

FILED
SUPREME COURT
STATE OF WASHINGTON
9/24/2019 2:21 PM
BY SUSAN L. CARLSON
CLERK

NO. 96830-6

SUPREME COURT OF THE STATE OF WASHINGTON

JESSICA L. WRIGLEY, et al

Respondents,

v.

STATE OF WASHINGTON, DSHS, et al

Petitioners.

ANSWER TO BRIEF OF AMICUS CURIAE

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 1. Scope of Review 1

 2. WSAMA is mistaken in its concerns 2

 3. Investigation purposes differ 3

 4. Mandated reports lead to investigations 4

 5. DCYF/DSHS investigations 4

 6. Law enforcement investigations and taking a child
 into custody. 4

 a. Abuse or neglect without imminent danger is insufficient
 basis to take child into custody 4

 b. When a child is taken into custody 5

 c. Any law enforcement investigation continuing after
 taking a child into custody is not for the protection
 of the child 6

 d. Law enforcement may decide not to take a child
 into custody 6

 7. WSAMA’s concern is not well taken 7

 8. Argument regarding statutory change is a red herring 7

 9. Conclusion 8

TABLE OF AUTHORITIES

Washington Cases

<i>Brown v. Dep't of Soc. & Health Servs.</i> , 190 Wn. App. 572, 360 P.3d 875 (2015)	5
<i>Krause v. Catholic Cmty. Servs.</i> , 47 Wn. App. 734, 737 P.2d 280 (1987)	3
<i>Wrigley v. State</i> , 5 Wn. App. 2d 909, 428 P.3d 1279 (2018) as amended (Feb. 20, 2019), review granted, 193 Wn.2d 1008, 439 P.3d 1065 (2019).	1–3

Washington Statutes

Laws of 1975,1 st Ex. Sess., ch 217 § 1	8
Laws of 1975,1 st Ex. Sess., ch 217 § 5	8
RCW 4.24.595	2
RCW 13.34	6
RCW 13.34.010	3
RCW 13.34.040	7
RCW 13.34.040(1)	6
RCW 13.34.050	7
RCW 13.34.060(1)	6
RCW 26.44.010	8
RCW 26.44.020(16) [former]	5
RCW 26.44.030	3
RCW 26.44.030(1)	2, 3
RCW 26.44.030(2)	3, 4
RCW 26.44.050 [former]	2, 3, 4, 8

RCW 26.44.050, par. 1 [former] 2, 6
RCW 26.44.050, par. 2 [former] 2, 4
RCW 26.44.280 2

Other Sources

Minority Report (20th Century Fox, 2002) 2

I. INTRODUCTION

Amicus WSAMA, representing municipalities and particularly law enforcement, raises concerns that the *Wrigley* Court of Appeals opinion “serves as license to hold social workers and law enforcement officers to a strict liability standard, functionally elevating them to insurers for the wrongful and despicable acts of child abusers.” Amicus Brief at 14. *Wrigley v. State*, 5 Wn. App. 2d 909, 428 P.3d 1279 (2018) *as amended* (Feb. 20, 2019), *review granted*, 193 Wn.2d 1008, 439 P.3d 1065 (2019).

The *Wrigley* decision, however, does neither. Because WSAMA’s interest is that of law enforcement, this answer will primarily address law enforcement.

II. ARGUMENT

1. **Scope of Review.** Of first importance is that WSAMA may be seeking relief greater than requested by the state. Specifically, WSAMA asks the court to reverse the Court of Appeals and reinstate the trial court’s summary judgment order in favor of DSHS. The Court of Appeals decision, however, contained an unpublished portion for which the state has not sought review. In particular, the unpublished portion reversed the trial court as to its denial of the Wrigley’s motion for leave to amend its complaint to add a general negligence theory. The Court of Appeals also denied the state’s cross

appeal regarding opinions offered by the Wrigley's standard of care expert. Neither of the foregoing issues were within the state's current appeal. Thus, even if this court reverses the Court of Appeals on its construction of RCW 26.44.050, there has been no challenge to the Wrigley's right under the Court of Appeals decision to amend the complaint at the trial court to add a general negligence theory, including claims based on the shelter court order, special relationship, and/or entrustment. *Wrigley, id.* at 911.

Therefore, both the state's Petition for Review and WSAMA's Amicus should be construed to address only the published portion of the Court of Appeals decision, leaving intact the unpublished portion.

2. WSAMA is mistaken in its concerns. WSAMA fails to recognize the distinctions between the obligations of a mandated reporter, RCW 26.44.030(1), the duty to investigate possible abuse and neglect, RCW 26.44.050, par. 1, and law enforcement's ability to take a child into custody without a court order, RCW 26.44.050, par. 2.

Moreover, law enforcement is only liable in making emergent placement investigations if its act or omission constitutes gross negligence. RCW 26.44.280, 4.24.595. This is a far cry from strict liability or requiring the police department to keep PreCogs in a pool behind the station.¹

¹ WSAMA cited the futuristic movie *Minority Report*, in which beings called PreCogs were kept in a special pool and were able to determine when individuals were going to commit a crime.

3. Investigation purposes differ. Once the mandated report is made as required by RCW 26.44.030, the duty of DCYF and law enforcement to investigate the possible occurrence of abuse or neglect arises under RCW 26.44.050.² The ultimate goal of the department's investigation is the immediate protection of children and the remediation of parental deficiencies if possible. The goal of the law enforcement is also the immediate protection of children but includes as well the investigation of criminal acts.

4. Mandated reports lead to investigations. The distinction between a mandated reporter's duty to report and the duty of the department and law enforcement to investigate is addressed in detail in the Court of Appeals decision. *Wrigley* at 927. It is clear the purpose of mandated reports is to bring to the attention of the proper authorities—CPS and law enforcement—when the mandated reporter “has reasonable cause to believe that a child has suffered abuse or neglect.” RCW 26.44.030(1). Mandated reporters having such reasonable cause to believe are legally obligated to report the incident to DCYF or law enforcement.

² Though both DSHS/DCYF and law enforcement each have the duty to investigate, their purposes for investigation are inherently different. *Krause v. Catholic Cmty. Servs.*, 47 Wn. App. 734, 744, 737 P.2d 280 (1987). Their investigations are thus concurrent, neither deferring to the other. Law enforcement, after addressing any need to take a child into custody, investigates a possible crime; the Department's purpose in investigation is at all times to protect the child and the family. RCW 13.34.010.

5. DCYF/DSHS investigations. If DCYF receives a report and after investigation believes the child should be taken into custody, the law does not allow DCYF to do so on its own. Rather, the investigating social worker will contact law enforcement (if they are not already involved) to advise them of the social worker's belief that the child needs to be taken into custody. The law enforcement officer then investigates the situation.

6. Law enforcement investigations and taking a child into custody. As stated in the second paragraph of RCW 26.44.050, law enforcement has the authority to take the child into custody. However, unlike its obligation to investigate the possible occurrence or neglect, its authority to take a child into custody occurs only if there is probable cause to believe the child "is abused or neglected." Again, just as the mandated report is primarily of past offenses that is brought to the attention of appropriate investigators, so the actual taking of a child into custody without a court order—superseding constitutional and statutory protections of the parent, child, and family—may only be done when there is the present existence of abuse or neglect (the officer having probable cause thereof).

a. Abuse or neglect without imminent danger is insufficient basis to take child into custody. Moreover, probable cause to believe the child *is* abused or neglected is in itself not sufficient to grant law enforcement the authority to take a child into custody without a court order. The statute

continues with the additional requirement: “*and* that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050.” (Emphasis added.) In other words, contrary to Amicus WSAMA’s claim, the officer has to make a determination of future events in order to take a child into custody.³ Specifically, the officer must determine that the child *would be* further abused or *would be* hidden from the authorities in some way if the child “could not be taken into custody” because the officer had to wait for the investigating social worker to file a dependency case and obtain a pickup order.⁴

b. When a child is taken into custody. If the law enforcement officer, after investigating and following the requirements of statute, decides to take the child into custody, the law requires the child to be placed into shelter care, which means the child is delivered to DCYF. RCW

³ Though Amicus WSAMA’s brief concentrates on abuse, it is worth noting that the definition of neglect in former RCW 26.44.020(16) requires determination of future harm: “disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety”. This is a higher burden than mere negligence. *Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 588–594, 360 P.3d 875 (2015). Another example in statute of determining future harm is found in the mandated reporting statute RCW 26.44.030(2), where reports are mandated if “children are or may be at risk for abuse or neglect”.

⁴ In this writer’s experience in dependency cases, the determination of imminent future injury or imminent future flight is seldom if ever a consideration made by law enforcement when taking a child into custody. Perhaps law enforcement’s concern in the present case is because they are not used to making the determination of imminent future harm or flight as a necessary condition to taking an abused or neglected child into custody.

13.34.060(1). While the officer was obligated by the first paragraph of 26.44.050 to investigate the possible occurrence of abuse or neglect, the child could only have been taken into custody if there had in fact been abuse or neglect. The taking of the child into custody is thus the last action of the law enforcement officer for the purpose of taking the child into custody.

c. Any law enforcement investigation continuing after taking a child into custody is not for the protection of the child. The officer's other duties, however, include investigating possible crimes. The first paragraph of RCW 26.44.050 ends with the requirement, which is undifferentiated between DCYF and law enforcement, and "where necessary refer such report to the court." Law enforcement, as law enforcement,⁵ does not file dependency cases under 13.34 RCW. Rather, it is DCYF which files in juvenile court. To which court then does the statute direct law enforcement to refer a report? That would be the criminal court as a result of law enforcement's further investigation of a crime separate from having taken the child into custody.

d. Law enforcement may decide not to take a child into custody. If after investigating, the law enforcement officer determines (1)

⁵ Actually, though extremely unlikely, the officer could file the dependency himself or herself as a citizen. RCW 13.34.040(1).

that there is no probable cause to believe that the child is abused or neglected or (2) even with such probable cause there is no reason to believe a timely court order could not be obtained before further abuse or flight, the law enforcement officer should not take the child into custody—even if the investigating social worker requests this be done. In such event it then falls to the investigating social worker to file a dependency under RCW 13.34.040 and to seek an order to have the child taken into custody. RCW 13.34.050.

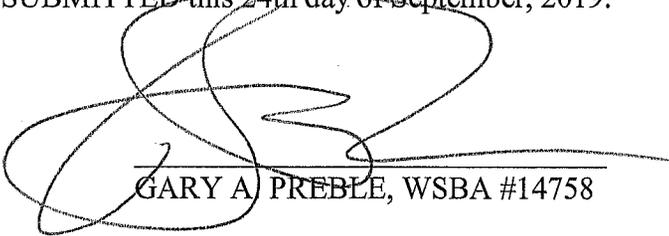
7. **WSAMA's concern is not well taken.** The harm that WSAMA envisions is not supported by statute. WSAMA does not distinguish between the mandatory obligation to report and the obligation of law enforcement to investigate. Nor does it acknowledge that taking a child into custody can only be done in the presence of abuse or neglect. Nor does it acknowledge that there are further requirements even if abuse or neglect exists that removal of the child be done by DCYF through a dependency action. And, WSAMA fails to acknowledge that liability can only occur when there has been gross negligence on the part of the officer. Moreover, law enforcement was not even involved with A.A., who was already in the care of the department of the department. In the present case it was the department's negligent investigation that led to A.A. tragic and violent death.

8. **Argument regarding statutory change is a red herring.** Amicus

WSAMA also claims that the legislature's removal of the word "nonaccidental," when RCW 26.44.050 was amended by Laws of 1975, 1st Ex. Sess., ch 217 § 5, Amicus Brief at 13-14, supports its reading of the statute. However, while the term "nonaccidental" might have reminded investigators that accidental injuries do not constitute abuse, the word was nevertheless still retained, for the legislature in § 1 of the same session law in added the word "nonaccidental" to RCW 26.44.010, replacing the words "by other than accidental means".

9. **Conclusion.** Based upon the foregoing, the Wrigleys request the court consider the Amicus WSAMA as inaccurate and inapplicable to the present case.

RESPECTFULLY SUBMITTED this 24th day of September, 2019.



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September 24, 2019 - 2:21 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96830-6
Appellate Court Case Title: Jessica L. Wrigley, et al. v State of Washington, DSHS, et al.
Superior Court Case Number: 14-2-02306-2

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