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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, CLARK COUNTY, AND CITY OF  
VANCOUVER'S JOINT MOTION TO STRIKE CPM/CCM'S  
REPLY TO ANSWER TO PETITION FOR REVIEW**

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## **I. STATEMENT OF RELIEF SOUGHT**

Respondents Department of Social and Health Services (“DSHS”), City of Vancouver (“City”), and Clark County (“County”) answered CPM/CCM and Fearghal McCarthy’s petitions for review showing why this Court should decline review of this matter. Petitioners CPM/CCM filed an improper reply to those answers. Respondents jointly file this motion to request that the court strike the majority of CPM/CCM’s reply as 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 merely argument in response to Respondents’ answers, and do not address new issues for which Respondents sought review. CPM/CCM should 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.

## **II. STATEMENT OF ISSUES**

Should the Court strike the majority of CPM/CCM’s reply as improper under RAP 13.4, and order them to file a reply limited to responding to the City’s Motion to Strike Appendix C?

### III. ARGUMENT

Respondents DSHS, the County, and the City filed answers showing why review should not be granted in this matter. Petitioners CPM/CCM filed a reply in support of their Petition for Review that is inconsistent with the requirements of RAP 13.4(d). RAP 13.4(d) allows a reply “only if the answering party seeks review of issues not raised in the petition for review” and requires that the reply “should be limited to addressing only the new issues raised in the answer.” In an attempt to make additional *argument* regarding the issues raised by Petitioners CPM/CCM, and answered by Respondents, CPM/CCM filed this reply under the guise of asserting that DSHS, the County, and the City seeks review of new *issues*. CPM/CCM did not request the Court decline review of the alternate basis for dismissal preserved by the County in their answer, and Respondents did not seek review of additional issues before this Court. Rather, Respondents made appropriate argument showing why this Court should decline to consider the issues identified by CPM/CCM and Petitioner Fearghal McCarthy<sup>1</sup> in their respective petitions. The Court should strike the issues 3.1, 3.2, and 3.3, and argument contained in Section I, and Sections III(A), (B), and (C) of Petitioners CPM/CCM’s reply.

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<sup>1</sup> Fearghal and Patricia McCarthy are referred to by first names for ease of reference.

**A. Issue 3.1 and Section III(A) Should Be Stricken**

Section III(A) of the reply filed by CPM/CCM, p. 1-4, should be stricken because Respondents' arguments regarding the application of stare decisis doctrine do not seek review of a new issue. Discussion of the doctrine of stare decisis is proper counter-argument to address the issues presented by CPM/CCM and Fearghal in their petitions for review. CPM/CCM and Fearghals' arguments regarding *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000), *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003), and their willful ignorance of the precedent found in *Roberson v. Perez*, 156 Wn.2d 33, 46-47, 123 P.3d 844 (2005), warranted stressing the importance of stare decisis. Arguments properly addressing the issues raised in a petition do not raise new issues. *See State v. Miller*, 156 Wn.2d 23, 32 n. 5, 123 P.3d 827, 831 (2005) (noting the difference between raising new issues for review and responding to arguments made in a petition).

Contrary to their argument in reply, CPM/CCM's petition argued for an interpretation of RCW 26.44.050 that would require overturning *M.W.* and *Roberson*, and which would improperly expand this Court's ruling in *Tyner*. Fearghal more explicitly called for overturning *M.W.*, while also ignoring this Court's analysis in *Roberson*. Contrary to the arguments advanced by CPM/CCM and Fearghals' petitions for review,

*Roberson* made clear that a “constructive placement” is not actionable under the implied statutory cause of action under RCW 26.44.050 for wrongful removal from a non-abusive parent. *Roberson*, 156 Wn.2d at 46. Stare decisis considerations are a relevant argument to show why review should not be granted in that context.

Inapposite to the issues presented here, CPM/CCM make additional argument in their reply regarding Court of Appeals opinions in *Yonker v. DSHS*, 85 Wn. App. 71, 930 P.2d 958(1997), and *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006), cases which involved the “placement decision” of failure to remove from a parent, not regarding the “placement decision” of wrongful removal from a non-abusive parent. Contrary to CPM/CCM’s assertion in this reply at p. 1 and 7, the issues in this case did not revolve around whether DSHS failed to remove CCM and CPM from an alleged abusive parent (Patricia), but were limited to whether DSHS caused the wrongful removal from an allegedly non-abusive parent (Fearghal). As noted in footnote 4 of DSHS’s Answer, p. 13, the McCarthys agreed before the trial court that they were not asserting, and there was no evidence to support, that CPM and CCM should have been removed from Patricia’s care. *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.”).

The *Yonker* decision addressed the question of whether the public duty doctrine applied to limit liability for the failure to remove from an abusive parent, and did not address the scope of the implied statutory cause of action under RCW 26.44.050 in cases alleging wrongful removal from a non-abusive parent. Similarly, the holding in *Lewis v. Whatcom County*, 136 Wn. App. 450, 457-58, 149 P.3d 686 (2006) did not address the wrongful removal from a non-abusive parent. CPM/CCM in reply incorrectly summarized the holding of *Lewis* as broadening the RCW 26.44.050 cause of action to not require an affirmative placement decision. Reply at p. 2-3. Although the allegations in *Lewis* were that the child was abused by an uncle, the Court of Appeals’ holding that law enforcement could be liable under an implied claim of negligent investigation under RCW 26.44.050 turned on the fact that the child’s *mother* was aware that the child was being abused but continued to allow the uncle to babysit the child. *Lewis*, 149 Wn. App. at 452-453, 458 (“The County also fails to explain how leaving a child in an abusive situation in which the parent sends her to an uncle who molests her is not a placement decision.”).

There is no conflict between this case and those cases addressing the implied claim in RCW 26.44.050 for wrongful removal from a non-abusive parent.

Discussion of stare decisis in this context did not raise new issues for review warranting a reply. The additional argument supplied by CPM/CCM in their reply should be stricken as improper under RAP 13(d).

**B. Issue 3.2 and Section III(B) Should Be Stricken**

All Respondents agree that this Court should deny review of this matter, leaving in place the Court of Appeals' decision that follows applicable statutory and case law requiring there to be a harmful placement decision in order to have an actionable claim under RCW 26.44.050. As an alternate basis for dismissal, the County preserved in their answer the argument that RCW 26.44.280 limits liability for certain placement decisions. *See* County's Answer, p. 5, Issue 3. CPM/CCM do not challenge in their reply that, if review were granted, this Court can consider the issue of whether the County is subject to limited liability under RCW 26.44.280 as an alternate basis for dismissal. That is the only proper purpose under RAP 13.4(d) for a reply to that singular additional issue preserved by the County. Because CPM/CCM do not challenge whether review can be taken of this issue, the entirety of their argument in Section III(B) of the reply, p. 4-5, is improper argument in response to

argument by Respondents that Legislative action in this area supports a finding that there are no issues of substantial public importance requiring review by this Court. A reply for the purpose of responding to argument in this manner is improper under RAP 13.4.

Respondents did not request that review be taken of new issues when they discussed the Legislature's decision to limit DSHS and law enforcements' liability under RCW 26.44.280 and RCW 4.24.595 in the context of whether this case presents an issue of substantial public importance requiring review by this Court. Where the Legislature has responded to judicial action in this area by narrowing the implied cause of action of found in RCW 26.44.050, and there are no conflicts within the lower courts, there is no basis to grant the petitions for review of this matter. Furthermore, as noted above, the issues in this case do not revolve around whether DSHS failed to remove CCM and CPM from an alleged abusive parent (Patricia), but were limited to whether DSHS caused the wrongful removal from an allegedly non-abusive parent (Fearghal). The arguments regarding the statutory limitation of liability responded to the argument at issue: whether the implied cause of action under RCW 26.44.050 intended to create a right of action for wrongful removal from a non-abusive parent in the absence of a placement decision made by DSHS or law enforcement. As the County noted in its answer to the petition for

review, an RCW 10.99 domestic violence arrest and no-contact order does not constitute a placement decision under RCW 26.44.050. As DSHS noted in its answer, DSHS did not take any action to initiate, or otherwise participate in, any proceedings to remove the children from Mr. McCarthy's custody. These arguments did not request review of an additional issue, but merely presented argument in response to issues raised by the petitions for review.

Issue 3.2 and Section III(B) of the reply should be stricken as an improper reply under RAP 13.4(d). Because CPM/CCM do not request the Court deny review of the alternate basis for dismissal under RCW 26.44.280 preserved by the County, the entire section should be stricken. DSHS, the City of Vancouver, and Clark County, are in agreement that the issues raised by the Petitioners CPM/CCM and Fearghal do not warrant review by this Court, and the Court of Appeals' decision should remain the final decision in this matter.

**C. Issue 3.3 and Section III(C) Should be Stricken**

Issue 3.3 and Section III(C) of the reply, p. 6-8, does not address a new issue raised by Respondents, but rather simply argues the same issue raised in CPM/CCM's petition for review regarding the prosecutorial immunity of City Prosecutor Petty. CPM/CCM do not even attempt to

couch this additional argument in terms of addressing a new issue. This portion of the reply should be stricken as improper under RAP 13.4(d).

#### IV. CONCLUSION

Respondents DSHS, the County, and the City respectfully request this Court strike the majority of the reply as improper under RAP 13.4(d). CPM/CCM should be required to refile a separate reply limited to responding to the City of Vancouver's motion to strike appendix C.

RESPECTFULLY SUBMITTED this 12th day of September, 2016.

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**PROOF OF SERVICE**

I hereby declare that on this 12<sup>th</sup> 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 12th day of September, 2016, at Tumwater, WA.

/s/ Breanne Higginbotham  
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Attached please find Respondents DSHS, Clark County, and City of Vancouver's Joint Motion to Strike CPM/CCM's Reply to Answer to Petition for Review.

Thank you.

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