

Sep 22, 2016, 4:22 pm

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NO. 93280-8

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Plaintiffs/Petitioners,

v.

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

Defendants/Respondents.

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**RESPONDENTS DSHS, COUNTY, AND CITY'S JOINT REPLY  
ON MOTION TO STRIKE CPM/CCM'S REPLY TO PETITION  
FOR REVIEW**

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## I. REPLY

The purpose of a petition for review is to allow the Court to determine whether it should grant review based upon one of the reasons enumerated by RAP 13.4(b). Respondents DSHS, City, and County filed responses showing that that none of the reasons set forth in RAP 13.4(b) warrant granting review of this case. The County preserved one issue for review as an alternate basis for dismissal should the Court accept the case. Petitioners CPM/CCM used their Reply on the Petition for Review, and their response to this Motion to Strike, to add improper supplemental argument in an attempt to obfuscate the primary questions before the Court on the Petitions for Review. The majority of CPM/CCM's Reply should be stricken, except for that section responding to the City's Motion to Strike Appendix C.

CPM/CCM and Fearghal do not deny that CPM/CCM's Reply fails to respond to whether the Court should grant review of the sole additional issue preserved by the County regarding the applicability of RCW 26.44.280 as an alternate basis for dismissal. Because the purpose of a petition for review is to determine whether to take review, their argument in response should have been limited to that question, not to argue about substance of the issue. Therefore, CPM/CCM's Reply regarding RCW

26.44.280 should be stricken as requested in the Respondent's Joint Motion to Strike.

The remainder of CPM/CCM's Reply should be stricken as improper argument. The applicability of stare decisis is not a "new issue," but is a fundamental tenet of legal construction that was properly raised in response to the new arguments raised in the Petitions for Review requesting, both explicitly and implicitly, for this Court to overturn the principles established in *M.W.* and *Roberson*. See Fearghals' Pet. for Rvw. at 10 (referring to "*M.W. v. DSHS*; the origin of the error" and requesting a rejection of "harmful placement decision" as an element of the implied statutory claim); CPM/CCM Pet. for Rvw. at 11 (arguing, contrary to *Roberson* and *M.W.*, that no placement has to be made by DSHS or law enforcement in order for a RCW 26.44.050 wrongful removal claim to be actionable). That CPM/CCM and Fearghal ignored *Roberson* and principles of stare decisis when asking the court to take review does not warrant allowing them a reply to make additional argument.

Similarly, that Petitioners ignored discussion of the Legislative amendments in this area of law related to whether there is an issue of substantial public importance presented here does not warrant a reply. This is not a new issue, but was proper argument raised in response to the

issues raised in the Petitions for Review. That section of CPM/CCM's Reply should be stricken.

Furthermore, in response to CPM/CCM's mischaracterization of *Lewis, Roberson, and Yonker* in their Reply brief, Respondents provided clarification of those cases as they related to the issue before the Court: whether the Reply was improper argument related to an issue already presented to the Court. Contrary to Fearghal's argument,<sup>1</sup> Respondents' clarification of those cases in its Motion to Strike was not improper. Brief discussion of the substantive background of those cases was necessary to assist the Court in understanding why the Reply brief contained improper argument related to the same issues raised in the Petitions for Review and was not a proper Reply regarding a new issue.

The majority of CPM/CCM's Reply was improper under RAP 13.4(d), which permits a reply "only if the answering party seeks review of issues not raised in the petition for review." Issues 3.1-3.3 and Sections III(A), (B), and (C) should be stricken because they are improper additional argument, and do not address new issues for which Respondents sought review. Respondents DSHS, City, and County request

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<sup>1</sup> In his response to the Motion to Strike Reply, Fearghal inserts improper argument in an attempt to make it appear as if there is a conflict within the Court of Appeals, and similarly mischaracterizes the opinion of the Court of Appeals in *Lewis v. Whatcom County*, 136 Wn. App. 450, 457-458, 149 P.3d 686 (2006) by ignoring the sentences in the opinion immediately preceding and following the selected quotation.

that CPM/CCM be ordered to file a reply that is limited to the City's Motion to Strike Appendix C and exclude additional arguments regarding the issues they raised in their petition for review.

RESPECTFULLY SUBMITTED this 22nd day of September, 2016.

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## PROOF OF SERVICE

I hereby declare that on this 2nd day of September, 2016, I caused to be electronically filed the foregoing document: Motion to Strike Reply by CPM/CCM, and I also served a copy on all parties or their counsel of record as follows:

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DATED this 22nd day of September, 2016, at Tumwater, WA.

/s/ Melissa Kornmann  
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**Subject:** RE: 93280-8, McCarthy v. DSHS, et al., DSHS's Answer to Petition for Review

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**Subject:** 93280-8, McCarthy v. DSHS, et al., DSHS's Answer to Petition for Review

Attached for filing please find Respondents DSHS, County, and City's Joint Reply on Motion to Strike CPM/CCM's Reply to Petition for Review.

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