NO. 98940-1

SUPREME COURT OF THE STATE OF WASHINGTON

KYLE P. KEELY, individually and as the natural father and guardian of M.K., a minor,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

GARTH A. AHEARN
Assistant Attorney General
WSB No.: 29840
1250 Pacific Ave., Suite 105
P.O. Box 2317
Tacoma, WA 98402-2317
Phone: (253) 593-5243
OID No.: 91105

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I. INTRODUCTION

This case arises out of the assault of the toddler M.K. that occurred when a teenager was left alone to care for his siblings by his mother. From the time M.K. was born until the assault occurred, approximately nine months later, the Department of Social and Health Services (DSHS)[1] did not receive a single referral identifying M.K. – or any of his siblings – as an alleged subject of abuse or neglect. Nor had DSHS received any referrals in the eight months preceding M.K.'s birth. In a unanimous, unpublished decision, the Court of Appeals held that, "even assuming the State owed M.K. a duty of protection and it breached its duty by failing to provide adequate services and failing to investigate, the trial court erred in denying summary judgment because Keely cannot establish factual causation." *Keely v. State,* No. 51639-0-II, 2020 WL 6888987, at *4 (Wash. Ct. App. Nov. 24, 2020).

This decision – applying well-settled law governing factual causation to the specific facts of this case – does not warrant this Court's discretionary review. The decision simply concluded that Petitioner Keely failed to meet his burden to establish cause in fact without impermissible

[1] The powers, duties, and functions of the Children's Administration, within the Department of Social and Health Services (DSHS), were transferred to the newly formed Department of Children Youth, and Families (DCYF) in July 2018. RCW 43.216.906. DCYF now holds the legal responsibilities once assigned to DSHS under RCW 26.44. For consistency with the Court of Appeals decision, this briefing refers to the agency as DSHS.

speculation. Keely's arguments regarding foreseeability, superseding cause, and field of danger are inapposite to the court's determination that Keely failed to establish cause in fact—that but for DSHS's assumed negligence, M.K.'s harm would not have occurred.

This Court should also reject Keely's invitation to take up the issue of duty. The Court of Appeals decision did not address duty at all. It assumed that DSHS's duty and breach were both established. It then concluded that Keely's factual causation claims were too speculative to survive summary judgment. The decision thus provides no basis to address the duty issue that Keely raises.

The Petition for Review should be denied.

II. COUNTER STATEMENT OF ISSUES

1. Where the Court of Appeals assumed that both duty and breach were present, did the court correctly determine that Keely failed to offer evidence sufficient to establish that DSHS's assumed negligence was the cause in fact of M.K.'s injuries?

2. Where the Court of Appeals assumed that both duty and breach were present; did not analyze either duty or breach in its unpublished decision; and based its decision solely on the grounds that Keely's evidence was insufficient to establish cause in fact, should this Court reject Keely's

invitation to review questions of duty that were not addressed by the decision below?

III. COUNTER STATEMENT OF THE CASE

M.K. was "born healthy" in February 2012, "and was generally a healthy child for the first nine months of life." *Keely*, 2020 WL 6888987, at *3. Prior to M.K.'s birth, DSHS had received four referrals regarding the family. In 2010, there were three referrals, of which only one alleged possible child neglect. It was investigated, and voluntary services were offered to M.K.'s mother, Robin Ross (Ross):

- 2010 – April 30: child falling asleep in school – no investigation initiated because no specific allegation of abuse or neglect made;
- 2010 – May 28: possible child neglect – investigation initiated;
- 2010 – August 4: notice of birth of child S.H.[2]

Id. at 1-2. In June 2011, before Ross was aware she was pregnant, a fourth referral was received from Ross's sister:

- 2011 – June 10: Ross reported to be slurring on a phone call, saying she was going on "drug binges" and was not a good mother.

Id. at 3.

Additional factual details are provided below.

[2] Following the approach taken in the Court of Appeals' decision, DSHS's briefing will refer to this child as "S.H." *See Keely*, 2020 WL 6888987, at *2 n.3.

A. In 2010, DSHS Received Three Referrals About the Family: the Sole Referral Alleging Possible Child Neglect Was Investigated, Services Offered, and the Referral Closed by December 2010

In 2010, DSHS received three referrals regarding Ross. The first referral alleged that C.J. (11-1/2 years old at the time) was falling asleep in class. CP at 42-46. C.J. told the teacher that his younger brother kept him up at night playing on the computer and he had to get up at 5:00 a.m. to get ready for school. CP at 42-46. DSHS did not initiate an investigation of the referral because it did not make allegations of potential child abuse or neglect. CP at 42-46.

On May 28, 2010, DSHS received a second referral. The referral alleged that Ross was at Harborview Medical Center where, due to a domestic violence incident, she was treated for injuries. Her two children C.J. (11-1/2 years old) and R.R. (7 years old) were left home alone while she was at the hospital. CP at 48-52. DSHS accepted the referral for investigation by Child Protective Services (CPS). CP at 48-52.

While the investigation was ongoing, DSHS received a third referral, simply providing notice that Ross had given birth to S.H. on August 4, 2010. CP at 54-57. The mandatory reporter made the report because Ross had mentioned a history with CPS. The mandatory reporter explained there were no current concerns about the newborn. CP at 54-57.

During DSHS's investigation of the May 28 referral, Ross admitted

to using drugs. CP at 65-66. From 1992 to 1997, she had a history of various misdemeanor charges related to drug use, among other things. CP at 169-78. However, by the time of the investigation she had incurred no new charges since 1997, and she held a full-time job working at Western State Hospital. CP at 64.

By December 10, 2010, DSHS completed its investigation regarding the May 28, 2010, referral. CP at 59-68. In the investigative assessment drafted at the conclusion of the investigation, the social worker noted that Ross had participated in domestic violence services, group therapy, and drug and alcohol treatment. CP at 59-68. DSHS's social worker determined that Ross was protective of her children. The investigator also concluded that she had neglected her two sons, C.J. and R.R., by leaving them alone without a safety plan in case R.R. had an issue with his asthma. CP at 59-68. There is no evidence that Ross continued to engage in services after the conclusion of the investigation.

B. In June 2011, DSHS Received a Fourth Referral: It Did Not Allege Child Abuse or Neglect

On June 10, 2011, DSHS received a referral from Ross's sister, who was living in Texas. CP at 70-76; 283. Ross's sister stated that, during a phone conversation, Ross had been slurring her words, claiming to be a bad mom and on a binge. CP at 70-76. The referral made no allegations that the

three children at the time (C.J., R.R., and S.H.) were being physically, sexually, or emotionally abused, or abandoned by their mother. CP at 82-83. Ross did not know, at the time, that she was pregnant with M.K. and did not learn of her pregnancy until many months later. CP at 35-37. Nor is there any evidence that Ross's sister knew Ross was pregnant with M.K.

The DSHS intake worker accepted the referral and assigned a 10-day response time. Her supervisor then overrode the decision and decided a 72-hour response was appropriate based on a baby (S.H.) being in the home. CP at 85. However, the Area Administrator determined the referral did not meet the criteria for investigation. CP at 87. Specifically, the referral did not contain allegations of child abuse or neglect; therefore, it did not contain sufficient allegations to conduct an investigation. CP at 87.

C. In February 2012, M.K. Was Born Healthy: DSHS Received No Referrals Regarding Him or the Family Until the Assault Occurred Nine Months Later

M.K. was born on February 22, 2012, approximately one week early based on a 38-week gestational period. CP at 89-90. The birth was normal. CP at 89. There is no indication in his medical provider notes that M.K. was born drug affected. CP at 89. The notes do not indicate that the hospital where M.K. was born had any concerns about M.K.'s welfare at the time of his birth. CP at 89. There is no evidence in the record that the hospital complained to DSHS that M.K. was being abused or neglected.

Over the next months, medical providers—all mandatory reporters—saw M.K. multiple times for routine well-child checkups and did not report any concerns to DSHS.

- March 1: M.K.'s first well-child exam was normal. CP at 89-92. The medical provider did not make a referral.
- March 2: M.K. seen to address a loss of weight. Doctor discussed feeding strategies with Ross. CP at 94-95. The medical provider did not make a referral.
- March 5: M.K.'s two-week well-child checkup. His weight was back up and doctor noted M.K. was in no acute distress and appeared well nourished and developed. CP at 97-99. The medical provider did not make a referral.
- March 12: M.K. had routine health exam. Chart notes indicated M.K. doing well. The physical exam noted M.K. was in no acute distress, was well nourished, and well developed. CP at 101-03. The medical provider did not make a referral.
- April 15: Ross took M.K. to Saint Joseph Medical Center emergency room for a cough. Doctor examined M.K., and released him that same day. CP at 105-17. The medical provider did not make a referral.
- April 23: M.K. had routine well-child exam. Medical provider's report indicated M.K. was doing well and his cough was improving. Physical exam noted M.K. was in no acute distress, was well nourished and well developed. CP at 119-21. The medical provider did not make a referral.
- On November 29, Ross took M.K. to another routine child health exam. CP at 123-27. The exam included a full review of M.K. CP at 123-27. Exam notes do not indicate that M.K. showed any signs of physical abuse or neglect. The exam notes do not mention any concerns about Ross's behavior or ability to appropriately parent M.K. The provider did not make a referral.

In sum, the exam records indicate that M.K. was doing well.

Two days later, on December 1, Ross left M.K. with his 14-year-old brother C.J. She claims to have left the house to go to the neighbors. CP at 304-05. Sometime while C.J. was watching M.K., C.J. shook M.K. numerous times, causing M.K. to be hospitalized. CP at 304-05.

DSHS was notified by the hospital of the incident and M.K. was removed from Ross's care while CPS investigated the matter along with law enforcement. CP at 296-309. During the course of the investigation, DSHS learned that Ross had relapsed in her drug use. She claims she began using drugs sometime in the spring of 2011 and continued using up until the time of the assault. During this time, she would often leave her four children at home while she went out to consume drugs. CP at 284-85. The 14-year-old C.J. would be charged with watching his three younger siblings, including M.K. CP at 296-309.

During the investigation, DSHS also learned that sometime in 2011, prior to his assault of M.K., C.J. had displayed anger issues. CP at 296. The record provides no indication that this information had ever been reported to either law enforcement or to DSHS prior to DSHS learning of it during the investigation. CP at 307.

D. In Litigation Below, the Court of Appeals Correctly Concluded That Dismissal Was Appropriate Because Keely Offered No Evidence to Establish Cause In Fact, Only Speculation

In this litigation, Petitioner Keely, individually and on behalf of his child M.K., sued the State for negligence. *Keely*, 2020 WL 6888987, at *4. The trial court denied DSHS's motion for summary judgment but granted its request to certify the matter for appeal pursuant to CR 54(b). *Id.*.

In an unpublished, unanimous decision, the Court of Appeals reversed the trial court's denial of summary judgment and dismissed Keely's claims against DSHS. The court held that "even assuming the State owed M.K. a duty of protection and it breached its duty by failing to provide adequate services and failing to investigate, the trial court erred in denying summary judgment because Keely cannot establish factual causation." *Id.* at *4.

The Court of Appeals explained that, "[v]iewing the evidence in the light most favorable to Keely, there is still a missing link in the chain of causation." *Id.* at *6. On the evidence presented, "[a] reasonable person could conclude that but for Ross's negligent treatment of leaving M.K. unattended by an adult, M.K. would not have been at risk in general for injury." *Id.* However, although that neglect presented the opportunity for C.J. to harm M.K., "ultimately, it was C.J.'s anger issues and violent tendencies that caused of M.K.'s injuries." *Id.*

With respect to the 2010 referral and investigation, "Keely presented no evidence of C.J.'s violent tendencies or anger issues at the time of the May 2010 referral or at the closure of Ross's case in December 2010." *Id.* Therefore, even if DSHS had provided additional services, "it is far too speculative to assume that DSHS would have discovered C.J.'s violent tendencies because the record indicates that they surfaced a year later." *Id.* at *6.

And with respect to the 2011 referral that was not investigated, even assuming that "C.J.'s anger issues and violent tendencies would have been revealed during an investigation . . . , it is far too tenuous to infer from the evidence that the harm to M.K. would have been prevented." *Id.*

> In order to come to this conclusion, we would need to either adopt the possible theory that as part of the services provided to Ross, DSHS would have also provided services to C.J., C.J. would have participated in services, and the services would have fully addressed his anger to prevent M.K.'s injuries, or the possible theory that C.J. would have been permanently removed from the home. Keely does not present any evidence supporting these theories. *Without evidence supporting a reasonable inference of either theory, both are speculative as to proximate cause.*

Id. (emphasis added).

The court noted that Keely speculated regarding "a number of steps" that DSHS "could have taken" that "might have contributed" to the prevention of M.K.'s harm. *Id.* at *6. It explained "this type of speculation

is insufficient to create a genuine issue of material fact as to whether M.K.'s injuries would have been prevented had DSHS intervened." *Id.* Therefore, "viewing the evidence in the light most reasonable to Keely, we hold that a reasonable jury could not find a genuine issue of material fact as to whether DSHS's failure to provide adequate services and failure to investigate caused M.K.'s injury." *Id.* The court reversed the trial court's denial of summary judgment and dismissed Keely's claims.

IV. REASONS WHY REVIEW SHOULD BE DENIED

In its unpublished decision, the Court of Appeals held that Keely "cannot establish factual causation on his claims." *Keely*, 2020 6888987, at *1. Factual causation – specifically whether Keely introduced sufficient evidence to establish cause in fact – was the sole basis for the decision below and is the sole issue properly subject to this Court's discretionary review.

Disregarding the limited basis of the Court of Appeals' ruling, Keely focuses his Petition almost exclusively on duty. *See* Pet. at 6-16. The Petition effectively seeks an advisory opinion, because the Court of Appeals explicitly assumed that both duty and breach were present and did not analyze or rule on either. *Keely*, 2020 WL 6888987 at **4, 5, 6. This Court should reject Keely's request for an advisory opinion, and deny

discretionary review of the Court of Appeals' fact-specific application of well-settled law.

A. Review Is Not Warranted of This Unpublished Decision That Does No More Than Apply Well-Settled Law Governing Cause In Fact to the Specific Facts Presented by This Case

The Court of Appeals' unpublished, unanimous decision "reverse[d] the trial court's denial of summary judgment on the basis that Keely cannot establish factual causation on his claims." *Keely*, 2020 6888987, at *1. Contrary to Keely's contentions, the Court of Appeals' decision is entirely consistent with well-settled Washington law dictating that cause in fact cannot be based on impermissible speculation. Discretionary review of this fact-specific decision applying well-settled law is not warranted.

1. The Decision Below Correctly Determined That Keely Failed to Present Sufficient Evidence to Establish Cause in Fact Without Impermissible Speculation

The Court of Appeals dismissed this case as a matter of law because Keely did not establish cause in fact. The court applied settled law to reach this conclusion, correctly pointing out that a "claim for liability cannot rest on a speculative theory or an argumentative assertion of possible counterfactual events." *Id.* at *4 (citing *Martini v. Post*, 178 Wn. App. 153, 165, 313 P.3d 473 (2013); *H.B.H. v. State*, 197 Wn. App. 77, 93, 387 P.3d 1093 (2016), *aff'd*, 192 Wn.2d 154, 429 P.3d 484 (2018)). "Cause in fact exists when 'but for' the defendant's actions, the claimant would not have

been injured." *Id.* at *5 (citing *Tyner v. Dep't of Soc. & Health Servs*., 141 Wn.2d 68, 82, 1 P.3d 1148 (2000)).

Proceeding from these fundamental tenets of black letter law, the Court of Appeals properly identified the question in this case to be:

> if DSHS had provided Ross with adequate services following the May 2010 referral, and if DSHS had accepted the June 2011 referral and conducted an investigation, would DSHS have discovered C.J.'s violent tendencies towards other children in the home and would such discovery have enabled DSHS to prevent M.K.'s injury in December 2012.

Keely, 2020 6888987, at *6. The Court of Appeals correctly concluded that Keely could not meet his burden of proof on this question absent impermissible speculation, for a number of reasons.

First, as the Court of Appeals identified, Keely "*presented no evidence* of C.J.'s violent tendencies or anger issues at the time of the May 2010 referral or at the closure of Ross's case in December 2010." *Id.* at *6 (emphasis added). Thus it was "far too speculative" to assume that, if DSHS had provided additional services following the May 2010 referral, then "DSHS would have discovered C.J.'s violent tendencies because the record indicates that they surfaced a year later." *Id.* at *6.

Second, the Court of Appeals then addressed Keely's contention that M.K. would not have been harmed if DSHS had conducted a June 2011 investigation. To survive summary judgment, as the Court of Appeals

correctly pointed out, "a plaintiff must present '"some competent evidence of factual causation" that precludes jury speculation.'" *Id.* at *4 (quoting *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 347, 453 P.3d 729 (alteration in original) (quoting *Estate of Bordon ex rel. Anderson v. Dep't of Corr.*, 122 Wn. App. 227, 242, 95 P.3d 764 (2004)), *review denied*, 195 Wn.2d 1012 (2020)).

With this principal in mind, the court noted that even assuming a June 2011 investigation would have revealed C.J.'s behaviors, it was "far too tenuous" to make the inference from the evidence in the record that M.K. would not have been harmed. *Id.* at *6. The trier of fact would "need to either adopt the possible theory that as part of the services provided to Ross, DSHS would have also provided services to C.J., C.J. would have participated in services, and the services would have fully addressed his anger to prevent M.K.'s injuries, or the possible theory that C.J. would have been permanently removed from the home." *Id.*

However, Keely presented no evidence supporting either of these theories. *Id.* There is no admissible evidence in the record that C.J. would have been removed from the home prior to the assault. Ms. Barbara Stone, Keely's standard of care expert, did not opine that any of Ross's children would have been removed from the home based on the facts of this case. CP at 245-81. Further, Ms. Stone did not opine that C.J. would not have

assaulted M.K. if DSHS had acted differently. Indeed, as she never spoke to C.J., she had no factual basis to form an opinion on that issue even if she were qualified to render such an opinion, which she is not. *See Melville v. State*, 115 Wn.2d 34, 40-41, 793 P.2d 952 (1990) (finding that speculations of expert witnesses opining as to effect of voluntary services on individual with whom they had no direct contact were insufficient to raise an issue of fact); *Bordon,* 122 Wn. App at 247.

Given the lack of evidence in the record to support Keely's theories of factual causation, the Court of Appeals properly concluded that, "[w]hile Keely speculates that DSHS could have taken a number of steps that could have contributed to the prevention of M.K.'s harm, *this type of speculation is insufficient* to create a genuine issue of material fact." Keely, 2020 WL 6888987, at *6 (emphasis added). As such, the Court of Appeals properly reversed the trial court's denial of summary judgment and dismissed Keely's claims.

2. Keely's Contentions Regarding Foreseeability, Superseding Cause, and Field of Danger Are Inapposite

The Petition opens its cursory argument that the fact-bound causation issue warrants review with the inflammatory – and erroneous – contention that the decision means DSHS "need not protect against the dangers to a baby who is home alone." Pet. at 16-17. The decision, a

case-specific, unpublished ruling on factual causation, means no such thing. Nonetheless, in support, Keely argues three concepts inapposite to the decision's rationale: foreseeability, superseding cause, and field of danger. Pet. at 16-20. All three are red herrings. Foreseeability goes to scope of duty, which the decision below assumed and did not decide. Superseding cause was likewise not at issue in the decision, which simply determined that the evidence presented was insufficient to establish cause in fact. As for field of danger, it goes to the analysis of legal causation, not factual causation. Discretionary review should be denied.

Keely first raises foreseeability, contending that the decision, which the Court of Appeals explicitly restricted to cause in fact, "limits [DSHS's] duty too because the 'pertinent inquiry' – foreseeability – is the same." Pet. at 17. This erroneously conflates the scope of a legal duty that is limited by foreseeability (the RCW 26.44.050 negligent investigation duty) with the separate element of cause-in-fact. *See Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992) (foreseeability limits the scope of a duty, it does not independently create a duty). Because the Court of Appeals did not reach the duty issue, Keely, 2020 WL 6888987, at **4, 5, 6, foreseeability is inapposite.

Keely then claims the unpublished opinion creates a "rupture in the law of causation" by "sever[ing] causation analysis from the strict rules for

finding a superseding cause." Pet. at 17. Specifically, Keely argues that "any intervening act that is reasonably foreseeable, or that was related to the situation created by the defendant's negligence, cannot be a superseding cause." Pet. at 17. But the Court of Appeal's determination that Keely failed to establish cause in fact was not based on C.J.'s action constituting a superseding cause. Rather, it was based on Keely failing to introduce any evidence to support the inference that, if DSHS had provided more services in 2010 or conducted an investigation in 2011, the assault would not have occurred. *Keely*, 2020 WL 6888987, at *6.

Finally, Keely claims the decision focused "too narrowly on the specific mechanism of harm" rather than the "general field of danger" to M.K. Pet. at 17-18. But "field of danger" goes to legal causation, and the interrelated issue of duty. *Meyers v. Ferndale Sch. Dist.*, 12 Wn. App. 2d 254, 266-68, 457 P.3d 483, 490, *aff'd*, No. 98280-5, 2021 WL 822221 (Wash. Mar. 4, 2021). By contrast, factual causation was the basis of the Court of Appeals' decision below.

In this case, the Court of Appeals simply determined that it was "far too tenuous to infer from *the evidence* that the harm would have been prevented" even if DSHS acted differently. Keely, 2020 WL 6888987, at *6. The Court of Appeals' conclusion is consistent with the long-standing rule that a plaintiff must establish that the harm suffered would not have

occurred "but for" an act or omission of the defendant. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005).

Cause in fact does not exist if the connection between an act and the later injury is indirect and speculative. *Walters v. Hampton,* 14 Wn. App. 548, 555, 543 P.2d 648 (1975). As Keely admitted, the injuries to M.K. were caused by M.K.'s brother C.J. Mot. for Recons. at 3. Keely fails to identify any admissible evidence showing that C.J. would not have assaulted M.K. if Ross had participated in services. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 761, 310 P.3d 1275 (2013). Put another way, even if Ross's issues had been fully addressed, it is still speculative to claim that M.K. would not have been harmed by C.J. The Court of Appeals decision correctly found Keely's evidence on factual causation to be speculative. Discretionary review is not warranted.

B. Review Is Not Warranted on the Issue of Duty, Which the Unpublished Decision Assumed and Did Not Address

This Court should also reject Petitioner Keely's invitation to use the decision below as a vehicle for conducting a sweeping review of DSHS's duty to Washington's children. Pet. at 6-16. The Court of Appeals was explicit: it did not reach the issue of duty when it determined that Keely's claims should be dismissed. Instead, the court assumed for the sake of argument that both duty and breach existed based on current case law, and

dismissed Keely's claims solely on the grounds that factual causation was speculative. *Keely*, 2020 WL 6888987, at *6. Accordingly, the decision offers neither grounds nor fodder for considering the issue of duty. Keely's extensive argument regarding duty is inapposite to the sole issue addressed in the decision below and should be denied.

Given that the unpublished decision below assumed duty without further analysis, it obviously creates no conflict with any decisions of this Court or the Court of Appeals. The Petition's critiques of supposed State positions on duty are merely an attempt to create a basis for review where none exists. The decision below does not create a conflict of law, nor any other basis warranting review pursuant to RAP 13.4(b).

V. CONCLUSION

As the Court of Appeals properly recognized in its unpublished decision, speculation regarding what DSHS could have done differently does not constitute evidence to establish cause in fact. The court correctly determined that Keely's claims failed on cause in fact. Keely's Petition for Review should be denied.

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RESPECTFULLY SUBMITTED this 24th day of March, 2021.

ROBERT W. FERGUSON
Attorney General

/s/ Garth A. Ahearn
GARTH A. AHEARN, WSB No.: 29840
Assistant Attorney General
1250 Pacific Ave., Suite 105
P.O. Box 2317
Tacoma, WA 98402-2317
Phone: (253) 593-5243
Email: Garth.Ahearn@atg.wa.gov
Attorneys for Respondent

DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding "ANSWER TO PETITION FOR REVIEW" was filed in the Supreme Court of the State of Washington, and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

HESTER LAW GROUP, INC. P.S.
Brett A. Purtzer
1008 South Yakima Ave., Ste. 302
Tacoma, WA 98405
brett@hesterlawgroup.com
kathy@hesterlawgroup.com

THE PUGET LAW GROUP
Casey M. Arbenz
708 Broadway, Suite 400
Tacoma, WA 98402
casey@pugetlawgroup.com

TALMADGE FITZPATRICK
Gary W. Manca
Philip Talmadge
2775 Harbor Ave. S.W.
Third Floor, Suite C
Seattle, WA 98126
gary@tal-fitzlaw.com
phil@tal-fitzlaw.com
matt@tal-fitzlaw.com
assistant@tal-fitzlaw.com

TORRONE LAW, LLC
Christopher G. Torrone
705 South Ninth St., Ste. 201
Tacoma, WA 98405
chris@torronelaw.com

Attorneys for Petitioner

DATED this 24th day of March, 2021 at Olympia, Washington.

s/ Annya Ritchie
ANNYA RITCHIE
Legal Assistant

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

March 24, 2021 - 10:02 AM

Transmittal Information

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Appellate Court Case Title:	Kyle P. Keely v. State of Washington
Superior Court Case Number:	16-2-05028-5

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