condition was met, the parties agreed A.K. could return home and the

court entered an Agreed Order of Return Home and Continuance on August 8, 2016. CP 425-26.

The parents were able to take A.K. home August 8, 2016, but chose to transition her home for the next week. CP 1477. They completed all court-ordered services by October 20, 2016, and the State moved for dismissal of the dependency. CP 432-33. The court entered an agreed order dismissing the dependency October 25, 2016. CP 434.

In November 2016, the parties stipulated to dismissal of Desmet's administrative appeal of the Founded Finding based on Desmet's agreement to withdraw her request for a hearing and the State's agreement to change the finding to Unfounded. CP 454. The Unfounded Finding was issued February 16, 2017. CP 891.

IV. ARGUMENT

A. The Plain Meaning of RCW 4.24.595(2) Grants Immunity to DCYF for Complying With Dependency Court Orders

This Court should apply RCW 4.24.595(2) to the parents' claims and terminate this litigation. The trial court disregarded the plain meaning of the statute by denying the State immunity expressly granted in RCW 4.24.595(2). Plain meaning in a statute is the expression of the legislature's intent, and the court's goal must be to effectuate the legislature's intent. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708,

153 P.3d 846 (2007) (internal citations omitted). “Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole.” *Id.*

If statutory language is susceptible to more than one reasonable interpretation, it is ambiguous and the court may attempt to discern the legislature’s intent from the legislative history of the statute. *State v. Armendariz*, 160 Wn.2d 106, 110-11, 156 P.3d 201 (2007). If the statutory language is unambiguous, the court’s inquiry ends. *Id.* at 110. The language in RCW 4.24.595(2) is not ambiguous. *See App. A.*

1. The ordinary meaning of the language in RCW 4.24.595(2) establishes immunity for complying with shelter care and other dependency orders

Article II, section 26 of the Washington Constitution grants the legislature the power to determine the State’s liability. *See App. C.* This includes the authority to immunize actions taken by the State and its employees. *Taggart v. State*, 118 Wn.2d 195, 224, 882 P.2d 243 (1992) (“the Legislature is free to limit or eliminate the duty we announce here by passing a statute broadening parole officers’ immunity . . .”).

The legislature used its power to limit the State’s liability by:

1) applying the gross negligence standard to emergent placement investigations, 2) eliminating liability for DCYF and its employees when

following court orders including shelter care orders and other dependency orders, and 3) granting DCYF employees providing reports and recommendations to juvenile court the same immunity other witnesses in judicial proceedings are provided. RCW 4.24.595.⁶

DCYF and its workers “are not liable” for acts performed to comply with court orders such as shelter care orders and dependency orders. RCW 4.24.595(2). The legislature intended that DCYF not be held legally responsible for damages when acting in compliance with shelter care and dependency orders. *Id. See also* RCW 26.44.280, *infra* p. 14.

The parents stipulated to the shelter care placement on February 10, 2016. From that date until August 8, 2016, A.K.’s placement with her aunt continued by order of the juvenile court. The parents had unlimited access to their daughter, seeing her every day during this time. CP 1104. Under the plain meaning of RCW 4.24.595(2), the State is entitled to judgment as a matter of law.

2. RCW 4.24.595 makes clear that child safety must prevail over the legal interests of parents accused of abuse or neglect

⁶ See also *Peterson v. State*, 9 Wn. App. 2d 1079, 2019 WL 3430537, *5 (July 30, 2019) (unpublished) (“[T]he legislature has limited the scope of [the negligent investigation cause of action] by granting the Department immunity for emergent placement decisions and compliance with shelter care and dependency court orders.”). CP 1776-84. The *Peterson* opinion is a nonbinding authority which may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

The ordinary meaning of the language in RCW 4.24.595(2) in the context of the entire statute and the statutory scheme for addressing child abuse shows the legislature intended to immunize DCYF from legal claims for the benefit of child safety. The statutory scheme protecting children from abuse and neglect includes RCW 13.34, the Juvenile Court Act, and RCW 26.44, Abuse of Children. The legislature declared this purpose: “When the child’s physical or mental health is jeopardized, or the safety of the child conflicts with the legal rights of a parent . . . the health and safety interests of the child should prevail.” RCW 26.44.010.

Prior to passage of RCW 4.24.595, courts had found that DCYF had duties to both children and parents in investigating child abuse and neglect. *Tyner v. Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) (“CPS owes a duty of care to a child’s parents, even those suspected of abusing their own children, when investigating allegations of child abuse.”). Under *Tyner*, the State could be liable to a parent for wrongful removal of a child from a non-abusive home and conversely to a child for allowing the child to remain in an abusive home or placing the child into an abusive home. *See M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). The legislature remedied the conflict between DCYF’s competing duties to children and to parents by

amending RCW 26.44.010 and enacting RCW 26.44.280 and 4.24.595.⁷

The safety of the child must be paramount.

To that end, the legislature limited state liability to parents accused of child abuse or neglect:

Consistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and mental health, and safety, and the requirement that the child's health and safety interests prevail over conflicting 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; *see* App. D. By providing immunity to DCYF for following court orders, the legislature put the responsibility of deciding whether to believe parents accused of child abuse or neglect with the juvenile court. The parties – parents and DCYF – can share information with the court. Then, the court determines what placement is necessary to keep the child safe. Parents cannot sue DCYF for complying with the court's placement decision. This Court should effectuate the legislature's intent by applying the immunity in RCW 4.24.595(2).

⁷ Although there is no ambiguity to resolve with legislative history here, the bill reports for ESSB 6555 highlight the legislature's intent to prioritize child safety over the legal interests of parents and guardians accused of abuse or neglect. "The [Tyner] court based this holding in part on legislative intent statements in the child abuse statutes describing the importance of the family unit and the parent-child bond." H. B. Rep. on Engrossed Substitute S.B. 6555, at 3, 62d Leg. Reg. Sess. (Wash. 2012) (CP 1846-56).

B. RCW 4.24.595 Applies to All of the Parents' Claims

The State agrees with the trial court's determination that, if applied, RCW 4.24.595(2) would preclude all of the parents' claims for relief. CP 1980, quoted *supra* p. 3. The injury the parents allege is that A.K. remained placed with her aunt longer than they liked. Any other injury alleged, such as damage to Desmet's reputation from a Founded Finding, is moot. As of February 16, 2017, only the Unfounded Finding exists. The only relevant issue for application of RCW 4.24.595(2) is whether the court ordered placement of A.K. with her aunt during the period of claimed damages. There is no factual dispute on the relevant issue. The facts that CPS first issued a Founded Finding and Desmet successfully challenged the finding administratively do not override the immunity in RCW 4.24.595(2). *See* Resp. Br. 32.

1. The State's immunity for complying with dependency court orders includes the false light claim based on the Founded Finding

The Founded Finding did not cause A.K.'s removal from her parents or determine when she would return home. The court ordered A.K.'s placement with her aunt at the February 10, 2016, shelter care hearing.

This placement arose when law enforcement took A.K. into protective custody at the hospital. The parents offered Katalin Simpson's

home as “the best place ever,” for A.K. CP 458. They stipulated to the placement at the shelter care hearing. In the Agreed Shelter Care Order, the parents agreed: 1) there was reasonable cause for out-of-home placement pending a fact-finding hearing, and 2) the release of the child would present a serious threat of substantial harm to the child. CP 387.

CPS investigated and, based on the evidence gathered, issued a Founded Finding of negligent treatment or maltreatment. There was never any finding of child abuse despite the parents’ claim the State “published that Michelle Desmet was an abuser!” Resp. Br. 34. The sheriff’s office continued its criminal investigation under the theory that a baby cannot break its own leg. The sheriff’s office had not yet referred the case to the prosecutor’s office for a filing decision when the juvenile court heard and decided the motion for return home.

The court’s task in ruling on the motion for return home was to determine whether the child would be safe if returned to the parents’ care and custody. *See* RCW 13.34.065(4)(b). Unlike a CPS investigation, which looks backward to determine whether alleged abuse or neglect occurred, dependency proceedings look forward to the future safety of the child. The parents’ attorney and the attorney for DCFS submitted “voluminous documents” to the juvenile court for consideration of the

parents' motion for return. But no party submitted an explanation for A.K.'s injury.⁸

Without an explanation for A.K.'s injury, the juvenile court was not certain A.K. would be safe if returned to her parents' custody and ordered the placement to continue. "[W]ithout a plausible explanation for [the cause of the fracture] the court finds the reasonable cause standard for continuing shelter care (out of home placement) continues to be met." CP 419. These court orders place the parents' claims squarely within the cover of RCW 4.24.595(2) regardless of any CPS finding.

To establish A.K. would be safe if returned home, the court ordered psychological evaluation with a mutually agreeable provider, to which the parents agreed. CP 419. When they met the condition, the court ordered A.K.'s return. At all times the State acted to comply with the operative dependency court orders. The State is therefore immune from damages under RCW 4.24.595(2). The juvenile court's order, not the Founded Finding, kept A.K. out of the parents' custody.

⁸ Dr. Duralde's report did not state Desmet caused the spiral fracture to A.K.'s femur; however, it narrowed the period when the injury occurred to the day Desmet stayed home with A.K. CP 1884-86.

2. Desmet obtained a remedy for the Founded Finding of negligent treatment through administrative appeal

The administrative procedure in RCW 26.44.125, not a civil suit for damages, is the proper means to challenge a Founded Finding. *See Cazzanigi v. General Elec. Credit Corp.*, 132 Wn.2d 433, 445, 938 P.2d 819 (1997) (court should not recognize an implied cause of action when the legislature has provided an adequate remedy in statute). Desmet timely appealed the Founded Finding as was her right under RCW 26.44.125. In February 2017, CPS changed the finding to Unfounded. Desmet achieved the remedy for which the statute provides; there is no separate cause of action available for any compensatory or emotional distress damages allegedly related to the administrative finding.

Further, the parents and their attorney were not aware of the Founded Finding at the time the court decided the motion for return. According to Desmet, they learned of the Founded Finding in May 2016. Independent of CPS's Founded Finding, the court decided to maintain placement with A.K.'s aunt on April 12, 2016. The Founded Finding did not cause the damages the parents' allege.

C. The Record Refutes the Parents' Allegations of False Testimony

The parents argue the immunity in RCW 4.24.595(2) should not apply because DCYF presented false testimony or misrepresented evidence to the juvenile court. Resp. Br. 24. Specifically, they assert:

At the April 12, 2016 motion of the parents for the State to return to them custody of their baby A.K., the State misrepresented or provided outright false information to the court on the following subjects:

- a. That an investigation was ongoing.
- b. That plaintiff Michelle Desmet had failed her polygraph test and was deceptive.
- c. That the State possessed medical testimonial evidence that the parents had caused the spiral fracture to their baby's left femur; and
- d. That the State 'investigation' had affirmatively excluded all other possible causes.

Resp. Br. 25. The parents make this factual assertion without any reference to the record in violation of RAP 10(a)(3). "Reference to the record must be included for each factual statement." RAP 10(a)(3); *see also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). This Court should reject unsupported factual statements. Further, the record does not show the State provided false testimony or misrepresented any evidence.

1. An investigation was ongoing

Because the parents failed to cite to the record, it is unclear whether "investigation" refers to the CPS investigation or the criminal

investigation. The record shows the sheriff's office investigation remained open as of April 12, 2016. CP 356. Linda Townsend-Whitman stated in her April 5, 2016, declaration: "[A.K.] needs to remain in an out of home placement as law enforcement completes their investigation." CP 1005. The sheriff's office forwarded its investigation report to the prosecutor for a filing decision on April 18, 2016. CP 356.

2. Desmet failed her polygraph test

The sheriff's office polygraph expert, Jason Brunson, found both of Michelle Desmet's polygraph tests inconclusive. CP 355-56. Law enforcement told CPS it meant she did not pass. CP 1454. The parents provided copies of the February 13, 2016, test results and their own experts' interpretations of them to the juvenile court. CP 115-120. The State provided results from both of Desmet's polygraphs. CP 1007. The court had the actual results and could determine how to interpret them regardless of how the State social worker characterized them.

3. The State did not claim to have medical testimonial evidence that the parents caused A.K.'s fracture

It is impossible to know exactly what the parents are referring to here without a cite to the record. Linda Townsend-Whitman stated in her declaration: "[A.K.] suffered a spiral fracture to her left femur, between the time frame of February 3 to February 4, 2016, when she was only in

the care of her parents.” CP 1010. She attached Dr. Duralde’s report from examining A.K. on March 15, 2016, as an exhibit. CP 1005. She urged the court to consider Dr. Duralde’s report as more accurate than Dr. Handelsman’s report. CP 1005. She did not claim to have additional testimonial evidence that the parents caused A.K.’s spiral fracture. CP 1004-10.

4. The State did not claim its investigation affirmatively excluded all possible causes of the injury other than the parents

Here again, this is impossible to rebut without a cite to the record. In her declaration Ms. Townsend-Whitman said: “[T]here is still no explanation of the injury spiral fracture, which could only be caused by a twisting motion.” CP 1004. She stated the CPS investigator had learned it was “remotely possible, unlikely but possible” the injury occurred at daycare. CP 1006. She did not represent CPS had excluded all other possible causes but rather narrowed the time when the injury occurred to “the time frame of February 3 to February 4, 2016, when [A.K.] was only in the care of her parents.” CP 1010.

5. RCW 4.24.595(2) Expressly Provides DCYF Employees the Same Witness Immunity as Any Other Witness

In any event, the legislature dealt with the possibility of inaccurate or false testimony by expressly granting DCYF employees “the same

witness immunity as would be provided to any other witness.” RCW 4.24.595(2). Witnesses in judicial proceedings enjoy absolute immunity from civil legal actions based on their testimony. *Bruce v. Byrne-Stevens & Assoc. Eng’rs., Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). Civil suits are not necessary to safeguard against false testimony; safeguards inhere in the judicial process itself. *Id.* Safeguards include: 1) the requirement to take an oath before testifying, 2) the availability of cross-examination, and 3) the threat of prosecution for perjury. *Id.* The parents cite multiple statutes relate to the crime of perjury to support their claim that witnesses do not have absolute or even qualified immunity from a civil suit when they commit perjury. Resp. Br. 31. None of these statutes creates a civil cause action for damages for the crime of perjury.

The parents accuse Linda Townsend-Whitman of providing untrue information to the juvenile court. Resp. Br. 10. Testimony from Townsend-Whitman’s discovery deposition, cited at length in the Brief of Respondents, was not before the juvenile court on the parents’ motion for return. Resp. Br. 10-13. All of the judicial safeguards against false testimony were in place for submission of Townsend-Whitman’s declaration. RCW 4.24.595(2) does not qualify witness immunity based on whether the DCYF employee is a named party to the lawsuit.

The limitation of liability provision in the Child Abuse statute, RCW 26.44.280, indicates the legislature intended to limit the liability of government entities as well as individuals when acting to protect children. “[T]he liability of governmental entities, and their officers agents, employees, and volunteers . . . is limited as provided in RCW 4.24.595.” See App. D. Granting witness immunity for DCYF employees reporting to court in subsection (2) of RCW 4.24.595, the same subsection granting immunity the Department for complying with shelter care and dependency orders, recognizes that an entity is only able to provide a report or recommendation to the court through one of its employees. This Court should reject alleged false testimony as a reason for not applying the immunity in RCW 4.24.595(2).

D. The Parents’ Agreement to Place A.K. With her Aunt Precludes Liability Under *Roberson v. Perez*

Notwithstanding the State’s immunity under RCW 4.24.595(2), the State is not liable for negligent investigation because the parents agreed to A.K.’s placement. The negligent investigation claim under RCW 26.44.050 is a narrow exception to the rule that there is no general tort claim for negligent investigation. *M.W.*, 149 Wn.2d at 601. The claim is only available when DCYF conducts a biased or faulty investigation resulting in a harmful placement decision. *Albertson v. State*, 191 Wn.

App. 284, 301, 361 P.3d 808 (2015). Courts recognize three harmful placements: 1) removal of a child from a non-abusive parent, guardian, or custodian; 2) placement of a child in an abusive home; and 3) allowing a child to remain in an abusive home. *Id.* at 302.

The Court has rejected State liability for negligent investigation where a mother decided to remove her son from the home preemptively for his safety and sent him to live with his grandmother. *Roberson v. Perez*, 156 Wn.2d 33, 46, 123 P.3d 844 (2005). The *Roberson* court found “constructive placement” not suited for the narrow negligent investigation cause of action. *Id.* The facts here differ from those in *Roberson* but the effect is the same: The parents contacted A.K.’s aunt and arranged for A.K.’s placement there.

First, when law enforcement took A.K. into custody, the parents chose Kacso’s sister as “the best place ever” for A.K. CP 458. Second, the parents agreed to the placement at the shelter care hearing. The parents agreed the “risk of imminent harm to the child” established reasonable cause for continued out-of-home placement pending the fact-finding hearing for the dependency and it was “contrary to the welfare of the child to . . . return home.” CP 386. All parties agreed A.K. was safe while placed with her aunt. Further, the parents had unlimited access to A.K. Desmet testified she spent every day with A.K. from the time she woke up

to the time she went to sleep. CP 1104. This placement was not the result of a negligent investigation and is not suited for or cognizable in a negligent investigation cause of action.

E. Court Orders Proximately Caused A.K.’s Placement

Even without the immunity granted in RCW 4.24.595, the parents’ claim for negligent investigation fails because they cannot meet the causation element. To establish liability for negligent investigation under RCW 26.44.050, plaintiffs must prove that a biased or faulty investigation was the proximate cause of a harmful placement decision. *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004). Court action can be a superseding, intervening cause of harmful placement when reasonable minds cannot differ that all material information was before the court in making its decision. *Id.* at 59.

1. Agreed court orders preclude the parents from claiming damages from February 10 to April 12, 2016, and April 13 to August 8, 2016

The agreed court orders in the record contradict the parents’ claim that a negligent investigation caused A.K.’s placement with her aunt. A plaintiff must prove that the allegedly negligent investigation was both the cause in fact and the legal cause of the damages they claim. *Petcu*, 121 Wn. App. at 56. Cause in fact is the actual or “but for” cause of the injury, as in, but for the defendant’s actions, the plaintiff would not be injured.

Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998). The record does not establish that but for a faulty or biased investigation by the State, A.K. remained placed with her aunt through mid-August 2016.

The record contains the following agreed orders:

- 2/10/16 Agreed Shelter Care Order. CP 384-92.
- 3/8/16 30-Day Shelter Care Order (Agreed/Status Quo). CP 394-96.
- 4/13/16 Agreed Order Continuing Fact-Finding/Trial to 6/20/16. CP 421.
- 6/3/16 Agreed Order Continuing Fact-Finding/Trial to 8/8/16. CP 423.

The parents agreed to continued shelter care placement with A.K.'s aunt at the shelter care hearing. The agreed shelter care order specified: "A hearing shall be held before any change in placement, unless agreement of the parties." CP 388. The next proceeding in the matter of the dependency of A.K. was a 30-day shelter care hearing on March 8, 2016. The agreed 30-day shelter care order set an additional shelter care hearing in order for the juvenile court to hear the parents' motion for return. The placement continued until the court heard the motion for return.

The parents did not agree with the court's denial of their motion for return on April 12, 2016. But, they did agree the following day to

postpone the fact-finding hearing on the matter of A.K.'s dependency.⁹ It is wholly inconsistent to claim damages from the State for A.K.'s continued placement with her aunt when the parents through counsel voluntarily agreed to push out the hearing that would give them the opportunity to show A.K. could be safely returned to their custody.

The parents agreed again to push out the fact-finding hearing on June 3, 2016, because they had agreed to psychological evaluation by Dr. O'Leary and needed more time for that process. CP 423. The June 3, 2016, order moved the fact-finding hearing to August 8, 2016. Again, the parents' agreement to continue the fact-finding hearing caused A.K. to remain in her placement.

Dr. O'Leary completed his evaluation report on July 10, 2016. CP 1929. Dr. O'Leary's report assured the court A.K. would be safe if returned home. CP 1945. The court authorized A.K.'s return home at the next hearing date, August 8, 2016. The parents transitioned A.K. home a week later. The cause in fact of A.K.'s placement with her aunt from February 10 to April 12, 2016, and again from April 13 to August 8, 2016,

⁹ The parents assert DSHS sought continuances in order to have time to complete its investigation. Resp. Br. 16. Their citation to Kenneth Kagan's declaration (CP 1302), the sheriff's office report (CP 354-65) and Jennifer Schooler's deposition (CP 1399) does not establish this as a fact. Further, regardless of which party requested continuances from the juvenile court, the orders referenced, *supra* p. 24, evidence the parents' agreement to the continuances.

was the parents' agreement to multiple court orders governing A.K.'s placement and continuance of the dependency fact-finding hearing. The cause in fact that A.K. remained placed with her aunt after August 8, 2016, was the parents' own decision to transition her home slowly.

2. The State is not liable for A.K.'s continued placement because the juvenile court had all available material facts before it on the motion for return

Where the juvenile court is aware of all the material information and reasonable minds could not differ on the issue, the court's order breaks any causal connection between a negligent child abuse investigation and a harmful placement as a matter of law. *Petcu*, 121 Wn. App. at 58 (citing *Tyner*, 141 Wn.2d at 82, 88). A material fact is one that would have resulted in a different court decision. *Id.* at 56. In determining whether the causal connection is broken, the court must look at all the information before the juvenile court, not just the information produced by the State. *Id.* at 59.

The trial court mistakenly accepted the parents' argument that the juvenile court may not have known Dr. Duralde was not prepared to testify on a more-probable-than-not basis as to when A.K.'s fracture occurred and whether the parents were causally related to the injury. CP 1842. This was error because the State did not withhold any information concerning Dr. Duralde on the parents' motion. The State

provided the information it had: Dr. Duralde's consultation report containing her examination notes and her conclusion that "[t]his injury is highly suspicious for physical abuse in an infant." CP 1877-87.

Dr. Duralde's deposition testimony upon which the parents rely, Resp. Br. 13-14, occurred long after the motion hearing of April 12, 2016.

The parents had a full, meaningful opportunity to provide their facts and evidence to the juvenile court through their counsel on the motion for return. They did so. *See* CP 3-157. The court wanted an explanation for A.K.'s injury but neither party provided one. To ensure A.K.'s safety, the court continued A.K.'s placement with her aunt and secured the parents' agreement to undergo psychological evaluation by an agreed provider. The court ordered A.K.'s return upon receiving that provider's report. The court was not deprived of any material fact on April 12, 2016, that would have resulted in a different decision. Accordingly, the order denying return severs any causal connection between the alleged negligence and A.K.'s placement.

V. CONCLUSION

The legislature specified that child safety prevails over the legal interests of parents accused of abuse or neglect and limited liability accordingly. RCW 4.24.595 is unequivocal and unambiguous. DCYF and its employees "shall comply with the orders of the court, including shelter

care and other dependency orders, and are not liable for acts performed to comply with such orders.” RCW 4.24.595(2). DCYF respectfully requests reversal of the trial court’s denial of summary judgment and clarification that RCW 4.24.595(2), as a matter of law, affords it immunity on the claims at bar.

RESPECTFULLY SUBMITTED this 6th day of July, 2020.

ROBERT FERGUSON
Attorney General



CINDY J. GADDIS, WSBA #49788
OID # 91023
Assistant Attorney General
Attorney for Appellants
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
Phone: (360) 709-6466
Fax: (360) 586-6655
Cindy.Gaddis@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that I caused to be served on July 6, 2020 a true and correct copy of Appellant's Reply Brief to be electronically served to the following:

Daniel R. Kyler [dkyler@rhhk.com]
Michael J. Fisher [mfisher@rhhk.com]
Vea Steppan [vsteppan@rhhk.com]
Rush Hannula Harkins & Kyler LLP
4701 S. 19th Street, Suite 300
Tacoma, WA 98405 1199
Attorneys for Plaintiff

Christopher R. McLeod [crmcleodlawoffices@gmail.com]
P.O. Box 65858
University Place, WA 98464-1252
crmcleodlawoffices@gmail.com
Attorney for Plaintiff



CINDY J. GADDIS, WSBA #49788
OID # 91023
Assistant Attorney General
Attorney for Appellants
Torts Division
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126
Phone: (360) 709-6466
Fax: (360) 586-6655
Cindy.Gaddis@atg.wa.gov

APPENDIX A
RCW 4.24.595(2)

Desmet V. DSHS

RCW 4.24.595**Liability immunity—Emergent placement investigations of child abuse or neglect—Shelter care and other dependency orders.**

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

(2) The department of children, youth, and families and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of children, youth, and families are entitled to the same witness immunity as would be provided to any other witness.

[**2017 3rd sp.s. c 6 § 301; 2012 c 259 § 13.**]

NOTES:

Effective date—2017 3rd sp.s. c 6 §§ 102, 104-115, 201-227, 301-337, 401-419, 501-513, 801-803, and 805-822: See note following RCW **43.216.025**.

Conflict with federal requirements—2017 3rd sp.s. c 6: See RCW **43.216.908**.

APPENDIX B
HISTORICAL CHRONOLOGY

Desmet V. DSHS

Date	Event	Cite
2/1-2/3/16	A.K. at Rainbow Connection daycare.	CP 1864
2/3/16	Desmet and Kacso take A.K. to hospital for cough. Examination by Dr. Margot Gottschalk.	CP 1506-09
2/4/16	Desmet stayed home with A.K.	CP 1089
2/5/16	Desmet and Kacso take A.K. to hospital for swollen leg. Examination by Jeffrey Flaskerud, MD and James Green, DO.	CP 1563-64; CP 237-50
2/5/16	Consultation and assessment by Yolanda Duralde, MD: "Probable inflicted trauma. Needs to be in a safe environment until investigation can be done."	CP 239; CP 974
2/5/16	Law enforcement take A.K. into protective custody. Kacso called his sister Katalin Simpson. Parents spent the night at the hospital with A.K. and Simpson.	CP 373-376; CP 456-458; CP 488
2/6/16	After CPS approval, A.K. went home with Simpson as "the best place ever," for A.K.	CP 458; CP 488
2/9/16	Dependency Petition filed in King County Superior Court by CPS social worker Jennifer Schooler.	CP 378-380
2/10/16	Parents signed Agreed Shelter Care Hearing Order placing A.K. with Simpson and her boyfriend.	CP 384-392
2/10/16	The Order the parents agreed to finds: "The risk of imminent harm to the child as assessed by petitioner establishes reasonable cause for the continued out-of-home placement of the child pending the fact finding hearing..."	CP 386, ¶ 2.6
2/10/16	The Order the parents agreed to also finds: "It is currently contrary to the welfare of the child to remain in or return home. The child is in need of shelter care because there is reasonable cause to believe the release of the child would present a serious threat of substantial harm to the child as assessed by petitioner."	CP 386-387, ¶ 2.7
3/8/16	30 Day Shelter Care Order (Agreed/Status Quo) setting hearing for hearing on Motion for Return Home.	CP 394-396
3/15/16	Dr. Duralde examined A.K. in person.	CP 1886
3/17/16	Attorney Christopher McLeod filed Motion for Return Home on behalf of Desmet and Kacso.	CP 398-403
3/31/16	CPS Founded Letter from Moriah Faimalie sent to Desmet at wrong address – not received.	CP 441-445
4/1/16	Stipulated Order Continuing Pretrial Hearing until after hearing on Motion for Return Home	CP 410

4/12/16	Hearing on Motion for Return Home. Desmet and Kacso represented by Christopher McLeod.	CP 418
4/12/16	Order Denying Parents' Motion to Modify Shelter Care Order and Return Child Home. "[W]ithout a plausible explanation for [the cause of the fracture] the court finds the reasonable cause standard for continuing shelter care (out of home placement) continues to be met."	CP 418-419
4/12/16	Desmet and Kacso agreed to participate in psychological evaluation with mutually agreeable provider, "ASAP."	CP 419
4/13/16	Agreed Order Continuing Fact-Finding/Trial.	CP 421
4/2016 – 8/8/2016	Desmet went to the house where A.K. resided with Simpson to spend time with A.K. every day from time A.K. woke up until the time she went to sleep.	CP 1104-05
4/18/16	King County Sheriff's Office forwards investigation report to prosecutor's office for filing decision on charging Desmet with Assault of a Child.	CP 350-56
5/2016	Desmet, Kacso, and their attorney learned CPS had issued a Founded Letter.	CP 1096-97
6/3/16	Agreed Order Continuing Fact-Finding/Trial.	CP 423
6/3/16	New CPS Founded Letter from Moriah Faimalie sent to Desmet.	CP 447-450
7/10/16	Psychological evaluation report by Dr. Michael O'Leary.	CP 1929-45
7/18/16	Letter from Cleveland King, DCYF Area Administrator, upholding Founded Finding.	CP 452
8/8/16	Agreed Order of Return Home and Continuance.	CP 425-426
8/8/16	Agreed Order Continuing Fact-Finding/Trial.	CP 427
8/15/16	Parents transitioned A.K. home.	CP 1097; CP1477
10/6/16	Agreed Order Continuing Fact-Finding/Trial.	CP 429-430
10/24/16	State filed motion to dismiss dependency based on parents' completion of all court-ordered services.	CP 432-433
10/25/16	Agreed Order Dismissing Dependency.	CP 434-436
11/21/16	Stipulation and Order of Dismissal for administrative appeal of Founded Finding.	CP 454
2/16/17	Letter from Mr. King changing Founded Finding to Unfounded.	CP 891

APPENDIX C

Article II, Section 26 of the Washington Constitution

Desmet V. DSHS

CONSTITUTION OF THE STATE OF WASHINGTON

This Constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under section 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The Constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with section 8 of the Enabling Act, the president of the United States proclaimed the admission of the State of Washington into the Union.

TABLE OF CONTENTS

- (A) Constitution of the State of Washington
- (B) Constitutional Amendments (in order of adoption)
- (C) Index to State Constitution.

In part (A), for convenience of the reader, the latest constitutional amendments have been integrated with the currently effective original sections of the Constitution with the result that the Constitution is herein presented in its currently amended form.

All current sections, whether original sections or constitutional amendments, are carried in Article and section order and are printed in regular type.

Following each section which has been amended, the original section and intervening amendments (if any) are printed in italics.

Appended to each amendatory section is a history note stating the amendment number and date of its approval as well as the citation to the session law wherein may be found the legislative measure proposing the amendment; e.g. "[AMENDMENT 27, 1951 House Joint Resolution No. 8, p 961. Approved November 4, 1952.]"

In part (B), the constitutional amendments are also printed separately, in order of their adoption.

(A) Constitution of the State of Washington

PREAMBLE

Article I — DECLARATION OF RIGHTS

Sections

- 1 Political power.
- 2 Supreme law of the land.
- 3 Personal rights.
- 4 Right of petition and assemblage.
- 5 Freedom of speech.
- 6 Oaths — Mode of administering.
- 7 Invasion of private affairs or home prohibited.
- 8 Irrevocable privilege, franchise or immunity prohibited.
- 9 Rights of accused persons.
- 10 Administration of justice.
- 11 Religious freedom.
- 12 Special privileges and immunities prohibited.
- 13 Habeas corpus.
- 14 Excessive bail, fines and punishments.

- 15 Convictions, effect of.
- 16 Eminent domain.
- 17 Imprisonment for debt.
- 18 Military power, limitation of.
- 19 Freedom of elections.
- 20 Bail, when authorized.
- 21 Trial by jury.
- 22 Rights of the accused.
- 23 Bill of attainder, ex post facto law, etc.
- 24 Right to bear arms.
- 25 Prosecution by information.
- 26 Grand jury.
- 27 Treason, defined, etc.
- 28 Hereditary privileges abolished.
- 29 Constitution mandatory.
- 30 Rights reserved.
- 31 Standing army.
- 32 Fundamental principles.
- 33 Recall of elective officers.
- 34 Same.
- 35 Victims of crimes — Rights.

Article II — LEGISLATIVE DEPARTMENT

Sections

- 1 Legislative powers, where vested.
- 1(a) Initiative and referendum, signatures required.
- 2 House of representatives and senate.
- 3 The census.
- 4 Election of representatives and term of office.
- 5 Elections, when to be held.
- 6 Election and term of office of senators.
- 7 Qualifications of legislators.
- 8 Judges of their own election and qualification — Quorum.
- 9 Rules of procedure.
- 10 Election of officers.
- 11 Journal, publicity of meetings — Adjournments.
- 12 Sessions, when — Duration.
- 13 Limitation on members holding office in the state.
- 14 Same, federal or other office.
- 15 Vacancies in legislature and in partisan county elective office.
- 16 Privileges from arrest.
- 17 Freedom of debate.
- 18 Style of laws.
- 19 Bill to contain one subject.
- 20 Origin and amendment of bills.
- 21 Yeas and nays.
- 22 Passage of bills.
- 23 Compensation of members.
- 24 Lotteries and divorce.
- 25 Extra compensation prohibited.
- 26 Suits against the state.
- 27 Elections — Viva voce vote.

Article II Section 16

counties composing the joint senatorial or joint representative district, the person appointed to fill the vacancy must be from the same legislative district and of the same political party as the legislator whose office has been vacated, and in case a majority of said county commissioners do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district and of the same political party as the legislator whose office has been vacated. [AMENDMENT 32, 1955 Senate Joint Resolution No. 14, p 1862. Approved November 6, 1956.]

Amendment 13 (1930) — Art. 2 Section 15 VACANCIES IN LEGISLATURE — Such vacancies as may occur in either house of the legislature shall be filled by appointment by the board of county commissioners of the county in which the vacancy occurs, and the person so appointed shall hold office until his successor is elected at the next general election, and shall have qualified: Provided, That in case of a vacancy occurring in the office of joint senator, the vacancy shall be filled by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial district. [AMENDMENT 13, 1929 p 690. Approved November, 1930.]

Original text — Art. 2 Section 15 WRITS OF ELECTION TO FILL VACANCIES — The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.

SECTION 16 PRIVILEGES FROM ARREST. Members of the legislature shall be privileged from arrest in all cases except treason, felony and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

SECTION 17 FREEDOM OF DEBATE. No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.

SECTION 18 STYLE OF LAWS. The style of the laws of the state shall be: "Be it enacted by the Legislature of the State of Washington." And no laws shall be enacted except by bill.

SECTION 19 BILL TO CONTAIN ONE SUBJECT. No bill shall embrace more than one subject, and that shall be expressed in the title.

SECTION 20 ORIGIN AND AMENDMENT OF BILLS. Any bill may originate in either house of the legislature, and a bill passed by one house may be amended in the other.

SECTION 21 YEAS AND NAYS. The yeas and nays of the members of either house shall be entered on the journal, on the demand of one-sixth of the members present.

SECTION 22 PASSAGE OF BILLS. No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.

Governmental continuity during emergency periods: Art. 2 Section 42.

SECTION 23 COMPENSATION OF MEMBERS.

Each member of the legislature shall receive for his services five dollars for each day's attendance during the session, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature, on the most usual route.

Compensation of legislators, elected state officials, and judges: Art. 28 Section 1, Art. 30.

SECTION 24 LOTTERIES AND DIVORCE. The legislature shall never grant any divorce. Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon. [AMENDMENT 56, 1971 Senate Joint Resolution No. 5, p 1828. Approved November 7, 1972.]

Original text — Art. 2 Section 24 LOTTERIES AND DIVORCE — The legislature shall never authorize any lottery or grant any divorce.

SECTION 25 EXTRA COMPENSATION PROHIBITED. The legislature shall never grant any extra compensation to any public officer, agent, employee, servant, or contractor, after the services shall have been rendered, or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office. Nothing in this section shall be deemed to prevent increases in pensions after such pensions shall have been granted. [AMENDMENT 35, 1957 Senate Joint Resolution No. 18, p 1301. Approved November 4, 1958.]

Compensation of legislators, elected state officials, and judges: Art. 28 Section 1.

Increase during term of certain officers, authorized: Art. 30 Section 1.

Increase or diminution of compensation during term of office prohibited.

county, city, town or municipal officers: Art. 11 Section 8.

judicial officers: Art. 4 Section 13.

state officers: Art. 3 Section 25.

Original text — Art. 2 Section 25 EXTRA COMPENSATION, PROHIBITED — The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered, or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office.

SECTION 26 SUITS AGAINST THE STATE. The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.

SECTION 27 ELECTIONS — VIVA VOCE VOTE. In all elections by the legislature the members shall vote viva voce, and their votes shall be entered on the journal.

SECTION 28 SPECIAL LEGISLATION. The legislature is prohibited from enacting any private or special laws in the following cases:

1. For changing the names of persons, or constituting one person the heir at law of another.
2. For laying out, opening or altering highways, except in cases of state roads extending into more than one county, and

APPENDIX D
RCW 26.44.280

Desmet V. DSHS

RCW 26.44.280**Liability limited.**

Consistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and mental health, and safety, and the requirement 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**.

[**2012 c 259 § 14.**]

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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Transmittal Information

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Sender Name: Cassandra Hendricksen - Email: kassandra.hendricksen@atg.wa.gov

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