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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 96742-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CHRISTELLE CUNNINGHAM,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF SOCIAL & HEALTH SERVICES

Respondent.

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**DSHS ANSWER TO PETITION FOR DISCRETIONARY REVIEW**

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constitutional questions, Ms. Cunningham fails to cite to a single provision of the constitution at issue, or make any constitutional arguments.

The straightforward statutory construction and evidentiary issues raised by Ms. Cunningham do not warrant review. Similarly, the discretionary denial of a CR 15 motion presents no constitutionally significant issue. This Court should deny Ms. Cunningham's petition for review.

## **II. IDENTITY OF RESPONDENT**

The State of Washington, Department of Children, Youth & Families (Department or DCYF)<sup>1</sup>, Respondent, answers the Petition for Review (PFR).

## **III. CITATION TO COURT OF APPEALS DECISION**

The Court of Appeals issued an unpublished decision on December 17, 2018, affirming the Department finding that appellant had negligently treated a child in her care. The order upholding the founded finding is attached hereto as Appendix A.

## **IV. ISSUES PRESENTED FOR REVIEW**

1. Whether the Department's founded finding that Appellant negligently treated a four-year old child in her care after leaving him

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<sup>1</sup> DCYF is a new, cabinet-level agency created as of July 1, 2018. DCYF has acquired the function of investigating reports of child abuse/neglect and issuing findings, which was at the time of the incident at issue here performed by DSHS.

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unattended for more than ninety minutes in a public park due to her failure to conduct a headcount is supported by substantial evidence.

2. Whether appellant's motion to amend her appeal of the negligent treatment finding to add an appeal of the decision revoking her childcare license was properly denied when she filed the motion to amend months after the deadline for appeal had expired under RCW 34.05.542(2).

#### **V. RESTATEMENT OF THE CASE**

Ms. Cunningham, then a licensed childcare provider, left a four-year-old child alone at a playground near a parking lot and major streets. She did not notice he was gone for over an hour. CP 306-308, 320, 986. Ms. Cunningham did not follow her usual seatbelt check and headcount before leaving the playground, with the result that one seat in her child care van was empty when she pulled out. CP 262-263, 280, 642. Her omission of what she acknowledged to be an important safety step led to the four-year-old being placed at serious risk of substantial harm from unknown persons, vehicle traffic, sex offenders residing in the area, or injuries on playground equipment. CP 306, 520, 534-538, 615-618, 668-669. Accordingly, the Department determined that she had neglected a child. Based on the founded finding of neglect as well as a history of licensing violations, Ms. Cunningham's child care license was also revoked by the Department of Early Learning (DEL). DEL was separate from DSHS at the time.

Ms. Cunningham obtained review of both the founded finding and the revocation of her license at the Office of Administrative Hearings (OAH) by making two separate hearing requests, one for each action. When both agencies' actions were upheld, Ms. Cunningham followed instructions to make two appeals: one appeal to the DEL Review Judge for the revocation, and one appeal to the DSHS Board of Appeals for the founded finding. The review findings were issued sequentially, first by the Board of Appeals, and then by the DEL Review Judge, who had been awaiting the pivotal Board of Appeals ruling.

Ms. Cunningham timely filed a petition for judicial review in King County Superior Court of the Board of Appeals decision. She failed, however, to file a petition for judicial review of the decision by the DEL Review Judge within the thirty-day timeframe for appeal set forth in RCW 34.05.542(2). Months after the expiration of the deadline for appealing the DEL Review decision, on April 26, 2016, Ms. Cunningham filed a motion under CR 15 to amend her appeal of the Board of Appeal decision to add an appeal to the DEL Review decision. The trial court denied her motion due to lack of compliance with RCW 34.05.542(2), ruling that "case law makes clear that this court has no discretion to grant the Motion to Amend the Petition."

Ms. Cunningham sought review by Division I of the Washington Court of Appeals, arguing that the Board of Appeals Review Judge erroneously interpreted and applied the law, substantial evidence did not support the finding of negligent treatment, and that the Final Order was arbitrary and capricious. She did not advance a constitutional argument under either the Washington or US Constitution. Brief of Appellant filed 10/27/17; Appellant's Reply Brief filed 3/5/18.

Division I upheld the founded finding and again denied Ms. Cunningham's attempt to obtain judicial review of the revocation of her license without following the requirements of RCW 34.05.542(2). Slip Op. at 17-25.

Ms. Cunningham requested that this Court review her case through a Petition for Review submitted on January 16, 2019. Her only theory for acceptance of review is that her case presents a substantial issue of law under the Washington State Constitution. PFR at 1-2, 9.

## **VI. REASONS WHY REVIEW SHOULD BE DENIED**

### **A. There Is No Viable Constitutional Claim Warranting Review In This Case.**

Ms. Cunningham claims that this Court should review the findings of Division I in her case under RAP 13.4(b)(3) based on the assertion that the courts below erroneously applied RCW 26.44.020, RCW 34.05.570, and

CR 15 to her case. PFR at 1-2. Her briefing does not explain how the alleged legal errors she cites implicate constitutional law so as to warrant review by this Court.

**1. Ms. Cunningham cites no clause of the Washington State Constitution in support of her claims.**

In order to succeed in her petition for review under RAP 13.4(b)(3), Ms. Cunningham would at a minimum need to explain how the provisions of the Washington State Constitution, her only basis for seeking review, have been violated. But she does not even cite the Constitution, and instead simply restates her disagreement with the application of relevant statutes and civil rules to the facts of her case. PFR at 1-19. This cannot support review by this Court on constitutional grounds.

Further, Ms. Cunningham's invocation of the Washington Constitution should not be considered because this Court generally does not review issues that were not presented to the court of appeals. *Peoples Nat. Bank of Wash. v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973). Ms. Cunningham presented no constitutional argument below, and as in her PFR, never cited the Washington Constitution in her briefing to Division I. PFR at 14-15; Brief of Appellant filed 10/27/17. Because she provides no citations or analysis to support her claims, this Court should decline to

review them. *Bryant v. Palmer Cooking Coal Co.*, 86 Wn. App. 204, 216, 936 P.2d 1163 (1997).

**2. Errors in application of the law to facts in a civil case are not of constitutional magnitude.**

Instead of raising a genuine constitutional issue, Ms. Cunningham simply repeats her unsuccessful arguments that the founded finding in her case was based on erroneous application of statutory law to the facts found below;—facts that were not contested on appeal. Slip Op. at 7-8; PFR at 1-19. This is not sufficient to sustain her request for review from this Court. Errors in applying a statutory right are not constitutional errors, and thus are not fit for review under RAP 13.4(b)(3). *State v. Hughes*, 154 Wn.2d 118, 153, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

Further, Ms. Cunningham’s arguments mischaracterize both the record and the Court of Appeal’s decision. While Ms. Cunningham complains that the agency decision did not evaluate whether there was “serious disregard of consequences of such magnitude as to constitute a clear and present danger” to the child as required statute, the Court of Appeals explicitly disagreed, based on the record:

[T]he DSHS Board of Appeals Review Judge did not disregard the statutory definition of negligent treatment. The extensive unchallenged findings support the conclusion that leaving four-year-old T.J. alone at the Garfield Community



Center playground for approximately an hour and a half evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to T.J.'s welfare or safety.

Slip Op. at 17. As the Court of Appeals noted, the record was replete with evidence that Ms. Cunningham did not perform the customary headcounts and seatbelt checks before leaving a child behind in a public space with access to traffic and random individuals including sex offenders residing in the area. Slip Op. at 4-5, 20. There is no legal error in these conclusions, which do not rise to the level of constitutional issues and cannot support review as requested by Ms. Cunningham.

Ms. Cunningham's second argument, based on court rules rather than constitutional principles, is equally unavailing. She claims that she should have been allowed to amend her petition for judicial review of the DSHS decision to add a new challenge to the findings of a completely separate administrative agency under CR 15. PFR at 16-19. The Court of Appeals correctly rejected Ms. Cunningham's argument, noting that to allow a civil complaint amendment to substitute for a petition for review would undermine the "exclusive means of judicial review for agency action" established in the Washington Administrative Procedures Act. Slip Op. at 22. Ms. Cunningham's attempt to substitute civil rules for statutory

obligations is not based on constitutional principles, and thus would not support this Court's review under RAP 13.4(b)(3) even if meritorious.

**B. Ms. Cunningham has not briefed and may not rely upon RAP 13.4(b)(1), (2), or (4) to obtain review.**

Ms. Cunningham may reply to this response with new theories under different sections of RAP 13.4(b). She should not be allowed to seek avenues of review not presented in her opening brief as a matter of basic fairness. The rationale of the *Byrant* decision applies with equal force to Ms. Cunningham's opening brief and any reply brief she might file. *Bryant*, 86 Wn. App. at 216. Ms. Cunningham should not be allowed to proceed on a trial and error basis to come up with new theories on reply that are not subject to briefing by the Department in response.

**VII. CONCLUSION**

The Appellant has failed to establish that the Court of Appeals decision in this case presents a significant question of law under the Washington Constitution that should be resolved by the Supreme Court. The Respondent respectfully requests that the Court deny the Ms. Cunningham's Petition for Review.

RESPECTFULLY SUBMITTED this 27th day of February, 2019.

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### CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Washington State Supreme Court, under Case No. 96742-3, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Corey Evan Parker, Law Office of Corey Evan Parker at  
[corey@coreyevanparkerlaw.com](mailto:corey@coreyevanparkerlaw.com)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of February, 2019, at Seattle, WA.

  
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NICK BALUCA  
Legal Assistant

**ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE**

**February 27, 2019 - 3:36 PM**

**Transmittal Information**

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