NO. 101294-2

SUPREME COURT OF THE STATE OF WASHINGTON

VAN B. HICKS,

Petitioner,

v.

KLICKITAT COUNTY SHERRIF'S OFFICE, SHIRLEY DeARMOND, and THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondents.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES' ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

I. INTRODUCTION

Adhering to well-settled law, the Court of Appeals determined that Hicks' negligent investigation and negligent retention claims against the Department of Social and Health Services must fail. Disregarding that authority, amicus requests that this Court accept review to greatly expand both causes of action beyond their long-established boundaries. These arguments should be rejected.

As to the negligent investigation claim, the Court of Appeals properly rejected Hicks' request to expand the statutory tort to address harms beyond those contemplated by the statute—placement decisions that concern the child's residential placement or the parent-child relationship. The decision is consistent with this Court's and the Court of Appeals' other holdings. Amicus does not demonstrate any legal error by the Court of Appeals; rather, amicus repeats Plaintiff's arguments and requests that this Court create a new, never-before-recognized cause of action based on inapposite precedent.

Likewise, the Court of Appeals correctly held that Hicks' negligent retention claim should be dismissed. The court followed controlling precedent and appropriately reasoned that a plaintiff cannot circumvent the limited purpose of the tort of negligent investigation by repackaging it as a negligent retention claim.

The Court of Appeals decision does not warrant review under RAP 13.4(b)(1) or (4), and amicus does not present any additional basis beyond Plaintiff's arguments. The Petition should be denied.

II. ARGUMENT

A. The Court of Appeals Properly Determined that the Negligent Investigation Statutory Claim Requires a Harmful Placement Decision Effectuated Through a Court Order About the Parent-Child Relationship or the Child's Residence

Washington appellate courts have repeatedly stated that there is no general tort of negligent investigation. *Wrigley v. State*, 195 Wn.2d 65, 76, 455 P.3d 1138 (2020); *Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013). There is,

however, an "intentionally narrow" exception that allows a plaintiff to bring an implied cause of action under RCW 26.44.050 against the Department when a child abuse or neglect investigation is incomplete or biased and leads to a harmful placement decision. *Wrigley,* 195 Wn.2d at 76; *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003). Amicus' and Plaintiff's request to broaden the scope of this limited cause of action should be rejected.

1. The Court of Appeals did not err in holding that the criminal orders in this case did not constitute harmful placement decisions

Amicus' arguments would push the negligent investigation action beyond its statutory basis and violate the implied cause of action analysis that allows its existence. To succeed in a negligent investigation claim, a plaintiff must prove that a harmful placement decision resulted from an incomplete or biased investigation by the Department. *M.W.*, 149 Wn.2d at 601-02. That decision could include removing a child from a nonabusive home, placing a child in an abusive home, or letting

a child remain in an abusive home. *Id*. Amicus advocates expanding the definition of a harmful placement decision to sexual assault protection orders sought by the prosecutor, issued by the criminal court without input from the Department, and unrelated to the parent-child relationship or the child's residence. Amicus Mem. at 8.

The placement decisions specified in *M.W.* are tied to the harm that the Department's statutory duty to investigate is meant to address—the child's residential placement and the parent-child relationship—and therefore give rise to an implied cause of action. *M.W.*, 149 Wn.2d at 598. Amicus wrongly relies on *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), to argue that the definition of a placement decision, and the source of the Department's duty, may encompass *any* impact on a family after a Department investigation, even if the Department's investigation is unrelated to the court order in question. Amicus Mem. at 7. That position is incorrect for two primary reasons.

First, like Plaintiff, amicus does not address the controlling case on which the Court of Appeals relied to hold that the court orders here do not qualify as harmful placement decisions. *Hicks v. Klickitat Cnty. Sheriff's Office*, 23 Wn. App. 2d 236, 247, 515 P.3d 556, 559 (2022) (citing *McCarthy v. Cnty. of Clark*, 193 Wn. App. 314, 332-33, 376 P.3d 1127 (2016) (published in part), *review denied*, 186 Wn.2d 1018 (2016)). *McCarthy* held that a no-contact order issued through a parent's criminal matter did not constitute a harmful placement decision. *McCarthy*, 193 Wn. App. at 321, 325, 330. That criminal order did not trigger the Department's liability under RCW 26.44.050 because criminal proceedings are "not designed to address the parent-child relationship and the child's residence." *Id.* at 333. Similarly, here, after establishing that Hicks' arrest and protection orders originated from his criminal charge, the Court of Appeals followed *McCarthy*'s holding and affirmed summary judgment against his negligent investigation claim. *Hicks*, 23 Wn. App. 2d at 247. The Court of Appeals' decision here thus

presents no conflict with other Court of Appeals or Supreme Court decisions.

Amicus' reasoning to the contrary, and its silence on *McCarthy*, pays short shrift to the purpose of RCW 26.44.050 and the underpinning of the negligent investigation tort. The defining characteristic of an order effectuating a "harmful placement decision" is not that it originates *only* in a dependency proceeding. And the Department explicitly did not make that argument. Respondents' Answer to Pet. for Review at 20-21.

Rather, the underpinning of a "harmful placement decision" is that the order's purpose must address the parent-child relationship or the child's residence. *McCarthy*, 193 Wn. App. at 333. Without this limitation, the implied cause of action would extend beyond its statutory rationale. *Id*. Criminal court orders, in contrast, address an alleged crime regardless of the victim's relationship to the defendant, an entirely distinct proceeding than a process to address the parent-child relationship or where the child lives. *Id.* The negligent investigation cause of

action is to be intentionally narrow, and appellate courts have repeatedly refused to expand it. For example:

- *Wrigley*, 195 Wn.2d at 77. Refusing to extend the negligent investigation tort to a report of predicted, not existing, behavior.
- *Ducote v. State, Dep't of Soc. & Health Servs*., 167 Wn.2d 697, 222 P.3d 785 (2009). Refusing to extend duty to conduct non-negligent investigation to stepparents.
- *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005). Rejecting inclusion of harms caused by "constructive placement decisions" in negligent investigation claims.
- *M.W.*, 149 Wn.2d at 589. Refusing to extend negligent investigation to include harm child suffers as part of investigation itself.
- *Blackwell v. State Dep't of Soc. & Health Servs.,* 131 Wn. App. 372, 127 P.3d 752 (2006). Refusing to find duty owed to foster parents to conduct non-negligent investigations.

Like these cases, amicus' and Hicks' argument attempting to upend this narrow cause of action should be rejected.

Second, amicus' argument must fail because it posits a rule from *Tyner* for which that case does not support. *Tyner* does not stand for the proposition that the Department should be liable for any impact on the parent-child relationship caused by a sexual assault protection order when the Department neither requested the order nor was involved in providing information to the criminal court. The Department's liability through its duty to investigate has historically been tied to a placement decision that relies on information gathered and presented to the court by the Department. *E.g. Tyner*, 141 Wn.2d at 86 (providing liability may exist when Department fails to provide court with material information over which it has sole control). Thus, in *McCarthy*, the court determined there could be no proximate cause between the Department's actions and the protection orders because there was no evidence that the criminal court relied on the Department's investigation. *McCarthy,* 193 Wn. App. at 335.

Likewise here, the officer who wrote the probable cause statement, Sgt. Anderson, testified that he wrote his probable cause affidavit independently, based on his recollection from participating in the children's interviews. CP 226; *Hicks*, 23 Wn. App. 2d at 239. No one influenced Sgt. Anderson to forward his affidavit to the prosecuting attorney for review. CP 226; *Hicks*, 23 Wn. App. 2d at 239. And the prosecutor did not review any documents from the Department. *Id.* The Department was not involved in the court's decision to enter protective orders in Hicks' criminal matter. This Court should thus decline to follow amicus' invitation to expand the definition of a harmful placement decision.

2. Plaintiff has not raised a common law negligence argument and this Court should decline amicus' attempt to do so

This Court should disregard amicus' invitation to create a common law theory of negligent investigation, a novel issue that amicus alone raises in this appeal. This Court has stated unequivocally that it "will not address arguments raised only by

amici." *Sundquist Homes, Inc. v. Snohomish Cnty. Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413-14, 997 P.2d 915 (2000) (citation omitted).

At the Court of Appeals, Hicks never raised a common law theory of negligence. Consequently, that court did not address it. *See Hicks*, 23 Wn. App. 2d at 241. Neither did Hicks raise a common law theory of negligence in his Petition for Review. *See* Pet. For Rev. at 9-17. Accordingly, the issue is not properly before this Court. *See Sundquist Homes,* 140 Wn.2d at 413-14.

But, even on its substance, amicus' arguments should be disregarded. Amicus asks this Court to recognize, for the first time, a common law theory of negligent investigation. Amicus Mem. at 10-11. Such an invitation violates clear, repetitive statements of the law and should be disregarded for that reason. *McCarthy*, 193 Wn. App. at 333; *Wrigley*, 195 Wn.2d at 76.

Amicus' common law argument is premised on the broad common law duty to refrain from "affirmative acts of

misfeasance" under § 302B of the *Restatement (Second) of Torts* (1965). Amicus Mem. at 10. Under § 302B, "a duty to third parties may arise in the limited circumstances that the actor's own affirmative act creates a recognizable high degree of risk of harm." *Robb v. City of Seattle*, 176 Wn.2d 427, 433, 295 P.3d 212 (2013). This requires "an affirmative act that creates or exposes another to a situation of peril," and that "[f]orseeability alone is insufficient." *Id*. at 435. However, an omission, or failure to eliminate a danger, is insufficient; an affirmative act that increases a danger is required. *Id*. at 435-39.

Amicus suggests that a criminal court order could constitute a situation of peril, creating a § 302B duty. Amicus Mem. at 11. However, in cases examining such a duty, the "situation of peril" requires a risk of *physical* danger resulting from defendants' affirmative acts. *See e.g., Robb*, 176 Wn.2d at 429 (rejecting § 302B claim where law enforcement officers' actions did not change plaintiff's exposure to physical danger);

Washburn v. City of Federal Way, 178 Wn.2d 732, 759-61, 310 P.3d 1275 (2013) (upholding § 302B duty where an officer's affirmative acts in serving a protection order created physical danger to the plaintiff); *Parrilla v. King Cnty.*, 138 Wn. App. 427, 438-39, 157 P.3d 879 (2007) (holding § 302B duty existed where driver left keys in bus ignition and a passenger stole the bus, injuring several people). The risk that a criminal no-contact order may issue is not the same as the physical danger present in § 302B duty cases, and amicus' argument should be rejected.

B. The Court of Appeals Correctly Decided that Hicks' Negligent Retention Claim Should be Dismissed

1. Precedent requires proof the allegedly deficient employee acted outside the scope of employment

The Court of Appeals correctly held that Hicks' negligent retention claim fails because he acknowledged that the social worker's investigation was within her scope of employment. *Hicks*, 23 Wn. App.2d at 247. Amicus, like Plaintiff, incorrectly

finds fault with this holding for relying on *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 47, 423 P.3d 197 (2016). Amicus Mem. at 12.

The *Evans* court distinguished between a vicarious liability claim, where an employer is responsible for an employee's actions within the scope of employment, and direct liability, where the employer is liable for its own negligence when the employee acts outside of the scope of employment by engaging in criminal acts that were enabled in some manner by the employment. *Evans*, 195 Wn. App. at 47. This rule, that an employer could be liable even for the criminal acts of its employees, was articulated in this Court's opinion in *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997), and it has remained intact ever since.

Two years after *Evans*, in *Anderson v. Soap Lake School District*, 191 Wn.2d 343, 423 P.3d 197 (2018), this Court cited the *Evans* distinction approvingly in stating that "[t]he scope of employment limits the vicarious liability of the employer."

Id. at 373 n.21. In fact, this Court has repeatedly denied review of cases applying the scope of employment rule to negligent supervision claims. *Evans*, 195 Wn. App. at 47; *McCarthy*, 193 Wn. App. 314 ¶ 107 (unpublished text); *Garrison v. Sagepoint Fin., Inc.*, 185 Wn. App. 461, 503, 345 P.3d 793 (2015) (citing approvingly the distinction between vicarious and direct liability claims, such as negligent retention, where an employee acted within the scope of employment), *review denied*, 183 Wn.2d 1009 (2015). Review should be denied here as well.

Further, amicus' suggestion that this Court should grant review to upend this settled law by adopting the *Restatement (Third) of Torts* § 41 and its alleged abandonment of this distinction should be rejected. The Court of Appeals did not err in following Washington law, and amicus cannot demonstrate that review would be appropriate under RAP 13.4(b)(1) or (4).

2. A negligent retention claim should not circumvent the limited purpose of a negligent investigation claim

The Court of Appeals correctly held that to allow Hicks' negligent retention claim to make an "end run" around his negligent investigation claim, in the absence of a harmful placement decision, would violate the "carefully limited negligent investigation claim." *Hicks*, 23 Wn. App.2d at 248. This reasoning was an alternative basis to apply summary judgment to Hicks' negligent retention claim because the basis for this claim was the same set of facts underlying his negligent investigation claim. *Id.* Hicks did not address this alternative basis in his Petition, and this Court should reject amicus' attempt to complete that task. *See Sundquist Homes,* 140 Wn.2d at 413-14.

Regardless, the Court of Appeals' alternative basis was correct. To allow Hicks' negligent retention claim to proceed based on the same allegedly-faulty investigation as his other claims and in the absence of a harmful placement decision,

would allow one claim to stand in for another. This would result in violating the purpose underlying RCW 26.44.050 and the implied cause of action analysis that created the negligent investigation claim. *M.W.*, 149 Wn.2d at 598. Hicks should not be allowed to proceed on a faulty negligent investigation cause of action merely by assigning it a new title.

III. CONCLUSION

For the reasons stated above, the Petition should be denied.

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RESPECTFULLY SUBMITTED this 8th day of December 2022.

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

EXECUTED this 8th day of December 2022, at Olympia, Washington.

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