No. 100433-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

W.M., a minor, by ERIN OLSON, his Litigation Guardian ad Litem and JAMES MANEY,

Plaintiffs/Petitioners,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS

Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system.

II. INTRODUCTION

This case gives the Court an opportunity to clarify confusion surrounding the tort of negligent investigation under RCW 26.44.050. The appellate decision below narrows the "harmful placement decision" element of the tort by 1) incorporating into that element a "prior or current abuse" requirement, regardless of whether the "placement" was "harmful," and 2) defining "placement" as limited to the placement location and excluding attendant risks. It also resolved causation as a matter of law, despite evidence other courts have deemed sufficient to create a fact question. The decision demonstrates confusion regarding the proof requirements for negligent investigation. The Court should grant review.

III. BACKGROUND

This case arises out of grievous injuries suffered by two-year-old W.M. after he was released to his mother by the state and severely beaten nine days later by his mother's boyfriend. The facts are drawn from the Court of Appeals opinion and the parties' briefs. *See W.M. v. State,* 19 Wn. App. 2d 608, 498 P.3d 48 (2021); Petition at 2-13; Answer at 4-11.

W.M. was born to James Maney and Katelyn Lawson in July, 2015. Two years later, Lawson filed for divorce. The Cowlitz County Superior Court appointed a guardian ad litem (GAL) for W.M. to advise the court regarding custody. The GAL reported:

- Lawson had perpetrated domestic violence on Maney;
- Lawson was deceptive about her living situation;
- Lawson was living, at least part-time, with her boyfriend, and planned to move there permanently;
- Lawson was unstable and posed a risk to W.M.;
- sole custody should be awarded to James.

The GAL report was submitted to the court in October, 2017. The court ordered Lawson temporary residential custody.

On December 9, 2017, Lawson took W.M. to a hospital emergency room. Providers determined W.M. had ingested Suboxone, a drug prescribed to help addicts overcome addiction. Due to the suspicious circumstances, a hospital social worker reported the incident to Child Protective Services (CPS). CPS investigator Kimberly Hartnagel went to the hospital that evening.

Lawson initially lied about the location of the incident, claiming W.M. ingested the drug at her parents' home. She later admitted that it occurred at the home of her boyfriend, Samuel Rich, whom she had been dating for six months. Hartnagel recorded Rich's address but did not take his name or check his background. Had Hartnagel conducted a background check, she would have learned that Rich had a "founded" allegation of abusing his prior girlfriend's daughter. Despite Lawson's deception and the suspicious nature of the injury, W.M. was sent home with his mother.

Caseworker Katie Palmquist visited Lawson's parents' home three days later, while W.M. was present. Palmquist stated W.M. appeared healthy and safe. However, she noted that she

talked to Lawson's mother, who was not present when W.M. was injured and did not know details surrounding the incident. Palmquist conducted no further investigation.

Nine days after the Suboxone incident, Rich was left alone with W.M. and brutally beat him. W.M. was unresponsive, not breathing and had no detectable pulse. He survived, but the abuse resulted in permanent and disabling injuries.

W.M.'s father and litigation guardian brought this action against the state for negligent investigation. The state moved for summary judgment, asserting there were no genuine issues of material fact regarding breach or causation.[1]

W.M. submitted declarations from child welfare expert Barbara Stone. Stone opined that the Department's response to the Suboxone incident fell below the standard of care. She emphasized that a reasonable investigation would have included a background check of Rich. Based on that information, the Department should have implemented a safety plan and met with Lawson and her mother to review protective steps for W.M. She

[1] The state also asserted immunity under RCW 4.24.595(1). The courts below did not reach the immunity issue.

opined that had Lawson been deemed not protective, the state could have taken W.M. into custody.

The state submitted the expert opinion of Maria Scannapieco, who maintained that the Department met the standard of care. She opined the Department had no authority to take custody of W.M. and at most could have implemented a safety plan. The Department argued that because a safety plan is voluntary, whether it would have changed the outcome was too speculative to create a fact issue on causation. The trial court granted the state's motion.

In a 2-1 decision, the appellate court affirmed. It held W.M.'s placement with Lawson did not satisfy the "harmful placement decision" element because 1) there was no evidence of prior or current abuse, and 2) W.M.'s injury was inflicted at a different location than the placement residence. *See W.M.*, 19 Wn. App. 2d at 623-24. The court further held that there was no genuine issue of material fact regarding causation. *See id.* at 624.

W.M. petitioned this Court for review.

IV. ISSUES PRESENTED

1. Is review warranted to address whether the appellate court improperly narrowed the "harmful placement decision" element of the tort?

2. Is review warranted to address whether the appellate court improperly resolved disputed facts regarding causation as a matter of law?

V. ARGUMENT IN SUPPORT OF REVIEW

A. Review Is Warranted To Address Whether The Appellate Court Improperly Narrowed The Scope Of A "Harmful Placement Decision."

Re: proof of prior or current abuse[2]

The appellate court held that to prove the existence of a harmful placement decision, "there must be some evidence that abuse has occurred or abuse was occurring in the home *at the time of the placement* in order for the child to be left in an abusive home." *See id.* at 623. In so holding, the court conflates the "harmful placement decision" element with other elements of the tort and disregards the teachings of this Court.

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[2] This ACM address whether, as a legal matter, evidence of prior or current abuse at the time of placement is necessary to establish a "harmful placement decision." Even assuming this requirement exists, however, W.M. correctly points out there was a question of fact as to whether W.M.'s ingestion of Suboxone provided such evidence, at least for summary judgment purposes.

This Court has framed the negligent investigation tort as akin to a traditional negligence claim. *See M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Under this formulation, the Department's duty to investigate is triggered upon a report of prior abuse or neglect. *See* Laws of 2020, ch. 71, § 1 (codified at RCW 26.44.050); *Wrigley v. State,* 195 Wn.2d 65, 77-78, 455 P.3d 1138 (2020). The duty that is triggered requires the Department to conduct a reasonable (unbiased and complete) investigation. *See M.W.*, 149 Wn.2d at 601. Breach of that duty is cognizable if it is the proximate cause of the type of harm recognized under the tort, *i.e.*, injury resulting from a "harmful placement decision." *See id.* (claim based on abuse by investigators not cognizable because "the injuries [plaintiff] alleges are outside those *harms* DSHS's statutory duty to investigate child abuse was designed to prevent" (brackets and emphasis added)); *see also id.* at 591 (claim available if negligent investigation "leads to" a harmful placement decision).

No decision of this Court has stated or implied that "harmful placement decision," the *injury* element of the tort, requires proof of prior or current abuse, and for good reason: this

inquiry is already undertaken in two other elements of the analysis: 1) triggering the duty to investigate, and 2) determining whether there has been a "biased or faulty," and thus negligent, investigation. Recognizing the distinct functions of each element of the tort comports with general negligence principles and respects Washington precedent.

Review is necessary to address whether the appellate court's characterization of harmful placement decision creates overlapping and incoherent elements of the tort and places unnecessary and arbitrary obstacles in the path of meritorious claims.

Re: relevance of attendant risks

Perhaps more disturbing is the majority's second limitation of the harmful placement decision element, which concluded that the legally relevant "placement" is limited to the geographic location where the child will be housed and does not encompass risks associated with that placement. Notwithstanding evidence indicating that Rich had access to W.M. when he was with his mother, the appellate court defined the relevant "placement" as restricted to Lawson and her mother:

> [T]he State did not place W.M. in Rich's home or even make the decision to allow W.M. to remain in Rich's home. Again, the placement decision that the State made was to allow W.M. to remain in [Lawson's] parents' home under [Lawson's] care. *Although [Lawson] was spending time at Rich's house*, it is undisputed that her parents' home was still her residence at the time of both the Suboxone ingestion and the December 18 abuse. And neither [Lawson nor her mother] identified Rich as one of W.M.'s caregivers. Therefore, the State did not make the decision to place W.M. in a home and/or with a caregiver that ultimately resulted in harm to W.M.

W.M., 19 Wn. App. 2d at 624 (brackets and emphasis added). By limiting "placement" to the physical residence, without consideration of attendant risks, the appellate court's rule disregards precedent and threatens the safety of children.[3]

This Court's decision in *Tyner* suggests a far more fluid and comprehensive formulation of harmful placement decision that encompasses attendant risks associated with placement. There, the plaintiff father challenged the circumstances surrounding the placement of his children, which involved the

[3] Plaintiffs argue that there are genuine issues of material fact as to whether W.M. was "placed" with Lawson and her mother, or instead was "placed" with Rich. *See* Petition at 23-25. The Foundation agrees, but argues that even assuming the "placement" was with Lawson, risks of harm associated with a placement must be included in defining the legally relevant "placement."

children remaining in the home, and the father's removal combined with a no contact order and subsequent supervised visitation order. *See Tyner*, 141 Wn.2d at 73-76. In sustaining the negligent investigation claim, this Court assumed that the circumstances, consisting of the children's placement with their mother accompanied by the no contact order imposed on the father, could suffice as a harmful placement decision.

The decision below also conflicts with *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006), which supports the conclusion that abuse by an out-of-home caregiver may render a placement "harmful." In *Lewis*, the plaintiff was sexually molested by her uncle at his home during periods when he was providing childcare. She sued, claiming that despite knowledge of the alleged abuse, the sheriff's department declined to investigate, permitting the abuse to continue. The County responded that the negligent investigation tort should be limited to abuse by parents and should not encompass caregivers and other individuals. The court disagreed, noting the RCW 26.44.050 duty to investigate "is a broad mandate covering any report of possible abuse or neglect." *Id.* at 454. The Legislature's

definition of child abuse included mistreatment by "any person," and its definition of "child protective services" included "those services provided by the department designed to protect children from child abuse and neglect . . . including reports regarding child care centers." *Lewis*, 136 Wn. App. at 455 (quoting RCW 26.44.020(12) & (18)). The court recognized the duty to investigate encompasses abuse by out-of-home caregivers:

> That child care centers are included indicates the legislature intended to extend the statute's protections to children who are abused outside the home by people other than their parents.

Lewis, 136 Wn. App. at 455.

The appellate court's formulation of "placement" disregards the statutory scheme and the precedent regarding its application, and would treat as equal different living situations and attendant risks. Consider the following three scenarios:

1. mother is single, lives with child's grandmother, and has no boyfriend;
2. mother lives with child's grandmother but takes child to stay with abusive boyfriend; the Department has investigated and has implemented and reviewed with

mother and grandmother a safety plan prohibiting boyfriend's access;

3. mother lives with grandmother but regularly visits abusive boyfriend with her son; there is no safety plan or other protective measures in place.

These three scenarios pose profoundly different risks to children. The Court should grant review to examine whether the appellate court's framework excludes dangerous risks from the calculus and disregards Washington precedent.

B. Review Is Warranted To Address Whether The Majority Improperly Resolved Disputed Issues Of Causation As A Matter Of Law.

Relying in part on expert testimony, W.M. argued that the Department should have implemented a safety plan and advised Lawson and her mother as to its requirements, and that if Lawson appeared noncompliant, the Department could have taken W.M. into custody. W.M. contends the Department's failure to reasonably investigate and take protective steps was a proximate cause of Rich's abuse.

The appellate court rejected this argument, reasoning that even if the Department had put in place a safety plan, "there is

simply no evidence in the record that [Lawson] would have followed whatever voluntary safety plan that may have been put into place." *W.M.*, 19 Wn. App. 2d at 625 (brackets added).

Factual cause "refers to the actual, 'but for' cause" of the injury," and is generally reserved for the factfinder. *See Tyner*, 141 Wn.2d at 82 (citations omitted). It should only be resolved as a matter of law if reasonable minds cannot differ. *See Joyce v. State*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). At least one Washington appellate court applied these rules in the context of a negligent investigation claim and held that whether a safety plan would have been followed generally creates a question of fact. *See Albertson v. State*, 191 Wn. App. 284, 303, 361 P.3d 808 (2015).

In this case, the appellate court relied on Lawson's prior deception in concluding that Lawson would not have followed a safety plan. To reach that conclusion, the court had to disregard other facts that supported the *opposite* conclusion, including that Lawson brought her child to the hospital after his injuries, that Lawson installed safety equipment for the benefit of W.M., and that Lawson lived with her mother, W.M.'s grandmother, who

would have attended a safety plan meeting and learned of its requirements. And, had Lawson been deemed not protective, W.M.'s expert opined that the Department would have had a sufficient basis to take W.M. into custody. To resolve causation in the Department's favor, the court disregarded material facts and improperly resolved the issue as a matter of law.

VI. CONCLUSION

The Court should grant review.

DATED this 24th day of February, 2022.

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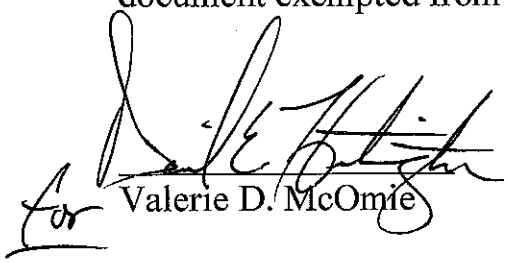

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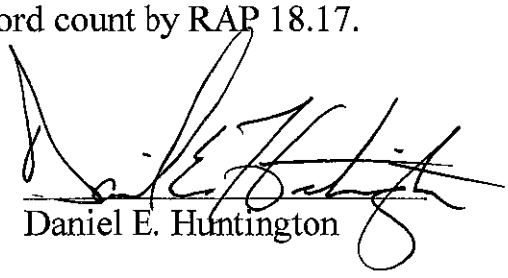

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On behalf of WSAJ Foundation

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 24th day of February, 2022, I served the foregoing document by email to the following persons:

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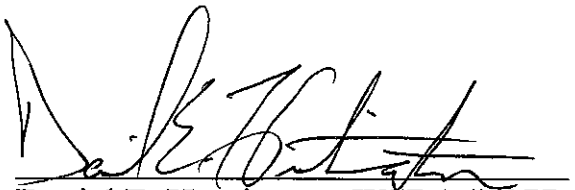

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Attached please find the Amicus Curiae Memorandum of Washington State Association for Justice Foundation.

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