NO. 99893-1

SUPREME COURT OF THE STATE OF WASHINGTON

MICHELLE A. DESMET and SANDOR KACSO,
individually and as the General Guardians
of their daughter, ASHLEY A. KACSO, a minor

Respondents.

vs.

STATE OF WASHINGTON by and through its agency
the DEPARTMENT OF SOCIAL AND HEALTH
SERVICES and the CHILD PROTECTIVE SERVICES
DIVISION thereof, and YOLANDA A. DURALDE, M.D.

Appellants

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petitioner asserted at the Trial Court, before the Court of Appeals and now before this Court that RCW 4.24.595(2) is a grant in unambiguous language of *absolute immunity* to the Department of Children, Youth & Families once a Trial Court enters a Shelter Care Order. The statute does not provide such a broad grant of immunity. The statute simply does not say what the Department wishes it said. In any Trial Court dependency action, the Petitioner controls the flow of information to an impartial decisionmaker. When the Petitioner presents false, distorted and unsupported allegations, claims and statements to the trier of fact, any claimed order entered by the Trial Court is flawed and should not support a claim that Petitioner bears no liability for its misconduct occurring before or after such an order based on false and misleading information.

The matter which Petitioner seeks this Court to review is a case of first impression interpreting RCW 4.24.595(2). A previous, unpublished decision, *Peterson v. Dept. of Social & Health Services*, 9 Wn. App. 2d 1079, 2019 WL 3430537 involved Division II of the Court of Appeals interpreting RCW 4.24.595(1). Petitioner's argument for review now is presented as a claim that the statutory language is ambiguous, requiring analysis by the courts. This is simply the latest incarnation of the Petitioner's position on this subject, and a reversal of Petitioner's earlier

assertions. At the Trial Court, Petitioner argued the statute was unambiguous (CP 325); in its opening brief in the Court of Appeals, Petitioner/Appellant argued that the statute was unambiguous (Appellant's Opening Brief, p. 8); in its reply brief, it argued to the Court of Appeals that the statute was unambiguous (Appellant's Reply Brief, p. 8) and now, before this Court, Petitioner argues the statutory language is ambiguous and requires resort to legislative history. The statute Petitioner seeks this Court to review is not ambiguous in that it does not provide absolute immunity for the Petitioner's misconduct. At the present time, with only one Appellate Court construing RCW 4.24.595(2) there is no substantial basis under the Rules of Appellate Procedure for this Court to accept review of this question on the record before this Court. RAP 13.4(b)(4).

II. IDENTITY OF RESPONDENTS

Respondents brought suit as both the parents of the minor child A.K. individually and as guardians of the minor child A.K. The Petitioner seeks review of the published decision in *Desmet v. State*, No. 53962-4-II.

III. ISSUE FOR REVIEW

A. Is an order denying summary judgment for Petitioner based on Petitioner's claim of absolute immunity under RCW 4.24.595(2), with a single Appellate Court construing the statute, an adequate record to require this Court to construe whether the Petitioner continues to have liability for its malfeasance, misrepresentations, negligence, false statements and misconduct before the Dependency Court to secure an ongoing shelter care orders?

IV. STATEMENT OF THE CASE

Michelle Desmet and Sandor Kacso brought their three and a half month old daughter, A.K. to Tacoma's Mary Bridge Children's Hospital (Mary Bridge) on a Friday, February 5, 2016 where, to their horror, it was discovered that she had a spiral fracture of her left femur. (CP 350) Their daughter A.K. had just entered daycare that week; the Respondent parents had no explanation for how this medical condition occurred. (CP 1417; 1721; 1516) *The initial placement in Shelter Care that night was not opposed nor objected to by the Respondent parents.* (CP 384-92) RCW 4.24.595(1) is not implicated in this case, nor in Petitioner's Petition for Review. Respondents supported a prompt investigation to determine how and in what manner their daughter A.K. had been injured.

The child A.K. was placed with Sandor Kacso's sister directly from Mary Bridge. (CP 1476) The Respondents, on their own, contacted the Department after hours Tuesday night as they had heard nothing about the status of their daughter. (CP 1101) They were then advised for the first time that there was a hearing the following morning that they were required to attend and that the "social worker" needed to get paperwork to them regarding the Petition for Dependency. (CP 1101-1102) Ostensibly, A.K. was in Shelter Care placement to be in a safe place while the Petitioner *investigated*! (CP 1102) In fact, the Petitioner did no

investigation. (CP 1428-1455) This is despite the fact that Petitioner had a statutory duty to investigate. RCW 26.44.030 and .040. By the Petitioner's own concession in its Petition for Review, the "Department completed its investigation, (slight as it was), in March, but the law enforcement investigation remained open while the prosecutor decided whether to file criminal charges." (Petitioner's Petition for Review, p. 4) In fact, when the record is fully considered, the Department had done absolutely nothing on this case to investigate the need for the removal of this minor from her parents since mid-March. (CP 354-65; 1302; 1399) In fact, the investigator assigned by the Department to this matter had concluded her employment with the Department by mid-March and her ultimate report, submitted in support of a "Founded Letter" and dated March 31, 2016 was allegedly compiled and ostensibly authored by this investigator after she was no longer employed by the Department. (CP 1384; 1399; 1401-06) Even the King County Sheriff's Office activity, which the Department seeks to now use to excuse its own non-action based on a claim that Petitioner was waiting for the end of the police investigation, was not undertaking any additional or further investigation by mid-March of 2016. (CP 354-65; 1302; 1399) By mid-March, no one was investigating this situation at all.

The Respondent parents moved in April to modify the Shelter Care Order and asked the Court to return A.K. to their home. (CP 398-403). The parents had an independent pediatric orthopedic expert's testimony (CP 1110-1176), polygraph test results (CP 1052) and a psychiatrist evaluation in support of the return of their child. (CP 1681-82) The Department submitted a declaration of a child welfare supervisor who had done nothing herself, but who relied upon hearsay and statements she claimed were in the Department's file. (CP 1696-1741) No expert testimony was submitted by declaration or affidavit. The Department's position was that investigation of the circumstances of this injury to A.K. was ongoing in some manner. (CP 1399; 1680; 1691; 1670-72) That statement was simply not true. (CP 1401-06) Neither the Department nor the King County Sheriff's Office was investigating anything at this point.

Despite no ongoing investigation by the Department, despite no ongoing investigation by the King County Sheriff's Office, despite the investigator whose report was the basis of the Department's action no longer even being an employee of the Department at the time of her report (which she testified under oath she did not author), the Petitioner issued a Founded Letter against Respondent mother, Michelle Desmet. (CP 1515-1523) Although Michelle Desmet was represented, and the Petitioner Department had her mailing address and her physical address, the

Founded Letter was not timely served on Michelle Desmet until after the time period to appeal the finding had passed. (CP 1304) The Department thereafter took the position that Michelle Desmet could not appeal or challenge the Founded Letter. (CP 1304) Additional legal efforts on Michelle Desmet's behalf ultimately resulted in the Department recanting that position, but continuing to assert the validity of the Founded Letter. (CP 1304) The question of whether the Department would reverse its position on the Founded Letter continued up until a hearing was emminent, well past the time that the Respondent parents were ultimately able to force the Department to either go to trial on the issue of A.K.'s dependency or return A.K. to her home. (CP 1304-05) This whole process was not a collaborative, rehabilitative kum-ba-ya experience. The Respondent parents had counsel, the Department had counsel and despite multiple instances in which it appeared an agreement had been reached, the Department would backtrack and refuse to give up jurisdiction over the minor child A.K. (CP 1100) The Department tried to unilaterally obtain a continuance of the trial date though the Dependency Court ultimately intervened and refused. Only faced with an impending trial the following morning with no testimony from any source on the issue of A.K.'s safety with her parents, the Department capitulated, dismissed the dependency action, and withdrew and terminated all the strings they were

attempting to attach to the parent-child relationship of Respondents going forward. (CP 1189-1191; 1303-1304)

Relevant to the Department's non-investigation is the fact that the Department never asked for, or got, a polygraph examination of the Respondents. (CP 1673) The Department's investigation concluded with its Founded Letter issued at the end of March, but containing only efforts by the Department through mid-March. (CP 1664-65) The Department was undertaking no investigation after it issued its Founded Letter. (CP 1665)

The Petitioner Department's supervisor, Linda Townsend-Whitman, knew that the Declaration she submitted before the Dependency Trial Court would be used to deny the return of A.K. to her home and parents. (CP 1676-77) This witness on behalf of the Department had never spoken to any doctor, any daycare person, any police officer, or any polygraph expert when she signed her Declaration. (CP 1675). The Petitioner's supervisor whose Declaration was the only document before the Dependency Trial Court, knew that the Department's expert, Dr. Duralde, did not attribute the injury to Respondent; she also knew that the Department did not consider expert Handelsman's opinions submitted by the Respondents and provided to the Department because this pediatric expert did not see the minor A.K. (CP 1680-1) Incredibly, when her

Declaration was prepared, Supervisor Townsend-Whitman did not know that in fact the King County Sheriff Investigation was over, but did testify that the Department held a different opinion than its expert Dr. Duralde on the potential responsibility of the Respondents for the minor's injury and therefore opposed returning A.K. to her parents. (CP 1686-7)

In the lawsuit that followed against the Petitioner Department for its wrongful and unnecessary prolonged separation of A.K. from her parents, and negligence in investigating the basis for that separation, the Petitioner Department claimed that RCW 4.24.595(2) provided it absolute immunity from the Respondents parents' and child's claims. (CP 323-24) The Trial Court denied the Petitioner Department's motion for summary judgment and entered a 54(b) Order to permit the Department to seek interlocutory review of the issue of its claimed immunity. (CP 1974-87)

V. LAW AND ARGUMENT

A. Contrary to Petitioner's argument and claim, the Court of Appeals decision does not conflict with this Court's guidance on the issue of legislative intent and the Petition for Review should be denied.

Petitioner's argument on this subject begins with the assumption that a review and use of legislative history is necessary and appropriate because the dissent at the Appellate Court referred to legislative history. The Petitioner makes this argument to attempt to bring its petition into the

parameters of RAP 13.4(b)(1). However, the law of this Court is clear that where the language used in a statute is unambiguous, referral to legislative history is irrelevant and immaterial. *Cerillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006). As this Court stated in *Cerillo*:

> In order to ascertain the meaning of [the statute at issue], we look first to its language. If the language is not ambiguous, we give effect to its plain meaning. "If a statute is clear on its face, it's meaning is to be derived from the language of the statute alone." (Citing authority)

Cerillo, at 201.

Petitioner's argument for review in this case assumes an ambiguity that it had previously argued didn't exist and then claims Division II's decision to not consider legislative history creates a conflict with this Court's prior rulings. Division II of the Court of Appeals applied the unambiguous, plain meaning of the language of RCW 4.24.595(2) as written. *Ronald Waste Water Dist. v. Olympic View Water & Sewer Dist.*, 196 Wn.2d 353, 364, 474 P.3d 547 (2020). In the context of what the Department has inconsistently argued as the ambiguous or unambiguous language of this statute, the majority of the Appellate Court succinctly clarifies what the Petitioner, and what the Dissent's legislative history argument suggests:

> Ultimately, the Department's argument and the dissent's analysis are based on what the Department *wishes* that RCW 4.24.595(2) stated.

Desmet, 17 Wn. App.2d at 313

The Petitioner's argument that the Appellate Court's construction conflicts with this Court's guidance on effectuating legislative intent is built on a false premise and is therefore inapplicable.

B. RAP 13.4(b)(4) involving a claim of substantial public interest is not implicated by the Appellate Court's decision and the bases for discretionary review before this Court are not met.

Petitioner finally argues in its briefing that the Appellate Court's majority's failure to conclude that RCW 4.24.595(2) does not give the State absolute immunity presents an issue of substantial public interest and requires that this Court accept review and interpret this statute for the Department's benefit. Quite frankly, it appears the Department desires to cloak itself in a blanket of immunity on the basis that it is protecting a child from risk of harm *perceived at the time, however flawed that perception may be*, and therefore is always in compliance with Court orders. (Petition for Review, p. 20) On the motion for summary judgment before the Trial Court in this case which comprises the only record to consider, the State, despite separating this child from her parents was conducting *no investigation!* This is directly in violation of its own policies and procedures as established by the record before the Trial Court.

(CP 1015-1021)[1] The State specifically misrepresented that it had any testimonial evidence whatsoever to justify the separation of this minor child from her parents. The State refused to consider expert testimony from a nationally-recognized pediatric orthopedic surgeon that this medical condition did not necessarily suggest abuse or intentional misconduct (CP 1110-1176) The State misrepresented to the Court the polygraph information and had no declaration from any expert other than the misconstruction and misstatement by its own supervisor who was not even involved in this investigation as to what the conclusions were of the King County Sheriff's Office polygraph expert. (CP 1676; 1680; 1691; 1696-1702)

It is on this record of malfeasance and misconduct that the State desires to wrap itself in a claim of immunity. Petitioner basically argues that it can commit any misconduct and undertake any act of malfeasance because its heart is pure. And, if the Court doesn't apply such a broad immunity rule for the benefit of persons working in the field of preventing child abuse, other courts have expressed concern of the potential for "catastrophic effect". The answer to this alarming concern about the lack of absolute immunity is simple: Do your job; don't lie to the Court and

[1] Former employee of DSHS, Barbara Stone, testified the Department has its own statutory duty to investigate. The Petitioner Department claims it was required to "stand down" or wait for the sheriff to complete its investigation is in error.

don't tell the Court you are doing things you aren't doing, or have things you don't have, so that the Court will continue to unnecessarily and harmfully separate a child from his or her parents. The unfair prolonged separation of A.K. from her parents without any effort at reunion of the family IS the "catastrophic effect".

C. Petitioner's claim that the plain language of RCW 4.24.595(2) exempts the Department from liability ignores the Trial Court and the Appellate Court's reasoning that the statute is inapplicable to Respondents' negligent investigation claims and does not support its argument for review by this Court of the Trial Court's order denying the Department's motion for Summary Judgment.

When circumstances suit the Petitioner, it now argues, as it did before the trial and appellate courts, that RCW 4.24.595(2) is *unambiguous* and that the plain language bars Respondents' claims. The Department argues:

> Where, as here, the Department complies with a Court order to place a child in an out-of-home placement, the Department is "not liable" for that action. (Petitioner's Pet. for Rev, p. 9)

The Department's argument ignores exactly what the Trial Court and the Appellate Court concluded made this language inapplicable:

> Desmet and Kacso's negligent investigation claim is not based on the Department's compliance with Court orders. Instead, their claim is based on the Department's alleged failure to conduct a complete and accurate investigation of the abuse allegation against Desmet and the Department's alleged act of providing false information and

> misrepresenting evidence to the Juvenile Court. No Court order directed the Department to engage in such conduct.
>
> * * *
>
> [Plaintiffs] are claiming that the Department's negligent investigation caused the Court to issue those orders. All of Respondent's claims flow from the errors referenced and not from any court order.

Desmet, 17 Wn. App.2d at 312

The Respondent's claims flow from the errors referenced and identified and not from any Court order. The Petition for Review should be declined.

D. The Petitioner's argument as to what the legislature intended is not supported by the record, the legislative history and the language of the statute and its Petition for Review is not warranted on the record before this Court.

On the record before the Trial Court on the State's motion for summary judgment, the Petitioner Department argues: 1) That the plain language of the statute here limits its liability; 2) If the plain language doesn't limit its liability, then the statute is ambiguous and despite lack of evidence of any specific legislative intent in support of its argument, that the legislature could *only have intended* to preclude the legal bases for negligent investigation identified in *Tyner* and *Petcu.* The language cited by Petitioner from *Tyner* belies the argument for such an unsupported

inference to create what the text does not supply. The Petitioner states in its Petition for Review:

> [The *Tyner* Court] then held that a Court 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." (Emphasis original)

(Petition for Review, p. 13.)

This is exactly the ruling of the Court of Appeals majority. The liability excused by RCW 4.24.595(2) is only the Department's acts *performed to comply with Court orders*. *Desmet*, 17 Wn. App.2d at 313.

As the Court of Appeals, Division II majority stated, where does any order entered by the Dependency Court *order* the Department not to conduct a complete and accurate investigation of the allegations against Desmet? Where does any order entered by the Dependency Court suggest or direct that the Department provide the Court false information or misrepresent the evidence it had to the Court to secure an order continuing out of home placement? What order of the Dependency Court orders, or even suggests, the Department to reject out of hand any expert opinion not obtained by its employees from experts of their choosing? The simple answer is, none of the orders do any such thing. None of the orders would ever do such a thing. When the Department secures orders of the Court

based on false and misleading information which do harm to the very parties it is supposed to be protecting, it is reasonable, appropriate and consistent with RCW 4.24.595(2) that the Department have liability for that conduct.

VI. CONCLUSION

The Department's arguments for this Court's review on the factual record of the Trial Court's denial of its motion for summary judgment is without merit and this Court should decline review.

The Petition for Review should be declined.

DATED this 8th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am over the age of 18, competent to testify and not a party to this action. On the date set forth below, I served the documents to which this certificate is attached in the manner noted on the following persons:

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