

FILED
Court of Appeals
Division II
State of Washington
4/3/2020 1:32 PM

NO. 53962-4

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION TWO

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

Respondents.

vs.

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

BRIEF OF RESPONDENTS

Daniel R. Kyler
Attorney for Respondents
WSBA #12905
RUSH, HANNULA, HARKINS
& KYLER, LLP
4701 So. 19th St., Suite 300
Tacoma, WA 98405
Phone: 253-383-5388

Christopher R. McLeod
Attorney for Respondents
WSBA #14190
LAW OFFICES OF
CHRISTOPHER R. McLEOD
P.O. Box 65252
University Place, WA 98464
Phone: 253-476-2220

TABLE OF CONTENTS

Table of Authorities iv

I. INTRODUCTION1

II. ISSUES PERTAINING TO APPELLANTS’
ASSIGNMENT OF ERROR3

A. Does RCW 4.24.595(2) give Appellant absolute immunity from civil liability when it obtains a Court shelter order based on false testimony, testimony which it knows is inaccurate and incomplete and persists in separating a baby from her family when there is no evidence to support its claims of abuse or neglect against the parents?..... 3

B. Does RCW 4.24.595 completely abolish the State’s liability under the *Tyner* line of cases for State misconduct in persisting in its separation of a baby from her family when it has no substantive evidence or testimony to support its action?..... 3

C. Does a “Founded” decision by DSHS/CPS regarding claimed abuse and neglect allegedly created by an individual who is not even still employed by the State and which is not communicated to the recipient or her attorneys for a timely appeal, place an individual in a False Light and is not subject in any respect to RCW 4.24.595?..... 3

D. Does RCW 4.24.595 limit the State’s liability for negligent infliction of emotional distress for employee misconduct, false testimony and untrue claims of abuse or neglect against a parent unrelated to any shelter care order of the Court?..... 3

III.	FACTUAL RECORD ON DENIAL OF STATE’S MOTION FOR SUMMARY JUDGMENT.....	4
A.	Pre-Shelter Care Order.....	4
B.	Post-Initial-Shelter Care Order.....	6
C.	The State/Appellants’ misconduct relative to its improper “Founded” finding and issuance of Unfounded finding.....	19
IV.	ARGUMENT.....	20
A.	Standard of Review.....	20
B.	Appellants’ claim of absolute immunity for DCYF and the State’s misconduct is without support from the plain language of RCW 4.24.595(2) and the Trial Court’s denial of the State’s Motion for Summary Judgment should be affirmed and this matter remanded for trial.....	22
1.	RCW 4.24.595(2) offers no protection to DCYF or the State for failing to perform its statutory duties, presenting false testimony to the Court to obtain shelter orders or misrepresenting the evidence held by the Department in support of its claims of parental neglect.....	24
2.	RCW 4.24.595(2) has no application to the State’s improper creation and labeling of its abuse allegations against Michelle Desmet as Founded, its failure to properly communicate that decision to the mother or her attorneys, the publication of that wrongful determination and its negligent infliction of emotional	

distress as a direct consequence of its
misconduct and failure to investigate..... 32

C. A review of the Legislative history of RCW
4.24.595 does not support Appellants' claim that
the statute abrogates CPS's common law and
statutory duty toward prompt reunification of
parents and children when there is a lack of
evidence of parental abuse or neglect and the
Trial Court's denial of the State's motion for
summary judgment should be affirmed and this
case remanded for trial..... 37

V. CONCLUSION..... 39

TABLE OF AUTHORITIES

Cases

<u><i>Agrilink</i></u> , 153 Wn.2d 292, 103 P.3d 1226 (2005).....	28
<u><i>Associated Gen. Contractors of Wash. v. King County</i></u> , 124 Wn.2d 855, 865, 881 P.2d 996 (1994).....	28
<u><i>Babcock v. State</i></u> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	30,31
<u><i>Bender vs. City of Seattle</i></u> , 99 Wn. 2d 582, 664 P.2d 492 (1983).....	30
<u><i>Cerillo v. Esparza</i></u> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	27,28
<u><i>Chen v. D’Amico</i></u> , No. C16-1877 JLR, 2020 WL 363354 at *9 (W.D. Wash. Jan. 22, 2020).....	37,38
<u><i>Columbia River-Keeper v. Port of Vancouver USA</i></u> , 188 Wn.2d 421, 435, 395 P.3d 1031 (2017).....	27
<u><i>Corey v. Pierce County</i></u> , 150 Wn. App. 752, 225 P.3d 367 (2010).....	35
<u><i>Cunningham v. Lockard</i></u> , 48 Wn. App. 38, 736 P.2d 305 (1987).....	35
<u><i>Dept. of Ecology v. Campbell & Gwinn, LLC</i></u> , 146 Wn.2d 1, 12, 43 P.3d 4 (2002).....	28
<u><i>Eastwood v. Cascade Broad Co.</i></u> , 106 Wn.2d 466, 722 P.2d 1295 (1986).....	33
<u><i>Gilliam v. Dept. of Social & Health Services</i></u> , 89 Wn. App. 569, 576-77, 950 P.2d 20, <i>rev. denied</i> , 135 Wn.2d 1015 (1958).....	26

<u><i>Glass v. Stahl Specialty Co.</i></u> , 97 Wn.2d 880, 652 P.2d 948 (1982).....	20
<u><i>Guffey v. State</i></u> , 103 Wn.2d 144, 690 P.2d 1163 (1984)	31
<u><i>Hartley v. State</i></u> , 103 Wn.2d 768, 774, 698 P.2d 77 (1985).....	21
<u><i>H.B.H., et al vs. State</i></u> , 192 Wn.2d 154, 429 P.3d 484 (2018) ..	29,30
<u><i>Hegle v. McMahon</i></u> , 136 Wn.2d 122, 960 P.2d 424 (1998)	36
<u><i>Herskovits v. Group Health Coop.</i></u> , 99 Wn.2d 609, 613, 664 P.2d 474 (1983)	21
<u><i>Hertog v. City of Seattle</i></u> , 138 Wn.2d 265, 275, 929 P.2d 400 (1999).....	26
<u><i>Hunsley v. Giard</i></u> , 87 Wn. 2d 424, 553 P.2d 1096 (1976)	35,36
<u><i>Jacobsen v. State</i></u> , 89 Wn.2d 104, 108, 569 P.2d 1152 (1977)	21
<u><i>Kilian v. Atkinson</i></u> , 147 Wn.2d 16, 50 P.3d 638 (2002)	27,28
<u><i>Lutheran Daycare v. Snohomish Cty.</i></u> , 119 Wn.2d 91, 105, 829 P.2d 746 (1992), <i>cert. denied</i> , 506 U.S. 1079 (1993).....	26
<u><i>Maybury v. Seattle</i></u> , 53 Wn.2d 716, 721, 336 P.2d 878 (1959).....	20
<u><i>Mock v. State</i></u> , 200 Wn. App. 67, 403 P.3d 102 (2017)	26,27
<u><i>MW v. DSHS</i></u> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	23
<u><i>Petcu v. DSHS</i></u> , 121 Wn. App. 36, 86 P.3d 1234 (2000)	23
<u><i>Peterson v. State</i></u> , 2019 WL 3430537 (July 30, 2019).....	28,29,37
<u><i>Progressive Animal Welfare Soc’y v. Univ. of Wash.</i></u> , 114 Wn.2d 677, 688, 790 P.2d 604 (1990).....	28
<u><i>Richardson v. McKnight</i></u> , 521 U.S. 399, 403, 117 S.Ct. 2100, 138 L. Ed. 2d. 540 (1997).....	26

<u><i>Rounds v. Union Bankers' Ins. Co.</i></u> , 22 Wn. App. 613, 617, 590 P.2d 1286 (1979).....	21
<u><i>State v. Hahn</i></u> , 83 Wn. App. 825, 831, 924 P.2d 392 (1996)	28
<u><i>State v. Keller</i></u> , 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)	27
<u><i>Tyner v. DSHS</i></u> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	3,23,24,28,30,31,38,39
<u><i>Washington State Coalition for the Homeless v. Dept. of Social & Health Services</i></u> , 133 Wn.2d 894, 905, 949 P.2d 1291 (1997).....	28
<u><i>Wilson v. Steinbach</i></u> , 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....	21
<u><i>Yakima Food & Cold Storage Co. v. Central Heating & Plumbing Co.</i></u> , 81 Wn.2d 528, 503 P.2d 108 (1972).....	21

Court Rules

CR 54 (b).....	3
CR 56(c).....	21

Statutes and WACs

RCW 4.24.595	3,21,33,36,37,38,39,40
RCW 4.24.595(1).....	28,29
RCW 4.24.595(2).....	3,22,24,27,28,29,31,32,37,38,39
RCW 9A.72.020.....	31
RCW 9A.72.030.....	31

RCW 9A.72.040.....	31
RCW 10.52.090	31
RCW 13.34.030	30
RCW 13.34.050 (1).....	29
RCW 13.34.065	29
RCW 13.34.110 (1).....	30
RCW 26.44.050	23,28,29,30
RCW 28A.400.303.....	33
RCW 49.60.015	31
WAC 388-71-113.....	33
WAC 388-825-645.....	33

Other Authorities

Restatement (Second) of Torts §652E (1977)	33
--	----

APPENDIX

Appendix 1 - House Bill Report – ESSB 6555.....	38
Appendix 2 - Senate Bill Report – ESSB 6555	38
Appendix 3 - Final Bill Report – ESSB 6555.....	38

I. INTRODUCTION

First-time parents Michelle Desmet and Alex Kacso's three and a half-month-old daughter A.K. was removed from their home and care ostensibly so that the State could "investigate" the cause of baby A.K.'s left femur spiral fracture. CPS conducted literally no "investigation" and based on the record before the Trial Court, concluded its investigation by mid-March 2016 when CPS's investigator, Jennifer Schooler, left her employment with DSHS to take a different job. The defendant State continued to oppose the unfettered reunification of baby A.K. with her parents for seven (7) months.

Ultimately the State had *no evidence* that either parent was a cause, on a more probable than not basis, of A.K.'s left femur spiral fracture. A motion in early April 2016 to return the minor child A.K. to her parents' home was opposed by the Appellant during which false testimony, inaccurate testimony and untrue claims of supporting medical testimony regarding the State's contention of parental neglect were submitted and argued to the King County Juvenile Court trial judge.

These parents literally bent over backwards to try and comply with unnecessary demands and requests for parental evaluations and classes simply to obtain the return of their baby. Unbeknownst to these parents and their dependency case trial counsel, the State was not even claiming to

be undertaking any additional investigation into the cause of A.K.'s injury after March of 2016.

A Founded Report by the defendant DSHS was entered against Michelle Desmet, although the individual who ostensibly "authored" that report, had not been an employee of the Department of Social & Health Services for two weeks when the "report" was created. That employee has testified that she did not prepare or sign that document that bears her name. The Founded Report was never provided to the parents or their attorneys by the defendant State until after the appeal period had run and then the State asserted that no timely appeal was permissible, and the "Founded Letter" would remain.

Ultimately, the State stipulated to the dismissal of its dependency action on the eve of trial and finally the State, when faced with an Administrative Tribunal Hearing regarding its conduct, agreed to retract the Founded Report and issue an Unfounded Letter.

This lawsuit by the parents individually, and on behalf of their baby A.K., asserts three (3) causes of action:

1. Negligent investigation by DSHS/CPS after the initial Shelter Order entered by the King County Juvenile Court;
2. Negligent infliction of emotional distress;
3. False Light.

The State sought the dismissal of plaintiffs' claims on the sole basis of RCW 4.24.595(2). As the Appellant does before this Court, the State argued to the Trial Court that this statute gives the State *absolute immunity* from plaintiffs' claims and that RCW 4.24.595 is a complete abrogation of the *Tyner* line of cases and the negligent investigation cause of action articulated in those cases.

The Trial Court denied the State's motion for summary judgment of dismissal and at the State's request, entered a CR 54(b) order. This appeal followed.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENT OF ERROR

- A. Does RCW 4.24.595(2) give Appellant absolute immunity from civil liability when it obtains a Court shelter care order based on false testimony, testimony which it knows is inaccurate and incomplete and persists in separating a baby from her family when there is no evidence to support its claims of abuse or neglect against the parents?
- B. Does RCW 4.24.595 completely abolish the State's liability under the *Tyner* line of cases for State misconduct in persisting in its separation of a baby from her family when it has no substantive evidence or testimony to support its action?
- C. Does a "Founded" decision by DSHS/CPS regarding claimed abuse and neglect allegedly created by an individual who is not even employed by the State and which is not communicated to the recipient or her attorneys for a timely appeal, place the individual in a False Light and not subject in any respect to RCW 4.24.595?
- D. Does RCW 4.24.595 eliminate the State's liability for negligent infliction of emotional distress for employee misconduct, false

testimony and untrue claims of abuse or neglect against a parent unrelated to any shelter care order of the Court?

III. FACTUAL RECORD ON DENIAL OF STATE'S MOTION FOR SUMMARY JUDGMENT

A. Pre-Shelter Care Order

Michelle Desmet remained home following the birth of her child on October 26, 2015 and these first-time parents reluctantly decided to have their 3 ½ month old baby, A.K. in daycare while her mother returned to the work force. (CP 1415); (CP 1085) On February 1, 2016, baby A.K. began daycare. (CP 1408) By Wednesday, February 3rd, baby A.K. had become fussy. (CP 1415) Believing an upper respiratory infection (URI) was the cause of their baby's fussiness, the parents took their daughter to a Seattle Children's Hospital (SCH) Urgent Care facility that Wednesday evening. (CP 1178-1179) Respondents were the last patients seen that night and the Urgent Care physician neither held their daughter, nor did a thorough examination, but concluded that the child had an upper respiratory infection and gave advice accordingly. (CP 1178) Michelle Desmet decided to stay home with A.K. on Thursday, February 4, 2016 and kept A.K. home from daycare. (CP 1179)

On Friday morning, February 5, 2016, A.K.'s left leg appeared enlarged and felt firm. (CP 1415) The parents decided to take their daughter to Mary Bridge Children's Hospital (MBCH). (CP 1415) Early

in this visit to MBCH an x-ray was performed of A.K.'s left leg and revealed a mid-femur spiral fracture. (CP 1091) Respondent parents could offer no explanation as to how the fracture occurred, resulting in a concern of "non-accidental trauma". (CP 235, 263, 380, 1410) King County Sheriffs were summoned, interviewed the parents and concluded there was no indication of abuse or neglect. (CP 1409-10) A CPS investigator, Jennifer Schooler was then involved by an MBCH social worker; (CP 1408) Schooler contacted Dr. Yolanda Duralde, head of the Child Abuse Investigation Department (CAID) at MBCH who, without an examination of the minor child, or any interview of the parents, expressed concern about non-accidental trauma and the parents because they had no explanation for their daughter's injury. (CP 1408-09; 239) CPS Investigator Schooler then contacted the King County Sheriff's Office who dispatched a detective. (CP 1410; 1416-1418)

The King County Detective arrived with a preconceived conclusion that the injury to A.K. must have been committed by her mother and took A.K. into custody. (CP 1305, 1416, 1417, 1418) This resulted in CPS investigator Jennifer Schooler initiating a Petition for Dependency and an initial Shelter Care Hearing was scheduled in *King*

County Juvenile Court¹ for Tuesday, February 10, 2016 at 8:00 in the morning. (CP 1496) The parents had heard nothing from Investigator Schooler by Monday evening following their daughter's removal from their care on Saturday and contacted her to learn when they would regain custody of their child. (CP 1398; 1425) It was only then that they were advised that there was a Dependency Hearing the following morning that they were required to attend, and the Court would determine the future disposition of their daughter and their custody. (CP 1101-1102) The parents drove after business hours to Investigator Schooler's office to obtain a copy of the DSHS Dependency Petition and then attended Court the following morning. (CP 1102) These parents were provided public defenders to represent them; the parents were advised to "stipulate" to an order and a 30-day Shelter Care Order was then entered by the Court. (CP 1102 and 1302)

B. Post-Initial-Shelter Care Order

The parents were frantic to obtain the return of their daughter to their care and custody. (CP 1300-1302) They voluntarily agreed to undergo polygraph tests to establish their innocence. (CP 1300) When the

¹ Appellant State refers to the underlying dependency action taking place in *Pierce* County. Appellant's Opening Brief at pages 4, 5, 6 and 10. This is an error. (See, generally, CP 1498). The underlying dependency action was filed in King County Juvenile Court. The reason for this was that at the time of the events in 2016, the plaintiff parents were residents of Federal Way in King County, Washington.

parents appeared shortly after the hastily convened Shelter Care Hearing for the polygraph testing, the King County polygraph examiner felt the parents were too distraught to test and told them to reschedule. (CP 1419; 1421)

The parents obtained private counsel and privately obtained the services of polygrapher Terry Ball, a polygraph operator who had, for approximately 40 years, worked for various government agencies and private clients performing polygraph tests. (CP 1033-1037) Mr. Ball is a recognized, pre-eminent authority in Polygraphs. (CP 1033-1037) On Mr. Ball's first examination of the parents, the father, Sandor Kacso clearly passed; mother, Michelle Desmet had an inconclusive result. (CP 1035) On retest, mother, Michelle Desmet also passed. (CP 1035) This information and the test results were provided to the Sheriff's Office and DSHS. (CP 354-356)

Following the entry of the initial Shelter Care Order, the Appellant DSHS and its employees essentially undertook no investigation of anything. (CP 1428-1455) The King County detective assigned to this matter, polygraphed two (2) of the four (4) daycare workers where baby A.K. had attended daycare. (CP 353) One of the two (2) "workers" was the daycare owner who had no contact with baby A.K. (CP 353 and 1517)

The King County Sheriff's detective essentially concluded her investigation by mid-March and the cause of baby A.K.'s spiral fracture was not established. (CP 1519) DSHS/CPS Investigator Schooler was undertaking no additional investigation. (CP 1399) The collateral arm of DSHS, ostensibly working toward reunification of this family, then suggested that a psychological evaluation of the parents was necessary to return baby A.K. to her home. (CP 1539-1541)

The parents elected to be proactive in demonstrating to DSHS that they were not a threat to their child. (CP 1300) They voluntarily underwent psychological evaluations and provided that evaluator's opinions to DSHS. (CP 1538) That psychological evaluation found that the parents were no threat to their child. (CP 1300)

The parents, through counsel, retained an eminent pediatric orthopedic doctor, Dr. John Handelsman, M.D. to review the medical records and information available and to provide an opinion as to the likely cause of the spiral fracture to baby A.K.'s left femur. (CP 1110-1176) Dr. Handelsman provided a report and expressed the opinion that A.K.'s injury was probably caused days before February 4th which made it likely that the injury occurred at daycare, an explanation that accounted for baby A.K.'s increasing crankiness during that period. (CP 1168-1179) Dr. Handelsman explained the process of injury and opined that sensation

of pain from the femur injury would have come on gradually over a period of days, as appeared to have been the case. (CP 1167-1174 and 1110-1116)

The testimony of DSHS employees is that they did not consider, and gave no weight to, the psychological evaluations performed on the parents because the examiner was not a “DSHS examiner”. (CP 1681-82) DSHS refused to consider, or have any physician on behalf of DSHS consider, the opinions and report of Dr. Handelsman. (CP1681-1682) The DSHS response to this affirmative evidence of non-culpability of the parents was a refusal to alter its position on continuing shelter care, but instead to demand additional evaluations of the parents and require the parents to take additional “classes”. (CP 1300-1303)

The parents, now through private counsel, made a motion before the King County Juvenile Trial Court for an order returning baby A.K. to them. (CP 398-413) This hearing was held April 12, 2016. DSHS vigorously opposed the parents’ motion for return of their child. (CP 1696; CP 1872-1922)

The State’s employees, in response to the parents’ motion for return of their child, submitted a Declaration from Linda Townsend-Whitman, a Supervisor at DSHS. (CP 1696-1741) Linda Townsend-Whitman is not a physician; she is not a polygraph operator or

knowledgeable about polygraphs. (CP 1664; 1691) Ms. Townsend-Whitman later testified in her deposition in this case that the information she provided to Juvenile Court, that Michelle Desmet's two inconclusive polygraph results were evidence of deception, was untrue. (CP 1691, CP 1036) Ms. Townsend-Whitman testified as follows:

BY MR. KYLER

Q Would you agree that there is nowhere in that email from Mr. Brunson to the detective in which he states: There was deception on the part of the mother?

A Yes, I agree.

Q Isn't it kind of serious when you're telling the Court that there was deception on the part of the mother based on records the Department has, when the issue is whether this child is safe to go back to its parents?

MR. THOMAS: Object to form.

A Yes. That . . . that is serious, yes.

Q (By Mr. Kyler) Is that opinion or conclusion that you state there on line 15 is just false from what the actual record says –

MR. THOMAS: Object to form.

Q -- in Exhibit 6, isn't it?

A I wrote it in what I thought was, at the time, was summarizing that trending towards deception. And I took that at the time for a reason I don't know, at this time, to mean that there was deception.

Q (By Mr. Kyler) Would you agree that when you looked at Mr. Brunson's statements in Exhibit 6 and what you write, that they're different? They're not the same. He doesn't say there's deception?

A Yes.

(CP 1691)

In the Appellants' opposition in the dependency trial court to the parents' motion for the return of baby A.K. to their custody, the State clearly claims to possess information and testimony that the injury to baby A.K. was as a result of the mother's conduct. (CP 1696-1702). In fact, that argument and this claim was untrue. Linda Townsend-Whitman testified:

Q And so the Department had no opinion testimony when you drafted this declaration that more probably than not, the cause of the fracture to Ashley Kaco's leg, was her mother?

MR. THOMAS: Object to form.

A Dr. Duralde did not suggest that the mother caused the injury in her report.

* * *

Q Was there any other medical testimony that you had available to you at the time this declaration was made, other than Dr. Duralde's opinions and conclusions, that would allow you to prove to the Court on a more probable than not basis that Michelle Desmet caused the injury to her child's leg?

A I am hesitating, because . . . because the Department didn't seek or pay for Dr. Handelsman's report. I don't think that answer – that's part of the answer to your question. So no, our medical contacts came from Dr. Duralde.

Q Okay.
And the investigative aspects of this case were concluded at that point?

A That's true.

(CP 1680)

The significance of this inaccurate and false declaration of Linda Townsend-Whitman before the King County Juvenile Court on plaintiffs'

motion to return baby A.K. to the custody of her parents cannot be overstated or unappreciated. At this point, the parents had been physically separated from their baby A.K. for approximately two (2) months.

Despite the Department's position to the contrary and its representations to the King County Juvenile Court, these were the facts:

1. The State's investigation was over;
2. The State had no medical testimony to establish that baby A.K. had been injured by one of her parents on a more probable than not basis;
3. There was no evidence that Michelle Desmet had failed a polygraph; and
4. The only psychological evidence the State had available to it was that the parents posed no danger to their child.

(CPs 1399; 1680; 1691; 1670-1672)

There is no question but that the Declaration of Linda Townsend-Whitman was submitted to persuade the King County Juvenile Court to deny the parents' request to return their child to them. The testimony of Linda Townsend-Whitman before the trial court in this case is clear on this subject:

Q When you submitted – or when you signed and provided Exhibit 2 to the Assistant Attorney General that was handling this matter, did you understand that this would be utilized to deny the parents' request to return their child to them?

A Yes.

Q Did you understand the Court would be relying upon the information in your declaration as a basis to do just that, to deny the return of the children – or the child to her parents?

A Yes.

Q At the time this document was signed, Exhibit 2, if you turn to page 7, it looks like it was signed on April 5th. Do you see that?

A Yes.

Q So at the time this was signed, there was a Founded Letter that had been issued in this case, correct?

A Yes.

(CP 1676)

The Appellant State, through Linda Townsend-Whitman's declaration, submitted extensive hearsay and third-party recounts of conversations with Dr. Duralde and one report from Dr. Duralde dated March 15, 2016. (CP 1696-1729) Nowhere in any of those documents, writings, recitations of hearsay or otherwise, does Dr. Yolanda Duralde opine that Michelle Desmet was the probable cause of the spiral fracture to baby A.K. Contrary to the Appellant/State's Opening Brief to this Court, no declaration of Dr. Duralde was ever submitted to the dependency court (Appellant's Opening Brief, p. 4) and Dr. Duralde was never a medical provider to baby A.K. In fact, ultimately when Dr. Duralde is deposed, once in the underlying dependency action and a second time in this litigation against the State, Dr. Duralde affirmatively testified:

Q In the case that commenced in approximately February 2016, did you ever offer any opinions or conclusions in this case as to whether or not Michelle Desmet or Alex Kacso was responsible for the spiral fracture of their child, Ashley Kacso's left leg, left femur?

A I never specifically named anyone.

Q That's what I understood and that's what –

A Okay.

Q It appeared, that there was that you never asked either to express such an opinion by the Department of Social and Health Services –

A It's not my place.

Q But you were never asked that opinion?

A I was not ever asked that.

(CP 964)

Following the dependency trial court's denial of the plaintiffs' motion for return of their baby and despite the fact the parents had voluntarily undergone a psychological evaluation which had been voluntarily provided to DSHS, the state demanded the parents be evaluated by *their expert*, doctor Michael O'Leary, Ph.D. (CP 1540-43) While Dr. O'Leary was not a "mutually agreeable" evaluator, (Appellants' Opening Brief, p. 5; and CP 418-19) the parents were amenable to doing anything necessary to secure the return of their baby. Language was written into the order denying the parents motion for the return of their child to the effect that they would be psychologically evaluated by Dr. Michael O'Leary. (CP 419) This evaluation could not be scheduled and take place because of Dr. O'Leary's schedule until July 2016. (CP 1641)

Thereafter, the State continued to demand and direct that the parents undertake additional trainings that the agency could offer, classes DSHS was “suggesting” and that caseworker Anne Sacquitne was indicating to the parents would be necessary for them to complete for their child to be returned. (CP 1623) The following is a list of the classes and training activities that the DSHS caseworker demanded the plaintiff parents undertake or complete, and which were taken and completed, to secure the return of their daughter:

- 1) Review of people crying
- 2) Dependency 101
- 3) Parenting classes (Module One)
- 4) Incredible years
- 5) IF PS/PFR (Parenting class-Module Two)
- 6) Homebuilders

Significant to the State’s misconduct and malfeasance in not reunifying this family was the fact, despite DSHS policy and procedure that meetings occur with parents to coordinate how reunification is going to occur, and to educate the parents on the process that is taking place and why they are being separated from their baby, absolutely nothing occurred and no information was provided to these parents. (CP 1540-41, 46, 47; CP 1181)

Expert Barbara Stone, a former supervisor with DSHS and Child Protection Services, testified that DSHS has a duty under its own policies

and practices to meet regularly with the family, to discuss and to work out ways to reunite the family. (CP 1019-20) This never happened. Rather, the DSHS caseworker dangled the possibility of the baby's return if the parents would voluntarily do programs, tests and classes described above. The agency's position never changed throughout the parents successful and exemplary completion of all these training modules and classes. In fact, literally on the eve of the scheduled trial, DSHS caseworkers were contacting plaintiffs' family members to determine whether they could "take custody" and "raise" baby A.K. (CP 1181-82; CP 1307)

Contrary to the factual summary provided by the Appellant State, the parents did not repeatedly seek continuances of the underlying dependency trial. (Appellants' Opening Brief, CP 6) It was DSHS who repeatedly sought continuances in order to have time to "complete its investigation". (CP 1302) This was repeatedly the stated reason for the State seeking continuances even though the police investigation concluded on April 18, 2016 and DSHS concluded its investigation in mid-March. (CP 354-65; 1302; 1399) DSHS also ostensibly claimed it was relying upon and waiting for the police investigation to conclude and yet never sought that information, nor found it relevant when it was provided. (CP 1544)

A fact-finding hearing was scheduled for October 24, 2016. In late May 2016, the State's attorney in the dependency action acknowledged the State had no testimony to support its case against plaintiff parents and would need subpoenas to compel the testimony of Dr. Duralde, Dr. Gottschalk (the SCH urgent care physician) and even the State's own psychological expert, Dr. O'Leary. (CP 1190)

Even with no basis to proceed with its dependency action, the State sought to enter into an "agreed" order in which DSHS would have "continuing jurisdiction" over these parents and their baby. (CP 1190) This condition was refused. (CP 1190) It became apparent that DSHS had no evidence, or any ability to present any evidence, and that it was essentially extorting these parents with yet another promise regarding their baby. (CP 1190) An order was finally crafted, late on the evening prior to the dependency trial, that simply dismissed the dependency case and concluded the State's efforts to separate and manipulate this family. (CP 1191; 1303-1304)

Prior to the termination of the Dependency Action, the Court did order the return of baby A.K. on August 8, 2016. (CP 424) The Appellant State indicates in its factual presentation that despite the parent's ability at this point to return their child to their home, they created a "transition period" to reintegrate their baby into their own family. (Appellant's

Opening Brief page 5, fn. 5). As a result of the State/Appellant's conduct, baby A.K. had been required to live, eat and sleep with caregivers to whom she had become, not surprisingly, closely attached. (CP 1476) Baby A.K. was fostered by her aunt and a woman the family referred to as grandma, during her formative bonding months, between her age of three and a half months and approximately eleven months. (CP 1476) She was not able to speak when removed from her parents and she could not crawl. A.K.'s parents were sensitive to this fact, as DSHS is apparently not, that uprooting her from a place where she had come to feel she belonged would be traumatic for A.K. Despite the parent's desperate eagerness to have their baby home, they devised and followed a reintegration process to allow their child to come back to their home without a shocking dislocation in her environment. (CP 1477) DSHS did nothing to facilitate this transition and now apparently asserts it to imply these parents were uncaring and that the return of baby A.K. was not that big of a deal. It is ironic that the agency that put this family in such a terrifying circumstance and situation should now seek advantage by criticizing the means of mediating the harm that defendant's conduct caused.

//

//

C. The State/Appellant's misconduct relative to its improper "Founded" finding and issuance of Unfounded finding.

The testimony was undisputed before the Trial Court that there was no additional or further investigation by CPS after it issued its "FOUNDED" letter on March 31, 2016. (CP 1665) The FOUNDED document of March 31, 2016 was ostensibly drafted and submitted by CPS Investigator Jennifer Schooler. (CPs 1515-1520) In fact, Jennifer Schooler had left DSHS/CPS on March 18, 2016. (CP 1399) The investigative basis of CPS Investigator Schooler's report supporting a founded allegation against Michelle Desmet is filled with supposition, speculation, double and triple hearsay, does not take into account any of the reports of Dr. Handelsman, (plaintiffs' pediatric orthopedic expert), does not take into account the positive polygraph examinations of the parents, the concurrence of four (4) other polygraphers, and does not take into account the positive psychological evaluation of the plaintiff parents provided to DSHS. (CP 1401-1406; CP 1033-1074)

Despite the fact this dependency action was in litigation and the parents were represented by attorneys, and that DSHS/CPS had the parents' mailing address and their attorneys' mailing address, the Appellant's agency *never provided the parents or their attorneys notice* that it had issued a Founded letter. (CP 1304) The parents and their

attorneys only incidentally found out about the existence of the Founded letter during a mediation on May 13, 2016. (CP 1304) That finding was immediately appealed and after prolonged efforts by the parents' attorneys, the State agreed that the appeal was timely. (CP 1304) The Appellant State did not willingly, or without a fight, withdraw the Founded letter and issue an Unfounded letter. (CP 1304-1305) The withdrawal of the Founded finding and replacement of it with an "Unfounded" finding occurred on the eve of a conference call with the assigned Administrative Law Judge (ALJ) Erika Lim. (CP 1305) The Appellant State agreed to change its position because it was evident the State would be unable to meet its burden of proof in the upcoming hearing. (CP 1305)

IV. ARGUMENT

A. Standard of Review

An Appellate Court stands in the same position as a trial court in reviewing a trial court's denial of a motion for summary judgment. See *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982). While generally, judicial policy disfavors interlocutory appeals, *Maybury v. Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959), an interlocutory appeal involving a new statute, with limited to no case interpretation of the section of the statute involved is generally appropriate as the challenged

issue from the trial court could materially impact the future handling of the case at the trial court level, or make further proceedings useless if the trial court has materially erred. Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

On summary judgment, a reviewing court takes the position of the trial court, assuming facts most favorable to a non-moving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); Yakima Food & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 503 P.2d 108 (1972). Summary Judgment is only appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); Herskovits v. Group Health Coop., 99 Wn.2d 609, 613, 664 P.2d 474 (1983). The burden is on the moving party to prove there is no genuine issue as to a fact which could influence the outcome at trial. Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). Summary judgment is not appropriate when reasonable minds might reach different conclusions. Rounds v. Union Bankers’ Ins. Co., 22 Wn. App. 613, 617, 590 P.2d 1286 (1979).

The Appellant State’s position before the Trial Court in its motion for summary judgment is that the statute RCW 4.24.595, provides the

Appellant State absolute immunity in the context of all of plaintiffs' claims asserted in this case. The Appellant State asserts that same position before this Court. (Brief of Appellant at page 2.)

No case has interpreted RCW 4.24.595(2) and, by its plain terms, it does not provide that Appellant has absolute immunity. The Legislature had the power to state that, and it did not. Respondents request that this Court deny the Appellant's request for relief and remand this case for trial.

B. Appellants' claim of absolute immunity for DCYF and its employees' misconduct is without support from the plain language of RCW 4.24.595(2) and the Trial Court's denial of the State's motion for summary judgment should be affirmed and this matter remanded for trial.

Plaintiff parents have not brought this lawsuit for damages on the basis of the State's compliance, or non-compliance, with any court order regarding the shelter care placement of their baby. Plaintiffs' lawsuit against the Appellant State and its agencies, is for the State's failure to follow, for this family's integrity and welfare, its own internal standards involving investigations; its failure to comply with statutory directives regarding reunification of parents and their children; its misrepresentation and outright lies to the King County Juvenile Court as a basis to continue the separation of these parents from their newborn baby and to generally impose the agency's will on this family with no basis and for no reason. The negligent investigation cause of action asserted by Respondents under

Tyner v. DSHS, 141 Wn.2d 68, 1 P.3d 1148 (2000) and its progeny, is succinctly summarized by the Tyner Court and quoted in this Court's decision in Petcu v. DSHS, 121 Wn. App. 36, 86 P.3d 1234 (2000) wherein the Court stated:

During its investigation the State has the duty to act reasonably in relation to all members of the family. The procedural safeguards of RCW 26.44.050 protect both children *and family members*; children are protected from potential abuse and *needless separation from their families and family members are protected from unwarranted separation from their children*. (Emphasis added.)

Tyner, 141 Wn.2d at 79.

Liability is imposed on the State and its employees when the State, through its agency DSHS/CPS:

“. . . conducts an incomplete or biased investigation that results in . . . 2. Removing a child from a non-abusive home.”

MW v. DSHS, 149 Wn.2d 589, 600-01, 70 P.3d 954 (2003); Petcu v. DSHS, *supra*, 121 Wn. App. at 59. That is what happened here.

None of these cases, Tyner, MW or Petcu involved any claim or allegation of the defendant State/DSHS not following a Court dependency order. Rather, all of these cases involved instances where the State, in the larger context of its investigation and notification functions, did an improper, incomplete, or inaccurate investigation, misrepresented relevant and crucial information to the Dependency Court, resulting in a wrongful

separation of a baby from her parents. Nothing about RCW 4.24.595(2) addresses Tyner or its progeny bases for State liability for failing to follow its statutory mandate, failing to comply with its internal policies and procedures regarding an investigation, misrepresenting relevant and crucial factual information to a juvenile court resulting in the ongoing separation of a child from her parents.

The Trial Court's denial of the Appellant State's motion for summary judgment should be affirmed and this matter remanded for trial.

1. **RCW 4.24.595(2) offers no protection to DCYF or the State for failing to perform its statutory duties, presenting false testimony to the Court to obtain Shelter Orders or misrepresenting the evidence held by the Department in support of its claims of parental neglect.**

Respondent parents do not assert that the language of RCW 4.24.595(2) is ambiguous. That section of the statute provides:

The Department of Social & 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 & Health Services, are entitled to the same witness immunity as would be provided any other witness.**

RCW 4.24.595(2) (Emphasis added.)

The relevant facts pertaining to the application of this statute in the context of what occurred in this case are without dispute in this record.

The State's malfeasance and misfeasance are undisputed:

1. After seeking and obtaining a shelter care order pertaining to baby A.K. the defendant State's employees did *no investigation after March 18, 2016*;
2. 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.

The Appellant State can point to no feature or content in any of the orders entered by the Superior Court stating:

- 1) the State did not have to follow its own rules and regulations in its investigation of a claimed situation of abuse or neglect and its own rules requiring communication with parents to facilitate reunification;
- 2) the Appellant State may misrepresent to the Court what evidence was available to support the State's claims of abuse or neglect;

- 3) the Appellant State may misrepresent to the Court the cause of the claimed abuse or neglect was one of the baby's parents;
- 4) the State can ignore and not consider or evaluate affirmative evidence and testimony exculpating parents and explaining how this injury to baby A.K. occurred and that the parents were not the cause, either by timeline or by culpability;
- 5) the State can improperly enter a "Founded" finding, not disclose it to the parents or their attorneys and refuse to retract it and enter an "Unfounded" finding despite dismissing its dependency petition and having no evidence to establish a Founded conclusion on a more probable than not basis.

This Court reviews a claim of absolute immunity as a question of law; the Court reviews a question of law *de novo* Hertog v. City of Seattle, 138 Wn.2d 265, 275, 929 P.2d 400 (1999). As Division One of the Court of Appeals stated in Mock v. State, 200 Wn. App. 67, 403 P.3d 102 (2017):

Immunity "frees one who enjoys it from a lawsuit whether or not he acted wrongly." Richardson v. McKnight, 521 U.S. 399, 403, 117 S.Ct. 2100, 138 L. Ed. 2d. 540 (1997). Absolute immunity, where it exists, protects the State as well as its agents. Gilliam v. Dept. of Social & Health Services, 89 Wn. App. 569, 576-77, 950 P.2d 20, *rev. denied*, 135 Wn.2d 1015 (1958). "Absolute immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity." Lutheran Daycare v. Snohomish Cty., 119

Wn.2d 91, 105, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079 (1993). (Emphasis added.)

Mock, 200 Wn. App. at 673-674.

This Court also reviews statutory interpretation *de novo*. Cerillo v. Esparza, 158 Wn.2d 194, 142 P.3d 155 (2006). The goal of a reviewing appellate court is to ascertain and give effect to the legislature’s intent. As the Court in Columbia River-Keeper v. Port of Vancouver USA, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017) stated: *There is a process for ascertaining that intent*. The State in its brief does not outline that process, nor asks this Court to follow it. When that process is followed with regard to RCW 4.24.595(2), plaintiff Respondents do not believe that any ambiguity is apparent or suggested and certainly the State’s claim of absolute immunity for its conduct does not exist.

The Courts, in reviewing statutory interpretation, “may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute”. Cerillo, supra at 201.

The Court in Cerillo stated with regard to interpreting a particular wage statute in that case as follows:

In order to ascertain the meaning of [the statute at issue], we look first to its language. If the language is not ambiguous, we give effect to its plain meaning. “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)). If a statute is ambiguous, we employ tools of statutory construction to ascertain its meaning. 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.’” AgriLink, 153 Wn.2d at 396 (quoting State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)). This Court does not subject an unambiguous statute to statutory construction and has “declined to add language to an unambiguous statute even if it believes the legislature intended something else but did not adequately express it.” Kilian, 147 Wn.2d at 20 (citing Keller, 143 Wn.2d 276; Washington State Coalition for the Homeless v. Dept. of Social & Health Services, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997)). “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” Kilian, 147 Wn.2d at 21 (footnote omitted) (citing Progressive Animal Welfare Soc’y v. Univ. of Wash., 114 Wn.2d 677, 688, 790 P.2d 604 (1990) and Associated Gen. Contractors of Wash. v. King County, 124 Wn.2d 855, 865, 881 P.2d 996 (1994)). Thus, when a statute is not ambiguous, only a plain language analysis of a statute is appropriate. Resort to aids in construction, “such as legislative history, is appropriate only after the Court determines that a statute is ambiguous. Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

Cerillo, supra, at 201.

The Appellant State argues to this Court that this Court’s decision in Peterson v. State, 2019 WL 3430537 (July 30, 2019), an unpublished decision interpreting RCW 4.24.595(1), somehow resolves the question of plain meaning, ambiguity and the legislature’s intent to modify the cause of action recognized in the Tyner line of cases deriving from RCW

26.44.050. (Brief of Appellant at page 9) Peterson has no application to the language and text of RCW 4.24.595(2). Peterson involved a claim asserted by an aggrieved father whose child was removed from his custody in an emergent removal and initial shelter care hearing. RCW 4.24.595(1) was implicated in Peterson as the statute itself defines “emergent placement investigation” as “those [investigations] conducted prior to a shelter care hearing under RCW 13.34.065”. The limited grant of protection under RCW 4.24.595(1) modifies the standard under which the State can be held liable for its conduct and decisions in an emergent placement investigation *prior* to an initial Shelter Care hearing to require a showing of gross negligence. Plaintiff parents in this case have made no such argument as to the initial shelter care hearing and the extent of the Appellant/State’s investigation prior to that initial, emergent hearing.

There is no dispute under Washington law that DSHS owes both a common law duty and a statutory duty to protect children in the context of dependency actions. H.B.H., et al vs. State, 192 Wn. 2d 154, 429 P.3d 484 (2018); RCW 26.44.050. DSHS bears the burden in the context of a dependency hearing of establishing by a preponderance of the evidence that the child is in fact “dependent”, in other words if there is a reasonable basis to believe the child’s health, safety and welfare would be seriously endangered if not removed from her family. RCW 13.34.050 (1); (RCW

13.34.030; RCW 13.34.110 (1). As the Supreme Court stated in H.B.H., supra, at 491:

Foster care placements are by their nature intended to be temporary. For this reason, the act of placing a child in foster care does not sever DSHS's relationship with the child as legal custodian or terminate DSHS's ongoing duty to protect dependent children in its care.

The duty of the State to protect a child in foster care in the context of an impending dependency action is to protect both the child and the child's family members from ... "needless separation from their families and family members are protected from unwarranted separation from their children". RCW 26.44.050; Tyner vs. DSHS, 141 Wn.2d 68, 79, 1 P.3d 1158 (2000).

As the Tyner Court stated, quoting with approval from the Court of Appeals in that same case:

[The] pivotal consideration is not the involvement of the court per se, but whether the state has placed before the court all the information material to the decision the court must make. Concealment of such information or negligent failure to discover material information may subject the state to liability even after adversarial proceedings have begun.

Tyner, 141 Wn 2d at 83-84

The Tyner Court's explanation and analysis of the State's liability for this conduct is in accord with the longstanding decisions of Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991); and Bender vs. City of

Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983). “...DSHS case workers do not enjoy absolute immunity for their foster care placement investigations.” Babcock, 116 Wn.2d 606; Tyner vs. DSHS, 141 Wn.2d 68, 84, 1 P.3d 1148 (2000). (Emphasis added)

The Washington Courts have held that DSHS case workers at times are entitled to qualified immunity. Babcock vs. State, 116 Wn.2d 596, 618, 809 P 2d 143 (1991). In order to qualify for qualified immunity, the caseworker must:

1. Carry out a statutory duty;
2. According to procedures dictated by statute and superiors;
3. Act reasonably. Babcock, supra, at 618; citing Guffey v. State, 103 Wn.2d 144, 690 P.2d 1163 (1984).

Witnesses generally do not have absolute, or even qualified immunity, when they testify falsely and/or commit perjury. RCW 10.52.090; RCW 49.60.015; RCW 9A.72.020; RCW 9A.72.030; RCW 9A.72.040.

Employees of the Department of Social & Health Services “witness immunity” as discussed in RCW 4.24.595(2) is somewhat irrelevant in this particular case before this Court. No specific individual of DSHS, no employee, case worker, agent or representative, was named individually as a defendant in this litigation. (CP 158-191)

Plaintiffs'/Respondents' claims are against the agency based on what its employees did or did not do.

Insofar as plaintiffs in this case have not named any individual employees at DSHS, the second sentence of paragraph 2 of RCW 4.24.595(2) is not implicated. The plain language of that statute does not preclude or eliminate vicarious liability, *respondeat superior*, or agency liability of DSHS for its employees' misconduct.

The Trial Court should be affirmed and this matter remanded for trial.

2. **RCW 4.24.595(2) has no application to the State's improper creation and labeling of its abuse allegations against Michelle Desmet as Founded, its failure to properly communicate that decision to the mother or her attorneys, the publication of that wrongful determination and its negligent infliction of emotional distress as a direct consequence of its misconduct and failure to investigation.**

The Appellant State does not even mention in its Opening Brief how, or in what manner, it contends that RCW 4.24.595(2) applies or affects plaintiffs' claims for False Light or negligent infliction of emotional distress. As previously described, no individual State employee or caseworker has been named as a party defendant in this litigation. The State's liability is on the basis of an employer/employee, *respondeat superior*, agency and/or apparent agency. The seriousness of an individual

being placed in the False Light of a “Founded” determination is no mere trifle. A person who has had a “Founded” determination made against them may not serve as a school volunteer, RCW 28A.400.303, may not participate in the COPES program, Wash. Admin. Code §388-71-113, may not care for a disabled person or an elderly parent, Wash. Admin. Code §388-825-645 and carries with them permanently the stigma of that of an ‘abuser’ whose status has been established by a State agency charged with the authority to investigate and make such a determination.

The Appellant State seems to just assume that RCW 4.24.595 has some type of application to plaintiffs’ other claims in this case not involving negligent investigation. There is no argument or analysis provided in the Appellant State’s Opening Brief in support of that conclusion. The Washington Supreme Court in *Eastwood v. Cascade Broad Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986), quoting from Restatement (Second) of Torts §652E (1977) stated:

A false light claim arises when someone publicizes a matter that places another in a false light if (a) the false light would be highly offensive to a reasonable person and (b) the actor knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed.

Eastwood, 106 Wn.2d. at 471.

The Appellant State appears to completely ignore that it did not, and never could have, prevailed in its dependency petition. It literally had no testimonial evidence. Despite this fact, the State published a Founded Letter without even following its own procedures to give Michelle Desmet notice to permit her to appeal and an opportunity to reverse the State's wrongful conclusion, **before** its publication. Even after the State's dependency action was dismissed because it could not meet its burden and had no evidence to bring to the Court to establish dependency, the State still would not retract its Founded Letter. Only after faced with the certainty that an Administrative Law Judge would require the issuance of a Not Founded Letter did CPS issue an Unfounded Letter.

The Appellant State's investigation had terminated in mid-March, and certainly by the end of March 2016. It had no admissible evidence of Michelle Desmet's fault or responsibility for her daughter's fractured femur. It was not conducting any additional investigation. It published that Michelle Desmet was an abuser! Would such a publication be offensive to a reasonable person? Given what the State knew, or should have known, regarding its own investigation (or lack thereof), the lack of support it had for its suppositions and speculations, its conduct was either intentional or a reckless disregard of the falsity of its publication. As the

Court stated in Corey v. Pierce County, 150 Wn. App. 752, 225 P.3d 367 (2010):

False light claims require a showing of falsity and knowledge of, or reckless disregard for, that falsity.

Corey, 154 Wn. App. at 762.

On the record before this Court, on summary judgment at the trial court, there is certainly substantial evidence warranting a denial of the Appellant State's motion for summary judgment. The Appellant State's appeal as to Michelle Desmet's False Light claim should be denied and remanded for trial.

In the Trial Court, the Appellant State argued that plaintiffs did not present a negligent infliction of emotional distress claim as they were never in "actual peril". Appellant State's motion for summary judgment at page 22 line 21 – page 23, line 2. (CP 337–338). A claim of negligent infliction of emotional distress does not have a component of physical harm. Hunsley v. Giard, 87 Wn.2d 424, 553 P.2d 1096 (1976); Cunningham v. Lockard, 48 Wn. App. 38, 736 P.2d 305 (1987). What is required are physical symptoms. That fact was established in the trial court by the testimony of Sarah Blum (CP 1342-43), and the testimony of Katalin Simpson-Boley (CP 951-52).

Hegle v. McMahon, 136 Wn.2d 122, 960 P.2d 424 (1998) is consistent with this conclusion. In Hegle, plaintiffs described in answers to interrogatories their objective symptoms of emotional distress. The Hegle Court, in addressing this, stated:

In order to recover for negligent infliction of emotional distress, plaintiff's emotional response must be reasonable under the circumstances, and be corroborated by objective symptomology. Hunsley, 87 Wn.2d at 436. In their original interrogatory answers, the Hegle's alleged that they felt scared, angry, upset, suffered nightmares and felt fear and panic. The trial court relied on Shoemaker vs. St. Joseph's Hospital and Healthcare Center, 56 Wn. App. 575, 784 P.2d 562 (1990) and held that these complaints were insufficient to satisfy Hunsley's objective symptomology requirement. In doing so, the trial court implicitly incorporated Shoemaker's rule that objective symptomology requires some sort of physical manifestation of the emotional distress. We disagree.

Hegle, 136 Wn.2d 132 – 133.

For purposes of summary judgment there is more than adequate information in the record before the Trial Court to establish plaintiffs' claims for negligent infliction of emotional distress. Once again, the Appellant State somehow simply assumes, without analysis or even argument, that RCW 4.24.595 applies in some manner, or in some fashion, and prohibits this claim against it. Neither the law, nor the record, support Appellant's position in this regard. The Appellant State's appeal should be denied and this matter remanded for trial.

- C. **A review of the Legislative history of RCW 4.24.595 does not support Appellants' claim that the statute abrogates CPS's common law and statutory duty toward prompt reunification of parents and children when there is a lack of evidence of parental abuse or neglect and the Trial Court's denial of the State's motion for summary judgment should be affirmed and this case remanded for trial.**

The State refers to the Legislative history of RCW 4.24.595 repeatedly in its Opening Brief for the general proposition that it was the Legislature's intent to absolutely immunize the State in any circumstance of post-Shelter Care order placement investigations, misconduct associated with any subsequent investigation and false or misleading representations before the dependency court. (Appellant's Opening Brief, pgs. 10-12) The concept the Appellant State repeatedly asserts is encapsulated by its phrase "following shelter care orders" implying and arguing that this covers *every single act of the agency that follows any shelter care order of the Court*. Curiously, however, not one word of that Legislative history is quoted to this Court, provided in an appendix, or even relegated to a footnote.

In support of this "Legislative intent" argument, the Appellant/State then cites this Court to the *Peterson* decision, *supra*, which is reviewed earlier herein and offers no support in the context of RCW 4.24.595(2). It then refers this Court to a U.S. District Court decision for the Western District of Washington, at Seattle, *Chen v.*

D'Amico, No. C16-1877 JLR, 2020 WL 363354 at *9 (W.D. Wash. Jan. 22, 2020) (Appellant's Opening Brief at pgs. 13 and 14).

A review of Chen reveals that the Federal District Court does not even mention RCW 4.24.595, or apply it in any fashion to the facts before the Court in that case.

To the extent that this Court concludes that reference to Legislative history is appropriate, and to facilitate that review, attached as Appendices to Respondents' Brief is House Bill Report ESSB 6555 (Appendix 1), Senate Bill Report ESSB 6555 (Appendix 2) and Final Bill Report ESSB 6555 (Appendix 3). Without question, nowhere in any of these three Appendices, is it even suggested that the Legislature intends to overrule Tyner and its progeny. Significant in the Final Bill Report, at page 3 of Appendix 3, the Legislature specifically found:

Witness immunity is a common law doctrine and it provides witnesses in judicial proceedings with immunity from suit based on their testimony. The purpose of witness immunity is to preserve the integrity of the judicial process by encouraging full and frank disclosure of all pertinent information within the witness's knowledge. The rule is based on the safeguards of judicial proceedings that help to ensure reliable testimony, such as the witness's oath, the hazards of cross-examination, and the threat of prosecution for perjury.

Does RCW 4.24.595 provide some limited protections in the context of DSHS conduct? Obviously, by the plain language of the

statute, there are limitations, including the imposition of a gross negligence standard for any investigation undertaken prior to an initial Shelter Care Order. Otherwise, the statute on its face, and the Legislative history for the statute provides, or suggests, nothing more. The legislative history, like RCW 4.24.595 (2) itself is silent on the subject of absolute immunity. This Court should affirm the Trial Court's denial of the Appellant State's motion for summary judgment and remand this case for trial.

V. CONCLUSION

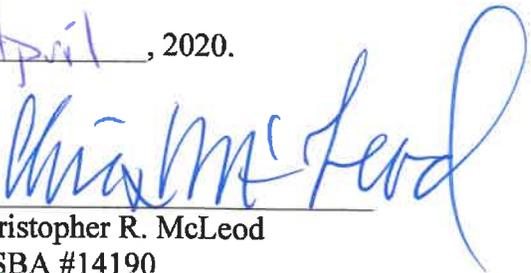
Contrary to the Appellant State's assertions and argument, RCW 4.24.595 does not provide the State absolute immunity in any context relevant to the misconduct of DSHS in this case. It does not confer immunity in any way that vitiates, much less eliminates, *Tyner* and its progeny. The fact that DSHS did not even conduct an investigation post initial Shelter Care Order, violated its own internal policies and procedures, misrepresented the evidence available to it in opposing the return of baby A.K., implied it had legally sufficient, evidentiary support to prevail in its dependency petition and misrepresented that it was continuing to investigate matters which would support its position, all are simply untrue.

RCW 4.24.595 has no application and offers no protection whatsoever in the context of the State's issuance of its Founded letter herein, its failure to notify Michelle Desmet, or her attorneys, of its issuance of a Founded letter, or its refusal to retract the Founded letter. The resulting damage and harm caused to plaintiff from that conduct and the False Light it placed Michelle Desmet in, is actionable and not subject to any claim of statutory immunity.

The Appellant State's appeal should be denied, the Trial Court affirmed, and this matter remanded for trial.

DATED this 3rd day of April, 2020.


Daniel R. Kyler
WSBA #12905
Attorney for Respondents


Christopher R. McLeod
WSBA #14190
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

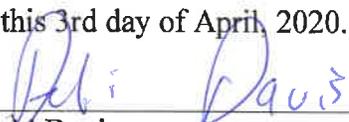
I am over the age of 18, competent to testify and not a party to this action. On the date set forth below, I served the documents to which this certificate is attached in the manner noted on the following persons:

Counsel for Defendants/Appellants

Matthew N. Thomas, WSBA #49382
Assistant Attorney General
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
matthewT1@atg.wa.gov
sharonj@atg.wa.gov
Tina.krueger@atg.wa.gov

Via U.S. Mail and E-Mail.

Signed at Tacoma, Washington this 3rd day of April, 2020.



Debi Davis
Paralegal to Daniel R. Kyler

APPENDIX 1

HOUSE BILL REPORT

ESSB 6555

As Passed House - Amended:

March 6, 2012

Title: An act relating to child protective services.

Brief Description: Providing for family assessments in cases involving child abuse or neglect.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Shin and Roach).

Brief History:

Committee Activity:

Early Learning & Human Services: 2/20/12, 2/21/12 [DPA];

Ways & Means: 2/24/12, 2/25/12 [DPA(ELHS)].

Floor Activity:

Passed House - Amended: 3/6/12, 80-17.

**Brief Summary of Engrossed Substitute Bill
(As Amended by House)**

- Requires the Department of Social and Health Services (DSHS) to implement a Family Assessment Response (FAR) within Child Protective Services (CPS) by December 1, 2013.
- Permits the DSHS to implement the FAR on a phased-in basis, by geographical area.
- Requires the DSHS to submit an implementation plan to the Legislature by December 31, 2012.
- Directs the Washington State Institute for Public Policy to evaluate the FAR and directs the DSHS to conduct client satisfaction surveys.
- Modifies the process to appeal CPS investigative findings and specifies items to be included in written notification to alleged perpetrators.
- Amends the purpose section of the statute governing child abuse and neglect to provide that the child's health and safety interests should prevail over conflicting legal interests of a parent, custodian, or guardian.
- Addresses the liability of governmental entities for acts or omissions in conducting emergent placement investigations of child abuse or neglect.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Provides that the state is not liable for actions taken to comply with court orders and that child abuse investigators are entitled to the same witness immunity as other witnesses.

HOUSE COMMITTEE ON EARLY LEARNING & HUMAN SERVICES

Majority Report: Do pass as amended. Signed by 9 members: Representatives Kagi, Chair; Roberts, Vice Chair; Walsh, Ranking Minority Member; Hope, Assistant Ranking Minority Member; Dickerson, Goodman, Johnson, Orwall and Overstreet.

Staff: Megan Palchak (786-7120).

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended by Committee on Early Learning & Human Services. Signed by 26 members: Representatives Hunter, Chair; Darneille, Vice Chair; Hasegawa, Vice Chair; Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Carlyle, Chandler, Cody, Dickerson, Haigh, Haler, Hinkle, Hudgins, Hunt, Kagi, Kenney, Ormsby, Pettigrew, Ross, Schmick, Seaquist, Springer, Sullivan and Wilcox.

Minority Report: Do not pass. Signed by 1 member: Representative Parker.

Staff: Melissa Palmer (786-7388).

Background:

Child Abuse Prevention and Treatment Act Reauthorization Act of 2010.

The Child Abuse Prevention and Treatment Act (CAPTA) is the sole federal child welfare program focusing only on preventing and responding to allegations of child abuse and neglect; the CAPTA was reauthorized in 2010 through 2015 (Public Law 111-320). Public Law 111-320 encourages states to review their laws, policies, practices, and procedures regarding neglect to ensure children are protected. It also encourages Child Protective Services (CPS) agencies to utilize "differential response" which is described as "a state or community-determined formal response that assesses the needs of the child or family without requiring a determination of risk or occurrence of maltreatment. Such response occurs in addition to the traditional investigatory response." There are no federal regulations regarding the practice of differential response.

Differential Response.

According to the United States Department of Health and Human Services, definitions and approaches to differential response vary. Differential response systems may be referred to as "alternative response," "multiple track," or another term. Minnesota has a mature differential response system which is referred to as "family assessment response." (More than 15 states have implemented differential response within their respective CPS agencies.) The National

Quality Improvement Center on Differential Response in Child Protective Services describes the core elements of differential response as follows:

- two or more discrete responses to screened in and accepted reports of maltreatment;
- assignment to response pathway is determined by an array of factors;
- original response assignments can be changed;
- families assigned to non-investigation pathways are able to accept or refuse to participate in the non-investigation pathway or choose the traditional investigation pathway;
- after assessment in the non-investigation pathway, services are voluntary as long as child safety is not compromised;
- discrete responses are established by codification in statute, policy, or protocols;
- no substantiation of alleged maltreatment (services are offered without a formal determination that maltreatment has occurred); and
- use of the central registry depends on the type of response.

Child Protective Services in Washington.

Under the state's child abuse statutes, the Washington Department of Social and Health Services (DSHS) is responsible for responding to and investigating allegations of child abuse or neglect. The DSHS, Children's Administration (CA) estimates that in 2011, its CPS division received 77,139 reports of child maltreatment (most allege neglect), investigated 27,199 of those reports, and determined that 4,878 reports contained founded allegations. Approximately 66 percent of founded reports were regarding neglect, 25 percent were regarding physical abuse, and 9 percent were regarding sexual abuse. In 2011 approximately 82 percent of CPS investigations resulted in no finding of child abuse or neglect. In 2010 approximately 70 percent of neglect reports the DSHS responded to were regarding families who had previously been reported to the DSHS.

Response to Reports of Child Abuse or Neglect.

Under DSHS administrative rules, when responding to reports of alleged child abuse or neglect, CPS:

- must assess all reports that meet the definition of child abuse or neglect using a risk assessment process to determine level of risk and response time;
- must provide an in-person response to alleged victims and must attempt an in-person response to the alleged perpetrator of child abuse and neglect in referrals assessed at moderate to high risk;
- may refer reports assessed at low to moderately low risk to an alternative response system;
- may interview a child, outside the presence of the parent, without prior parental notification or consent;
- must make reasonable efforts to have a third party present at the interview so long as the third party does not jeopardize the investigation, unless the child objects;
- may photograph the alleged child victim to document the physical condition of the child; and
- attempt to complete investigations within 45 days. In no case will the investigation extend beyond 90 days unless the investigation is being conducted under local protocol, established pursuant to chapter, and a law enforcement agency or prosecuting attorney has determined that a longer investigation period is necessary.

Duty to Investigate.

The DSHS or law enforcement must investigate reports received concerning the possible occurrence of abuse or neglect. The DSHS is specifically required to investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation, or that present an imminent risk of serious harm, and on the basis of the findings of such investigation, offer child welfare services in relation to the problem to such parents, legal custodian, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court, or another community agency. An investigation is not required of nonaccidental injuries that are clearly not the result of a lack of care or supervision by the child's parents, legal custodian, or persons serving in loco parentis. If the investigation reveals that a crime against a child may have been committed, the DSHS must notify the appropriate law enforcement agency. Investigations may be conducted regardless of the location of the alleged abuse or neglect.

Protective Custody.

In some cases of alleged abuse or neglect, a child may be immediately removed from his or her parent or guardian and taken into protective custody. A court can order law enforcement or CPS to take a child into custody where the child's health, safety, and welfare will be seriously endangered if the child is not taken into custody. A child may be taken into custody without a court order where law enforcement has probable cause to believe that the child is abused or neglected and the child would be injured or could not be taken into custody if it were necessary to first obtain a court order. A child can also be detained and taken into custody without a court order where a hospital administrator has reasonable cause to believe that allowing the child to return home would present an imminent danger to the child's safety. A shelter care hearing must be held within 72 hours of a child being taken into custody and placed under state care, excluding Saturdays, Sundays, and holidays. At the shelter care hearing, the court will determine whether the child can safely be returned home while the dependency is being adjudicated, or whether there is further need for an out-of-home placement of the child.

Tyner v. DSHS.

Washington courts have interpreted the child abuse investigation statute as creating an implied right of action for negligent investigation. In the case *Tyner v. DSHS*, the Washington Supreme Court found that the child abuse investigation statute creates a duty not only to the child who is potentially abused or neglected, but also to the parents of the child, even if a parent is suspected of the abuse. The 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. There are three types of negligent investigation claims recognized by the courts: (1) wrongful removal of a child from a non-abusive home; (2) placement of a child in an abusive home; and (3) failure to remove a child from an abusive home.

Process to Appeal an Investigative Finding.

A person named as an alleged perpetrator in a founded report of child abuse or neglect has the right to seek review and amendment of the investigative finding. Within 20 days of receiving written notice from the DSHS that the person has been named as a perpetrator in a founded report of abuse or neglect, the person must provide written notice to the DSHS that he or she wishes to contest the finding. If the request is not made within the time period, the person may not seek further review of the finding. However, if the alleged perpetrator seeks

DSHS review within specified timeframes, receives notification of the results of the DSHS's review, then the alleged perpetrator has 30 days to request further review via an adjudicative proceeding. If the alleged perpetrator fails to request further review within the 30-day period, then the alleged perpetrator may not challenge the finding further.

Notice of Investigative Finding.

Under DSHS administrative rules, notification regarding an investigative finding must inform the alleged perpetrator about the legal basis for the findings and sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded reports. The notice must also contain the following:

- The alleged perpetrator may submit to the DSHS a written response regarding the finding. If a response is submitted, it must be filed in the DSHS's records.
- Information in the DSHS's records may be considered in later investigations or proceedings relating to child protection or child custody.
- Founded CPS findings may be considered in determining:
 - if an alleged perpetrator is qualified to be licensed to care for children or vulnerable adults;
 - if an alleged perpetrator is qualified to be employed by a child care agency or facility; and
 - if an alleged perpetrator may be authorized or funded by the DSHS to provide care or services to children or vulnerable adults.
- The alleged perpetrator's right to challenge a founded CPS finding.

Confidentiality.

An unfounded, screened-out, or inconclusive report of child abuse or neglect may not be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW.

Alternative Response System in Washington.

In 1997 the Legislature authorized an alternative response system (ARS). Chapter 386, Laws of 1997 described an ARS as "voluntary family-centered services provided by a contracted entity with the intention to increase the strength and cohesiveness of families that the DSHS determined to present a low risk of child abuse or neglect." Prior to expiration, Chapter 386, Laws of 1997 provided that:

- The DSHS was required to: (1) contract for the delivery of services for at least two, but not more than three, models of alternative response; (2) provide for the delivery of services in the least intrusive manner reasonably likely to achieve improved family cohesiveness, prevention of referrals of the family for alleged abuse or neglect, and improvement in the health and safety of children; (3) identify and prioritize risk and protective factors associated with the type of abuse or neglect referrals that are appropriate for services delivered by the ARS; and (4) identify appropriate data to determine and evaluate outcomes of the services delivered by ARS providers. Contracts were to include provisions and funding for data collection.
- Contracted providers were required to: (1) use risk and protective factors to determine which services to deliver; (2) recognize the due process rights of families that receive ARS services; and (3) recognize that services were not intended to be investigative.

- The court was authorized to order the delivery of services through any appropriate public or private provider.

According to the DSHS, "historically, the contracted alternate intervention program in Washington... [had] not achieved ideal outcomes and... had some program design weaknesses. There... [had] been a lack of adequate program and service definition, and engagement rates of families in services... [had] been an issue. The percentage of families engaged in services by contracted providers... [had been] low." In 2006 the DSHS initiated a redesign of the ARS, and renamed it "Early Family Support Services." The stated goals of the redesign included: implementation of a standardized assessment tool, development of service delivery standards, and integration of promising or evidence-based programs.

Enhanced Community-Based Services.

In 1987 the Legislature enacted Engrossed Second Substitute Senate Bill 5659 which required the DSHS, under the state's child abuse statutes, to offer enhanced community-based services to persons who are determined not to require further state intervention, within funds appropriated.

Summary of Bill:

Family Assessment Response.

Terms.

Family Assessment Response (FAR) means a way of responding to certain reports of child abuse or neglect using a differential response approach to CPS. The FAR must focus on safety of the child, the integrity and preservation of the family, must assess the status of the child and family in terms of risk of abuse and neglect including a parent's or guardian's capacity and willingness to protect the child, and, if necessary, plan and arrange the provision of services to reduce the risk and otherwise support the family. No one is named as a perpetrator and no investigative finding is entered into the record as a result of the FAR.

A family assessment means a comprehensive assessment of child safety, risk of subsequent child abuse or neglect, and family strengths and needs that is applied to a child abuse or neglect report. The assessment does not include a determination as to whether child abuse or neglect occurred but does determine the need for services to address the safety of the child and the risk of subsequent maltreatment.

Implementation.

The DSHS must implement a FAR within CPS by December 1, 2013. The DSHS may implement the FAR on a phased-in basis, by geographical area. The DSHS must submit the implementation plan report to the Legislature by December 31, 2012.

The implementation plan must be developed in consultation with stakeholders, including tribes, and must include:

- a description of the FAR practice model;
- identification of possible additional non-investigative responses or pathways;
- an intake screening tool;

- a family assessment tool specifically to be used in the FAR, that at minimum, must evaluate the safety of the child and determine services needed by the family to improve or restore family well-being;
- staff training requirements;
- strategies to reduce disproportionality;
- strategies to assist and connect families with the appropriate private or public housing support agencies, for those parents whose inability to obtain or maintain safe housing creates a risk of harm to the child, risk of out-of-home placement of the child, or a barrier to reunification;
- identification of methods to involve specified local community partners in the development of community-based resources to meet family needs;
- mechanisms to involve the child's Washington tribe, if any, in any FAR, when the child subject to the FAR is an Indian child, as defined in 13.38.040;
- procedures to assure continuous quality assurance;
- identification of current departmental expenditures for FAR related services;
- identification of philanthropic funding to supplement public resources;
- a potential phase-in schedule, if proposed; and
- recommendations for legislative action required to implement the plan.

The items above must be developed prior to the implementation of the FAR.

Response to Reports of Child Abuse or Neglect.

When the DSHS receives a report of child abuse or neglect, the DSHS must use one of two responses for reports that are screened in and accepted for response: an investigation or a family assessment. In making this response, the DSHS must:

- use a method to assign cases to investigation or family assessment that are based on an array of factors that may include the presence of: imminent danger, level of risk, number of previous child abuse or neglect reports, or other presenting case characteristics such as the type of alleged maltreatment and the age of the alleged victim (age of the alleged victim may not be used as the sole criterion for determining case assignment);
- allow for a change in response assignment based on new information that alters risk or safety level;
- allow families assigned to the FAR to choose to receive an investigation rather than a family assessment;
- provide a full investigation if a family refuses the initial family assessment;
- provide voluntary services to families based upon the results of the initial family assessment; and
- conduct an investigation, and not a family assessment, in response to allegations that:
 - pose a risk of imminent harm to the child;
 - pose a serious threat of substantial harm to the child;
 - constitute conduct that is a criminal offense and the child is the victim; or
 - identify an abandoned child or an adjudicated dependent child.

Law enforcement and the DSHS are not required to investigate reports of possible abuse or neglect that have been assigned to the FAR.

Operating the FAR.

For reports that are assigned to the FAR, the DSHS must:

- implement the FAR in a consistent, cooperative manner;
- provide the family with a written explanation of the procedure for assessment of the child and family and its purpose;
- collaborate with the family to identify strengths, resources, service needs, and to develop a service plan with the goal of reducing risk of harm to the child and improving or restoring family well-being;
- have the parent or guardian sign an agreement to participate in services before services are initiated that informs the parents of their rights under the FAR, all of their options and the options the DSHS has if parents do not sign the form;
- complete the family assessment within 45 days of receiving the report. Upon parental agreement, this time period can be extended to 90 days;
- offer services to the family in a manner that makes it clear acceptance of the services is voluntary;
- upon completion of the family assessment, if the DSHS determines that services are not recommended, then the case must be closed; and
- within 10 days of the conclusion of the family assessment, meet to discuss the recommendations for services to address child safety concerns or significant risk of subsequent child maltreatment. If the parent or guardian disagrees with the DSHS's recommendation regarding the provision of services, the DSHS must convene a family team decision-making meeting to discuss the recommendations and objections. The caseworker's supervisor and area administrator must attend the meeting.

Under this act, the DSHS is no longer required, within funds appropriated, to offer enhanced community-based services to persons who are determined not to require further state intervention.

Confidentiality.

Information related to FAR cases may not be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW without consent of the individual identified in the report, unless that individual: (a) seeks to become a licensed foster or adoptive parent, or (b) the individual is the parent or legal custodian of a child being served by one of the agencies referenced above.

Evaluation.

The WSIPP must conduct an evaluation of the implementation of the FAR. At a minimum, the evaluation must address child safety measures, out-of-home placement rates, re-referral rates, caseload, and demographics. The WSIPP's first report is due December 1, 2014, and its final report is due December 1, 2016.

The DSHS must conduct two client satisfaction surveys of families that have been placed in the FAR. The first survey results are to be reported by December 1, 2014, and the second survey results by December 1, 2016.

Liability.

Family Assessment Response.

The DSHS are not civilly liable in using the FAR to respond to an allegation of child abuse or neglect, unless the response choice was made with reckless disregard.

Pre-Shelter Care.

Governmental entities, and their officers, agents, employees, and volunteers, are not liable for acts or omissions in emergent placement investigations of child abuse or neglect unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing. A new section is added to the child abuse and neglect statute stating that the liability of governmental entities to parents, custodians, or guardians accused of abuse or neglect is limited as provided in the bill, consistent with the paramount concern of the DSHS to protect the child's health and safety interest of basic nurture, health, and safety, and the requirement that the child's interests prevail over conflicting legal interests of a parent, custodian, or guardian. The DSHS and its employees must 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. In providing reports and recommendations to the court, employees of the DSHS are entitled to the same witness immunity as would be provided to any other witness. The purpose section of the child abuse statute is amended to state that a child's health and safety interests should prevail over conflicting legal rights of a parent and that the safety of the child is the DSHS's paramount concern when determining whether a parent and child should be separated during or immediately following investigation of alleged abuse or neglect.

Appeal of an Investigative Finding.

Timeframes.

Within 30 calendar days after the DSHS has notified an alleged perpetrator that he or she has been named in a founded report of child abuse or neglect, he or she may request that the DSHS review the finding. If the request is not made within the specified time period, the person has no right to further review of the finding, unless the person can show that the DSHS did not comply with the notice requirements of RCW 26.44.100. The DSHS must complete its review within 30 days.

Notice.

The DSHS's written notice to an alleged perpetrator named in a founded report must contain the following:

- information about the DSHS's investigative finding as it relates to the alleged perpetrator;
- sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded allegation;
- that the alleged perpetrator has the right to submit a written response regarding the finding which the DSHS must file in the records;
- that information in the DSHS's records may be considered in a later investigation or proceeding related to a different allegation of child abuse or neglect;
- that founded allegations of abuse or neglect may be used in determining:
 - whether the person is qualified to be licensed or approved to care for children or vulnerable adults; or
 - whether the person is qualified to be employed by the DSHS in a position having unsupervised access to children or vulnerable adults; and
- that the alleged perpetrator has the right to challenge the founded allegation of abuse or neglect.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for sections 1 and 3 through 11, relating to implementing the FAR, which take effect December 1, 2013.

Staff Summary of Public Testimony (Early Learning & Human Services):

(In support) Child Protective Services investigations can be intrusive and prevent parents and families from moving forward in their lives. This type of reform would help families engage in needed services sooner. Case workers find this approach attractive, although change can be difficult. In other states, this type of reform has been proven to be effective for families and communities, and it has also resulted in cost savings. It has been particularly effective in terms of addressing the overlap between domestic violence and child maltreatment. Implementation should be swift, but should allow appropriate start-up.

(In support with concerns) There are many potential benefits to implementing a FAR within CPS. This type of reform allows more flexibility and maintains child safety. The DSHS has two concerns about this bill. First, the DSHS is unable to fund the provisions in the bill. Costs associated include computer/data systems, training, and evaluation. Second, this bill includes very broad language regarding safe and stable housing; the language should be revised so it is clear the DSHS will assist and connect families to housing resources. Service coordination needs to be added back into the definition of case management to sync with the performance-based contracting bill.

(Opposed) None.

Staff Summary of Public Testimony (Ways & Means):

(In support) The child welfare community is absolutely thrilled with the Legislature's support of this policy. House Bill 2289 passed out of the House unanimously and the Senate bill passed out of the Senate unanimously. During the process, there have been improvements made to the legislation. The proposed operating budget that this committee is considering includes funding to support implementation of Family Assessment Response, which is very pleasing.

(Opposed) None.

Persons Testifying (Early Learning & Human Services): (In support) Frank O'Dell, Washington Federation of State Employees; Gina Enochs, Washington Parent Advocacy Committee; Kelly St. Clair, Snohomish County Parent Advocacy Committee; Pamela Crone, Washington State Coalition Against Domestic Violence; and Laurie Lippold, Children's Home Society of Washington and Mockingbird Society.

(In support with concerns) Denise Revels Robinson, Department of Social and Health Services; and Alia Griffing, Washington Federation of State Employees.

Persons Testifying (Ways & Means): Laurie Lippold, Children's Home Society and the Mockingbird Society.

Persons Signed In To Testify But Not Testifying (Early Learning & Human Services): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): None.

APPENDIX 2

SENATE BILL REPORT

ESSB 6555

As Amended by House, March 6, 2012

Title: An act relating to child protective services.

Brief Description: Providing for family assessments in cases involving child abuse or neglect.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Shin and Roach).

Brief History:

Committee Activity: Human Services & Corrections: 1/31/12, 2/02/12 [DPS-WM].

Ways & Means: 2/06/12, 2/07/12 [DPS(HSC)].

Passed Senate: 2/11/12, 46-0.

Passed House: 3/01/12, 97-0; 3/06/12, 80-17.

SENATE COMMITTEE ON HUMAN SERVICES & CORRECTIONS

Majority Report: That Substitute Senate Bill No. 6555 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Hargrove, Chair; Regala, Vice Chair; Stevens, Ranking Minority Member; Carrell, Harper, McAuliffe and Padden.

Staff: Jennifer Strus (786-7316)

SENATE COMMITTEE ON WAYS & MEANS

Majority Report: That Substitute Senate Bill No. 6555 as recommended by Committee on Human Services & Corrections be substituted therefor, and the substitute bill do pass.

Signed by Senators Murray, Chair; Kilmer, Vice Chair, Capital Budget Chair; Zarelli, Ranking Minority Member; Parlette, Ranking Minority Member Capital; Baumgartner, Brown, Conway, Fraser, Harper, Hatfield, Hewitt, Holmquist Newbry, Honeyford, Kastama, Keiser, Kohl-Welles, Padden, Pridemore, Regala, Schoesler and Tom.

Staff: Jenny Greenlee (786-7711)

Background: Child Protective Services (CPS) in Washington. CPS are services provided by the Department of Social and Health Services (DSHS) designed to protect children from child abuse and neglect, safeguard such children from future abuse and neglect, and conduct

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

investigations of child abuse and neglect reports. Investigations may be conducted regardless of the location of the alleged abuse or neglect. CPS includes a referral to services to ameliorate conditions that endanger the welfare of children; the coordination of necessary programs and services relevant to the prevention, intervention, and treatment of child abuse and neglect; and services to children to ensure that each child has a permanent home.

Duty to Investigate. A number of professionals who regularly work with children are mandated reporters in Washington State. If they have reasonable cause to suspect that a child has been abused or neglected they must report that fact to DSHS or law enforcement. DSHS must investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation or that present an imminent risk of serious harm. On the basis of the findings of such investigation, DSHS or law enforcement must offer child welfare services in relation to the problem to such parents, legal custodian or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court, or another community agency. An investigation is not required of non-accidental injuries that are clearly not the result of a lack of care or supervision by the child's parents, legal custodian, or persons serving in loco parentis. If the investigation reveals that a crime against a child may have been committed, the DSHS must notify the appropriate law enforcement agency.

Appeal of a Finding of Child Abuse or Neglect. A person named as an alleged perpetrator in a founded allegation of child abuse or neglect has the right to seek review and amendment of the finding. Within 20 days of receiving notice that the person has been named as a perpetrator in an allegation of abuse or neglect, the person must provide written notice to DSHS that he or she wishes to contest the finding. If the request is not made within the time period, the person has no right to agency review or further administrative or court review of the finding. After receiving notification of the results of DSHS's review, the person has 30 days within which to ask for an adjudicative hearing with an administrative law judge. If the request is not made within the 30-day period, the person has no right to further review

Alternative Response System in Washington. In 1997 the Legislature authorized an alternative response system (ARS). ARS was voluntary family-centered service provided by a contracted entity with the intention to increase the strength and cohesiveness of families that DSHS has determined to present a low risk of child abuse or neglect. The families that were referred to ARS were families that would not have been screened in for investigation. In 2006 DSHS redesigned ARS program because a study of ARS determined that it was not producing good outcomes. The new program was called Early Family Support Services (EFSS). The stated goals of this program included the implementation of a standardized assessment tool, development of service delivery standards, and integration of promising or evidence-based programs. Again, the families referred to this program were those not likely to be screened in for an investigation.

Consideration of Differential Response in Washington. In 2008 DSHS issued a legislative report regarding its consideration of a differential response system. The report described pros and cons associated with implementing differential response, which are summarized below.

Pros:

1. Social workers could concentrate on family assessment and case planning rather than the outcome of an investigation.

2. Investigative findings may become more consistent, due to a narrower focus.
3. Families that are chronically reported to CPS may receive more therapeutic interventions that are motivational in nature.

Cons:

1. In order for change to succeed the total agenda must be staged and doable, organizational capacity must be addressed given the number of change initiatives underway.
2. Funding, service levels, and ability to meet the basic needs of families would limit the outcomes of a differential response system.
3. The CA would likely not have the ability to respond to families in an assessment track with immediate services to meet their basic living needs and if Washington prioritized services for the most at-risk children, then lower risk families in the assessment track would receive fewer services paid by the DSHS/CA.
4. All social work staff must be trained in engaging families and assessing safety and risk factors.
5. Implementation of non-contracted differential response system would require further specialization of staff and additional categorization of families.
6. Agencies serving vulnerable adults and children would not learn about some potential CPS concerns regarding persons applying to be employed or licensed since CPS investigative findings on some cases involving maltreatment would no longer occur for families diverted to the assessment track.
7. Research did not clearly indicate that referring moderate risk families to differential response will improve outcomes (some states limit an alternate response to low risk cases).

Differential Response In Other States. A number of other states have implemented a differential response system. Minnesota is the state with the longest running differential response system. Approximately 18 other states have similar systems. In the differential response system, cases that would normally be screened in and investigated are placed in the differential response system where the families strengths and weaknesses and child safety are assessed and no investigation is conducted nor are findings of child abuse made. If the family does not wish to participate, unless the case presents no child safety issues, the case is referred for investigation.

Summary of Engrossed Substitute Bill: Family Assessment Track (FAT). When DSHS receives a report of child abuse or neglect, DSHS must use one of two responses for reports that are screened in and accepted for response: an investigation or a family assessment. In making this response, DSHS must:

1. use a method by which to assign cases to investigation or family assessment that are based on an array of factors that may include the presence of imminent danger, level of risk, number of previous child abuse or neglect reports, or other presenting case characteristics.
2. allow for a change in response assignment based on new information that alters risk or safety level;
3. allow families assigned to FAT to choose to receive an investigation rather than a family assessment;
4. provide a full investigation if a family refuses the initial family assessment;

5. provide voluntary services to families based upon the results of the initial family assessment; and
6. conduct an investigation on response to allegations that:
 - a. pose a risk of imminent harm to the child;
 - b. pose a serious threat of substantial harm to the child;
 - c. constitute conduct that is a criminal offense and the child is the victim; or
 - d. the child is an abandoned or adjudicated dependent child.

DSHS is not liable in using FAT to respond to an allegation of child abuse or neglect unless the response choice was made with reckless disregard.

A family assessment is defined as a comprehensive assessment of child safety, risk of subsequent child abuse or neglect, and family strengths and needs that is applied to a child abuse or neglect report. The assessment does not include a determination as to whether child abuse or neglect occurred but does determine the need for services to address the safety of the child and the risk of subsequent maltreatment. FAT is defined as a way of responding to certain reports of child abuse or neglect using a differential response approach to child protective services. FAT is to focus on safety of the child, the integrity and preservation of the family, and is to assess the status of the child and family in terms of risk of abuse and neglect including a parent's or guardian's capacity and willingness to protect the child. No one is named as a perpetrator and no investigative finding is entered in DSHS's database as a result of the FAT.

DSHS must implement FAT by December 1, 2013. DSHS must develop an implementation plan in consultation with stakeholders including the tribes. DSHS must submit an implementation plan report to the Legislature by December 31, 2012.

For reports that are placed in the FAT, DSHS must :

1. provide the family with a written explanation of the procedure for assessment of the child and family and its purpose;
2. complete the family assessment within 45 days of receiving the report. Upon parental agreement, this time period can be extended to 60 days;
3. offer services to the family in a manner that makes it clear acceptance of the services is voluntary;
4. implement the family assessment track in a non-arbitrary, non-coercive manner;
5. have the parent or guardian sign an agreement to participate in services form before services are initiated that informs the parents of their rights under the family assessment track, all of their options and the options DSHS has if parents do not sign the form.

Upon completion of the family assessment, if DSHS determines that no services be offered, the case is closed. Within ten days of the conclusion of the family assessment, DSHS must meet with the child's parent or guardian to discuss the recommendations for services to address child safety concerns or significant risk of subsequent child maltreatment. If the parent or guardian disagrees with DSHS's recommendation regarding the provision of services, DSHS must convene a family team decision-making meeting (FTDM) to discuss the recommendations and objections. The caseworker's supervisor and the area administrator must attend the FTDM.

DSHS must develop a family assessment tool which at a minimum must include the following:

1. An interview with the child's parent, guardian, or other adult residing in the child's home who serves in a parental role. The interview is to focus on ensuring the immediate safety of the child and mitigating future risk of harm to the child in the home environment.
2. An interview with other persons suggested by the family or whom DSHS believes has valuable information.
3. An evaluation of the safety of the child and any other children living in the same home. The evaluation may include an interview with or observation of the child.
4. In collaboration with the family, identification of family strengths, resources, and service needs and the development of a plan of services that reduces risk of harm and improves or restores the family well-being.

The Washington State Institute for Public Policy (WSIPP) must conduct an evaluation of the implementation of the FAT. WSIPP is to define the data to be gathered and maintained. At a minimum, the evaluation is to address child safety measures, out of home placement rates, re-referral rates and caseload sizes and demographics. WSIPP's first report is due December 1, 2014, and its final report is due December 1, 2016.

DSHS must conduct two client satisfaction surveys of families that have been placed in the FAT. The first survey results are to be reported by December 1, 2014, and the second survey results by December 1, 2016.

Appeal of a Finding of Child Abuse or Neglect. A person named as an alleged perpetrator in a founded allegation of child abuse or neglect has the right to seek review and amendment of the finding. Within 30 days of receiving notice from DSHS that the person has been named as a perpetrator in an allegation of abuse or neglect, the person must provide written notice to DSHS that he or she wishes to contest the finding. The written notice provided by DSHS to the perpetrator must contain the following:

1. information about DSHS's investigative finding as it relates to the alleged perpetrator;
2. sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded allegation;
3. the alleged perpetrator has the right to submit a written response regarding the finding which DSHS must file in the records;
4. that information in DSHS's records may be considered in a later investigation or proceeding related to a different allegation of child abuse or neglect;
5. that founded allegations of abuse or neglect may be used in determining;
 - a. whether the person is qualified to be licensed or approved to care for children or vulnerable adults;
 - b. whether the person is qualified to be employed by DSHS in a position having unsupervised access to children or vulnerable adults.
6. that the alleged perpetrator has the right to challenge the founded allegation of abuse or neglect.

If the request is not made within the time period, the person has no right to agency review or further administrative or court review of the finding, unless the person can show that DSHS

did not comply with the notice requirements of RCW 26.44.100. After receiving notification of the results of DSHS's review, the person has 30 days within which to ask for an adjudicative hearing with an administrative law judge. If the request is not made within the 30-day period, the person has no right to further review.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Original Bill (Human Services & Corrections):

PRO: FAT is a wonderful alternative to the usual CPS investigation process that many parents have gone through. It's a way to provide resources to the home and families and guide them to be successful in raising their children. Work directly with families going through the dependency process and meet many women who could have benefited from a family assessment rather than a traditional CPS investigation. Outcomes associated with this approach in other states include reducing re-referrals into CPS, increasing worker satisfaction, increasing family satisfaction, and saving the state money. A domestic violence sensitive process can really benefit children and protect their safety while keeping them with a protective parent. Domestic violence sensitive differential response programs, like the one in Rochester, Minnesota have shown that kids are safe while staying with a parent - prevent out of home placement. Will see fewer court cases if this bill is passed because more cases will be resolved without having to go to court. Would allow DSHS more flexibility in responding to reports of child abuse and neglect while still maintaining accountability to intervene sooner. Concerned about the need for additional funding for DSHS to implement this system.

Persons Testifying (Human Services & Corrections): PRO: Shrounda Selivanoff, WA State Parent Advocacy Committee; Joanne Moore, OPD; Denise Revels-Robinson, DSHS; Margaret Hobart, WA State Coalition Against Domestic Violence; Laurie Lippold, Children's Home Society

Staff Summary of Public Testimony on Substitute (Ways & Means): PRO: The investigation process with CPS leaves parents feeling disengaged and angry. Investigations are very expensive and do not help families. FAT would allow parents to form a partnership with CPS, which will lead to better outcomes for families and children. This new approach would allow families to receive services up front and encourage parents to engage in those services. There is a lot of repetitive use of the child welfare system. This bill would shift spending from courts and investigations to up front services. Other states have found a reduction in re-referrals and an increase in family engagement, social worker satisfaction, and use of services after implementing similar systems.

Persons Testifying (Ways & Means): PRO: Kelly St. Clair, Snohomish County Parent Advocacy; Kimberly Mays, King County Parent Advocacy Center; Grace Huang, WA State

Coalition Against Domestic Violence; Laurie Lippold, Children's Home Society, The Mockingbird Society.

House Amendment(s):

- Allows the DSHS to implement the FAR on a phased-in basis, by geographical area;
- Modifies components in the implementation plan;
- Clarifies that DSHS must develop strategies to assist and connect families with the appropriate private or public housing supports for those parents whose inability to obtain or maintain safe housing creates a risk of harm to the child, risk of out-of-home placement of the child, or a barrier to reunification (safe and stable housing language is removed);
- Includes a potential phase-in schedule if proposed;
- Adds recommendations for legislative action required to implement the plan;
- Permits identification of philanthropic funding available to supplement public resources;
- Requires DSHS to develop mechanisms to involve the child's Washington State tribe, if any, in any FAR, when the child subject to the FAR is an Indian child;
- Clarifies that FAR must be completed within 45 days unless a parent agrees to an extension. Upon parental agreement, the FAR may be extended up to 90 days;
- Adds provisions of ESHB 2510, which addresses the liability of governmental entities for acts or omissions in conducting emergent placement investigations of child abuse or neglect and provides that the state is not liable for actions taken to comply with court orders and that child abuse investigators are entitled to the same witness immunity as other witnesses.

APPENDIX 3

FINAL BILL REPORT

ESSB 6555

C 259 L 12
Synopsis as Enacted

Brief Description: Implementing provisions relating to child protection.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Shin and Roach).

Senate Committee on Human Services & Corrections
Senate Committee on Ways & Means
House Committee on Early Learning & Human Services
House Committee on Ways & Means

Background: Child Protective Services (CPS) in Washington. CPS are services provided by the Department of Social and Health Services (DSHS) designed to protect children from child abuse and neglect, safeguard such children from future abuse and neglect, and to investigate reports of child abuse and neglect. Investigations may be conducted regardless of the location of the alleged abuse or neglect. CPS includes a referral to services to ameliorate conditions that endanger the welfare of children; the coordination of necessary programs and services relevant to the prevention, intervention, and treatment of child abuse and neglect; and services to children to ensure that each child has a permanent home.

Duty to Investigate. A number of professionals who regularly work with children are mandated reporters in Washington State. If the mandated reporter has reasonable cause to suspect that a child has been abused or neglected the fact must be reported to DSHS or law enforcement. DSHS must investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation or that presents an imminent risk of serious harm. On the basis of the findings of such investigation, DSHS or law enforcement must offer child welfare services to such parents, legal custodians, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court or other community agency. An investigation is not required of non-accidental injuries that clearly do not result from a lack of care or supervision by the child's parents, legal custodians, or persons serving in loco parentis. If the investigation reveals that a crime against a child may have been committed, DSHS must notify an appropriate law enforcement agency.

Appeal of a Finding of Child Abuse or Neglect. A person named as an alleged perpetrator in a founded allegation of child abuse or neglect has the right to seek review and amendment of the finding. Within 20 days of receiving such notice, the person must notify DSHS in writing

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

that he or she wishes to contest the finding. If the request is not made within the 20-day time period, the person has no right to agency review or further administrative or court review of the finding. After receipt of notification of the results of DSHS's review, the person has 30 days within which to ask for an adjudicative hearing with an administrative law judge. If the request is not made within the 30-day period, the person has no right to further review

Alternative Response System in Washington. In 1997 the Legislature authorized an alternative response system (ARS). ARS was a voluntary family-centered service provided by a contracted entity with the intention to increase the strength and cohesiveness of families that DSHS has determined to present a low risk of child abuse or neglect. The families referred to ARS were families that would not have been screened in for investigation. In 2006 DSHS redesigned ARS because a study of ARS determined that it was not producing good outcomes. The new program was called Early Family Support Services (EFSS). The stated goals of this program included the implementation of a standardized assessment tool, development of service delivery standards, and integration of promising or evidence-based programs. Again, families referred to this program were those not likely to be screened in for an investigation.

Consideration of Differential Response in Washington. In 2008 DSHS issued a legislative report regarding its consideration of a differential response system. The report described pros and cons associated with implementing differential response, which are summarized below.

Pros:

1. Social workers could concentrate on family assessment and case planning rather than the outcome of an investigation.
2. Investigative findings may become more consistent, due to a narrower focus.
3. Families that are chronically reported to CPS may receive more therapeutic interventions that are motivational in nature.

Cons:

1. In order for change to succeed the total agenda must be staged and doable, organizational capacity must be addressed given the number of change initiatives underway.
2. Funding, service levels, and ability to meet the basic needs of families would limit the outcomes of a differential response system.
3. The Children's Administration (CA) would likely not have the ability to respond to families in an assessment track with immediate services to meet their basic living needs and if Washington prioritized services for the most at-risk children, then lower risk families in the assessment track would receive fewer services paid by the DSHS/CA.
4. All social work staff must be trained in engaging families and assessing safety and risk factors.
5. Implementation of non-contracted differential response system would require further specialization of staff and additional categorization of families.
6. Agencies serving vulnerable adults and children would not learn about some potential CPS concerns regarding persons applying to be employed or licensed since CPS investigative findings in some cases involving maltreatment would no longer occur for families diverted to the assessment track.

7. Research does not clearly indicate that referring moderate risk families to differential response would improve outcomes (some states limit an alternate response to low risk cases).

Differential Response In Other States. Approximately 18 other states have implemented a differential response system. Minnesota has the longest running differential response system. In a differential response system, a family's strengths and weaknesses and child safety are assessed and no investigation is conducted nor findings of child abuse made for cases that would otherwise be screened in and investigated. If the family does not wish to participate in the assessment, the case is referred for investigation, unless no child safety issues are presented.

Under the state's child abuse statutes, DSHS is responsible for investigating and responding to allegations of child abuse or neglect. In some cases of alleged abuse or neglect, a child may be immediately removed from a parent or guardian and taken into protective custody.

A court may order law enforcement or CPS to take a child into custody when the child's health, safety, and welfare would be seriously endangered if the child is not taken into custody. A child may be taken into custody without a court order when law enforcement has probable cause to believe that the child has been abused or neglected and the child would be injured or could not be taken into custody if it were necessary to first obtain a court order. A child may also be detained and taken into custody without a court order when a hospital administrator has reasonable cause to believe that allowing the child to return home would present an imminent danger to the child's safety.

A shelter-care hearing must be held within 72 hours of a child being taken into custody and placed under state care, excluding Saturdays, Sundays, and holidays. At the shelter-care hearing, the court determines whether the child can safely be returned home while the dependency is being adjudicated, or whether there is further need for an out-of-home placement of the child.

Washington courts have interpreted the child abuse investigation statute as creating an implied right of action for negligent investigation. In *Tyner v. DSHS*, the Washington Supreme Court found that the child abuse investigation statute creates a duty not only to the child who is potentially abused or neglected, but also to the parents of the child, even if a parent is suspected of the abuse. The 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. There are three types of negligent investigation claims recognized by the courts: (1) wrongful removal of a child from a non-abusive home; (2) placement of a child in an abusive home; and (3) failure to remove a child from an abusive home.

Witness immunity is a common law doctrine that provides witnesses in judicial proceedings with immunity from suit based on their testimony. The purpose of witness immunity is to preserve the integrity of the judicial process by encouraging full and frank disclosure of all pertinent information within the witness's knowledge. The rule is based on the safeguards in judicial proceedings that help to ensure reliable testimony, such as the witness's oath, the hazards of cross examination, and the threat of prosecution for perjury.

Summary: Family Assessment Response (FAR). When DSHS receives a report of child abuse or neglect, it must use one of two responses for reports that are screened in and accepted for response: an investigation or a family assessment. A family assessment is defined as a comprehensive assessment of child safety, risk of subsequent child abuse or neglect, and family strengths and needs that is applied to a child abuse or neglect report. The assessment does not include a determination as to whether child abuse or neglect occurred but does determine the need for services to address the safety of the child and the risk of subsequent maltreatment. FAR is defined as a way of responding to certain reports of child abuse or neglect using a differential response approach to child protective services. FAR must focus on the safety of the child, the integrity and preservation of the family, and assessment of the status of the child and family in terms of risk of abuse and neglect, including a parent's or guardian's capacity and willingness to protect the child. No one is named as a perpetrator and no investigative finding is entered in DSHS's database as a result of the FAR.

In responding to a report of child abuse or neglect, DSHS must:

1. use a method by which to assign cases to investigation or family assessment that are based on an array of factors which may include the presence of imminent danger, level of risk, number of previous child abuse or neglect reports, or other presenting case characteristics.
2. allow for a change in response assignment based on new information that alters risk or safety level;
3. allow families assigned to FAR to choose to receive an investigation rather than a family assessment;
4. provide a full investigation if a family refuses the initial family assessment;
5. provide voluntary services to families based upon the results of the initial family assessment; however, if the family refuses the services and DSHS cannot identify specific facts related to risk or safety that warrant assignment to an investigation, and there is no history of child abuse or neglect reports related to the family, then DSHS must close the case; or
6. conduct an investigation in response to allegations that:
 - a. pose a risk of imminent harm to the child;
 - b. pose a serious threat of substantial harm to the child;
 - c. constitute conduct that is a criminal offense and the child is the victim; or
 - d. the child is an abandoned or adjudicated dependent child.

DSHS must develop a plan to implement FAR in consultation with stakeholders, including tribes. The plan must be submitted to the appropriate legislative committees by December 31, 2012. The following must be developed before implementation and submitted in the report to the Legislature:

1. description of the FAR practice model;
2. identification of possible additional non-investigative responses or pathways;
3. development of an intake and family assessment tool specifically to use for FAR;
4. delineation of staff training requirements;
5. development of strategies to reduce disproportionality;
6. development of strategies to assist and connect families with the appropriate private- or public-housing support agencies;

7. identification of methods by which to involve community partners in the development of community-based resources to meet families' needs;
8. delineation of procedures to ensure continuous quality assurance;
9. identification of current DSHS expenditures for services appropriate to FAR;
10. identification of philanthropic funding available to supplement public resources;
11. mechanisms to involve the child's Washington state tribe, if any, in FAR;
12. creation of a potential phase-in schedule, if proposed; and
13. recommendations for legislative action necessary to implement the plan.

DSHS is not liable for using FAR to respond to an allegation of child abuse or neglect unless the response choice was made with reckless disregard.

DSHS must implement FAR no later than December 1, 2013. DSHS may phase-in implementation of FAR basis by geographic area. DSHS must develop an implementation plan in consultation with stakeholders, including tribes. DSHS must submit a report of its implementation plan to the Legislature by December 31, 2012.

For allegations that are placed in FAR, DSHS must:

1. provide the family with a written explanation of the procedure for assessment of the child and family and its purpose;
2. collaborate with the family to identify family strengths, resources and service needs, and develop a service plan with the goal of reducing risk of harm to the child and improving or restoring family well-being;
3. complete the family assessment within 45 days of receiving the report. Upon parental agreement, this time period may be extended to 90 days;
4. offer services to the family in a manner that makes it clear acceptance of the services is voluntary;
5. implement the family assessment response in a consistent and cooperative manner;
6. conduct an interview with the child's parent, guardian, or other adult residing in the home who serves in a parental role. The interview must focus on ensuring the immediate safety of the child and mitigating risk of future harm to the child in the home environment;
7. conduct an interview with other persons suggested by the family or persons DSHS believes has valuable information; and
8. conduct an evaluation of the safety of the child and any other children living in the same home. The evaluation may include an interview with or observation of the child.

The Washington State Institute for Public Policy (WSIPP) must conduct an evaluation of the implementation of FAR. WSIPP must define the data to be gathered and maintained. At a minimum, the evaluation must address child safety measures, out of home placement rates, re-referral rates and caseload sizes and demographics. WSIPP's first report is due December 1, 2014, and its final report is due December 1, 2016.

DSHS must conduct two client satisfaction surveys of families that have been placed in FAR. The first survey results must be reported by December 1, 2014, and the second survey results by December 1, 2016.

Appeal of a Finding of Child Abuse or Neglect. A person named as an alleged perpetrator in a founded allegation of child abuse or neglect has the right to seek review of the finding. Within 30 days of receiving notice from DSHS, the person must notify DSHS in writing that the person wishes to contest the finding. The written notice provided by DSHS to the alleged perpetrator must contain the following:

1. information about DSHS's investigative finding as it relates to the alleged perpetrator;
2. sufficient factual information to apprise the alleged perpetrator of the date and nature of the founded allegation;
3. the right of the alleged perpetrator to submit a written response regarding the finding, which DSHS must file in the records;
4. that information in DSHS records may be considered in a later investigation or proceeding related to a different allegation of child abuse or neglect;
5. that founded allegations of abuse or neglect may be used in determining;
 - a. whether the person is qualified to be licensed or approved for care of children or vulnerable adults;
 - b. whether the person is qualified to be employed by DSHS in a position having unsupervised access to children or vulnerable adults.
6. that the alleged perpetrator has the right to challenge the founded allegation of abuse or neglect.

If the request is not made within the 30-day time period, the person has no right to agency review or further administrative or court review of the finding, unless the person can show that DSHS did not comply with the notice requirements of RCW 26.44.100. After receiving notification of the results of DSHS's review, the person has 30 days within which to ask for an adjudicative hearing with an administrative law judge. If the request is not made within the 30-day period, the person has no right to further review.

Government Liability. The purpose section of the child abuse or neglect statute is amended to provide that a child's health and safety interests should prevail over conflicting legal rights of a parent and that the safety of the child is DSHS's paramount concern when determining whether a parent and child should be separated during or immediately following investigation of alleged abuse or neglect.

Governmental entities, and their officers, agents, employees, and volunteers, are not liable for acts or omissions in emergent placement investigations of child abuse or neglect unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing. A new section is added to the child abuse or neglect statute stating that the liability of governmental entities to parents, custodians, or guardians accused of abuse or neglect is limited as provided in the bill, consistent with the paramount concern of DSHS to protect the child's health and safety interest of basic nurture, health, and safety, and the requirement that the child's interests prevail over conflicting legal interests of a parent, custodian, or guardian.

DSHS and its employees must 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. In providing reports and recommendations to the court, DSHS employees are entitled to the same witness immunity as would be provided to any other witness.

Votes on Final Passage:

Senate	46	0	
House	97	0	(House amended)
Senate			(Senate refused)
House	80	17	(House receded/amended)
Senate	49	0	(Senate concurred)

Effective: June 7, 2012
December 1, 2013 (Sections 1 and 3-10)

RUSH HANNULA HARKINS AND KYLER, LLP

April 03, 2020 - 1:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53962-4
Appellate Court Case Title: State of Washington, Appellant v Michelle A. Desmet, Respondent
Superior Court Case Number: 18-2-10502-7

The following documents have been uploaded:

- 539624_Briefs_20200403132843D2573892_6028.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Kacso brief of resp.pdf

A copy of the uploaded files will be sent to:

- crmcleodlawoffices@gmail.com
- matthew.thomas@atg.wa.gov

Comments:

Sender Name: Michael Fisher - Email: mfisher@rhhk.com

Filing on Behalf of: Daniel R. Kyler - Email: dkyler@rhhk.com (Alternate Email: vsteppan@rhhk.com)

Address:
4701 S 19TH ST STE 300
TACOMA, WA, 98405-1199
Phone: 253-383-5388

Note: The Filing Id is 20200403132843D2573892