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No. 94409-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TANYA JAMES-BUHL,

Petitioner,

**BRIEF OF WACDL AS AMICUS CURIAE OBO PETITIONER,
TANYA JAMES-BUHL**

From the Court of Appeals, State of Washington No. 48393-9-II

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Petitioner Tanya James-Buhl (Ms. James-Buhl). WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has around 1,000 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

II. ISSUE OF CONCERN TO AMICUS

1. Whether the mandatory reporting obligations of professionals designated in RCW 26.44.030(1)(a) extends to parents who learn of alleged child abuse or neglect outside the scope of their profession?

2. Whether the mandatory reporting obligations of professionals designated in RCW 26.44.030(1)(a) infringe on the constitutional rights of parents to make decisions concerning the care, custody, and control of their children?

III. ARGUMENTS AND AUTHORITY

A. **RCW 26.44.030(1)(a) and (d) does not require parents to report suspected child abuse or neglect of children living in their home regardless of their profession unless the abuse rises to the level of severe abuse.**

Appellate courts reviews statutory interpretations de novo. Doi Foods, Inc. v. Dept. of Revenue, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). When construing a statute, the court's objective is to ascertain and carry out the legislature's intent. Lake v. Woodcreek Homeowners Ass'n, 169 Wn 2d 516. 526, 243P.3d 1283 (2013).

In enacting RCW 26.44, the Legislature emphasized the “paramount importance” of the constitutionally protected parent-child relationship, and stated that the chapter should not be interpreted so as to authorize interference with the rights of parents to raise their children unless their actions are injurious to the child’s health, welfare and safety. RCW 26.44.010- 015(1) Against the “paramount importance” of the parent-child relationship, the Legislature determined that certain circumstances warrant state intervention. RCW 26.44.010. Specifically, intervention was found to be warranted “in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety.” RCW 26.44 010. The Legislature’s Declaration of Purpose thus makes explicit that the intent of RCW 26.44 is to balance the fundamental

right to raise one's children and to privacy against the state's interest in protecting children from abuse and neglect.

To that end, the Legislature enacted RCW 26.44.030(1), which governs reporting and investigation of suspected child abuse and neglect. It contains, in turn, six subsections, (a)-(f), which impose varying reporting requirements on specified classes of people. The first subsection, (1)(a), imposes heightened reporting requirements on a number of professionals who likely interact closely with children on a regular basis RCW 26.44.030(1)(a). This list includes "professional school personnel," which is defined to include teachers such as Ms. James-Buhl. RCW 26.44.20(19).

The professionals listed in RCW 26.44.030(1)(a) are required to make a report to the appropriate authorities when they have "reasonable cause to believe that a child has suffered abuse or neglect." "Abuse or neglect" is defined to include "sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety." RCW 26.44.020(1).

Subsection (d) imposes a reporting requirement on "any adult who has reasonable cause to believe that a child who resides with them has suffered severe abuse." RCW 26.44.030(1)(d). "Severe abuse," in turn, is defined to include abuse of sufficient severity to cause death, significant

bleeding, deep bruising, unconsciousness, or other serious injuries. RCW 26.44.030(1)(d) There is no allegation Ms. James-Buhl learned of any “severe abuse” as defined by the statute.

Juxtaposing subsections (1)(a) with (1)(d), therefore, the “abuse or neglect” of children that designated professionals are required to report is substantially broader than the “severe abuse” that adults are required to report in regards to the children with whom they reside. This difference reflects the express legislative intent to balance the “paramount importance” of the parent-child relationship against the state interest in preventing child abuse and neglect. The state’s compulsion of professionals to report abuse or neglect occurring in households other than their own implicates privacy interests to a much lesser degree than compelling individuals to report incidents occurring within their own homes. Relative to the diminished privacy interest attendant to compelling reports from third party professionals, the state’s interest in preventing abuse and neglect is strong. The balancing of the interests thus allows the state to pursue a more robust policy, mandating third party professionals to report lower levels of abuse and neglect. RCW 26.44 030(1)(a).

The State maintains that the lower reporting standard in (1)(d) was not enacted out of any concern for the privacy and parental rights implicated, but is instead merely a reflection of the lower expectations the

legislature has for adults who are not members of professions designated in (1)(a). *Br. of Resp't* at 11-12. In this respect, the State asserts in its appellate brief “[t]he law can and should expect more of professionals regularly called upon to mobilize resources that may understandably seem beyond the reach of an average adult ” *Br. of Resp't* at 11-12. Because of these designated professionals’ “special training, experience and position within the fabric of the state’s social safety net” the State reasons, these professionals should not be allowed “to remain silent about off-the-clock discoveries of their own children’s abuse.” *Br. of Resp't* at 11-12.

At the outset, the State’s position, echoed by the Court of Appeals, unravels upon a closer review of the list of professionals set forth in RCW 26.44.030(1)(a). While the list does include some professionals with high levels of education and training, such as teachers, medical examiners, and psychologists, it also includes some professionals with no specialized education or training, such as placement and liaison specialists, HOPE center staff, and volunteers in the ombudsman’s office. Hypothetically, a sixteen-year-old child care employee working part-time after school can be a mandatory reporter. See WAC 170-295-1040 (permitting the hiring of child care assistants at the age of sixteen).

From the perspective of the State, the only acceptable action for a competent parent to take when confronted with evidence of abuse of one’s

child is to immediately report it to the authorities. *Br. of Resp't* at 11-12.¹

The State maintains that any other action is a selfish placing of one's petty "personal concerns" above the protection of one's own children, and that the law expects more of the specially trained professionals designated in (1)(a). *Br. of Resp't* at 11-12. Hence, the State's argument that there is no conceivable legitimate interest in limiting the (1)(a) obligation in any

¹ It is worth noting disagreement among experts in the field of rape recovery about the utility of prosecution. For instance, Jessie Mindlin, senior legal counsel of the Victim Rights Law Center and former senior staff attorney for the Center for Law and Public Policy on Sexual Violence, responded to a fact pattern involving a sexual assault victim whose assailants were vigorously prosecuted, stating:

I'd never have advised [the victim] to prosecute. But then, we almost never suggest prosecution unless the victim really, really wants to go that way. It's so much better for her to focus on what she needs: safety in her school, just say. We can use civil orders to make that happen.

Michelle Oberman, Two Truths and a Lie: In re John Z. and Other Stories at the Juncture of Teen Sex and the Law, 38 Law & Soc. Inquiry 364, 397 (Spring 2013). Brandy Davis, the former head of Breaking the Cycle, responded:

Prosecution likely didn't help [the victim]. Prosecution is all about punishing the offender, which might benefit all victims, but it's not clear how it benefited this victim. She's likely to have been retraumatized by the prosecution's interviewing process, not to mention by the trial. She already experienced a loss of control, a loss of freedom, most of which won't be addressed by court system. And it's not really going to help stop the cycle of violence for perpetrators.

Id. See also Allegra M. McLeod, Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform, 102 Calif. L. Rev. 1553, 1618 (Dec. 2014) ("The conventional prosecutorial process frequently retraumatizes survivors of sexual violence, particularly when the perpetrator is someone with whom the victim has a close, personal relationship (as is often the case)"); Patricia Yancey Martin & R. Marlene Powell, Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims, 19 Law & Soc. Inquiry 853, 856 (1994) ("Women whose cases were prosecuted were less well-off psychologically six months after the rape than were those whose cases were not prosecuted, attributing this result to the effects of an adversarial legal system that subjects rape victims to challenge and duress").

manner argument directly conflicts with the stated legislative finding of the “paramount importance” of the parent-child relationship

Although not determinative of the question of whether subsection (d) constitutes an exception for parents who happen to be teachers, the language of subsection (a) appears to be broader than that in subsections (b) and (c), as noted by the Court of Appeals. It would, however, lead to absurd results to require all professionals to disclose abuse or neglect regardless of how or why they received the information. This is true in part because many professionals wear multiple hats. Consider a simple hypothetical of a lawyer who moonlights as a high school debate coach. In his capacity as a debate coach, he would fall under the definition of “professional school personnel.” If he learned of child abuse or neglect in his lawyer capacity, he would be prohibited by the Rules of Professional Conduct from disclosing the abuse, but required by RCW 26.44.030 to disclose it. In such an instance, the lawyer’s specific obligations under the RPCs would trump his general obligations under RCW 26.44.030. Likewise, in this example, Ms. James-Buhl is both a teacher and a mother. When there is a conflict between the general duties of subsection (a) and the specific duties under subsection (d), the specific duties should prevail, particularly given the constitutionally protected parental rights at stake.

Further evidence that the legislature did not intend for parents to have a duty to report child abuse is found in chapter 9A.42 RCW. Chapter 9A.42 RCW, titled “Criminal Mistreatment,” sets forth the duties of parents towards their children. The chapter begins by saying, “The legislature finds that there is a significant need to protect children . . . from abuse and neglect by their parents.” RCW 9A.42.005. The legislature continues that parents have a duty to provide “basic necessities” to their children, defined as “food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication.” RCW 9A.42.010(1). Failure to provide basic necessities constitutes the crime of criminal mistreatment. RCW 9A.42.020-.037. Noticeably absent from the definition of “basic necessities” is the requirement that parents notify law enforcement of child abuse perpetrated by a third party.

In addition to providing the “basic necessities,” parents also have a duty to never leave their children alone with a registered sex offender. RCW 9A.42.110. An exception is made, however, where the sex offender is a “parent, guardian, or lawful custodian of the child.” RCW 9A.42.110(1). Although the state has an interest in preventing registered sex offenders from having access to children, the legislature has

determined that this weighty interest yields to the fundamental privacy and child-rearing rights of parents and caretakers.

The interpretation of RCW 26.44.030 urged by Petitioner and *Amicus* is consistent with the interpretation given to similar statutes in other states. In Del. Bd. of Nursing v. Gillespie, 41 A.3d 423, 425 (Del. 2012), a nurse learned of child abuse being perpetrated against her grandchildren but failed to disclose the abuse. The Delaware Supreme Court held the “reporting duty applied only to information obtained in a person’s role as a medical service provider. Given the narrow class of professionals articulated in the statute, it is reasonable to infer that the legislature intended to target those persons positioned to learn of child abuse in the course of their work.” Gillespie at 427. Because the nurse learned of the abuse in her capacity of a grandmother and not in her capacity of a nurse, she had no duty to report.

Similarly, in May v. State, 295 Ga. 388, 389, 761 S.E.2d 38, 40 (Ga. 2014) the Georgia Supreme Court reviewed a fact pattern where a sixteen-year-old girl disclosed sexual abuse to a school teacher. The teacher taught at a different school than the one attended by the girl and did not have the girl in any of her classes. The Georgia Supreme Court concluded the teacher did not learn of the abuse “pursuant to her duties as a school teacher” and, therefore, did not have a duty to disclose. May at

46. *Amicus* is unaware of any case in any jurisdiction finding a duty to report when the mandatory reporter learns of the abuse outside the scope of his or her professional role.

This Court should find that RCW 26.44.030(1) does not require parents to disclose alleged child abuse or neglect regardless of their chosen profession unless the abuse meets the definition of “severe abuse.” When Ms. James-Buhl learned of alleged child abuse in her capacity as a parent, she was not under a duty to disclose, despite the fact that she happened to also be a school teacher.

B. The State’s reading of RCW 26.42.030(1)(a) conflicts with the Petitioner’s right to make decisions concerning the care, custody, and control of her children.

Courts are compelled to construe statutes in a way that is consistent with their underlying purpose and avoids constitutional deficiencies. *State v. Crediford*, 130 Wn 2d 747, 927 P.2d 1129 (1996). The Court of Appeals’ interpretation of the statute conflicts with the legislative intent of chapter 26.42 RCW and the constitutional right of parents to make decisions concerning their children.

The Fourteenth Amendment Due Process Clause confers on parents “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66, 120 S Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455

U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). A parent has a constitutionally protected fundamental liberty interest in rearing his or her children “without state interference.” Custody of Smith, 137 Wn. 2d 1, 15, 969 P.2d 21, 28 (1998). Despite the clear expressions of legislative intent in RCW 26.44.010 to treat the parent-child relationship with “paramount importance,” the Court of Appeals, as urged by the State, improperly construed RCW 26.44.030(1) in a manner that erodes the fundamental rights of parents to raise their children on the entirely arbitrary basis of their chosen occupation.

In Iroxel, the United States Supreme Court reviewed RCW 26.10.160, which granted standing to third parties (in that case, the grandparents) to petition for visitation when it was in the best interest of the child. The Supreme Court found the statute unconstitutional because it infringed on the rights of the fit parent to limit visitation with third parties.

The foregoing assessment of legislative intent, that the respective reporting requirements reflect a balancing of private and state interests, finds further support in prior decisions of this Court. The Court has established that “a state can intrude upon a family's integrity pursuant to its *parens patriae* right only when parental actions or decisions *seriously* conflict with the physical or mental health of the child.” Custody of Smith, 137 Wash. 2d at 18, 969 P.2d at 29 (emphasis added) (citing In re the

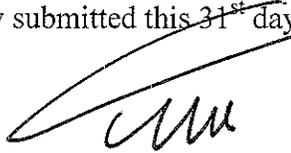
Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); Parham v. J.R., 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); Wisconsin v. Yoder, 406 U.S. 205, 230, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

Ms. James-Buhl made a decision not to report alleged child abuse or neglect involving her own children. While reasonable minds may differ on the wisdom of this decision, her fitness as a parent has never before been questioned and no court order was in place limiting her parental rights. As such, she retained her right to make decisions concerning the care, custody, and control of their children. The fundamental right to parent has to give way to the interest of the state to prosecute.

IV. CONCLUSION

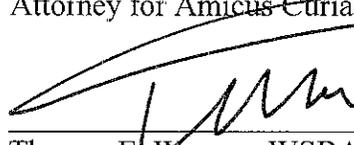
For the foregoing reasons, the Court of Appeals decision should be reversed and the trial court judgment dismissing the charges with prejudice should be reinstated.

Respectfully submitted this 31st day of October, 2017.



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