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STATE OF WASHINGTON

NO. 81714-6

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CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

KENT DUCOTE,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL & HEALTH
SERVICES,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT M. MCKENNA
Attorney General

Catherine Hendricks
Senior Counsel
WSBA No. 16311
800 5th Avenue, Suite 2100
Seattle, Washington 98104-3188
206-464-7352

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I. IDENTITY OF RESPONDENT

The Washington State Department of Social and Health Services (DSHS or "the Department"), defendant in the trial court and respondent in Division I of the Court of Appeals, is the respondent to Kent Ducote's untimely petition for review.

II. COURT OF APPEALS DECISION

At the time of the sexual abuse allegations at issue in this case, Mr. Ducote was the stepfather of his wife Dixie's three children. In March 2000, his wife's oldest child, a girl then age fourteen, told her middle school counselor that Mr. Ducote had been sexually inappropriate with her, and physically violent toward her brother. As a result of the oldest child's allegations, DSHS requested that Mr. Ducote be restrained from entering the family home and filed dependency petitions regarding all three of Dixie Ducote's children. The restraining order and the dependency petitions were dismissed, but only after an extensive fact-finding hearing in which the trial court concluded the oldest child had misinterpreted Mr. Ducote's behavior.

Two and a half years after the restraining order and dependency petitions were dismissed, Mr. Ducote filed a negligent investigation claim against DSHS. That claim was dismissed by the trial court on summary judgment.

In an unpublished opinion, Division I of the Court of Appeals applied established precedent in affirming the trial court's dismissal of Mr. Ducote's negligent investigation claim, finding that, as a stepparent, Mr. Ducote was not a member of the particular, circumscribed class to which DSHS owes a tort duty under RCW 26.44, *et seq.* Consequently, he did not have standing to pursue a negligent investigation claim against the Department.

As the Court of Appeals concluded:

The plain language of [RCW 26.44.050] does not include stepparents. The omission is rationally based, because parents (including adoptive parents), guardians and custodians have legal obligations to children that are more enduring than the obligations of stepparents to stepchildren (citation omitted).

**

If the duty of care is to be extended to stepparents, the proper body to make that decision is the legislature.

Appendix A, p. 6-8.

DSHS filed a timely motion to publish Part I (pages 1 through the top of page 8) of the Court of Appeals unpublished opinion. Mr. Ducote joined in DSHS's motion. The Court of Appeals granted DSHS's motion to publish Part I of its opinion on May 14, 2008. Appendix B.

Mr. Ducote filed an untimely petition for review on June 16, 2008, and a motion for extension and accompanying declarations, on June 17, 2008.

III. ISSUE PRESENTED FOR REVIEW¹

Did the Court of Appeals correctly apply this Court's precedents and those of the Court of Appeals to dismiss Mr. Ducote's negligent investigation claim against DSHS because Mr. Ducote—a person who chose not to adopt his stepchildren or to accept the responsibilities of being a legal “custodian” or “guardian”—was not a member of the particular, circumscribed class to which DSHS owes a tort duty under RCW 26.44, *et seq.* and, consequently, did not have standing to pursue a negligent investigation claim against the Department?

IV. SUPPLEMENTAL STATEMENT OF FACTS

Kent and Dixie Ducote were married in 1994. CP 65. At the time of her marriage to Kent, Dixie had three children: Brittney L. Maxey (1/21/86), Cole Maxey (3/18/91) and Morgan Maxey (11/27/92). CP 65.

DSHS began providing home support services to Dixie and her children beginning in 1989. CP 65. After Dixie's marriage to Kent and prior to the dependency proceedings at issue in this case, DSHS and the San Juan County Sheriff's Office received at least nine referrals regarding Kent and Dixie Ducote and their relationship with her children. CP 59-60,

¹ The petition for review was untimely and Mr. Ducote has moved for relief. This brief opposing review is therefore relevant only if the Court determines that Mr. Ducote meets the “extraordinary circumstances” and “gross miscarriage of justice” test of RAP 18.8(b), as construed in *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn. 2d 366, 849 P.2d 1225 (1993) and subsequent cases.

65-67, 69-71, 126-27. A number of those referrals were made by Dixie Ducote and then recanted or minimized. CP 126.

It was against this background of continuing referrals to DSHS and the San Juan County Sheriff that, in April 2000, Brittney L. Maxey, then age 14, was taken into protective custody by the San Juan County Sheriff's Office as the result of her report to her middle school counselor.² CP 19. The Sheriff's Office transferred Brittney to DSHS custody. CP 19. DSHS Social Worker David Parks placed Brittney in emergency temporary shelter care. CP 19.

In Mr. Parks' interview with Brittney she repeated what she had told her middle school counselor, and also told Mr. Parks that Mr. Ducote's sexual attention made her "uncomfortable and frightened" and that she did not "feel safe in her home because her mother cannot protect her and she fears for her safety when her parents learn of this disclosure. She is also concerned about the safety of her younger siblings." CP 69-71, 118 (4/25/07).

² An independent investigation of that same report by the San Juan County Sheriff led the San Juan County Prosecutor's Office to file a felony voyeurism case against Mr. Ducote. That case was dismissed without prejudice on January 29, 2001. CP 109 (4/25/07); 139-45. At the time of dismissal, the deputy prosecutor stated, in a sworn affidavit, that the dismissal was required because the "pressure" Dixie Ducote had placed on her oldest daughter had led her to file a statement indicating she may have been mistaken when she said she saw Mr. Ducote's face looking through her bedroom window. CP 141-45.

DSHS filed a dependency petition requesting that the court find Brittney dependent because she had been “abused or neglected as defined in Chapter 26.44 RCW” and because she “has no parent, guardian, or custodian capable of caring for [her].” CP 117-119 (4/25/07). After a shelter care hearing, Brittney was placed in licensed foster care by court order. CP 19, 21-23, 67.

A few days later, a San Juan County Juvenile Court Commissioner entered an “Order on Motion for TRO and Other Relief” regarding both Cole and Morgan Maxey that barred Mr. Ducote from the home he had shared with his wife and stepchildren. CP 24-29; CP 123-127. The Ducotes made no effort to revise any of the orders entered in the spring of 2000.

At the time of the sexual abuse allegations at issue in this case, Mr. Ducote had not adopted his stepchildren, nor had he accepted the responsibilities of being a legal “custodian” or “guardian” for his wife’s children as those terms are defined by the Revised Code of Washington. *See* RCW 13.04.011(5) and (6); 13.34.030(7)

In late October and early November 2000, the San Juan Superior Court conducted a dependency fact-finding hearing. CP 31-34, 36-38, 64-77. Throughout the fourteen-day hearing, Kent and Dixie Ducote were

present and represented by counsel.³ CP 31-34, 64-77. The only discussion about whether the Court had jurisdiction over Mr. Ducote was held on November 6, 2000, when the following exchange occurred:⁴

Court: Question among many: Foster parent legally responsible for the step children?

Ms. Higginson: I didn't find anything in the dependency statute that a step parent in the shoes of the parent.

Ms. Blaine⁵: The step parent doesn't have rights of the parent. Not a right to be involved unless court exercises discretion to do so. Court can make any party they deem appropriate. Court's discretion to allow Mr. Ducote to be part of this.

**

Court: ... I don't know. Not asking for briefing unless you'd like to submit.

CP 33. Thirty lay and expert witnesses—including three detectives from the San Juan County Sheriff's Office—testified at the Ducote dependency fact-finding hearing; forty documents were admitted. CP 36-55.

At the conclusion of the fact-finding hearing, the trial court said that the case had been “most challenging” and the court had “spent a great deal of time balancing and weigh[ing] the evidence.” CP 58-62. The court's findings describe Brittney's detailed allegations, but the dependency court's ultimate resolution of the conflicting evidence was

³ Attorney Carla Higginson.

⁴ The colloquy is taken exactly as it appears in the November 6, 2000 Minute Entry. CP 33.

⁵ Katherine B. Blaine, as a Special Assistant Attorney General, represented DSHS.

that Brittney had misinterpreted Mr. Ducote's various behaviors.
CP 64-77.

Although it dismissed the dependency petitions, the trial court also concluded that DSHS had "established a prima facie case in its case in chief." CP 77. In his oral ruling, the dependency judge said:

As to voyeurism: certainly on its face quite plausible; State had made prima facia [sic] case. Quite understandable and thought Brittany [sic] on the face of it quite believable and only when looking at the evidence as a whole there is reason for doubt.

CP 60.

The petition implies that the DSHS and judicial actions were unwarranted. DSHS disagrees. The child's allegations resulted in a careful fourteen-day hearing in which the trial judge reached a difficult decision and the outcome could not be predicted by the parties.

Two and half years after the dependency petition was dismissed, Mr. Ducote, filed suit against DSHS claiming the dependency and criminal proceedings, his removal from home, and disruption of his relationships with his stepchildren arose because DSHS conducted a negligent investigation and failed to properly supervise its employees. Mr. Ducote seeks reimbursement of the attorney's fees he incurred in defending against the dependency actions and felony charges, and damages for emotional distress and loss of reputation. CP 110 (4/25/07).

It is the dismissal of this negligent investigation claim by the trial court, and the subsequent affirmation of that dismissal by the Court of Appeals for which Mr. Ducote seeks review by this Court. No aspect of that dismissal and affirmance warrants review under RAP 13.4(b).

V. ARGUMENT AGAINST REVIEW

A. Standard of Review.

The considerations governing acceptance of discretionary review by this Court are identified on RAP 13.4(b). Mr. Ducote has based his petition on RAP 13.4(b)(1) and (4). Neither section serves as a basis for review, since, as discussed in detail below, the Court of Appeals decision does not conflict with any decision of this Court nor does it raise an issue of substantial public interest that should be determined by this Court.

B. The Court of Appeals Correctly Determined That Absent Specific Statutory Authorization, a Claim for Negligent Investigation Violates Well Established Public Policy.

1. The Tort of Negligent Investigation Is Not Available at Common Law.

There is no common law cause of action for negligent investigation in Washington. As stated in *Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237 (1992): “No Washington court has ever recognized a separate and distinct cause of action for negligent investigation.” The public policy underpinning this general position is clear:

The reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement.

Dever, 63 Wn. App. at 46 (citations omitted). See also, *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999) and; *Blackwell v. Department of Social and Health Services*, 131 Wn. App. 372, 375, 127 P.3d 752 (2006).

Mr. Ducote errs throughout his petition in assuming that “the tort of negligent investigation protects the rights of all family members.” Petition at 5. Neither DSHS, nor any other investigative body, has the broad, generic duty to “protect the integrity of the family unit” presumed by Mr. Ducote. Petition at 6. Therefore, unless Mr. Ducote’s negligent investigation claim is specifically authorized by statute--and a stepparent has standing to assert that statutory claim--the claim was properly dismissed as a matter of law, the Court of Appeals correctly affirmed that dismissal, and there is no basis for discretionary review by this court.

2. RCW 26.44, et seq. Authorizes a Statutory Claim for Negligent Investigation That Is Limited, By the Terms of the Statute and Interpreting Case Law, to Children and Their Parents

Although there is no general, common law tort claim available for negligent investigation, and no investigative body has a broad duty to conduct reasonable investigations that is actionable by all potential

claimants, this Court has determined that RCW 26.44, et. seq. creates an actionable duty that flows from DSHS to children and parents who may have been harmed by DSHS negligence.

In *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68, 76, 1 P.3d 1148 (2000), this Court specifically considered the question of “whether the State, acting through CPS caseworkers, owes a duty of care in conducting an investigation of parental child abuse to the parent suspected of such abuse.” This Court analyzed the issue in terms of the Legislature’s intent in enacting RCW 26.44, et seq., applying the test it had articulated in *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990) for determining whether a legislative enactment may be the foundation of a right of action. 141 Wn.2d at 77-82.

In *Bennett*, this Court outlined when a cause of action will be implied from a statute, requiring that a court ask the following questions:

[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

113 Wn.2d at 920-21.

In applying the first prong of the *Bennett* test in *Tyner*, this Court found that a parent was within the class for whose “especial” benefit the

statute was enacted, specifically contrasting the interests of a parent (and a parent's membership in that special class) with the interests of non-parent third parties, like Mr. Ducote:

The interests of a parent are significantly greater than those of a third party in this context. As one court noted, "[c]harges of child abuse leveled against a parent and ineptly handled strike at the core of a parent's basic emotional security, providing ample justification for the imposition of liability." (citation omitted). We find the first prong of the *Bennett* test is met.

Tyner, 141 Wn.2d at 80.

In concluding that the second prong of the *Bennett* test was met under the facts of *Tyner*, this Court noted:

RCW 26.44.050 places an affirmative duty of investigation on the State. At the same time, the Legislature has emphasized that the interests of a child and parent are closely linked. RCW 26.44.010. *Thus, by recognizing the deep importance of the parent/child relationship, the Legislature intends a remedy for both the parent and the child if that interest is invaded.*

Tyner, 141 Wn.2d at 80 (emphasis added).

Finally, in concluding that the third prong of the *Bennett* test was satisfied, this Court observed:

An implied tort remedy *in favor of a parent* is also consistent with the underlying purposes of RCW 26.44.050, thereby satisfying the third prong of the *Bennett* test.

Tyner, 141 Wn.2d at 80 (emphasis added).

On the basis of the *Bennett* test, this Court held:

We conclude that under RCW 26.44.050, CPS owes a duty of care to a child's parents, even those suspected of abusing their own children, when investigating allegations of child abuse.

Tyner, 141 Wn.2d at 82 (emphasis added).

Application of the *Bennett v. Hardy* test to Kent Ducote's negligent investigation claim makes it clear that, by contrast with David Tyner, a biological father investigated by CPS for having abused his two minor children, there is no basis for implying a cause of action from RCW 26.44.010 and 26.44.050 to benefit Mr. Ducote. Mr. Ducote's broad reading of *Tyner* does not present a significant issue requiring review by this Court. RAP 13.4(b)(4).

There is also no foundation in the post-*Tyner* case law for expanding DSHS's duty to stepparents.

In *M.W. v. Department of Social and Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), this Court followed its reasoning in *Tyner* in holding: "[RCW 26.44, et. seq.] creates an actionable duty that flows from DSHS to both children and parents who are harmed by DSHS negligence that results in wrongfully removing a child from a nonabusive home, placing a child into an abusive home, or allowing a child to remain

in an abusive home (emphasis added).”⁶ See also, *Pettis*, 98 Wn. App. at 560 (“In RCW 26.44.010, the Legislature specifically recognized the unique relationship between parent and child and made clear that the State may interfere with that relationship in only the most urgent situations. That legislative intent is inconsistent with extending a duty of care to nonparental relationships.); and *Blackwell*, 131 Wn. App. at 376, (“There is no case law supporting the expansion of DSHS’s duty beyond biological parents and children.”)

Mr. Ducote errs in relying upon this Court’s decisions in *Babcock v. State*, 116 Wn.2d 596, 610-12, 809 P.2d 143 (1991) and *Roberson v. Perez*, 156 Wn.2d 33, 36, 123 P.3d 844 (2005) as authority for the proposition that family members beyond those specifically enumerated in RCW 26.44.010 have standing to sue for negligent investigation.

In *Babcock*, the plaintiffs were three children, their biological father, and their father’s parents. But the grandparents’ standing to sue for negligent investigation was not challenged by DSHS (or affirmed by this Court). The case focuses entirely on the availability of absolute immunity

⁶ This Court’s analysis in *M.W. v. Department of Social and Health Services* was based, in part, upon the examination of the twelve Washington cases (all of the cases decided prior to *M.W.*) analyzing DSHS liability under RCW 26.44, et seq. and dividing them into three factual categories that was conducted by Judge Morgan in his lengthy dissent to *M.W. v. Department of Social and Health Services*, 110 Wn. App. 233, 255-6, 39 P.3d 993 (2002) (Morgan, J., dissenting). 149 Wn.2d at 594-5. All of the cases discussed by Judge Morgan focus on the duty owed by DSHS to parents and children.

to social workers and qualified immunity to the State. It offers no precedential authority for Mr. Ducote.

Roberson is similarly distinguishable. In *Roberson*, Honnah Sims and her husband Jonathan (who is identified as the *guardian ad litem* for his minor son Daniel in the case caption but as the boy's stepfather⁷ in Mr. Ducote's petition for review) relinquished guardianship of Honnah's son Daniel to his grandparent when Ms. Sims "learned that she was identified in police reports among those accused of abusing children." 156 Wn.2d at 36. Honnah and Jonathan Sims subsequently sued Douglas County for negligent investigation. Douglas County did not challenge his standing to sue for negligent investigation. Rather, Douglas County successfully prevailed on the ground that Daniel had been placed voluntarily with his grandparent, and, consequently, DSHS had not made the placement decision required as a pre-requisite for a negligent investigation claim under *M.W. v. D.S.H.S.*, *supra*. 156 Wn.2d at 38-39. Jonathan Sims standing to sue was never at issue in the case, and was not decided by this Court. The case is not precedent for Ducote.

This Court and the Courts of Appeal have been consistent in their determination that under RCW 26.44.010 and 26.44.050, DSHS's duty to conduct a reasonable investigation of allegations of child abuse is owed to

⁷ Mr. Ducote's counsel represented Douglas County in *Roberson* and may be relying upon information not available in this Court's published opinion.

a “particular, circumscribed class” that is limited to the children who are alleged to be abused and their parents. The expansion of this “particular circumscribed class” to a third party—in this instance a stepparent—runs directly counter to this Court’s precedents authorizing a narrow cause of action for negligent investigation under RCW 26.44, et. seq.

Mr. Ducote’s claim that the Court of Appeals decision conflicts with opinions of this Court fails. RAP 13.4(b)(1). He shows no basis for discretionary review by this Court.

3. The Court of Appeals Correctly Determined That Stepparents Are Not Properly Included Under RCW 26.44, et seq.

In *Tyner*, on the basis of RCW 26.44.010, the Court announced that a claim against DSHS for negligent investigation was available to *parents, custodians, guardians* and children. The pertinent definitions of these terms are found in RCW 13.04.011(5), (6) and 13.34.030(7):

“Parent” or “parents”, as used in chapter 13.34 RCW, means the biological or adoptive parents of a child ...;

“Custodian” means that person who has the legal right to custody of the child.

“Guardian” means the person or agency that (a) Has been appointed as the guardian of a child in a legal proceeding other than a proceeding under this chapter;

and (b) has the legal right to custody of the child pursuant to such appointment. The term “guardian” shall not include a “dependency guardian” appointed pursuant to a proceeding under this chapter.

RCW 13.34.011(5), (6) and 13.34.030(7).

Under the plain language of these statutes, the legislature specifically excluded stepparents.

Parents, custodians, and guardians all have extensive legal obligations to the children in their homes. The ability of a stepparent to end all financial responsibility for a stepchild merely by petitioning the court after a legal separation makes it clear that a stepparent, who has chosen not to adopt his spouse’s child, necessarily plays a different role in that child’s life. This Court’s decision in *Harmon v. Department of Social and Health Services*, 134 Wn.2d 523, 951 P.2d 770 (1998) underscores the difference between the responsibilities assumed by natural parents and the minimum required of a stepparent. In *Harmon*, the Court found that:

With respect to the language regarding termination of a stepparent's obligation under the family expense statute [RCW 26.19.075], we believe the Legislature intended only to distinguish between parents and stepparents to the extent that the obligation, once assumed, would not continue for stepparents beyond the termination of the marriage. *The parent's obligation for the support of a child continues and is not dependent on the continuation of the marital relationship.*

134 Wn.2d at 542 (emphasis added).

Mr. Ducote, a stepfather, seeks the discretionary review of this Court in order to extend the reach of DSHS's duty. But, he is not the biological parent of Dixie Ducote's three children. He had lived with Dixie's children for more than six years prior to the dependency proceedings at issue in this case, yet there is no evidence he made any attempt to adopt her children prior to the year 2000. He was not their legal custodian. He was not their legal guardian. Under *Harmon*, Mr. Ducote had no obligation to Dixie's children that would have continued beyond his marriage.⁸

C. The Court of Appeals Correctly Dismissed Mr. Ducote's Arguments Concerning RCW 74.13 and RCW 13.34.

Mr. Ducote argues that RCW 26.44, when combined with RCW 74.13 and RCW 13.34, indicate that it is the "family unit"—including sisters, brothers, and stepparents, as well as parents and legal guardians—who may be foreseeably harmed as a result of a negligent child abuse investigation, and, consequently, that all of these family and household members have standing to sue for negligent investigation. The Court of Appeals correctly rejected this argument, both because it had not been

⁸ This Court's recent application of the common law parental immunity doctrine to a stepparent also has no precedential value for Mr. Ducote. *Zellmer v. Zellmer*, ___ Wn.2d ___, ¶36, ___ P.3d ___, 2008 WL 2840567 (July 24, 2008) ("No court has allowed a stepparent to claim parental immunity solely by virtue of his or her marriage to the injured child's biological parent. (Citation omitted.) This is consistent with the common law rule that a stepparent gains no parental rights and assumes no obligations merely by reason of the relationship. 67A C.J.S. Parent and Child § 352 (2008); 59 Am. Jur. 2d Parent and Child § 12 (2008).")

made in the trial court and because it conflicted with this Court's analysis in *Tyner*:

Ducote argues that legislative intent to extend the duty to stepparents and other members of a family who provide parental-type care to children is found in RCW 74.13. In that statute, the department's duty to investigate complaints of child abuse is paired with a mandate to "offer child welfare services in relation to the problem to such parents, legal custodians, or *persons serving in loco parentis*." RCW 74.13.031(3) (emphasis added).

This argument warrants scant mention because it was not raised in the trial court. And in any event the cases discussing the tort of negligent investigation of child abuse have all located its statutory source in RCW 26.44.050. While RCW 26.44.050 *refers* to RCW 74.13, it is only to say that the investigator must provide "a report in accordance with chapter 74.13 RCW."

Ducote also points to *Tyner's* reference to the declaration of the importance of the family found in RCW 13.34.020. He contends that the analysis in *Tyner* shows that the Department's duty to use reasonable care is owed to anyone in the existing family unit who is damaged by state intervention. But *Tyner*, like the Court of Appeals decisions preceding it, identified RCW 26.44.010 and .050 as the source of the duty. In referring to RCW 13.34.020, the court was responding to the department's argument that allowing alleged child abusers to bring suit for negligent investigation was inconsistent with the statute's primary goal of protecting children. The court used RCW 13.34.020 simply to show that the goal of protecting children is not inconsistent with the goal of avoiding needless separation of children from other family members.

Appendix A, p. 6-8.

As a threshold matter, this issue is inappropriate for discretionary review because it was not raised in the trial court. But, even if Mr. Ducote had preserved this argument, there is no basis in RCW 13.34.020 or RCW 74.13 for the wholesale expansion of DSHS's tort duty Mr. Ducote seeks. The plain language of the only statute on which this Court has founded a claim for negligent investigation [RCW 26.44.050] does not include stepparents. This omission is rational, since parents (including adoptive parents), guardians and custodians have legal obligations to children that are more enduring than the obligations of stepparents to stepchildren.

Mr. Ducote's reliance on RCW 13.34.020 and RCW 74.13 provides no basis for discretionary review by this Court.

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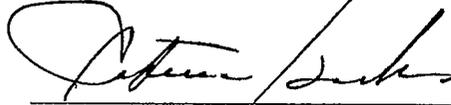
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VI. CONCLUSION.

Discretionary review of the Court of Appeals decision should be denied because nothing in the opinion meets the standard for review set by RAP 13.4(b).

RESPECTFULLY SUBMITTED this 29th day of July, 2008.

ROBERT M. MCKENNA
Attorney General



CATHERINE HENDRICKS, WSBA #16311
Senior Counsel
Attorneys for the State of Washington
Department of Social & Health Services

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington, that on the undersigned date the original of the preceding Answer To Petition For Review was filed in the Washington State Supreme Court according to the Court's Protocols for Electronic filing, as a PDF e-mail attachment, at the following e-mail address: Washington State Supreme Court (Supreme@courts.wa.gov)

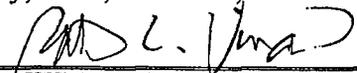
That an electronic courtesy copy of the preceding Answer To Petition For Review was sent to appellate counsel for appellant Ducote at cate@washingtonappeals.com, and in addition, a hard copy was served on appellate counsel by legal messenger at the following address:

Catherine W. Smith
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101-2988

And that one copy of the preceding Answer to Petition For Review was served by First Class Mail on trial counsel for appellant Ducote at the following address:

Carla J. Higginson, Attorney at Law
Higginson Law Offices
175 Second Street
Friday Harbor, WA 98250

DATED this 29th day of July, 2008, at Seattle, WA.



PATTI L. VINCENT

APPENDIX A

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MAR 18 2008

ATTORNEY GENERAL'S OFFICE
TORTS DIVISION
SEATTLE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KENT DUCOTE,) NO. 59275-1-1
)
Appellant,)
)
v.) UNPUBLISHED OPINION
)
STATE OF WASHINGTON)
DEPARTMENT OF SOCIAL &)
HEALTH SERVICES,)
)
Respondent.) FILED: March 17, 2008

BECKER, J. — Appellant was temporarily separated from his stepchildren as a result of a state investigation into allegations that he was guilty of child abuse. He brought suit against the State Department of Social and Health Services for negligent investigation. The statutory duty owed by the Department under RCW 26.44.050 does not extend to stepparents. The trial court correctly dismissed the claim.

Appellate review of summary judgment orders is de novo. We engage in the same inquiry as the trial court. All inferences and facts are viewed in the light most favorable to the moving party. Summary judgment is proper if the pleadings, depositions, admissions on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Pettis v. State, 98 Wn. App. 553, 558, 990 P.2d 453 (1999).

Appellant Kent Ducote is the stepfather of his wife Dixie's three children. When Ducote and Dixie began dating in 1992, the oldest was six years old, the second child was fourteen months, and Dixie was two months pregnant with the third. They have lived together as a family since 1994 when Kent and Dixie married.

In March 2000 the oldest child, a girl then age fourteen, told her middle school counselor that Ducote had been physically violent with the middle child and sexually inappropriate with her. The counselor notified child protective services. In April, the Department of Social and Health Services placed the fourteen-year-old in emergency temporary shelter care and filed a dependency petition. After a shelter care hearing, the court placed the girl in foster care. The Department then filed dependency petitions for the two younger children as well. The court entered a temporary restraining order preventing Ducote from entering the family home.

After a lengthy fact-finding hearing, the court determined on January 25, 2001 that the children were not dependent.¹ Regarding the sexual misconduct allegations, the court found that the girl had misinterpreted Ducote's behavior. The court terminated the restraining order.

Two years later, Ducote filed this negligent investigation suit against the Department. The Department successfully moved for summary judgment on grounds that Ducote, a stepparent, lacked standing to bring such a suit. The Department relied on Blackwell v. Department of Social and Health Services, 131 Wn. App. 372, 127 P.3d 752 (2006). In Blackwell, foster parents claimed to be within the class of persons to whom the Department owes a statutory duty under RCW 26.44.050 when investigating child abuse. This court rejected the suit. "There is no case law supporting the expansion of DSHS's duty beyond biological parents and children." Blackwell, 131 Wn. App. at 376.

Ducote filed a motion for reconsideration alleging that he had standing to sue as a de facto or psychological parent. The trial court denied the motion. Ducote appeals.

There is no common law cause of action for negligent investigation. Dever v. Fowler, 63 Wn. App. 35, 44, 816 P.2d 1237 (1992); Pettis v. State, 98 Wn. App. 553, 558, 990 P.2d 453 (1999). But statutes can create an exception to the common law. Blackwell, 131 Wn. App. at 375. A cause of action will be implied from a statute if the plaintiff is within the

¹ Clerk's Papers at 77.

class for whose "especial" benefit the statute was enacted, if the legislative intent explicitly or implicitly supports creating a remedy and if implying a remedy is consistent with the underlying purpose of the legislation. Bennett v. Hardy, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990); Tyner v. Dep't of Soc. & Health Servs., 141 Wn.2d 68, 77-78, 1 P.3d 1148 (2000). Tyner applied the three-part test set forth in Bennett and concluded that RCW 26.44.050 implies a cause of action based on the Department's statutory duty to investigate child abuse:

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

RCW 26.44.050. Tyner confirmed earlier cases in which this court recognized an implied cause of action. Lesley v. Dep't of Soc. & Health Servs., 83 Wn. App. 263, 273, 921 P.2d 1066 (1996) (biological parents had a cause of action against department when department mistook their daughter's birthmarks for bruises and removed the girl from parental custody); Yonker v. Dep't of Soc. & Health Servs., 85 Wn. App. 71, 81-82, 930 P.2d 958 (1997) (mother and her son, who was allegedly abused, fell within the particular and circumscribed class of individuals the legislature intended to protect in enacting RCW 26.44). Tyner also confirmed that the duty to use reasonable care in investigating allegations of child abuse is owed to a child's parents, "even those suspected of abusing their own children."

Tyner, 141 Wn.2d at 82. This is because the statute declaring the purpose of RCW 26.44.050 recognizes the "paramount importance" of the "bond between a child and his or her parent, custodian, or guardian." RCW 26.44.010; Tyner, 141 Wn.2d at 78. The Department does not, however, owe the duty to child care providers or foster parents because they are not within the statutorily defined class of parent, custodian, or guardian. Pettis, 98 Wn. App. at 560; Blackwell, 131 Wn. App. at 376-77.

Ducote contends the statutory duty owed to a "parent, custodian or guardian" extends to stepparents as well because the harm addressed by the statute is unnecessary interference with the integrity of the family.

The plain language of the statute does not include stepparents. The omission is rationally based, because parents (including adoptive parents), guardians and custodians have legal obligations to children that are more enduring than the obligations of stepparents to stepchildren. See, e.g., Harmon v. Dep't of Soc. and Health Servs., 134 Wn.2d 523, 541, 951 P.2d 770 (1998) (support obligation of stepparent does not extend beyond termination of marriage to child's parent).

Ducote argues that legislative intent to extend the duty to stepparents and other members of a family who provide parental-type care to children is found in RCW 74.13. In that statute, the department's duty to investigate complaints of child abuse is paired with a mandate to "offer child welfare services in relation to

the problem to such parents, legal custodians, or persons serving in loco parentis." RCW 74.13.031(3) (emphasis added).²

This argument warrants scant mention because it was not raised in the trial court. And in any event the cases discussing the tort of negligent investigation of child abuse have all located its statutory source in RCW 26.44.050. While RCW 26.44.050 refers to RCW 74.13, it is only to say that the investigator must provide "a report in accordance with chapter 74.13 RCW."

Ducote also points to Tyner's reference to the declaration of the importance of the family found in RCW 13.34.020. He contends that the analysis in Tyner shows that the Department's duty to use reasonable care is owed to anyone in the existing family unit who is damaged by state intervention. But Tyner, like the Court of Appeals decisions preceding it, identified RCW 26.44.010 and .050 as the source of the duty. In referring to RCW 13.34.020, the court was responding to the department's argument that allowing alleged child abusers to bring suit for negligent investigation was inconsistent with the statute's primary

² "The department shall . . .

"(3) Investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation, or that presents an imminent risk of serious harm, and on the basis of the findings of such investigation, offer child welfare services in relation to the problem to such parents, legal custodians, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court, or another community agency: PROVIDED, That an investigation is not required of nonaccidental injuries which are clearly not the result of a lack of care or supervision by the child's parents, legal custodians, or persons serving in loco parentis. If the investigation reveals that a crime against a child may have been committed, the department shall notify the appropriate law enforcement agency." RCW 74.13.031(3).

goal of protecting children. The court used RCW 13.34.020 simply to show that the goal of protecting children is not inconsistent with the goal of avoiding needless separation of children from other family members.

If the duty of care is to be extended to stepparents, the proper body to make that decision is the legislature.

DE FACTO PARENT

In his motion for reconsideration, Ducote argued that he is within the scope of the statutory duty owed to parents because he is a de facto or psychological parent as discussed in In re Parentage of L.B., 155 Wn.2d 679, 708-09, 127 P.3d 752 (2006) and Blackwell, 131 Wn. App. at 378-79. Ducote supported the motion with declarations from himself and Dixie about his full involvement in the children's lives for many years. The Department opposed the motion, in part, on grounds that it was too late to introduce a new theory and new evidence to defeat the motion for summary judgment. The court denied the motion, ruling that Ducote had not shown sufficient basis for reconsideration:

At . . . the time of the Motion for Summary Judgment the information that the—Mr. Ducote was a psychological parent or de facto parent, or that he had adopted one child, or that the . . . accuser had taken his name were not before the Court. The issue before the Court was whether a stepparent had standing under the statute.

At any rate, there are no newly discovered grounds. This has not been brought under the newly discovered grounds theory of CR 59. Rather it's being brought under "substantial justice has not been done," which is a pretty catchall phrase.

But at the time of the summary judgment the Court's information certainly justified the Motion for Summary Judgment. I see no reason to change that decision.^[3]

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds or reasons. Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Civil Rule 59 does not permit a plaintiff who finds a judgment unsatisfactory to suddenly propose a new theory of the case when that theory could have been raised before entry of the adverse decision. Wilcox, 130 Wn. App. at 241. In Wilcox, arguments for reconsideration were based on new legal theories with new and different citations to the record. The plaintiff provided no explanation for why the arguments were not timely presented. The same is true here. See also JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (plaintiff's motion for reconsideration was an inadequate and untimely attempt to amend its complaint).

The trial court's order denying the motion for reconsideration recited that the declarations of Kent and Dixie Ducote had been "considered" in the process of denying the motion. Ducote emphasizes that the declarations are properly before this court inasmuch as they were considered by the trial court. See

³ Report of Proceedings, January 18, 2007 at 10-11 (Court's oral ruling on Ducote's Motion for Reconsideration).

Jacob's Meadow Owners Ass'n v. Plateau 44II, LLC, 139 Wn. App. 743, 754-55, 162 P.3d 1153 (2007). But the fact that the Ducote declarations are part of the record on review does not alter the fact that the trial court's decision to deny the motion for reconsideration is reviewed here for abuse of discretion. Ducote could have raised his de facto parentage argument when he responded to the Department's motion for summary judgment. The trial court did not abuse its discretion in denying a motion for reconsideration that was based on a new theory of the case.

Affirmed.

WE CONCUR:

Appelwirth, J.

Becker, J.
Baker, J.

APPENDIX B

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KENT DUCOTE,

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STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL &
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Respondent.

) NO. 59275-1-1

)

) ORDER

)

) PUBLISHING PORTION

)

) OF OPINION

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STATE OF WASHINGTON

Having considered the respondent's motion to publish a portion of the opinion, and the answer thereto, and the hearing panel having reconsidered its prior decision not to publish, Now, therefore, it is hereby

ORDERED that pages 1 through the top of page 7 of the opinion in the above entitled case which was filed March 17, 2008 shall be published and printed in the Washington Appellate Reports. The text shall end on page 7 after the sentence which reads as follows:

If the duty of care is to be extended to stepparents, the proper body to make that decision is the legislature.

Done this 14th day of May 2008.

FOR THE COURT

Becker, J.

OFFICE RECEPTIONIST, CLERK

To: Vincent, Patti (ATG)
Cc: cate@washingtonappeals.com; taraf@washingtonappeals.com; Hendricks, Catherine (ATG)
Subject: RE: Ducote v State of Wash, Sup. Ct. No. 81714-6 - Attachment Filing

Rec. 7-29-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Vincent, Patti (ATG) [mailto:PattiV@ATG.WA.GOV]

Sent: Tuesday, July 29, 2008 4:15 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: cate@washingtonappeals.com; taraf@washingtonappeals.com; Hendricks, Catherine (ATG)

Subject: Ducote v State of Wash, Sup. Ct. No. 81714-6 - Attachment Filing

Attached for filing in Ducote v State of Washington, Sup. Ct. No. 81714-6, is the State's Answer to Petition for Review. Senior Counsel Catherine Hendricks (WSBA 16311, tel. no. 206-464-7352, cathh@atg.wa.gov) is filing this Answer. Thank you very much.

Patti Vincent

Torts Appellate Program

206-389-2150

<<Ans to Pet for Review 7-29-08.pdf>>