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STATE OF WASHINGTON
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¶NO. 100433-8

SUPREME COURT OF THE STATE OF WASHINGTON

W.M., a Minor, by ERIN OLSON, his Litigation Guardian Ad Litem, and JAMES MANEY,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON'S RESPONSE TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Amicus did not identify any grounds under RAP 13.4(b) that support their argument for review, nor do any exist. Applying established law to the largely unchallenged facts, the Court of Appeals correctly affirmed summary judgment on two separate but equally dispositive grounds. First, Plaintiffs failed to show there was a harmful placement decision. *W.M. v. State*, 19 Wn. App. 2d 608, 622-24, 498 P.3d 48 (2021). As a matter of law, an admittedly correct placement of a child in a home where no abuse has occurred and where the child is not at imminent risk of harm is not now nor has it ever been a harmful placement decision. RCW 13.34.050(1); *M.W. v. Dep't of Soc. & Health Srvs.*, 149 Wn.2d 589, 598, 70 P.3d 954 (2003); *M.E. & J.E. v. City of Tacoma*, 15 Wn. App. 2d 21, 471 P.3d 950 (2020), *review denied*, 196 Wn.2d 1035 (2021).

Second, it is undisputed that, notwithstanding the negligence alleged, the State made the correct placement decision. Thus, as a matter of law, that negligence could not

possibly have caused a harmful placement decision and Plaintiffs' negligent investigation claim fails as a matter of law. *Roberson v. Perez*, 156 Wn.2d 33, 46, 123 P.3d 844 (2005). Furthermore, the Court of Appeals correctly rejected Plaintiffs' attempt to manufacture proximate cause based on nothing more than unsupported hypotheticals and speculation. *W.M.*, 19 Wn. App. 2d at 624-26; *see also Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019); *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

Both dispositive grounds adhere to longstanding precedent from this Court and the Court of Appeals and both grounds independently compel the Court of Appeals' decision.

Amicus Washington State Association for Justice Foundation's (Amicus) challenge is not truly directed at the Court of Appeals' legal analysis or the authority it relied upon. Amicus simply does not like the result it reached. Amicus then purports to embark on a journey trying to rectify "confusion" in the law that does not exist. In the course of that journey Amicus

misstates existing law, fails to cite or discuss controlling law, and disregards established Washington law that balances the interests of children with the long recognized Constitutional liberty interests parents have to raise their child without interference from the State. Amicus' conclusory assertions and partial, unsupported analysis does not support or warrant review under any provision of RAP 13.4. Respectfully, this Court should deny review.

II. BACKGROUND

Amicus' factual assertions are not supported with citation to the record as required by RAP 13.4(h) and RAP 10.4(f), and should, therefore, be disregarded entirely or treated as unsupported argument. *See State v. Hensler*, 109 Wn.2d 357, 359, 745 P.2d 34 (1987). The State incorporates, by this reference, its detailed recitation of facts from its Answer Brief, pages 4-11.

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III. ARGUMENT

A. Consistent With Well Established Precedent, The Court Of Appeals Correctly Held Plaintiffs Did Not Establish A Harmful Placement

Relying on established precedent, the Court of Appeals properly affirmed summary judgment because Plaintiffs' failed to establish the "harmful placement decision" element of their claim. Amicus challenges that holding, not by demonstrating error, but by choosing to ignore the holdings of this Court's in *Roberson* and *M.W.* Amicus' disregard of controlling Washington law does not demonstrate error by the Court of Appeals here nor does it warrant review under RAP 13.4(b).

1. *M. W.* and *Roberson* Require Proof of a Harmful Placement Decision

Amicus asserts, without analysis or support, that "a harmful placement decision" has nothing to do with "prior or current abuse" the child suffers in that placement. Amicus claims the actual abuse a child suffered is somehow subsumed in the claim elements that require there to be a triggering report of abuse and proof that the State's investigation was biased or

faulty. *Amicus Br.* at 7-8. However, that contradicts this Court's decisions that compel separate proof of a harmful placement decision.

To establish the limited negligent investigation claim, Plaintiffs must show the State's negligent investigation of a report of child abuse "result[ed] in a harmful placement decision, such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *M.W., at* 602. The actionable "harm" that gives rise to this claim is the "harmful placement decision." *Id*. at 591-601.

Amicus' contention that a "harmful placement decision" is a form of damages and not *really* a separate element of Plaintiffs' claim was expressly rejected by this Court in *Roberson*. In *Roberson*, the plaintiff was a suspect in the much publicized "Wenatchee sex ring." Fearing her arrest was imminent and the State would place her own 13-year-old son in foster care, plaintiff sent him to live with a grandparent in Kansas. She and her husband also relinquished guardianship of her son to that

grandparent. *Id*. Plaintiff was subsequently arrested and charged with six counts of rape and child molestation. After she was later acquitted, she filed suit against Douglas County and others asserting a negligent investigation claim.

After the jury returned a verdict for plaintiffs, the County appealed. *Roberson*, 156 Wn.2d at 38. In the intervening period between trial and oral argument, this Court decided *M.W. Id.* Relying on *M.W.*, the County argued for the first time on appeal that plaintiffs avoided any "harmful placement decision" by sending their son to live with his grandparent. The Court of Appeals determined that *M.W.* controlled, agreed Plaintiffs failed to establish a harmful placement decision, reversed the jury award, and dismissed the action. *Id*. at 39. This Court granted review.

The Roberson plaintiffs argued that sending their son to Kansas was a "preemptive move," and was tantamount to a "constructive removal" of their son from his home. *Id*. at 46. The *Roberson* Court rejected that argument, and affirmed dismissal of

the lawsuit because plaintiffs failed to show the County's negligent investigation led to a harmful placement decision:

> Our interpretation of the statute in *M.W.* unequivocally requires that the negligent investigation to be actionable must lead to a 'harmful placement decision.'

Roberson, 156 Wn.2d at 46;[1] *McCarthy v. Clark County*, 193 Wn. App. 314, 329, 376 P.3d 1127 (2016), *review denied*, 186 Wn.2d 1018 (2016) ("The 'harmful placement decision' requirement is strictly applied.")

Thus, it is not sufficient to show a report of abuse and a negligent investigation. This Court found a negligent investigation claim actionable only when the investigation results in a harmful placement decision such as leaving or placing a child in an abusive home. A negligent investigation claim is properly dismissed on summary judgment where, like here, Plaintiffs failed to demonstrate a harmful placement decision. *Roberson*, 156 Wn.2d at 46.

[1] Amicus failed to cite or address this controlling authority.

Next, Amicus erroneously asserts that no decision of this Court has "stated or implied" that a harmful placement decision "requires proof of prior or current abuse." *Amicus Br.* at 7. Amicus can only reach that conclusion by ignoring the specific examples of harmful placement decisions this Court identified in *M.W. See M.W.*, 149 Wn.2d at 602.

For example, to show the State let "a child remain in an abusive home" there must, by definition, be proof the child was previously abused in that placement. Without that proof, that harmful placement decision does not exist and the negligent investigation claim fails as a matter of law. *Roberson*, 156 Wn.2d at 46; *M.W.*, 149 Wn.2d at 602; *see also M.E. & J.E. v. City of Tacoma*, 15 Wn. App. 2d 21, 33-34, 471 P.3d 950 (2020), *review denied*, 196 Wn.2d 1035 (2021) (to show the child was left in an abusive home, there must be evidence the child was abused).

There is no confusion in the law. For almost two decades this Court has required plaintiffs to prove the State made a harmful placement decision, and, provided examples of the types of

placements that qualify. *Id*. As the Court of Appeals correctly held, Plaintiffs simply failed to establish that element here. The failure to prove a longstanding, essential element of their claim is not a basis for review under RAP 13.4, and review should be denied.

2. Plaintiffs Failed to Show That a Court Would Have Ordered W.M. Removed From Lawson, And, Thus, As a Matter of Law, Cannot Prove W.M. Was Improperly "Left In An Abusive Home"

The Court of Appeals also applied well-established precedent in holding that Plaintiffs failed to establish the type of harmful placement they allege: that W.M. was left in an abusive home. Here, Amicus erroneously suggests the Court of Appeals created a geographic limitation on the placement decision that excludes other risks associated with that placement. *Amicus Br.* at 8-11. The Court of Appeals did no such thing. Unlike the argument Amicus advances, the Court of Appeals decision adheres to the holding in *M.W.* and the limits on the State's authority to interfere with Lawson's Constitutional liberty interest in raising W.M.

To establish the harmful placement decision of "leaving a child in an abusive home," which is what Plaintiffs alleged here, they had to show that a court would have ordered W.M. taken from his mother at the time of the December 9 placement decision. Absent evidence that a court would have ordered the child removed from his mother, Plaintiffs cannot show the State improperly left the child in that home.

Parents have a constitutionally protected interest to raise their child without state interference. *In re Custody of Smith*, 137 Wn.2d 1,13-14, 969 P.2d 21 (1998). Before a court could order the State to interfere in how Lawson raised W.M., there had to be evidence that he was abused in that placement, that continuation in that placement would seriously endanger W.M., and that W.M. was at "imminent risk of harm." RCW 13.34.050(1); *M.E.*, 15 Wn. App. 2d at 33-34. Plaintiffs failed, completely, to produce any evidence satisfying that mandatory requirement. There is simply no evidentiary basis that would have supported a court order directing W.M. to be taken from Lawson on December 9, 2017.

> At the time W.M. left the hospital there was no evidence any abuse had occurred in either Katelyn's or Rich's homes. Significantly, there are no allegations that Rich had engaged in any acts of physical abuse toward W.M. prior to the assault of December 18, Therefore, between December 10 [the date he was released from the hospital] and December 18. W.M. could not have been placed or left in an abusive home because there is no evidence that abuse occurred *or was occurring* in Katelyn's home.

W.M., 19 Wn. App. 2d at 623-24 (emphasis added).

Apparently relying on Rich's administrative finding of abuse of a different child from six years earlier, Amicus asserts that Rich's "access" to W.M. was enough for a court to order W.M. taken from his mother. *Amicus Br.* at 8. That unsupported contention, too, withers under close scrutiny.

Plaintiffs produced no court order that prevented Rich from being around W.M., much less authority for the proposition that Rich's remote administrative finding created a duty for the State to prevent contact between Rich and other children including W.M. Amicus' underlying assumption is that an earlier finding of abuse of a different child necessarily compels State interference in the

parent-child dynamic. That is legally incorrect, especially, where, like here, Plaintiffs' did not produce one shred of evidence that Rich abused or in any way harmed any child in the intervening six years, and never ever harmed or abused W.M. prior to December 18. *In the Matter of the Dependency of M.S.D. v. State*, 144 Wn. App. 468, 481-82, 182 P.3d 978 (2008).

Finally, on an unrelated topic, Amicus argues the State had authority to remove a child from an abusive, non-parent caregiver. *Amicus Br*. at 11. That misses the point. As Plaintiffs' expert concedes, W.M. was placed with his mother. CP 1099. The State could not interfere with Lawson's liberty interests in raising her child absent evidence that a court would have removed W.M. on December 9 pursuant to RCW 13.34.050(1). *See also In re Custody of Smith*, 137 Wn.2d at 13-14. Plaintiffs simply failed to produce any evidence that satisfies that test.

Applying longstanding Washington law, the Court of Appeals properly affirmed summary judgment because Plaintiffs could not establish the necessary "harmful placement decision"

element of their negligent investigation claim. As this Court has repeatedly held, that is dispositive of their claim. *Roberson*, 156 Wn.2d at 46; *M.W.*, 149 Wn.2d at 602. There is no legitimate reason or basis under RAP 13.4(b) for this Court to grant review.

B. The Court Of Appeals Properly Held That Plaintiffs Failed To Establish Proximate Cause

Relying on precedent from this Court and decisions of the Court of Appeals, the Court of Appeals also correctly affirmed the dismissal of Plaintiffs' negligent investigation claim because they cannot establish the mandatory proximate cause element of their claim. Two different grounds compelled that decision, only one of which Amicus challenges here. First, it is undisputed the same placement decision would have occurred regardless of the negligence Plaintiffs allege. *See* CP 725; CP 1141-43. Thus, as a matter of law, Plaintiffs cannot show the negligence resulted in a harmful placement, and their claim was properly dismissed. *Roberson*, 156 Wn.2d at 46. Amicus ignored this dispositive point even though it renders argument on the second ground moot.

Second, Court of Appeals correctly held that Washington

law prohibits Plaintiffs and Amicus from relying on hypotheticals, unsupported conclusory statements and speculation to try and prove proximate cause. *W.M.*, 19 Wn. App. 2d at 624-26.

1. The Same Placement Decision Would Have Occurred Irrespective of the Negligence Alleged

The State made one placement decision: on December 9, 2017, it allowed W.M. to remain with his mother. CP 481; CP 1099. In support of its motion for summary judgment the State produced expert testimony that confirmed this was the correct placement decision. CP 496, 797-98, 1141-43. The burden then shifted to Plaintiffs. To defeat summary judgment they had to establish that W.M. should have been removed from his mother and that a court would have ordered the same. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) They failed to do so.

> If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion....'In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an

> essential element of the nonmoving party's case necessarily renders all other facts immaterial.'

Young, 112 Wn.2d at 225 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

When specifically asked this critical question, Plaintiffs' expert was unable to dispute or challenge the correctness of the State's one placement decision. CP 725. That is dispositive of Plaintiffs' negligent investigation claim.

W.M. was correctly allowed to remain with his mother, and the undisputed evidence shows that same placement would have taken place irrespective of the negligence alleged. Thus, as a matter of law, the alleged negligence in the State's investigation could not possibly have "resulted" in a harmful placement decision, and Plaintiffs' claim necessarily fails as a matter of law. *Roberson*, 156 Wn.2d at 46; *Young*, 112 Wn.2d at 225.

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2. Baseless Speculation and Conjecture Is Insufficient To Defeat Summary Judgment

Amicus completely ignores the critical testimony of Plaintiffs' expert, and instead focuses solely on the absence of a voluntary safety plan. Amicus, like Plaintiffs, concludes the State had the legal authority to "request" that Lawson not allow any contact between Rich and W.M., and theorizes that had it done so, Rich's assault would not have occurred. Contrary to Amicus' argument, the Court of Appeals could not possibly have weighed "competing evidence" on this point because there was no admissible evidence in this record to support Plaintiffs' baseless assertion. Rather, the Court of Appeals correctly rejected Plaintiffs' hypothetical assertions about the possible effect that a safety plan might have had because they were "completely unsupported by any actual evidence in the record…there is no evidence of causation and any possible question of fact relating to causation is too speculative to defeat summary judgment." *W.M.*, 19 Wn. App. 2d at 625-626.

Amicus' unsupported arguments here are constructed from the same improper speculation that compelled the Court of Appeals to affirm summary judgment. *Id.* at 625-26. Initially, Amicus cannot point to any authority that gives the State the extra-judicial authority to unilaterally order a parent to take any action. Further, where the State lacks the authority to remove the child in the first instance, as was the case on December 9, 2017, it is highly improper for the State to coerce compliance with a voluntary safety plan with the threat that noncompliance will result in the removal of the child from the home. *See Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 482-83 (7th Cir. 2011), *rehearing and rehearing en banc denied* (2011) (it is a violation of substantive due process to threaten removal for violation of a voluntary safety plan where the evidence does not support removal of the child).

More fundamentally here, the State's statutory duty to investigate a report of child abuse or neglect "does not *necessarily* include a duty to, for example, offer and implement

a voluntary safety plan for the family." *Albertson v. State*, 191 Wn. App. 284, 301, 361 P.3d 808 (2015) (emphasis in original). As a matter of law, the State's failure to implement such a plan is not actionable in the absence of a faulty or biased investigation that leads to a harmful placement decision. *Id*. As demonstrated above, because there is no dispute the State correctly allowed W.M. to live with his mother, Plaintiffs cannot show State negligence led to a harmful placement decision, and their claim against the State fails as a matter of law. *Roberson*, 156 Wn.2d at 46; *Young*, 112 Wn.2d at 225.

Even if one ignored this dispositive, unchallenged fact, Amicus' claims regarding the impact a voluntary safety plan *might have had* on the incident that took place are premised on rank speculation. As a matter of law, speculation and conjecture, even when offered by an expert, are insufficient to create a material issue of fact or defeat summary judgment. *White*, 131 Wn.2d at 9 ("a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues

remain"). Amicus' assertion that speculation is sufficient when uttered by an "expert" is also plainly wrong. *Strauss*, 194 Wn.2d at 301 (an expert's opinion "must be based on fact and cannot simply be a conclusion or based on an assumption if it is to survive summary judgment"); *Sartin v. Estate of McPike*, 15 Wn. App. 2d 163, 172-73, 475 P.3d 522 (2020), *review denied*, 196 Wn.2d 1046 (2021) (an expert's statement that is grounded in speculation will not preclude summary judgment).

There is no evidence that a voluntary safety plan would have prevented the assault that took place. Indeed, Plaintiffs produced no evidence that Lawson would have complied with an order restricting contact with Rich. This record is devoid of deposition testimony and/or declarations from Lawson or her family on this point. The only evidence in this record, which took place after Rich's assault, establishes that, when forced to choose between Rich and the safety of her son, Lawson chose Rich.

For example, it is undisputed that when she arrived at Rich's house following his assault and found W.M. unconscious,

cold, lifeless and barely breathing, Lawson waited almost 30 minutes before finally taking him to the hospital. CP 754, 758, 762, 765. It is undisputed Lawson's delay risked her son's life and exacerbated his injuries. CP 660, 663. When Lawson finally took W.M. to the hospital, and with his life in the balance in the next room, she concocted lie after lie about how her son's injuries occurred. Only when Lawson's mother finally directed that she "tell the truth" did Lawson finally admit she was not present when W.M. was injured and that W.M. had been in Rich's sole care and custody. CP 662.

Amicus also speculates, without any supporting evidence, that the State could and would have detected contact between Rich and W.M. in a different state in sufficient time to bring a legal action to remove W.M. from his mother before any assault. As the Court of Appeals correctly held, it is, at best, speculative whether a judge would have ordered W.M. taken from his mother based on nothing more than an administrative finding of abuse by Rich of a different child from six years earlier. *W.M.*, 19 Wn.

App. 2d at 626; *see also In the Matter of the Dependency of M.S.D.*, 144 Wn. App. at 481-82.

In *M.S.D.*, Kyisha Davis appealed a finding of dependency that was based on the failure to protect her 7-year-old daughter from her live-in boyfriend, Seth Poirier. Poirier had a 10 year old criminal conviction for assault and criminal mistreatment of his own 2-month-old baby.[2] *Id*. at 476-77. On appeal, DSHS argued the boyfriend's "criminal history alone establishes that he poses a danger to M.S.D.'s health, welfare and safety, and supports the trial court's finding of dependency due to Davis' failure to

[2] The criminal charges arose after the boyfriend and the child's mother brought their two-month-old to the hospital. Doctors determined the child suffered scald burns on her buttocks. X-rays also revealed 18 healing fractures, including seven broken ribs, several broken arm bones, both lower leg bones, and a fractured pelvis. The boyfriend entered an *Alford* plea to the amended charges of assault of a child in second degree and criminal mistreatment in the second degree. The court sentenced him to 42 months in prison. *In re Dependency of M.S.D.*, 144 Wn. App. at 475.

protect her." *Id*. at 481. The Court of Appeals disagreed and reversed the finding of dependency. *Id*. at 483.

Critical to its holding, the Court observed there was no evidence the boyfriend physically abused M.S.D. or any other child since his release from prison, no evidence that someone who assaulted an infant 10 years earlier was likely to assault a 7-year-old child, nor was there any evidence that whatever risk the prior conviction posed did not diminish "with age and maturity or that [the boyfriend] was unable to change." *Id*. at 481.

Prior to December 18, there was even less justification to warrant removal of W.M. from his mother than existed in *M.S.D*. Plaintiffs did not produce a court order that prevented Rich from being around W.M. or any other child. There is no evidence in this record that Rich abused any child or other person in the six years leading up to December 9. Plaintiffs did not offer an opinion from any qualified expert that, because Rich assaulted a different child six years earlier, Rich was likely to assault W.M. in the future. And, as the Court of Appeals correctly observed

here, there is absolutely no evidence Rich harmed W.M. in any way prior to December 18. *W.M.*, 19 Wn. App. 2d at 623-24.

The Court of Appeals correctly rejected Plaintiffs' unsupported hypotheticals, conclusory statements, speculation, and conjecture as insufficient, as a matter of law, to create an issue of fact or defeat summary judgment. That decision does not merit review by this Court.

IV. CONCLUSION

Relying on long established precedent, the Court of Appeals correctly affirmed the dismissal of the State from this lawsuit on summary judgment. Amicus failed to demonstrate any error in that decision, and offered no legitimate ground for this Court to accept review. For each of the reasons stated, the State respectfully asks this Court to deny review.

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This document contains 3987 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 11th day of March, 2022.

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DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding Response To Washington State Association For Justice Foundation Amicus Curiae Memorandum In Support Of Petition For Review was filed in the Washington State Supreme Court, according to the Court's protocols for electronic filing.

I further declare that a copy of the preceding was electronically served on all counsel of record, by agreement and through ACORDS, at the following email addresses:

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