Supreme Court No. 93280-8

Court of Appeals No. 46347-4-II

**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,

Plaintiffs and Appellants

Vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL AND HEALTH SERVICE,

Defendants and Respondents

# CCM'S AND CPM'S REPLY TO RESPONDENTS' ANSWERS TO PETITION FOR REVIEW

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**Washington Cases**



**Statutes**



**Federal Cases**



**Rules**

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## I. IDENTITY OF PETITIONER

Petitioners are CCM and CPM, children who were separated from their non-abusive father and left in an abusive home for nearly two years, as a result of a negligent investigation by the Clark County Sheriff's office and by DSHS.

## II. ISSUES PRESENTED FOR REVIEW

3.1 Should this court considere the doctrine of Stare Decisis when the children have not asked this Court to overturn *M.W. v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 589, 70 P.3d 954 (2003), *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000), or *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005)?

3.2 Does this case present an issue of substantial public interest despite the legislative amendment in RCW 26.44.280 and RCW 4.24.595 when those amendments do not grant immunity, and they only apply to an emergent placement investigation?

3.3 Are the children entitled to preserve the issue of prosecutorial immunity for review if this Court grants their petition for review?

## III. ARGUMENT IN REPLY TO NEW ISSUES RAISED

### A. The doctrine of Stare Decisis does not apply because the children have not petitioned this Court to overturn M.W., Tyner, and/or Roberson.

Both Clark County and DSHS raise the new issue of whether the doctrine of Stare Decisis should apply. DSHS argues that the doctrine of Stare Decisis cautions against granting review because the children are asking this Court to overturn its own precedent in Tyner, M.W., and Roberson. DSHS answer to CPM/CCM Pet. At 11. However, the children have not asked this Court to overturn any precedent. Instead, they have asked this Court to clarify the holdings in those cases, in order to alleviate a conflict among the divisions and to aid the Court of Appeals in applying the precedent consistently.

The children do not ask for a new rule of law, nor do they assert that no harmful placement decision is required. Instead, they argue that a harmful placement decision is not limited to an affirmative placement by DSHS because the duty to investigate that is imposed on DSHS and Law Enforcement is independent from any court proceeding. See CCM/CPM Pet. at 10-11. This is already the rule under existing case law. *M.W.*, 141 Wn.2d 589. *M.W.* favorably cited to *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wn. App. 71,74, 81, 930 P.2d 958 (1997), a case in which the child was not placed by DSHS, yet DSHS was not shielded from the child's claim for negligently investigating the allegation of child abuse. M.W., 141 Wn.2d at 600. Again in *Lewis v. Whatcom Cnty*, 136 Wn. App. 450, 457-58, 149 P.3d 686 (Ct. App. Div. 1 2006), which was decided after *M.W.*,

Division One allowed a child to bring a cause of action against law enforcement for negligently investigating an allegation of child abuse even though the child's mother was the one who placed her in danger.

Both DSHS and Clark County argue that the children are asking this Court to overturn *Roberson*, but that is not accurate. The children simply assert that no Washington case has limited the definition of a harmful placement decision to a dependency or dependency-related placement decision, as the Court of Appeals concluded. *McCarthy v. Clark County*, No. 463474, (Apr. 12, 2016) Slip Opinion at 15-17; CC answer at 2. *M.W.* defined a harmful placement decision as "removing a child from a non-abusive home, placing a child in an abusive home, or letting a child remain in an abusive home." 149 Wn.2d at 595.

But, beyond the dispute over the definition of a "harmful placement decision," the children's argument is that the Court of Appeals erred by not applying the proper test to determine whether the criminal no-contact order was a superseding intervening cause. See COA decision at 14-17; CCM/CPM Pet. at 17-18. It appears that both Clark County and DSHS agree that the proper test is whether all of the material information was presented to the court. CC answer at 16; DSHS Answer at 19. The children's complaint is that the court of appeals did not apply that test, nor did it apply

the principles of foreseeability, because it conflated cause in fact with legal causation.

### B. RCW 26.44.280 and 4.24.595 do not create immunity, nor do they apply to non-emergent placements investigations like the investigations that occurred in this case

Both Clark County and DSHS raise a new issue in their answers regarding the applicability of RCW 26.44.280 and RCW 4.24.595. This issue was raised below by the City of Vancouver, but was not decided in the Court of Appeals. (See COV Br. In Resp. at 38. Clark County and DSHS argue that this case does not present an issue of substantial public interest because the RCW 26.44.280 limits government liability when responding to allegations of child abuse. Therefore, future litigants will be subject to the statutory amendments, instead of case law, and the precedential impact of this case would be rendered moot. DSHS answer at 3, 17-18; CC answer at 1 n.1, 15. But, this argument creates an issue of statutory interpretation, which in itself is an issue of substantial public interest. Moreover, this argument is misplaced for two reasons. First, the investigation in the instant case does not involve an "emergent placement decision investigation" and RCW 4.24.595 only limits government liability in an emergent situation. Second, even in an emergent situation, RCW 4.24.595 does not create

statutory immunity. Instead it requires the plaintiff to show that there was gross negligence.

"Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." *In re Dependency of M.H.P.*, 184 Wn.2d 741, 756-57, 364 P.3d 94 (2015) quoting *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). Since RCW 4.24.595 only expressly mentions emergent placement investigations, it necessarily excludes non-emergent placement investigations. Emergent placement investigations are "those conducted prior to a shelter care hearing under RCW 13.34.065." RCW 4.24.595. A shelter care hearing is held within seventy-two hours of when a child is taken into custody. Nothing on the face of the statute suggests that it applies to children in a situation similar to the McCarthy children, where they were not taken into custody, there was never a shelter care hearing or a dependency, and there was no emergency whatsoever. (Deputy Kingrey responded to a cold call, the alleged assault had occurred the night before and Patricia told Deputy Kingrey that she and the children were safe and had a place to stay for the night). CP 1537, 1543, 1825-27. RCW 26.44.280 is not only moot as to this case, but in every similar non-emergent case. Therefore, the impact of this case affects a substantial issue of public interest despite these amendements.

C. **The Children properly preserved the issue of prosecutorial immunity as it relates to negligent investigation and malicious interference for review if this Court accepts review of the other issues.**

RAP 13.4(b) contains the four considerations that govern acceptance of a petition for review. It does not mandate that every issue in the case has to fall under one of those four factors. But, the rules of appellate procedure do mandate that any issues a party wants to be reviewed, must be properly raised in the petition for review. RAP 13.7(b). An issue is properly raised if it complies with RAP 13.4(c)(5), which requires a concise statement of the issues presented for review. *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13 (2006). An issue first raised in a supplemental brief is not within the scope of review. *Id.* citing *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 671, 63 P.3d 125 (2003).

Therefore, presenting the issue of prosecutorial immunity, as it relates to negligent investigation and malicious interference, in the petition for review was the only appropriate way to preserve that issue and the children properly did so. The issue of prosecutorial immunity is intimately related to the other issues presented because the court of appeals decisions granted prosecutor Petty immunity as a matter of status, which is prohibited. See *Robichaud v Ronan*, 351 F.2d 533, 537 (9th Cir. 1965). This is most

apparent from the Court of Appeals' holding that "even though a genuine issue of material fact exists regarding Petty's liability for malicious interference, she has absolute immunity for this claim." *McCarthy*, No. 463474 Slip Opinion at 32. The Court of Appeals even went on to state that "[a]rguably, Fearghal has presented evidence to support every element of a claim for malicious interference." *Id.* at 33.

To be sure, the children have never disputed that a prosecutor is absolutely immune for actions arising out of charging decisions. Instead, they have argued that absolute immunity does not apply when a prosecuting attorney acts outside the scope of his or her duties as prosecutor. In other words, when a prosecutor's acts are not intimately related to the judicial process, he or she is no longer protected by absolute immunity. *Robichaud*, 351 F.2d at 536.

In addition, it is necessary for this Court to review the issues as a whole in order to fully adjudicate this case. All three respondents played a part in both separating the children from their non-abusive father and in allowing the children to remain in an abusive home. And the picture becomes clear when all of the respondents' actions are viewed together.

This Court has discretion to accept review of the issues presented, to limit the issues, to expand the issues, or to review different issues. See

RAP 13.7(b). Therefore, asking this Court to review the prosecutorial immunity issue as it relates to negligent investigation and malicious interference, if it chooses to accept review, was the appropriate way to preserve the issue and it did not require a thorough analysis of the RAP 13.4(b) factors. The children included the issue of prosecutorial immunity in a concise statement of the issues presented with enough specificity to preserve the issue, should this Court accept review.

## IV. RESPONSE TO CITY OF VANCOUVER'S MOTION TO STRIKE

The City of Vancouver made a motion to strike appendix C within its answer to the Petitioners' petition for review. COV answer at 2-3. The children timely respond within their reply pursuant to RAP 17.4 (d). A motion may only be made in a brief if granting the motion would preclude hearing the case on the merits. RAP 17.4(d).

Appendix C is a printout of the docket from the criminal case against Fearghal, showing that City Prosecutor Jill Petty filed the certificate of probable cause statement. It was submitted to the Court of Appeals as part of a motion for the court to take judicial notice. That motion was denied. See Order Denying Mot. To Take Judicial Notice, McCarthy v. Clark County, No. 46347-4-II (Ct. App. Mar. 7, 2016). Although the children did not expressly identify the order denying the motion to take judicial

notice, it is interwoven into the prosecutorial immunity issue, which the children properly stated in their concise statement of the issues presented for review. See RAP 13.4(c)(5).

Here, even if the City of Vancouver's motion to strike is granted, it does not preclude hearing this case on the merits. As argued above, in section III.C, the children have properly and sufficiently preserved the issue of prosecutorial immunity as it relates to both negligent investigation and malicious interference. Appendix C, which Vancouver moves to strike, does not affect whether the claims against the City of Vancouver can be heard on the merits. Even if Appendix C cannot be relied upon to form a material fact, it is appropriately part of the record for review of the order denying the motion for judicial notice.

And, even if this Court determines that the order denying judicial review is not within the scope of review, striking Appendix C still does not preclude hearing the case against the City of Vancouver on the merits. Therefore, the motion is not properly before this Court and should be denied. *State v. Saas*, 118 Wn.2d 37, 46 n.2, 820 P.2d 505 (1991).

## V. CONCLUSION

Petitioners CCM and CPM respectfully request that this Court accept review. Petitioners also request that the City of Vancouver's

Petitioners CCM and CPM respectfully request that this Court accept review. Petitioners also request that the City of Vancouver's Motion to Strike Appendix C be denied because it is not properly before this Court.

DATED this 31st day of August, 2016

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DECLARATION OF SERVICE

I hereby declare that on August 31, 2016, I served the foregoing CCM'S AND CPM'S REPLY TO DEFENDANTS' ANSWERS TO PETITION FOR REVIEW on:

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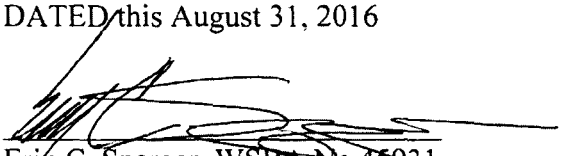
By the following indicated method or methods:

[X] by transmitting via electronic mail in accordance with the agreement of the persons served, a full, true and correct copy thereof to the attorney at the email address shown above, which is the last known email address for the attorney's office, on the date set forth below.

I also electronically filed the above Reply in the Washington State Supreme Court

DATED this August 31, 2016



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Dear Clerk,

Please file the attached CCM's and CPM's Reply to Respondents' Answers to Petition for Review for Case No. 93208-8 entitled McCarthy v. Clark County.

My contact information and bar number are below in my signature.

- Thank you and Shalom,
- Erin Sperger, Attorney for CCM and CPM

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