NO. 93280-8

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,

Plaintiff/Petitioners,

v.

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

Defendants/Respondents.

RESPONDENT DEPARTMENT OF SOCIAL AND HEALTH SERVICE'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

SUZANNE M. LIABRAATEN
Assistant Attorney General
WSBA No. 39382
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6413
OID No. 91023
SuzanneL@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

For over a decade, this Court has made clear that the implied cause of action under RCW 26.44.050 for negligent investigations is limited to those cases that result in the type of "harmful placement decision" contemplated by the statute. *See, e.g., M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003); *Roberson v. Perez,* 156 Wn.2d 33, 46–47, 123 P.3d 844 (2005); *see also Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000). The Court of Appeals adhered to these decisions and their progeny when it affirmed summary judgment dismissal of Petitioners Fearghal McCarthy's and his minor sons', CPM and CCM, negligent investigation claims against the Department of Social and Health Services (DSHS) because there was no evidence that "DSHS caused a placement decision." *McCarthy v. County of Clark*, 193 Wn. App. 314, 2016 WL 1448352, at *9-10 (April 12, 2016).[1]

Petitioners ask this Court to accept review because of an alleged conflict among the cases and so that this Court can reconsider its long-standing precedent. This Court should decline. As an initial matter, there is

[1] For ease of reference, this brief refers to the McCarthy parents by their first names, Fearghal and Patricia, and the minor children as CPM (five years old at the time of the original lawsuit) and CCM (two years old at the time). This brief is filed on behalf of Respondent Department of Social and Health Services. The other respondents—the City of Vancouver and Clark County—have filed separate briefs.

no conflict. The Court of Appeals accurately applied this Court's prior decisions to find that no "reasonable mind" could conclude that DSHS's investigation, even if negligent, was the proximate cause of Fearghal's separation from his sons—independent, intervening judicial protection and restraining orders were the cause. *McCarthy*, 2016 WL 1448352, at *10.

More importantly, this case is not one of the rare occasions where this Court should reconsider its prior rulings contrary to the doctrine of stare decisis. A limited application of the implied cause of action is not incorrect, harmful, nor has it been superseded by intervening authority. *See State v. Otton*, No. 91669-1, 2016 WL 3249468, at *1-2 (Wash. June 9, 2016). Instead, they simply disagree with the Court's rulings. *See e.g.* Fearghal Pet. at 16; CPM/CCM Pet. at 11.

Continued application of a narrow, purposeful construction of RCW 26.44.050's implied cause of action insures that any claim is limited to that contemplated by the statute, which is to protect children from ongoing abuse effectuated by DSHS placement decisions and to protect families from state custody of children unless there is reasonable cause to do so. *See* RCW 26.44.010, .050. Petitioners' request to expand the implied statutory cause of action for "negligent investigation" to matters where no DSHS placement occurs "at all" simply does not satisfy this

purpose. Fearghal Pet. at 16; *see also* CPM/CCM Pet. at 11. No further consideration by this Court is necessary.

This case also does not present an issue of substantial public interest that should be determined by this Court, particularly in light of the Legislative amendments to RCW 26.44 made after *Tyner,* which clarified that "the safety of the child shall be the department's paramount concern" over the separation of a parent and child; amendments which limit the liability of DSHS and law enforcement when responding to allegations of abuse. RCW 26.44.010 (emphasis added); *see* RCW 4.24.595; RCW 26.44.280. Petitioners' proposed expansion of RCW 26.44.050 claims are not in line with this Court's precedent or Legislative direction.

For these reasons, the issues presented do not meet the standard for review under RAP 13.4(b)(1), (2), or (4). Review should be denied.

II. STATEMENT OF THE CASE

A. DSHS's Investigation Of Fearghal's Abuse Of CCM Was Not Related To Any Placement Decisions

On June 4, 2005, DSHS received a Child Protective Services (CPS) referral from a pediatric nurse practitioner, who examined two-year old CCM after it was reported to her that CCM was hit by his father, Fearghal. CP at 1369. CCM's grandmother reported that on June 2, 2005, Fearghal was angry with two-year old CCM, hit CCM, and CCM fell off a stool hitting his head on the floor. The DSHS intake social worker who

received this report confirmed with the Clark County jail that Mr. McCarthy had already been arrested and was in custody because "[h]e physically assaulted someone in the family." CP at 1380.

On June 8, 2005, CPS received a copy of Deputy Kingrey's report in the criminal case. CP at 1380-81. The reviewing social worker entered a service episode record (SER) indicating that Patricia and the children had sought shelter at a church and that the matter had been investigated by Deputy Kingrey. CP at 1381. The SER noted the following:

> Patricia informed the officer that her husband Fearghal had threatened he would physically harm her if she ever reported the abuse to the police. Patricia said that over the past year Fearghal has been both physically and emotionally abusive to both to her and the boys. Patricia stated that Fearghal had pushed and shoved her and grabbed her by the neck in a fit of rage. Patricia told me Fearghal has a temper and 'can be very violent.' Patricia said that Fearghal continually, 'Pokes his finger in my eyes, gets in my face and threatens me about keeping the boys under control, and keeping them quiet.' Fearghal is known to 'Whack [CCM] across the head.'
> Patricia didn't believe a No contact order would assist. She believed that Fearghal would disregard it and later take it out on the children.
> [CPM] once disclosed physical abuse of his mother to a friend of the family only to be threatened by his father. [CPM] later denied the abuse out of fear. ....
> Patricia believes Fearghal will not abide by [the no contact order]. Patricia decided to stay with her parents for the time being.
>
> CP at 1381.

Patricia McCarthy was informed by Deputy Kingrey that a no-contact order would be issued, prohibiting Fearghal from returning to the residence or contacting Patricia or the children. CP at 1380-81.

On June 13, 2005, DSHS CPS investigative social worker Patrick Dixson visited Patricia, CPM, and CCM. CP at 1322, ¶ 3. Patricia described specific instances of abuse of the children and herself, including the June 2, 2005, incident involving CCM. CP at 1322, ¶ 4. She also confirmed that a no-contact order had been entered, prohibiting contact between Fearghal and either Patricia or the children. CP at 1322, ¶ 4; *see also* CP at 1438, 109:2-24. Patricia informed Dixson that Fearghal left for a trip to Ireland after he was released on bail. CP at 159; CP at 1216.

Based upon his observations of Patricia, it appeared to Dixson that she was taking appropriate steps to protect the children and she did not appear to be under the influence of drugs or alcohol. CP at 1322, ¶ 5; 1438. Patricia agreed to enter into a voluntary safety plan which said that she would not allow Fearghal to have contact with the children until the no-contact order was lifted, that she would seek domestic violence counseling, and that she would be protective of the children and keep them safe from domestic violence. CP at 1322, ¶¶ 5-6; 1366. The term of the safety plan was from June 13, 2005, to September 13, 2005. CP at 1366.

Dixson closed the referral with a "founded" finding on April 12, 2006. CP at 1322, ¶ 13. Dixson's supervisor Denise Serafin reviewed the file, concluded that no additional investigation was needed, and determined that there was sufficient evidence to make a "founded" finding of abuse against Fearghal. CP at 1318, ¶ 4. Accordingly, Ms. Serafin sent a letter to Fearghal communicating the findings of that investigation. CP at 1318, ¶ 6; *see also* CP at 1409. On May 8, 2006, Fearghal sought administrative review. CP at 1318, ¶ 7; 1416. In June 2006, a DSHS area administrator (AA) affirmed the "founded" finding. CP at 1318, ¶ 7; 1405.

Law enforcement continued to take the lead in the investigation of the criminal matter. On August 1, 2006, Fearghal pled guilty to Disorderly Conduct in the criminal matter, which included terms that he continue to have no contact with the victims, CCM and Patricia. CP at 1470. In October 2006, based upon new information provided to the agency, the AA changed the "founded" finding to a finding of "inconclusive." CP at 1318, ¶ 8; CP at 1391. The new information included:

> [R]etraction/recantation by older child witness, indication of coaching of child witness by mother, reduction of the assault charge to disorderly conduct and father's indication that he agreed to plea in order to avoid deportation, medical report that contradicted cause of alleged injury, and information that called into question mother's credibility.

CP at 1391.[2]

DSHS did not initiate or participate in any proceedings regarding the no-contact or protective orders. Dixson also never "appear[ed] in court to advocate for either McCarthy concerning my investigative findings regarding the June 2005 abuse referral." CP at 1322, ¶ 12.

B. Criminal And Family Law No Contact And Restraining Orders Were In Place Before, During, And After The CPS Investigation

On June 6, 2005, a no-contact order was entered upon Fearghal's release from custody following his booking on charges for Assault IV – Domestic Violence. CP at 1442. That order was followed by a number of additional orders restricting contact between Fearghal and Patricia and/or their children, entered both in Fearghal's criminal action and in a marital dissolution proceeding initiated by Patricia, including:

Date	Pertinent Terms
6/6/2005	No-Contact With CCM. CP at 1442. This order was rescinded on March 20, 2006
7/28/2005	Fearghal restrained from contact with Patricia, CPM, and CCM. Effective until 8/10/2005. CP at 1444
8/10/2005	Extending 7/28/2005 Order to 8/31/2005. CP at 1448.
8/31/2005	Both parties "restrained and enjoined" from "the other

[2] Patricia continued to report that Fearghal hit CCM during the pendency of the criminal case, including in a videotaped statement made at Fearghal's sentencing, Supp. Ex. 2. Her credibility was questioned regarding later allegations that Fearghal had violated no-contact orders. Later, in October 2008, Patricia recanted some of the allegations against Fearghal in a joint stipulation to a parenting plan filed by Fearghal's attorney on behalf of Fearghal and Patricia (who was then pro se) in the family law matter. CP at 1655. In a deposition in this matter in 2012, Patricia testified she was under duress to sign. CP 1623 (111:19), and again testified that Fearghal hit CCM on June 2, 2005. CP 1568-1569.

	party." Fearghal granted supervised visits with CPM. Effective until 8/31/2006[3]. CP at 1450.
12/8/2005	Fearghal prohibited from contact with CCM. Effective until 12/8/2010. CP at 1454.
1/17/2006	All contact between Fearghal and CPM ordered terminated. CP at 1456.
1/19/2006	Fearghal agrees "to terminate contact with [CPM] pending hearing." CP at 1458.
2/15/2006	Terminating any contact between Fearghal and CPM. "After [Fearghal's] criminal matter is resolved, the matter can be returned to court for review." CP at 1460.
2/21/2006	Prohibiting contact between Fearghal, Patricia and CCM, expiring 2/21/2008. CP at 1462.
2/21/2006	Same. CP at 1464.
6/28/2006	No contact with either child. CP at 1465
8/1/2006	Fearghal to have no-contact with Patricia or CCM before 8/1/2008. CP at 1466; 1470.
4/6/2007	Rescinding the no-contact order entered as a part of the sentence for Disorderly Conduct. CP at 1468.

On October 24, 2008, Fearghal and Patricia filed a joint declaration in support of a final parenting plan in their dissolution action, stating that the separation between Fearghal and their two children was "a result of court decisions based upon [Fearghal's] June 3, 2005, arrest and the additional criminal charges made against [Fearghal]." CP at 1655, ¶ 2.30.

DSHS was not involved in any proceedings nor did it provide information to any court regarding the no-contact or protective orders.[4]

---

[3] In a declaration submitted for the court's consideration of Patricia's request for a restraining order, Fearghal stated that he did not oppose an order of no-contact with Patricia, but that he opposed an order of no-contact with respect to CPM. CP at 1426, ¶¶ 13-14. In that same declaration, Fearghal acknowledged the existence of a continuing no-contact order prohibiting him from contact with CCM. CP at 1426, ¶ 6.

[4] In one sentence of a 21-paragraph declaration submitted in connection with her petition for dissolution, Patricia stated "Children's Protective Services came to

C. Relevant Procedural History

In 2008, Fearghal, on behalf of himself and CPM and CCM, filed suit against DSHS, Clark County, and the City of Vancouver. CP at 1. After completion of discovery, DSHS moved for summary judgment before the trial court in October 2012. *See* CP at 2070. The trial court granted summary judgment on May 9, 2014. CP at 2072.

Petitioners appealed the dismissal to the Court of Appeals, which affirmed summary judgment on April 12, 2016. *McCarthy*, 2016 WL 148352. The Court of Appeals found that the trial court did not err in granting summary judgment, rejecting petitioners' argument that the allegedly negligent investigation of the incident with CCM "prolonged Fearghal's separation from his children by impeding his efforts to convince the courts to remove the no-contact and restraining orders that were in place." *Id* at *9. The court found that "[r]easonable minds could not conclude that Dixson's negligent investigation was the proximate cause of the superior court's protection and restraining orders." *Id.* at *10. The court distinguished this case from those like *Tyner* because "DSHS did not control the flow of information to the court," "DSHS was never

---

investigate." CP at 1644, ¶ 15. There is nothing in the record to suggest that the existence of a CPS investigation affected any ruling of the Superior Court to which Patricia submitted this declaration. Nor is there anything in the record to suggest that the court addressing Fearghal's criminal charges received any testimony or evidence regarding Mr. Dixson's investigation.

involved in the superior court proceedings," and "there is no evidence that any court relied on information from DSHS, sought any information from DSHS, or considered the DSHS investigation in any way." *McCarthy*, 2016 WL 1448352, *at 10. The court also determined that "there is no evidence that an 'inconclusive' finding would have caused the superior court to change its decision to issue a protection or restraining order or caused the termination of an existing order." *Id.*

As it relates to DSHS, petitioners now seek review to overturn the decision by the Court of Appeals that "DSHS is not subject to liability under RCW 26.44.050 because Fearghal failed to show that Dixson's alleged negligent investigation was the proximate cause of any harmful placement decision." *McCarthy*, 2016 WL 1448352, at *5.

III. STATEMENT OF ISSUES

This case does not warrant this Court's review, but, if review is granted, the issues are:

1) Does the implied statutory cause of action under RCW 26.44.050 requires a harmful placement decision, as this Court has already held in cases including *Tyner, M.W.,* and *Roberson*?

2) Can a court order be a superseding cause of a placement decision in a negligent investigation cause of action, as this Court has already held in *Tyner*?

IV. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

A. Consideration Of Stare Decisis Cautions Against Review Of Issues Already Decided By This Court

Petitioners cloak their request for review in terms of conflict between this Court's rulings and the Court of Appeals' decision in this matter. Fearghal Pet. at 2; CPM/CCM Pet. at 8. However, the substance of their request is to revisit and overturn this Court's precedent in *Tyner, M.W.*, and *Roberson.* Fearghal Pet. at 3; CPM/CCM Pet. at 11. Considerations of stare decisis caution against granting review for this purpose. As this Court recently reiterated, a request to overturn prior decisions "is an invitation we do not take lightly." *Otton*, 2016 WL 3249468, at *1-2 (quoting *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011)). In order to overturn a prior ruling, there must be "a clear showing that an established rule is incorrect and harmful" or it must be one of the "relatively rare occasions when a court should eschew prior precedent in deference to intervening authority where the legal underpinnings of our precedent have changed or disappeared altogether." *Otton*, 2016 WL 3249468, at *1-2 (internal citations omitted).

> 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.' "

Otton, 2016 WL 3249468, at *1-2 (internal citations omitted).

Revisiting the holdings in *Tyner, M.W.,* and *Roberson* is not consistent with the doctrine of stare decisis. As discussed further below, Legislative action in this area of law took into consideration this Court's rulings in those cases and crafted additional restrictions on the implied statutory cause of action in RCW 26.44.050.

B. The Court Of Appeals' Decision Adhered To This Court's Longstanding Precedent In Narrowly Applying The Implied Cause Of Action

Over a decade ago, this Court set forth the principles applied by the Court of Appeals in this matter: 1) an RCW 26.44.050 claim must be based upon evidence that DSHS's negligent investigation caused a "harmful placement decision" and does not extend to claims asserting other alleged harms arising from a negligent investigation. *M.W.*, 149 Wn.2d at 591; and 2) where DSHS is not involved in the placement decision to remove custody of a child from his parent, there is no cognizable claim against DSHS under RCW 26.44.050. *Roberson,* 156 Wn.2d at 46–47. While suggesting that the Court of Appeals erred in following these principles, Fearghal Pet. at 2-17; CPM/CCM Pet. at 8-16, petitioners in essence ask this Court to overturn its prior rulings, in

particular the holdings in *M.W.* and *Roberson.*[5] Their arguments ignore that their proposed expansion of the implied statutory cause of action under RCW 26.44.050 is contrary to the principles that distinguish an "implied" statutory cause of action from a cause of action defined by the explicit terms of a statute and is contrary to Legislative enactments made in response to this Court's ruling in *Tyner* and related cases.

1. A Harmful Placement Decision Is A Necessary Part Of The Implied Statutory Claim Under RCW 26.44.050

In contravention of prior holdings, petitioners ask this Court to hold that the implied statutory cause of action under RCW 26.44.050 "does not require proof of a harmful placement decision or even a child placement decision, or really any sort of decision at all." Fearghal Pet. at

---

[5] The posture and facts of this case are also not well-suited for this Court to consider whether to revisit the standards set forth in *Tyner, M.W.,* and *Roberson.* The issues presented related to the scope of the RCW 26.44.050 cause of action were not raised below, *see e.g.* COA Opening Brief of CPM and CCM at 24-26, 29, 34 (citing favorably to *M.W.* standard); COA Opening Brief of Fearghal McCarthy at 48, 50 (citing favorably to *M.W.* standard), nor did petitioners assert below, or develop a record, on the children's allusion to a claim in their Petition that they were "left in an abusive home," Pet. at 1, 7, 15, and should have been removed from the mother's care while the allegations regarding their father's abuse were investigated. *See* CP at 1772 ("Plaintiffs are not contending that the State should have removed [CCM] or [CPM] from their mother and awarded custody to their father. The plaintiffs... are alleging that the State should have at least done its duty to investigate, which would have provided the neutral body of evidence. To state that would have created a change in placement or had any other concrete effect is to speculate."). Their claim that DSHS's duty to investigate extends to providing "information about the children's living situation that would have been relevant to the family court in making a placement decision," CPM/CCM Pet. at 14, would improperly expand the limited RCW 26.44.050 cause of action, create a new role for DSHS in contested divorce matters beyond that contemplated by the Legislature, and divert DSHS's resources away from investigating and seeking state protective custody only in those cases where there is evidence of abuse or serious neglect of children and where there is no fit parent. *See* RCW 26.44.010; .030(16); .050; RCW 13.34.

16; *see also* CPM/CCM Pet. at 11 (requesting rule that no "affirmative placement" be made by DSHS to bring a claim). Fearghal also incorrectly argues that because the term "harmful placement decision" does not appear in the statute, it should not be considered a necessary element of the cause of action. Fearghal Pet. at 16. His arguments reveal a fundamental misunderstanding of the nature of the judicially *implied* statutory cause of action and this Court's analysis of it.

There is no stand-alone claim for "negligent investigation." *M.W.*, 149 Wn.2d at 601 ("Our courts have not recognized a general tort claim for negligent investigation."); *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999) (noting the "the chilling effect such claims would have on investigations."). In *Tyner*, this Court first recognized an implied cause of action under 26.44.050. *Tyner*, 141 Wn.2d at 86 (allowing suit by father whose contact with child was cut-off after DSHS-initiated dependency proceeding when it failed to inform the court after it made an "unfounded" finding of abuse). A few years later, in *M.W.*, this Court affirmed that the statute creates a duty to children and their parents if they are harmed by "DSHS negligence that results in wrongfully removing a child from a nonabusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home." *M.W.*, 149 Wn.2d at 597-98; *see also M.W.*, 149 Wn.2d at 594 (citing to *M.W.*, 110 Wn. App. at 255 (Morgan,

J., dissenting)) (analyzing cases regarding DSHS liability in the context of child abuse investigations). The Court explicitly rejected the argument that the implied duty in RCW 26.44.050 "encompasses a general duty of care not to harm children during the course of an investigation." *M.W.*, 149 Wn.2d at 595-96. The Court also reiterated that "[t]he negligent investigation cause of action against DSHS is a narrow exception that is based on, and limited to, the statutory duty and concerns" in RCW 26.44.050. *M.W.*, 149 Wn.2d at 601.

The Court again affirmed that a negligent investigation must have caused a "harmful placement decision" by DSHS. *Roberson*, 156 Wn.2d at 46 (rejecting argument that a "constructive placement" is actionable). "Our interpretation of the statute in *M.W.* unequivocally requires that the negligent investigation to be actionable must lead to a 'harmful placement decision.'" *Id.*. The elements of the implied statutory claim must remain tethered to its statutory moorings, which includes the harm the action was intended to prevent. *See Roberson,* 156 Wn.2d. at 46; *M.W.,* 149 Wn.2d at 601. There is no requirement in RCW 26.44.050, or any other statute, that DSHS affirmatively interject itself into criminal or family law proceedings for purposes of influencing those court decisions, as the petitioners instead ask this Court to hold.

Fearghal asserts that the term "harmful placement decision" is made up and unrelated to the plain language of RCW 26.44.050. Fearghal Pet. at 15-16. This argument ignores that the words "negligent investigation" are also not found in the statute and ignores the purpose of RCW 26.44.050. RCW 26.44.050 provides that DSHS must investigate reports of possible abuse or neglect and "where necessary refer such report to the court," for purposes of taking a child "into custody," either after law enforcement takes a child into protective custody, or through seeking a court order under RCW 13.34.050. DSHS may only seek custody of a child by initiating a dependency action and requesting state custody where there are "reasonable grounds that the child's health, safety, and welfare will be seriously endangered" if left in a parent's care. RCW 13.34.050. DSHS may also receive custody from law enforcement (under RCW 26.44.050) or from a hospital (under RCW 26.44.056), but is then required to seek court approval within 72 hours. RCW 13.34.060(1). Although the term "negligent investigation" is often used as shorthand because it is cumbersome to articulate the narrow scope of that cause of action each time it is uttered, this Court has made it clear that the scope of that duty does not go beyond these statutory purposes.

Petitioners bemoan that the Court of Appeals narrowly construed the elements of the RCW 26.44.050 cause of action in this matter.

Fearghal Pet. at 16; *see also* CPM/CCM Pet. at 14 (arguing the scope of the duty should be "robust"). Such a narrow construction is consistent with this Court's cases and the need to tie implied causes of action to the Court's interpretation of legislative directive, in the absence of explicit language creating a right of action. Washington courts have consistently narrowly reviewed the implied cause of action under RCW 26.44.050 for *all* elements of the cause of action. *See M.W.*, 149 Wn.2d at 602; *see e.g. Ducote v. DSHS*, 167 Wn.2d 697 (2009) (no duty to alleged abusive stepfather); *Blackwell v. DSHS,* 131 Wn. App. 372 (2006) (no duty to foster parents); *Pettis*, 98 Wn. App. at 558 (no duty to child care workers). Petitioners' expansive view of RCW 26.44.050 is not in line with this Court's precedent or the statute itself.

2. The Legislature Limited, Not Expanded, Liability Under RCW 26.44.050

After this Court's ruling in *Tyner*, the Legislature limited the scope of DSHS' and law enforcement's liability with respect to placement decisions, clarifying that the statute is intended to prioritize the safety of the child over the placement of the child with parents. LAWS OF 2012, ch. 259, § 12 (amending RCW 26.44.010), § 13 (codified at RCW 4.24.595), and § 14 (codified at RCW 26.44.280). The Legislature made it clear that "[w]hen determining whether a child and a parent, custodian, or guardian

should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department's paramount concern." The Legislature further limited the liability of DSHS by directing that DSHS is "not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW." RCW 4.24.595(1); *see also* RCW 26.44.280 (limiting DSHS liability as found in RCW 4.24.595). DSHS is also immune from liability for following court orders. RCW 4.24.595(2) (DSHS is "not liable for acts performed to comply with such court orders."). Petitioners' request to expand the implied negligent investigation cause of action against DSHS is contrary to explicit Legislative action in this area. If the Legislature intended to expand the RCW 26.44 implied cause of action against DSHS, it could have done so; instead the Legislature chose to circumscribe it.

3. This Court Should Not Revisit Its Holdings That Court Involvement Can Break The Causal Chain

DSHS was not involved in any of the court proceedings or decisions regarding the contact between Fearghal and his children. CP at 1322, ¶ 12. Accordingly, the Court of Appeals properly applied this Court's precedent to find that there was insufficient evidence of proximate cause to allow the case to proceed against DSHS. *McCarthy*, 2016 WL

1448352, at *10. There was no evidence that DSHS was the cause of any cognizable injury. DSHS agrees with the County that the criminal no-contact and protective orders are not placement decisions within the scope of RCW 26.44.050. More importantly, DSHS had no role in causing them. Fearghal was subject to criminal no-contact and civil restraining orders before, during, and after DSHS completed its investigation. These orders were not entered upon the request of DSHS; DSHS was not party to any of the actions in which the orders were entered; no court sought or received testimony from DSHS regarding the propriety of the orders; and there is no indication that the existence or outcome of DSHS's investigation was considered by or material to any court's decision to prohibit contact between Fearghal and his sons. Thus, no reasonable jury could find that DSHS caused a harmful placement, an essential element of a claim for negligent investigation. For this reason, the facts of this case are not sufficient for the Court to revisit its holdings in *Tyner* and other cases holding that court involvement can break the chain of causation in certain circumstances. *Tyner*, 141 Wn.2d at 88 ("a judge's no-contact order will act as superseding intervening cause, precluding liability of the State for negligent investigation, only if all material information has been presented to the court and reasonable minds could not differ as to this question."); *see also Bishop v. Miche*, 137 Wn.2d 518, 532 (1999) ("the judge's

decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident.").

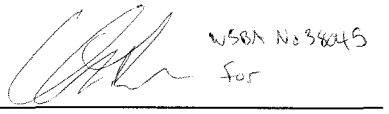
Washington courts have consistently applied causation principles in negligent investigation claims of wrongful removal under RCW 26.44.050; there is no conflict requiring review by this Court. *See Gausvik v. Abbey*, 126 Wn. App. 868, 887, 107 P.3d 98 (2005) (no causation where social worker was not involved in the decisions to arrest the father, and no information was withheld from the court when it removed the children); *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004) (father failed to prove causation where court had all material information). Washington courts have "rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care, by for example, failing to follow investigative procedures." *Petcu*, 121 Wn. App. at 59. Rather "the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement decision." *Id.* at 56. As this Court did in *Gausvik* and *Petcu*, it should deny review. *Gausvik v. Abbey*, 155 Wn.2d 1006, 120 P.3d 577 (2005) (denying review); *Petcu v. State*, 152 Wn.2d 1033, 103 P.3d 201 (2004) (denying review).

V. CONCLUSION

Respondent DSHS respectfully requests this Court decline review.

RESPECTFULLY SUBMITTED this 16th day of August, 2016.

ROBERT W. FERGUSON
Attorney General



SUZANNE LIABRAATEN,
WSBA No. 39382
Assistant Attorney General
Attorney for Defendant DSHS

PROOF OF SERVICE

I hereby declare that on this 16th day of August, 2016, I caused to be electronically filed the foregoing document: Answer to Petition for Review, and I also served a copy on all parties or their counsel of record as follows:

☒Electronic Mail by Agreement

Fearghal McCarthy
17508 NE 38th Way
Vancouver, WA 98682
Fearghalmccarthy001@gmail.com

Erin C. Sperger
1617 Boylston Avenue
Seattle, WA 98122
Erin@LegalWellspring.com

Taylor Hallvik, WSBA No. 44963
Deputy Prosecuting Attorney
Attorney for Defendant/Respondent
County of Clark
taylor.hallvik@clark.wa.gov
Nicole.davis@clark.wa.gov

Tyler K. Firkins
Van Siclen Stocks & Firkins
721 45th Street NE
Auburn, WA 98002
TFirskins@VanSiclen.com
Diana@VanSiclen.com

Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Defendant/Respondent
City of Vancouver
dan.lloyd@cityofvancouver.us
Deborah.hartsoch@cityofvancouver.us

DATED this 16th day of August, 2016, at Tumwater, WA.

BREANNE HIGGINBOTHAM
Legal Assistant