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No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 59275-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

FILED
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CLERK OF SUPREME COURT
STATE OF WASHINGTON
CA

KENT DUCOTE,

Petitioner,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL &
HEALTH SERVICES,

Respondents.

PETITION FOR REVIEW

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

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A. Identity of Petitioner.

The Petitioner is Kent Ducote, plaintiff in the trial court and appellant in the Court of Appeals.

B. Court of Appeals Decision.

The Court of Appeals originally filed its decision on March 17, 2008. By order dated May 14, 2008, the Court of Appeals granted a motion to publish a portion of its decision. *Ducote v. State*, __ Wn.2d __, __ P.3d __, 2008 WL 2185860 (2008).

C. Issue Presented For Review.

Whether a step-parent, who as a result of a negligent investigation of an allegation of sexual abuse by his teenage step-daughter is excluded from the family home and ordered to refrain from contacting any of his three step-children, is within the class of individuals who can have a cause of action against the Department of Social and Health Services?

D. Statement of Facts.

Kent Ducote is the step-father of Brittney Ducote (born January 21, 1986), Cole Ducote (born March 18, 1991), and Morgan Ducote (born November 27, 1992), the children of his wife Dixie. (CP 21, 24, 26, 33, 62) Until the Department obtained restraining orders against him, Kent lived with Dixie and her

children in the family home. (CP 132) When Kent and Dixie began dating in 1992, Dixie was pregnant with Morgan. Cole was 14 months old, and Brittney was six years old. (CP 108-09)

Kent and Dixie began living together in August 1994 and married on September 30, 1994. (CP 65, 110) The State concedes, and the Court of Appeals held, that Kent, Dixie, and her three children "have lived together as a family since 1994, when Kent and Dixie married." (Slip Op. at 2)

Kent's relationship with Brittney deteriorated as she grew into adolescence. Brittney was jealous of Kent's close relationship with Morgan, believed that Kent was unduly strict, and wanted her mother to leave Kent. (CP 71-72) In a March 2000 conference with a school counselor, Brittney accused Kent of watching her disrobe and of masturbating in her presence. (CP 66-67) The counselor referred the matter to CPS. Based solely on its caseworker's interview with Brittney, the Department filed a dependency petition as to Brittney and had the San Juan County Sheriff remove Brittney from Kent and Dixie's home on April 7, 2000. (CP 131-33, 149, 151-52)

The Department served Kent with a summons providing notice of the dependency action (CP 87), and the Department on

April 10, 2000, obtained a disputed Shelter Care Order placing Brittney in the custody of the Department over Kent and Dixie's objection. (CP 134-36) The Department also filed dependency petitions as to Cole and Morgan (CP 137-43), and obtained ex parte temporary restraining orders based on allegations that "the children are at risk of imminent harm if Kent Ducote is not removed from the home and if Dixie Ducote is not prohibited from removing children from jurisdiction . . ." (CP 142) The orders barred Kent from having any contact with Cole or Morgan. (CP 24, 28)

Relying on the caseworker's complaint to the San Juan County Sheriff, the San Juan County Prosecutor charged Kent with one count of felony voyeurism on June 20, 2000. (CP 152-54) The Sheriff's search warrant on the Ducote household based on the caseworker's complaint failed to produce any evidence indicating that Kent had an interest in child pornography, or any evidence of lewd or sexually inappropriate materials, and the criminal complaint was eventually dismissed. (CP 72, 155-59)

The Department pursued its dependency allegations against Kent and Dixie in a fourteen day trial. (CP 36-38). San Juan County Judge Alan Hancock announced at the conclusion of trial that the Department had failed to meet its burden of proving that

Kent posed any threat of danger to the children, and authorized Kent to immediately return to the family home from which he had been excluded and denied contact with his stepchildren for over eight months. (CP 34) Judge Hancock dismissed all three dependency petitions, finding that the allegations of Ken's physical and verbal abuse were "overblown," that the alleged voyeurism did not occur, and that the children are not at risk. (CP 59-62) Judge Hancock found instead that Brittney did not get along with Kent and wanted her mother to leave Kent because he was too strict. (CP 61)

Kent's lawsuit against the State for negligent investigation of child abuse was dismissed by San Juan County Superior Court Judge Vickie Churchill. Division One affirmed, publishing a portion of its decision. *Ducote v. State*, __ Wn.2d __, __ P.3d __, 2008 WL 2185860 (2008). In the published portion, the Court of Appeals held that the cause of action for negligent investigation of child abuse is available only to a "parent, custodian, or guardian" and that "the plain language of the statute does not include stepparents." (Slip Op. at 5, quoting RCW 26.44.010) The Court of Appeals rejected Kent's argument that the statutory duty of reasonable investigation protects the integrity of the family and all

family members. (Slip Op. at 6-7) In the unpublished portion of its decision, the Court of Appeals held that the trial court did not abuse its discretion in rejecting Kent's argument on reconsideration that he had standing to sue for negligent investigation as a *de facto* parent. (Slip. Op at 8-9)

E. Argument Why Review Should Be Accepted.

- 1. The Court of Appeals Decision Conflicts With This Court's Decisions Which Base The Tort of Negligent Investigation Of Child Abuse On The Legislature's Directive That Child Abuse Investigations Be Conducted Reasonably To Protect The Integrity of The Family.**

The Court of Appeals erred in holding that a stepparent, who was made a party to the State's dependency petition and wrongfully excluded from the family home on the basis of an improperly conducted investigation of child abuse, lacks standing to sue for negligent investigation. The Court of Appeals decision directly conflicts with this Court's previous decisions, holding that the tort of negligent investigation protects the rights of all family members. The Court of Appeals' narrow focus on the statutory purpose section of RCW ch. 26.44 to limit the cause of action to a "parent, custodian or guardian," ignores the specific investigative duties imposed by RCW 26.44.050, and the other statutes governing the State's duties upon receiving a report of abuse, RCW ch. 74.13 and

RCW ch. 13.34, which protect the integrity of the family unit. This Court should grant review under RAP 13.4(b)(1) and (4).

a. **The Court of Appeals Decision Conflicts With *Babcock* and *Tyner*.**

The Court of Appeals decision conflicts with this Court's decisions holding that the tort of negligent investigation furthers the State's duty to protect *all* family members from unwarranted separation resulting from faulty investigations of child abuse. This Court has addressed the tort of negligent investigation of child abuse in a series of cases beginning with *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). In *Babcock*, the Court rejected the State's attempt to assert a defense of immunity to a claim of negligent investigation brought by the children, the father and also the paternal grandparents, who claimed that the Department negligently placed the children with a foster parent who had raped them. 116 Wn.2d at 612.

Nine years later, in *Tyner v. Department of Soc. & Health Servs.*, 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000), this Court rejected the State's argument that the Department's tort duty does not extend to a parent suspected of child abuse. The *Tyner* Court noted that "this Court implicitly approved a negligent investigation claim . . . brought by the paternal grandparents and father of the

foster children” in *Babcock*. 141 Wn. 2d at 79. The Court held that “[d]uring its investigation [of child abuse] the State has the duty to act reasonably in relation to *all members of the family*.” 141 Wn.2d at 79 (emphasis added). This statutory duty has a dual purpose: to protect children and to preserve the integrity of the family:

[C]hildren are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children.

Tyner, 141 Wn.2d at 79.

More recently, this Court has held that the tort of negligent investigation is limited to those family members who suffer damages as result of harmful interference in the family and harmful placement decisions. However, the reasoning of those cases further undermines the Court of Appeals decision here.

In *M.W. v. Department of Social and Health Servs.*, 149 Wn.2d 589, 592, 70 P.3d 954 (2003), the Court rejected a negligent investigation claim by a child who alleged post-traumatic stress disorder after undergoing a vaginal examination by untrained DSHS caseworkers investigating an allegation of child abuse. The Court held a negligent investigation claim is not available unless the plaintiff can establish that “DSHS conduct[ed] a biased or faulty investigation that leads to a harmful placement decision. . .” *M.W.*,

149 Wn.2d at 591. As the family unit remained intact, the plaintiff had no cause of action.

In *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005), this Court relied upon *M.W.* to hold that a mother who was not alleged to have abused her son had no claim for negligent investigation of child abuse where the mother and step-father voluntarily sent her son to live with his grandparents while an investigation involving children not in the mother's care was pending:

Our interpretation of the statute in *M.W.* unequivocally requires that the negligent investigation to be actionable must lead to a "harmful placement decision."

Roberson, 156 Wn.2d at 46.

The Court of Appeals decision here conflicts with *Babcock* and with *Tyner*, in which this Court held unequivocally that the tort of negligent investigation protects all family members from unwarranted intrusion into their family integrity. RAP 13.4(b)(1). Here, the Department's negligent investigation was directed toward the children's step-father, clearly a member of their family and household, and it resulted in a harmful placement decision. This Court should grant review and hold that a stepparent who has been a party to the State's dependency proceeding and excluded from

the family home as a result of a negligent investigation has standing to sue.

b. The Court of Appeals Narrowing Of The Scope Of The State's Duty Of Investigation Misreads The Operative Statutes And Presents An Issue of Substantial Public Concern.

The Court of Appeals decision that standing is limited to a "parent, custodian, or guardian" represents an overly narrow reading of the state's statutory duty of care. While the statutory purpose stated in RCW 26.44.010 is evidence that the Legislature intended to protect parents from harmful investigations, it does not in any way limit the other statutory language that imposes upon the Department a duty to "act reasonably in relation to all members of the family." *Tyner*, 141 Wn. 2d at 79. The Court of Appeals' narrow view of standing does not fairly take into account the legislative scheme for investigation of child abuse, which is designed to protect the integrity of the entire family.

In limiting the Department's duty based solely on the language of the statutory statement of purpose, the Court of Appeals misapplied this Court's test for determining whether "a legislative enactment may be the foundation of a right of action." *Bennett v. Hardy*, 113 Wn. 2d 912, 919, 784 P.2d 1258 (1990).

This Court must look to whether the plaintiff falls in the class for whose benefit the statute was created, whether legislative intent supports creating or denying a remedy, and whether the remedy is consistent with the statutory purpose. *Bennett*, 113 Wn. 2d at 920-21, quoted in *Tyner*, 141 Wn. 2d at 77-78.

While RCW 26.44.010 establishes the Legislature's declaration of purpose, the Court of Appeals recognized RCW 26.44.050 as the statutory section that imposes the investigatory duty upon the Department:

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. (See Slip Op. at 4)

RCW ch. 74.13, which is incorporated in to RCW 26.44.050¹, further defines the Department's investigative duty, and provides

¹ The Court of Appeals asserted that Kent did not rely on RCW ch. 74.13 in the trial court, but it is undisputed that he based his argument on the State's "statutory duty, . . . under RCW 26.44.050," and this Court's decision in *Tyner*, which cited RCW ch. 74.13 as one of the statutes defining the State's *parens patriae* powers upon an allegation of child abuse. (CP 79) See *Tyner*, 141 Wn.2d at 77 n.3.

that the duty is owed not just to a parent, custodian or guardian, but to the family unit including those serving in *loco parentis*:

The department shall have the duty to provide child welfare services and 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~~ 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**.

RCW 74.13.031(3) (emphasis added).

RCW ch. 13.34 governs the State's obligations in commencing dependency proceedings. As the *Tyner* Court recognized, RCW 13.34.020, "evinces the Legislature's strong views" that "the family unit is a fundamental resource of American life which should be nurtured. RCW 13.34.020, *quoted in Tyner*, 141 Wn. 2d at 78-79. The Court of Appeals erred in holding that neither RCW ch. 74.13 nor RCW ch. 13.34 are relevant in defining the scope of the State's duty upon investigating an allegation of

abuse. These chapters of the Revised Code of Washington, as well as RCW ch. 26.44, "set forth the statutory scheme for State intervention as *parens patriae* when child abuse has been reported." See *Tyner*, 141 Wn.2d at 77 n.3. Taken together, these statutory provisions indicate that it is the "family unit," including grandparents as in *Babcock*, 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. The Court of Appeals erred in limiting the class of protected persons to a "parent, custodian, or guardian."

c. The Court of Appeals' Erred In Refusing To Recognize The Importance of The Parental Role Of A Stepparent Living In The Family Home.

In denying standing to Kent, the Court of Appeals erroneously equated the role of a stepparent who has assumed a parental role in the family with that of a foster parent. The Court of Appeals cited to *Blackwall v. Dept. of Social and Health Services*, 131 Wn. App. 372, 127 P.3d 752 (2006), in which the Court of Appeals rejected a foster parent's claim for negligent investigation of child abuse. (Slip Op. at 3)

The Court of Appeals conflation of the roles of foster parent and stepparent also conflicts with this Court's decisions. Foster

parents have diminished expectations and therefore diminished legal rights based on their temporary relationship with foster children. *In re Dependency of J.H.*, 117 Wn.2d 460, 469, 815 P.2d 1380 (1991) (relationship between foster parent and "child is by its very nature temporary, transitional and for the purpose of supporting reunification with the legal parents."). See also *In re Adoption of R.L.M.*, 138 Wn. App. 276, 287, 156 P.3d 940 (2007) ("Foster parents have no due process right to participate in proceedings determining the custody of children placed in their care, even if they have become a child's psychological parent."), *rev. denied*, 162 Wn.2d 1023 (2008), *petition for cert. filed* (May 2, 2008).

As a step-parent, however, Kent had a statutory financial obligation of support, not an expectation of compensation, that is based upon the Legislature's intent to foster the family relationship. RCW 26.16.205; *Harmon v. Department of Social and Health Servs.*, 134 Wn.2d 523, 951 P.2d 770 (1998); *Washington Statewide Organization of Stepparents v. Smith*, 85 Wn.2d 564, 536 P.2d 1202 (1975). While the Court of Appeals held that unlike a parent's continuing obligation, a stepparent's support obligation terminates upon divorce (Slip Op. at 5), this reasoning in no way

supports a diminished right or expectation of family integrity while the stepparent is married and living with his or her stepchildren.

This Court has recently recognized the importance of parenting, rather than biological or adoptive parentage, in the establishment of familial rights and obligations, in cases such as *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006) and *Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005), *cert. denied*, 547 U.S. 1143 (2006). The Court of Appeals decision denying a stepparent a cause of action for injuries sustained by the State's direct interference in his family conflicts with this Court's precedents and presents an issue of substantial public concern. RAP 13.4(b)(1), (4).

Kent's parental role in the Ducote family, and the State's unwarranted interference in that family have never been in dispute. While the Court of Appeals held that Kent's motion for reconsideration, arguing that he was a "*de facto*" parent, raised a "new theory," in fact the State in its motion for summary judgment established that Kent's parental role had already been conceded by the State, and confirmed by Judge Hancock, in the dependency proceedings. See CP 33 (in dependency proceedings, the State argued that "[i]f [the mother] is conceding that parenting to him, he

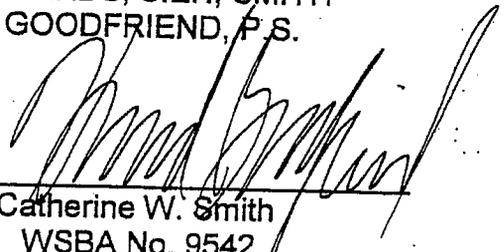
is responsible."); CP 87 (summons served on Kent stated that" if the Court finds the child dependent, [it] could result in substantial restriction or permanent loss of your parental rights."). The Court of Appeals accepted the fact that these parties "have lived together as a family." (Slip Op at 2) Regardless whether the trial court had the discretionary ability to reconsider its decision, the Court of Appeals' refusal to consider whether Kent's status as a *de facto* parent provided him standing to sue for negligent investigation was error.

F. Conclusion.

This Court should accept review, reverse the Court of Appeals, and remand this negligent investigation claim for trial.

Dated this 16th day of June, 2008.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 16, 2008, I arranged for service of the Petition for Review, to the court and to counsel for the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Hand Delivered
Catherine Hendricks Office of the Attorney General Torts Appellate Program 800 Fifth Avenue, Suite 2000 Seattle WA 98104-3188	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 16th day of June, 2008.



Tara D. Friesen

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

¹ Clerk's Papers at 77.

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 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

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).

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.

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.^[9]

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

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

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 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.

Becker, J.

WE CONCUR:

Appelwick, CJ.

Baker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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MAY 15 2008

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ATTORNEYS AT LAW

KENT DUCOTE,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL &
HEALTH SERVICES,

Respondent.

) NO. 59275-1-1
)
) ORDER
)
) PUBLISHING PORTION
)
) OF OPINION
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STATE OF WASHINGTON
2008 MAY 14 PM 2:35

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.