NO. 93280-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FEARGHAL MCCARTHY; CPM, a minor, by and through Fearghal McCarthy, his father; and CCM, a minor, by and through Fearghal McCarthy, his father,

Petitioners,

vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL & HEALTH SERVICES, CHILDREN'S PROTECTIVE SERVICES,

Respondents.

ANSWER TO PETITIONS FOR REVIEW BY RESPONDENT CITY OF VANCOUVER

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Defendant/Respondent
City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

PAGE(S)

WASHINGTON STATE CASES

PAGE(S)

WASHINGTON STATE CASES (continued)

FEDERAL CASES

PAGE(S)

WASHINGTON STATUTES

FEDERAL STATUTES

COURT RULES

SECONDARY SOURCES

I. INTRODUCTION

The primary issue advanced by Plaintiffs/Petitioners Fearghal McCarthy, CPM, and CCM[1] in their petitions for review is to what extent a criminal no-contact order affects a negligent investigation claim asserted under RCW 26.44.050. On this point of law, the reasons advanced by Defendants/Respondents Department of Social & Health Services (DSHS) and Clark County aptly explain why the Court of Appeals' decision neither conflicts with precedent nor merits further review.

Critically, though, the McCarthys' case against Respondent City of Vancouver hangs by a single, independent thread: whether review is warranted under RAP 13.4(b) as it pertains to the absolute immunity afforded to Jill Petty, the originally assigned City prosecutor. Importantly, the McCarthys concede that this issue does not merit independent review, given that they reference the issue only in passing as an "add-on" at the tail end of their petitions. *E.g.*, Children's Pet. for Rvw. at 20 ("The Court should *also* review the Prosecutorial immunity issue") (emphasis added).

The City adopts and supplements the arguments advanced by DSHS and the County concerning why review should be denied on the negligent investigation claim. But even if this Court were inclined to consider RCW 26.44.050, review should be denied entirely as to the City. The Court of Appeals' analysis of prosecutorial immunity is consistent with Washington precedent, and the McCarthys offer no persuasive

[1] Although the McCarthy children employed their full names in the trial court, *see* CP at 1-8, they have employed only their initials to this Court. The City follows their lead.

argument to the contrary. They have fallen far short of their burden to prove that review is warranted. Their petitions should be denied.

II. ISSUE PRESENTED

The City rejects the McCarthys' statements of the issues and presents the following in lieu thereof:

Whether a municipality employing a prosecutor is absolutely immune for actions arising out of charging decisions, which include communications with the complaining witness and telling the witness to report different crimes to the police.

III. STATEMENT OF THE CASE

A. Motion to Strike Appendix C to CPM/CCM Petition.

As an initial matter, the City moves to strike Appendix C to the Children's petition. Insofar as the factual background of this case is concerned, an appellate court "stands in the same position as the trial court" when reviewing a summary judgment order. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 224, 961 P.2d 358 (1998). In furtherance of this principle, this Court may consider only those documents called to the trial court's attention prior to summary judgment being entered. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986); *see also* RAP 9.12.

The City was granted summary judgment almost four years before the trial court dismissed Clark County and DSHS. *See* CP 1093-95, 2072-74. Thus, to properly consider the McCarthys' petition as it pertains to the City, only those Clerk's Papers and Exhibits filed prior to July 30, 2010,

can be considered. *Accord Tank*, 105 Wn.2d at 390. Despite this rule, the CPM and CCM attempt to rely on a document that was never presented to the trial court. *See* Children's Pet. for Rvw. at 8 & Appx. C. In fact, the Court of Appeals denied the McCarthys' motion to take that same document—a docket printout—under judicial notice. *See* Order Denying Mot. to Take Judicial Notice, *McCarthy v. Clark County*, No. 46347-4-II (Wash. Ct. App., Mar. 7, 2016). The McCarthys have not asked this Court to review that order. Accordingly, the City moves to strike Appendix C.

B. Factual background

On June 3, 2005, Patricia McCarthy called 911. Def.'s Ex. 1; *see also* CP 133-38.[2] In that call, she told the dispatcher that her "husband ha[d] been violent with us for the past year or so," and that the previous night, he [Fearghal] hit their (then) two-year old son CCM "across the head" twice, causing the child to fall off the chair and hit his head. CP 134. The audio, which is in the record, reveals Patricia to be crying hysterically while recounting the event. Def.'s Ex. 1. No one was with Patricia when she called 911. CP 138-39. Clark County Deputy Sheriff Edward Kingrey responded to the call, investigated, and a obtained *Smith* affidavit[3] from Patricia in which she affirmed—in her own handwriting—

[2] The actual 911 audio is contained on a disc that is Exhibit 1, which is a part of the appellate record. RAP 9.6. The transcript of that call is in the record too. CP 133-38.

[3] A *Smith* affidavit is a sworn statement by a domestic violence victim obtained by police officers to be used as substantive evidence to prove the accused's guilt if the victim later recants. *See State v. Smith*, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982). As this Court there recognized, "In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness." *Id.* at 861.

that Fearghal had "wacked [sic] [CCM] across the head" twice, forcing CCM to fall. CP at 192-195. Kingrey then interviewed Fearghal, obtaining his version. CP at 241-42. Choosing to believe the victim over the accused, Kingrey arrested Fearghal for fourth degree assault-domestic violence and transported him to jail. CP 230-31, 242. That was a Friday, meaning Fearghal spent the weekend in jail before being arraigned on Monday, June 6, 2005. *See* CP at 245-46, 322.

The day after Fearghal's arrest, CCM's grandmother took him to the doctor, who confirmed after examination that there was a "slight bruise on [the] side of [CCM's] forehead," which made it was necessary to "call the Abuse Hotline." CP at 433-34. The bruise was consistent with Patricia's allegations that Fearghal knocked CCM out of a chair. *Id.*

At arraignment, Clark County District Court Judge Schrieber entered a no-contact order, preventing Fearghal from coming into contact with CCM. CP at 245-46. The order imposed no restraint at all against Fearghal contacting his other son, CPM. *Id.*

1. City prosecutor Jill Petty learns that Patricia McCarthy reported an assault on a two-year old and files charges.

Up until and prior to the entry of the no-contact order, it is undisputed that Jill Petty had no involvement whatsoever in the case. On July 8, 2005, roughly one month after the no-contact order was issued, Petty formally charged Fearghal with fourth degree assault-domestic violence for the June 2 incident. CP at 248.

A month later, on August 9, 2009, Patricia filed for divorce while represented by her own attorney, Marcine Miles, and reaffirmed her allegations of abuse. CP at 196-200, 207-12. Patricia had retained Miles initially on June 20 to pursue dissolution. CP at 956. Miles testified to the following, which is uncontroverted:

> Throughout my representation of Ms. McCarthy, I fully abided by my client's decisions concerning the objectives of representation as required by and in compliance with Washington Rule of Professional Conduct 1.2. Every decision or action taken in the dissolution action during my representation was made either independently by me within my implied authority under RPC 1.2(a), in consultation and agreement with Ms. McCarthy, or by Ms. McCarthy herself.

CP at 497-98. Miles testified that she spoke to Petty only once in a "brief" phone call, and never communicated with her in writing. CP at 808-09. At deposition, Miles described that phone call as follows:

> The sum and substance was, I felt Ms. Petty and I could cooperate in this matter [the dissolution with Fearghal]. She said adamantly, no.…
>
> That is the detail. She [Petty] was very emphatic, telling me no.

CP at 811. Lest there be any doubt, Miles affirmed by declaration that Petty "adamantly refused to cooperate and assist with any part of the dissolution action." CP at 497. And although Patricia's testimony has fluctuated over the years, she has always admitted that she has no first-hand knowledge of anything communicated between Petty and Miles. CP at 1009. In sum, the record is devoid of any admissible evidence disputing Miles' testimony.

2. Three days after filing for divorce, Patricia reports three past violations of Judge Schreiber's no-contact order.

On August 12, 2005, three days after filing for divorce, Patricia reported to the police that Fearghal had violated the June 6, 2005, no-contact order three times the preceding two months. CP at 71, 75. Patricia traveled to the police department and provided VPD Officer Kortney Langston with not only another *Smith* affidavit detailing the violations (which she wrote in her own handwriting and without any pressure), but also documentation from where the violations occurred (a local fitness gym). CP at 77-88. Nothing in the record suggests that this documentation was forged or that it fails to accurately prove that Fearghal came within 500 feet of CCM in violation of the June 6 order. The record does show that the entire investigation into these crimes was done by Officer Langston alone, who took Patricia's report, *Smith* affidavit, supporting documentation, and forwarded it to the prosecutors. CP at 75.

On November 10, 2005, as a result of Officer Langston's report, Petty filed new charges against Fearghal for three violations of the June 6, 2005, no-contact order. CP at 337-38. In his operative pleading, Fearghal complained that Petty filed these charges without performing any further investigation. CP at 7.

3. Prior to Petty's resignation, Patricia submits evidence of witness tampering, which results in a transfer of the case to a County prosecutor.

On October 18, 2005, Patricia presented VPD Detective Carole Boswell with several pages handwritten by Fearghal. CP at 2234, 2245-

49. The McCarthys have never disputed that these pages were in fact authored by Fearghal. The handwriting stated that Patricia should "delete all emails from me to Trish," that she should "only call me using a calling card – not from your cell phone," and that "this note must be kept in a safe place." CP at 2245. The letter referenced the other son, CPM, stating "Any statements that he makes that I hit [CCM] or Mommy will be damning – or that he has been coached." *Id.* The following section began with the header "Your position/ testimony" with bullet points such as:

- "wife recanting testimony is common … Need to be careful"
- "You will need to talk to my attorney … he will advise you on whether to write a letter to prosecutor."

Id. The final page contained a list of bullet points below the heading "Fearghal's story." CP at 2248. Detective Boswell forwarded her report and the evidence to the prosecuting attorney's office for consideration of witness tampering charges. CP at 2234-35; *see also* RCW 9A.72.120.

On January 26, 2006, Clark County Prosecutor Camara Banfield filed a new information in Superior Court charging Fearghal with witness tampering. CP at 250-51.[4] That charging document consolidated the original assault charge into the newly filed Superior Court case, at that point jurisdiction fully transferred to the County, CP at 97; RCW 36.27.020(6). This led to the dismissal of the district court case under which Fearghal had been prosecuted for the assault, CP at 261-62.

[4] The original information was amended days later because it mistakenly charged Fearghal with assaulting Patricia instead of CCM on June 2. *See* CP at 250-54.

Petty resigned from the City on January 31, 2006, to pursue a career in private practice. CP at 360. She has not worked for the City since. CP at 2223-24.

The following August, Fearghal took advantage of a deal and pled guilty to Disorderly Conduct. CP 266, 268-76. In his plea, Fearghal stated that he "believe[d] that a jury could possible [sic] find that I was [guilty]." CP 274. Patricia emphatically begged the court at sentencing to have the record reflect that Fearghal "actually struck the child and there's a bruise on his head." Def.'s Ex. 2 at 43m,59s; *see also* CP at 316-19.

C. Procedural history

Fearghal commenced this action on August 1, 2008, on his behalf and also on behalf of his sons. CP at 2178-94. The dissolution action however, was still ongoing. Two months after the complaint was filed, Patricia agreed to sign a stipulation in the dissolution that drastically departed from her original allegations. CP at 218-28. The stipulation was signed on October 24, 2008, two months after her attorney had withdrawn, while she represented herself, and was prepared by Fearghal's dissolution attorneys. CP at 223-24, 357. In that document, Patricia denied the assault and all other crimes of which Fearghal was accused, and alleged that Petty pressured Patricia to maintain the allegations. CP at 223-24.

The City moved for summary judgment, which the Court largely granted. CP at 2112-16. However, the Court deferred ruling in part under CR 56(f), allowing the McCarthys to depose Petty and Miles "for the purpose of discovering whether Ms. Petty engaged in any conduct that

would not be protected by prosecutorial immunity and would create a genuine issue of material fact with regard to Plaintiffs' claims." CP at 2114-15.[5] Once taken, neither Petty's nor Miles' depositions provided the McCarthys with anything to help their case. Rather than relying on the discovery they were granted in the continuance, the McCarthys instead procured a 17-page matrix allegedly signed by Patricia that itemized 244 "corrections" to the deposition. CP at 740-57. Those corrections functionally rewrote the testimony, changing many "yes" answers to "no," vice versa, and even deleting entire blocks of testimony. *Id.*

The trial court granted summary judgment to the City and granted the City's motion to suppress the correction pages. CP at 1093-98.[6] However, the trial court elected to "accept … ["[t]he 'correction pages'"]

[5] The McCarthys originally claimed the City was liable for the actions of VPD officers such as Langston and Boswell. CP at 1-18. Those claims were dismissed on summary judgment, *see* CP at 2112-16, and the McCarthys no longer pursue them.

[6] It is well established that "[t]his Court may affirm a lower court's ruling on any grounds adequately supported in the record." *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The McCarthys' opposition to summary judgment hinged entirely on a 17-page typewritten matrix that was nothing short of an attempt to rewrite Patricia McCarthy's deposition. *See* CP at 740-57. "Yes" answers were changed to "no." "No" answers were changed to "yes." Some answers were deleted entirely. Additionally, the record demonstrated that the "corrections" were untimely submitted, and the matrix was prepared by someone other than Patricia. CP at 757, 904-07, 911; Br. of Resp't City, Appx. A. The trial court rightfully disregarded these "corrections." CP at 929-43. Should this Court be inclined to accept review, it will have to decide whether, and to what extent, an untimely correction sheet under CR 30(e) that rewrites a deposition entirely may be relied upon to oppose summary judgment. In other words, summary judgment should not be precluded when a party or witness—particularly in cases with domestic violence overtones—treats a deposition as "a take home examination." *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992). To date, this Court has not taken a stance on the question, despite some flux in the Court of Appeals. *Compare State Farm Mut. Auto. Ins. Co. v. Treciak*, 117 Wn. App. 402, 408-09, 71 P.3d 703 (2003), *with Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989). But the Court need not and should not decide this issue because, in the end, the McCarthys have not and cannot demonstrate a valid basis under RAP 13.4(b) to review the Court of Appeals' analysis on prosecutorial immunity.

… as a declaration of Patricia McCarthy." CP at 1098. After the County and DSHS were granted summary judgment almost four years later, CP at 2072-74, the McCarthys appealed, CP at 2075-2102. The Court of Appeals affirmed the trial court in its entirety. *McCarthy v. County of Clark*, 193 Wn. App. 314, ___ P.3d ___ (2016).

IV. ARGUMENT

Aside from negligent investigation, the McCarthys make only one passing reference to any cause of action—malicious interference with the parent/child relationship—and they do so only in the "issues presented" section without any supporting argument. FM Pet. for Rvw. at 1;[7] Children's Pet. for Rvw. at 2. Mere passing reference to a theory without "substantial argument or citation" is insufficient to preserve that issue for Supreme Court review. *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 594 n.2, 201 P.3d 309 (2009) Thus, the only cause of action still at issue is negligent investigation.

Supreme Court review is justified only in limited circumstances. RAP 13.4(b). The McCarthys bear the burden to demonstrate that the Court of Appeals' analysis on prosecutorial immunity "is in conflict with a decision of the Supreme Court," "is in conflict with another decision of

[7] Later in his brief, Fearghal references a "malicious prosecution" cause of action. FM Pet. for Rvw. at 17. The McCarthys never asserted that claim below. *See* CP at 1-18. Even if they had, the McCarthys never challenged the Court of Appeals' conclusion that no reasonable mind could dispute the presence of probable cause, *McCarthy*, 193 Wn. App. ¶ 105, which would be an absolute defense if they had asserted malicious prosecution, *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). Because the existence of probable cause is now the law of the case, and because the McCarthys never asserted malicious prosecution, there is no need to consider the tort at all.

the Court of Appeals," or is "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1), (b)(2), (b)(4). Because the McCarthys' petitions do not meet these demanding standards, review should be denied.

A. The McCarthys cite no authority that conflicts with the Court of Appeals' analysis on prosecutorial immunity, or show that review is otherwise justified.

The McCarthys' case against the City cannot be sustained if prosecutorial immunity is upheld—*regardless* of whether the Court were inclined to consider the scope of negligent investigation under RCW 26.44.050. As such, in order to maintain this case against the City, the McCarthys were required to demonstrate that the Court of Appeals' prosecutorial immunity analysis warrants review under RAP 13.4(b). And on this point, they have fallen far short.

Every court that has reviewed this case has consistently and correctly held that Petty's conduct about which the McCarthys complain all occurred within her role as an advocate for the City and was therefore protected by absolute immunity. *McCarthy*, 193 Wn. App. at 336-40; *see also id.* ¶¶ 110-113, 140-144, 155-158 (unpublished portion); CP at 1093-95. This is consistent with well-established Washington law, which has long held that prosecutorial immunity completely bars liability for any "matter[] … among those generally committed by the law to the control or supervision of the office [of the prosecutor] and are not palpably beyond authority of the office." *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935). Thus, as the Court of Appeals reaffirmed below,

"prosecutors generally have absolute immunity for initiating *and pursuing* a criminal prosecution." *McCarthy*, 193 Wn. App. at 337 (citing *Musso–Escude v. Edwards*, 101 Wn. App. 560, 570, 4 P.3d 151 (2000)) (emphasis added). This longstanding principle has existed for decades. *Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966); *Mitchelle v. Steele*, 39 Wn.2d 473, 474, 236 P.2d 349 (1951); *Schmitt v. Langenour*, 162 Wn. App. 397, 406-08, ¶¶ 19-23, 256 P.3d 1235 (2011). Like judicial immunity, prosecutorial immunity "is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property." *Anderson*, 181 Wash. at 331. In Washington, the government entity that employs the prosecuting attorney shares the same prosecutorial immunity as the individual. *Creelman*, 67 Wn.2d at 885. Thus, unlike qualified immunity, *see Savage v. State*, 127 Wn.2d 434, 442-47, 899 P.2d 1270 (1995), the City is entitled to the same absolute immunity as Petty, *Creelman*, 67 Wn.2d at 885.

The Court of Appeals correctly followed these longstanding principles. First, it noted that despite the McCarthys' arguments to the contrary, the comments Petty allegedly made to diffuse Patricia's "reluctance about pursuing Fearghal's prosecution" were all made in connection with Petty's efforts to initiate and pursue prosecution. *McCarthy*, 193 Wn. App. at 338. Consistent with Washington law (and common sense) holding that "[c]onferring with potential witnesses is within

the scope of a prosecutor's traditional duties," the court correctly held that Petty's motives to quell Patricia's reticence were "immaterial to the question of whether immunity applies." *Id.* (citing *Rodriguez v. Perez*, 99 Wn. App. 439, 450, 994 P.2d 874 (2000)). In the context of domestic violence, where victims recant at an alarming rate,[8] a prosecutor must be allowed to confer with witnesses and victims with absolute independence.

Second, the court correctly rejected the McCarthys' claim that Petty "strategized with Patricia's dissolution attorney regarding dissolution matters." *Id.* at 339. The court appropriately recognized Patricia's admission "that she was not part of any conversations between her dissolution attorney and Petty" and the only evidence to the contrary was hearsay. *Id.* This is consistent with settled Washington law holding inadmissible hearsay cannot preclude summary judgment. *E.g.*, *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 309, 151 P.3d 201 (2006).

Third, the court appropriately rejected efforts to hold the City liable for Petty allegedly "coaching Patricia during a deposition" in September 2009 because the McCarthys never "t[ook] any action to incorporate th[o]se allegations into their complaint." *McCarthy*, 193

[8] *See, e.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 751 (2005) ("Approximately 80 percent of victims decline to assist the government in prosecutions of domestic violence cases."); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367-68 (1996) ("[V]ictims of domestic violence are uncooperative in approximately eighty to ninety percent of cases. Many victims are uncooperative from the initial filing of the case, and *some of those who are initially cooperative become uncooperative*.") (emphasis added).

Wn. App. at 339-40. Additionally, it was always undisputed that Petty ceased working for the City over three years earlier. CP at 360.[9]

Lastly, the Court of Appeals rightly concluded that Petty's act of directing Patricia to report past violations of a no-contact order were still protected by immunity because they "[we]re related to her duty to make charging decisions." *McCarthy*, 193 Wn. App. at 339. Contrary to the McCarthys' unsupported argument, the Court of Appeals' analysis adheres to its holding from just a few years ago, which reaffirmed that "certain investigative acts, when undertaken in direct preparation for judicial proceedings[,] are subject to absolute immunity." *Schmitt*, 162 Wn. App. at 407, ¶¶ 21 (prosecutor who directed a police officer to reinterview a complaining witness had absolute immunity as the decision was related to charging). Whereas Supreme Court review is proper to correct a lower court's departure from precedent, that same review is unnecessary and improper when the lower courts fully adhere to Washington law.

In addition, the record conclusively shows that Fearghal did violate the no-contact order. The McCarthys rely exclusively on the 17-page "correction sheet" for Patricia's deposition to support the claim that Petty stepped outside her role in telling Patricia to report the violations to the

[9] In the lower courts, the McCarthys relied on a stipulation entered on September 11, 2009, that states "[a]ll actions taken by Jill Petty are deemed to be within the course and scope of her employment by Defendant City of Vancouver." CP at 2227. The stipulation was executed after the City moved for summary judgment to dismiss Petty due to the Plaintiff's failure to comply with RCW 4.96.020. *See* CP at 2210-22. More fundamentally, Patricia was not deposed until 17 days *after* the stipulation was entered. *See* CP at 121. Thus, the Court of Appeals correctly concluded that the alleged actions of a former employee could not, under any circumstances, give rise to the City's liability.

police. A review of the "corrections sheet," even assuming it warrants any consideration, *see supra* at 9 n.6, undermines this premise completely. The "corrections sheet" asserts that Patricia "told [Petty] that I had bumped into Fearghal at Ballys," after which Petty told Patricia to inform the police. CP at 746. Notably, this is exactly how Officer Langston recalled the incident in his report. CP at 75. Regardless of *who* told Patricia to talk to the police, *nothing* in the "corrections sheet" contradicts Patricia's deposition testimony that the three-page *Smith* affidavit she authored in front of Officer Langston detailing the violations was (a) in her handwriting, (b) written without anyone coaching her, (c) signed by her under penalty of perjury, and (d) *entirely true*. CP at 168-71, 213-15; *see also* CP at 746-47 (leaving unchanged the pages of Patricia's deposition attesting to the foregoing). It is irrelevant whether Patricia, CCM, or anyone else consented to Fearghal's contact. *State v. Shuffelen*, 150 Wn. App. 244, 258-59, 208 P.3d 1167 (2009). Thus, the record shows, at best, a prosecutor told a complaining witness to tell the police about a crime that actually happened.

Despite this sound reasoning that is fully consistent with Washington precedent, the McCarthys collectively rely on only two[10] cases to claim review of prosecutorial immunity is warranted under RAP

[10] Fearghal cites a third case: *In re Welfare of Sumey*, 94 Wn.2d 757, 762-62, 621 P.2d 108 (1980). *See* FM Pet. for Rev. at 18. *Sumey* considered "whether the residential placement procedures of RCW 13.32 violate due process by authorizing placement of a minor without a prior finding of parental unfitness." *Id.*at 758. The McCarthys have never claimed any constitutional violation. *Cf.* 42 U.S.C. § 1983. *Sumey*, which says nothing about prosecutorial immunity or negligent investigation, is totally inapposite to this case, meaning there is no conflict with the decision below. *Cf.* RAP 13.4(b)(1).

13.4(b)(1) or (b)(2): *Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 950 P.2d 20 (1998), and *Rodriguez*, 99 Wn. App. 439. Not only is the Court of Appeals' analysis consistent with both *Gilliam* and *Rodriguez*, the lower court *relied* on both cases to hold that the City and Petty were immune. *See McCarthy*, 193 Wn. App. at 337-38.

Further undermining the McCarthys' claim of alleged conflict is an examination of the cases themselves. Fearghal cites page 585 of *Gilliam* to argue "[w]hether an employee acts inside or outside the scope of their duties is ordinarily a question of fact for the jury." FM Pet. for Rvw. at 18. He goes on to claim the Court of Appeals' decision conflicts with *Gilliam* by "invad[ing] the province of the jury by making the factual determination that Petty did not conduct investigative duties as opposed to prosecutorial functions." *Id.* The children make the same argument. Children's Pet. for Rvw. at 20. This contention is legally flawed.

First, Fearghal misrepresents the portion of *Gilliam* that he cites. That passage was discussing whether, under those facts, the tort of negligent supervision should be dismissed as superfluous if the defendant-principal concedes scope of employment. *Gilliam*, 89 Wn. App. at 585. That is not the issue here, and that cause of action was never alleged against the City. Significantly, and noticeably absent from Fearghal's cursory analysis, is what *Gilliam* said just a couple pages later when the court *was* discussing prosecutorial immunity: "[t]he focus of an inquiry into a proposal for absolute immunity" turns on how a court "characteriz[es] … the functions of a [public employee]," which "is a

question of law." *Id.* at 578 (emphasis added); *accord Hannum v. Friedt*, 88 Wn. App. 881, 886, 947 P.2d 760 (1997) (citations omitted). This Court has often stressed that legal questions are decided by the court, not the jury. *E.g.*, *Osborn v. Mason County*, 157 Wn.2d 18, 22-23, 134 P.3d 197 (2006). Thus, the Court of Appeals did not "invade the province of the jury" by deciding a legal question that was reserved exclusively for its determination. The Court of Appeals' opinion does not conflict with *Gilliam*. *Cf.* RAP 13.4(b)(2).

Second, Fearghal's claim that extending prosecutorial immunity here would "deprive[] the protected class of the strong safeguards and remedies implied by RCW 26.44," *see* FM Pet. for Rvw. at 18, was properly rejected by not only the Court of Appeals below, but also *Rodriguez*, the one case cited by CPM and CCM as a "conflict." Contrary to Fearghal's view that chapter 26.44 RCW overrides prosecutorial immunity, *Rodriguez* stressed: "neither RCW 26.44 nor our holding restricts prosecutorial immunity." *Rodriguez*, 99 Wn. App. at 450. The Court of Appeals' decision does not conflict with *Rodriguez* – it follows it.

Put simply, the McCarthys have offered no precedent that even arguably conflicts with the Court of Appeals' and trial court's analysis on prosecutorial immunity. Nor have the McCarthys even attempted to argue why review of the Court of Appeals' prosecutorial immunity analysis is justified under RAP 13.4(b)(4). Because review of the prosecutorial immunity issue is necessary to salvage any claim against the City, the Court should, at a minimum, deny review as to the City.

B. By completely ignoring this Court's decision in *Roberson v. Perez*, the McCarthys distort *M.W. v. DSHS*.

The McCarthys devote the vast majority of their petitions to dispute the Court of Appeals' analysis of chapter 26.44 RCW. Notably, they both spend considerable time discussing *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), as either the primary authority with which the court's decision below conflicts, Children's Pet. for Rvw. at 8, or a source of mass confusion, FM Pet. for Rvw. at 10-17. The McCarthys argue that *M.W.* improperly requires plaintiffs asserting negligent investigation under RCW 26.44.050 to demonstrate that the investigation resulted in a "harmful placement decision" for liability to attach. *M.W.*, 149 Wn.2d at 601; *see also* FM Pet. for Rvw. at 12; Children's Pet. for Rvw. at 14-17.

What is strikingly absent from either petition for review is any citation or discussion of *Roberson v. Perez*, 156 Wn.2d 33, 44-47, 123 P.3d 844 (2005). *Roberson* held that *if* a chapter 26.44 RCW cause of action could be asserted against a law enforcement agency, *id.* at 45 n.10, the same essential element required to sustain a claim against DSHS would be required, namely that there be proof of causation between the law enforcement action and a "harmful placement decision," *id.* at 48. Thus, contrary to what the McCarthys assert, *M.W.* is not some "unique" outlier undeserving of precedential value.

Reduced to its core, the McCarthys petitions ask this Court to overrule *M.W.* But to take that drastic step, the Court would have to also overrule *Roberson*, which applied and extended *M.W.* Contrary to the

McCarthys' arguments, stare decisis "requires a clear showing that an established rule is incorrect *and* harmful before it is abandoned.'" *Waremart, Inc. v. Progressive Campaigns, Inc*., 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (citation and quotations omitted) (emphasis added). Significantly, in the decade since *Roberson* was decided, the legislature has not seen fit to expand chapter 26.44 RCW liability. Quite the contrary, the legislature has only diminished it. LAWS OF 2012, ch. 259 § 14, *codified at* RCW 26.44.280. This is markedly distinct from times when the legislature swiftly overruled this Court's view of the common law. *E.g.*, *Rahman v. State*, 170 Wn.2d 810, 817-18, 246 P.3d 182 (2011), *abrogated and overruled by* LAWS OF 2011, ch. 82, § 1. Given that the legislature has chosen to only reduce liability under chapter 26.44 RCW since *M.W.* or *Roberson* rather than enlarge it, there is no basis to legitimately assert "a clear showing" that those cases are both "incorrect and harmful." *Waremart*, 139 Wn.2d at 634. As this Court emphasized just two months ago:

> The question is not whether we would make the same decision if the issue presented were a matter of first impression. Instead, the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent—"'promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.'"

State v. Otton, 185 Wn.2d 673, 678, ___ P.3d ___ (2016) (quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v.*

Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991))) (italics and alterations in original). The Court of Appeals rightly followed *Roberson* and *M.W.*, *McCarthy*, 193 Wn. App. at 328-29, 332-35 & n.5, and the McCarthys do not persuasively argue why stare decisis should be disregarded here.

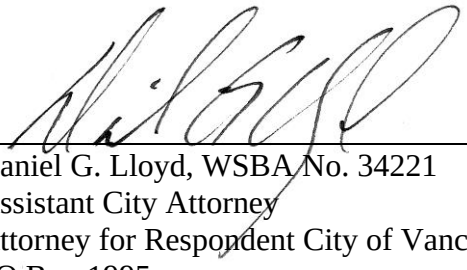
The City further supports and adopts the arguments made by both Clark County and DSHS why the Court should not grant review of the Court of Appeals' sound analysis of RCW 26.44.050 and the "narrow" cause of action based on that statute. *M.W.*, 149 Wn.2d at 601.

V. CONCLUSION

For all of the foregoing reasons, and for the reasons advanced by DSHS and the County, this Court should deny the petitions for review.

RESPECTFULLY SUBMITTED this 15th day of August, 2016.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON



Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Respondent City of Vancouver
PO Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
dan.lloyd@cityofvancouver.us

CERTIFICATE OF SERVICE

I certify pursuant to RAP 18.5(b) and 18.6(b) that on August 15, 2016 below, I served via U.S. mail, first class, postage prepaid, a copy of the foregoing document to each and every attorney of record herein, as identified below, at their last known email address(es):

Mr. Tyler Firkins
Van Siclen, Stocks & Firkins
721 45th St. NE
Auburn, WA 98002-1381

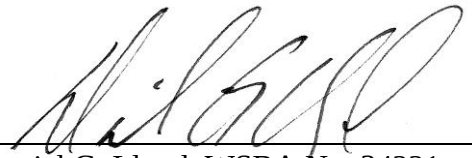
Ms. Suzanne LiaBraaten
Assistant Attorney General
PO Box 40126
Olympia, WA 98504

Ms. Erin Sperger
Legal Wellspring PLLC
1617 Boylston Ave.
Seattle, WA 98122

Mr. Taylor Hallvik
Clark County Prosecuting
Attorney's Office
PO Box 5000
Vancouver, WA 98666-5000

DATED this 15th day of August, 2016.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON



Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Respondent City of Vancouver
PO Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
dan.lloyd@cityofvancouver.us