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No. 94529-2

SUPREME COURT
OF THE STATE OF WASHINGTON

HBH; SAH; and TREY HAMRICK,
litigation guardian ad litem on behalf of
KEH, JBH, and KMH,

Respondents,

v.

STATE OF WASHINGTON,

Petitioner,

and

TOWN OF EATONVILLE,

Defendants.

RESPONDENTS' ANSWER TO WSAJ FOUNDATION
AND KCSARC AMICUS BRIEFS

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A. INTRODUCTION

The amicus curiae briefs of the Washington State Association for Justice Foundation (“WSAJF”) and the King County Sexual Assault Resource Center (“KCSARC”) do an excellent job of illustrating why the State’s argument that it has no special relationship and no duty to children in foster care is legally baseless and truly cruel in a human sense.

The amici briefs make clear that the State has a special relationship by common law and by statute with regard to children who have come under its care because it has acted in its *parens patriae* capacity to terminate the parental rights of those children’s parents or it is entrusted with the children’s care due to physical or sexual abuse of the children or neglect. The State fills in for the children’s parents under such circumstances. The State has a duty to such vulnerable children, who in some instances have no parents, to protect them by placing them with caregivers who will not sexually or physically abuse, or neglect them.

Division II got it right on the duty owed, and this Court should affirm that court’s application of well-established statutory and common law principles confirming the State’s duty to avoid negligent placement of children found to be dependent upon the State or entrusted to the State’s care.

B. STATEMENT OF THE CASE

The KCSARC brief makes clear the reality of the State's position in the real world. KCSARC is on the front line of addressing the horrible consequences of sexual abuse for its vulnerable child clients. The risk of re-victimization of such children mandates the careful screening of persons with whom the children are placed. KCSARC br. at 3-4.

This Court addressed the reality of the dysfunction in Washington's foster care system in great detail in *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). There, this Court was unambiguous in joining most American jurisdictions in recognizing that foster children generally (leaving aside whether they are dependent) have substantive due process rights to be free of unreasonable risk of harm and a right to reasonable safety. *Id.* at 699.

This Court stated:

The State has given us no compelling reason to part company with our brethren courts, and we accordingly recognize and adhere to the weight of authority that foster children have substantive due process rights the State is bound to respect. We hold that foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. To be reasonably safe, the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.

Id. at 700. For foster children, the foster care experience is no more predictable, safe, or nurturing today.

In this case, it is *undisputed* that the State terminated parental rights as to HBH and SAH, for example, and they were dependent upon the State. Ex. 112.¹ Moreover, as Division II noted in its opinion, the children were physically, emotionally, and sexually abused by Scott and Drew Anne Hamrick while they were their foster children, and after they were adopted. RP (2/5/15):19-52. DSHS caseworkers failed to conduct proper “health and safety” visits as to the children. Ex. 2. There were *no* such visits as to HBH or SAH *for a year* – October 1999 to October 2000. Suppl. br. at 3-4. DSHS failed to even follow up on instances of physical abuse by the Hamricks. Suppl. br. at 5-6. Had DSHS done its job as to HBH and SAH, *all* of the children would have been removed from the Hamricks’ abusive environment, as Division II properly concluded, op. at 14-17, based on the expert testimony of Barbara Stone. RP (2/9/15):68.

C. ARGUMENT

- (1) As WSAJF Notes, the State’s Duty Argument Is a Thinly-Veiled Effort to Restore Sovereign Immunity and Is Contrary to Law

¹ The State blithely glides over this critical fact in its supplemental brief. State suppl. br. at 4. In order for the children to be declared dependents *of the State*, and their parents’ rights to be terminated as to them, critical factual points described in RCW 13.34.180 had to be established *by the State* with respect to the deficiencies of the parents. A court had to agree with the State that the deficiencies were proved beyond a reasonable doubt and that termination of parental rights was in the children’s best interests. RCW 13.34.190. Once termination has occurred, the biological parents ceased to have any rights, duties, or obligations as to the children. RCW 13.34.200(1); *In re Dependency of G.C.B.*, 73 Wn. App. 708, 717, 870 P.2d 1037 (1994).

WSAJF notes that the gravamen of the State’s argument is that it is entitled to sovereign immunity, despite RCW 4.92.090. WSAJF br. at 5-9. Notwithstanding the State’s discussion of dependency statutes, State suppl. br. at 4-5, 15-16, the State cannot point to a single statutory provision that *immunizes* the State from its faulty placement decisions with respect to dependent children or children otherwise entrusted to its care.²

Moreover, the State’s peculiar notion that any duty it owes to such children must have an analog in a private duty to survive a public duty doctrine challenge, State’s suppl. br. at 19-22, has been routinely *rejected* by this Court, as WSAJF notes. WSAJF br. at 7-9. In *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012), Justice Chambers observed: “Private persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the state of Washington.” Nor do private persons stand in *parens patriae* to abused or neglected children. *See also, Osborn v. Mason County*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753-54, 310 P.3d 1275 (2013); *Boone v. State*, 200 Wn.

² The Legislature fully understood how to afford such immunity as evidenced by the fact that it limited the liability of governmental entities and attendant officials in emergent placement investigations in the absence of gross negligence. RCW 4.24.595/RCW 26.44.280.

App. 723, 403 P.3d 873 (2017) at ¶ 39 (“Where there is no similar or corresponding private action comparable to the State’s actions, we examine whether, under the public duty doctrine, the State owes a duty to a particular plaintiff.”).

Even if the State were correct that there must be an analog to a private duty in order for it to be liable, there *is* such an analog – the duty owed by parents to children. *Zellmer v. Zellmer*, 164 Wn.2d 147, 157, 188 P.3d 497 (2008) (“There now appears to be nearly universal consensus that children may sue their parents for personal injuries caused by intentionally wrongful conduct.”).

As noted *supra*, once a court declares a child to be dependent under RCW 13.34.190, the State stands *in loco parentis*³ to that child under the broad common law notion of its *parens patriae*⁴ obligation. See RCW 13.34.210 (“If upon entering an order terminating the parental rights of a parent, there remains no parent having parental rights, the court *shall* commit the child to the custody of [DSHS] or a supervising agency willing

³ *In loco parentis* refers to a status with duties, rights, and responsibilities of a parent. As the *Zellmer* court stated it is “a person who has put himself or herself in the situation of a lawful parents by assuming all of the obligations incident to the parental relation without going through the formalities of legal adoption and embodies the two ideas of assuming the status and discharging the duties of parenthood.” 164 Wn.2d at 164.

⁴ “[w]hen parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a *parens patriae* right and responsibility to intervene to protect the child.” *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

to accept custody for the purpose of placing the child for adoption.”). Children entrusted to the State’s care by the State’s own action in declaring them dependent are entitled to be free from foreseeable harm of abusive caregivers. *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953). It is no different for children entrusted to the care of the State generally by being placed in foster care, as will be noted *infra*. That the potential for caregiver abuse is foreseeable is evidenced by the fact that criminal background checks are mandatory for child caregivers. RCW 43.43.830.

Thus, even under the analogous private duty, the children stated a claim against the State.

Simply put, the State is not, and should not be, immune for its negligent placement of the children with abusers.

(2) The State Owes the Children a Duty of Care with Regard to Their Placement in the Hamrick Home

Whether under statute or common law principles, the State owed a duty to these children, children that the State in some instances went to court to have declared dependent on the State, to place them in a safe environment for their care. The Hamrick home was decidedly the antithesis of such an environment.

The briefs of WSAJF and KCSARC only confirm why such a duty was present. Both amici indicate that a special relationship exists between children declared to be dependent on the State under statute and common law or entrusted to the State's care, in this instance, in foster care. WSAJF br. at 9-20; KCSARC br. at 9-13.

Indeed, the special relationship necessary to establish a duty on the State's part is discussed in *Restatement (2d) of Torts* §§ 314A and 320. § 314A(4) describes a special relationship:⁵

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

§ 320 amplifies upon the duty set out in § 315, stating:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

⁵ Illustration 7 to that *Restatement* section provides:

A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

The provisions of § 320 apply to children in the custody of others: “the actor who takes custody...of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.” Cmt. b to § 320. Indeed, this duty requires the actor to anticipate danger:

One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it.

Cmt. d to § 320.⁶

That a special relationship exists between the State and children like HBH, SAH, KBH, JBH, and KMH is clear under RCW 13.34 and 74.13, as well as the common law. The State cruelly argues that in Washington’s child welfare system, it does not have a special relationship with these

⁶ Although these *Restatement* provisions speak in terms of “custody,” this Court should not confine this concept to “custody” in its physical sense only. The better analysis is that of “entrustment” as described in the WSAJF brief at 12-15. Indeed, a special relationship may exist without physical custody of the person in the “take charge” setting. *See Volk v. Demeerleer*, 187 Wn.2d 241, 262-66, 386 P.3d 254 (2016). It is no different for persons entitled to protection.

children, focusing only on the children's placement in foster care. State br. at 15-16. But the State is wrong. Its duty to the children is broader than it acknowledges, particularly where children are dependent as noted *supra* or are entrusted to the State and placed in foster or group care.⁷ RCW 13.34.130(1)(b).⁸ The circumstances of *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) are particularly apt, as Division II observed. Op. at 14. Under *Niece*, if the children had been entrusted by the State to group care, and the staff of such a facility had done to the children what the Hamricks did, there can be little question that the State would be liable for the harm.

Here, the State acted to terminate the parental rights of HBH/SAH's biological parents. If the State has no special relationship and consequent protective duty to the children, after the State's actions, *who does?* The State is oblivious to this profoundly important question. Similarly, as to the

⁷ Under 13.34.130, the State may decide to place children entrusted to its care with family members, in group care, or in foster care.

⁸ Indeed, the State sought to declare the HBH and SAH to be dependents of the State. It was the children's custodian. RCW 13.34.210. Its duty to the children was clear before their placement in foster care: it had a duty to them to place them in a safe environment, *Braam, supra*. It had a continuing duty to evaluate their placement to ensure that it was safe. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 84 P.3d 899 (2004), cited by the State in its suppl. br. at 16, does not help it. There, Division I discerned no duty on the State's part to neighbor children with regard to children under CPS's supervision. That is plainly distinct from the duty here owed by the State to the dependent children entrusted to the State's care, as Division II noted. Op. at 9.

other children the State determined should be placed with the Hamricks, it had a duty to ensure that their placement represented a safe environment. The State ignores its *parens patriae* responsibility discussed by KCSARC in its brief at 10-12. As KCSARC notes in its brief at 5-6, this Court initially recognized a duty on the part of the State to investigate the caregivers with whom foster children are placed, a negligent placement action, as early as *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991).

Moreover, the State largely ignores controlling precedent establishing that it had a special relationship with children like the respondents under the common law, as both KCSARC and the WSAJF note respectively in their briefs at 9-10 and 9-20.⁹ *See, e.g., CJC v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999); *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016). *See also, Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001); *C.L. v. Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 402 P.3d 346 (2017).

In *C.L.*, Division I joined Division II here in concluding that the State's present duty argument was baseless. Division I opined that Division II's opinion in *H.B.H.* was entirely consistent with precedent that a special

⁹ The State contended in its supplemental brief at 11-14 that it had to exert "custody and control" over a child. before a special relationship existed. Dependency is just such "custody and control." But the State's narrow concept of a special relationship rooted in physical custody was rejected by this Court in *Volk*, 187 Wn.2d at 262 n.11. WSAJF br. at 10-15.

relationship existed under § 315(b). *Id.* at 198. That court *rejected* the State's argument that attempts to artificially limit the duty it owed to children entrusted to its care to one of investigation only. *Id.* at 197.

Finally, it is critical that the State has not cited *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998), anywhere in its supplemental brief. There, this Court noted that the duty owed by DSHS to prospective adoptive parents akin to the duty owed by that agency to foster children for negligent placement. *Id.* at 396 n.6. The *C.L.* court believed the case to be significant to the analysis of the State's duty of care in the placement of dependent children. *Id.* at 197. There, this Court found that a duty in tort arises as to adoptive parents from what amounted to the special relationship between adoption placement agencies and adopting parents. 134 Wn.2d at 397. It would make little sense both logically and morally, for a duty to arise between the State and prospective adoptive parents but no duty to arise from the special relationship between the State as the entity seeking to declare children its dependents or DSHS as the agency entrusted to safeguard the children when placing them. Such children should be allowed a tort remedy when they are damaged by the State's negligent failure to uncover pertinent information about their prospective adoptive home.

D. CONCLUSION

As WSAJF and KCSARC only confirm, Division II faithfully applied this Court's well-developed common law principles to confirm that the State, given its *parens patriae* relationship with the children arising of their dependent status and statutory directives in RCW 13.34 and 74.31, had a duty to the children to protect them from harm when it placed them with the Hamricks, their chronic abusers. The children, who were repeatedly abused sexually, physically, and psychologically by their foster parents before their adoption due to the State's negligence, are entitled to their day in court. This Court should affirm Division II's conclusion that the State owed the children a duty. Costs on appeal should be awarded to the children.

DATED this 6th day of February, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Respondents' Answer to WSAJ Foundation and KCSARC Amicus Briefs* in Supreme Court Cause No. 94529-2 to the following parties:

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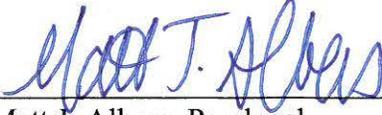
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 6, 2018, at Seattle, Washington.



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