No. 102795-8

SUPREME COURT
OF THE STATE OF WASHINGTON

IAN ATKERSON, individually and as Personal Representative to the Estate of RUSTIN ATKERSON,

Plaintiff - Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF CHILDREN, YOUTH, and FAMILIES, John and Jane Doe 1-10,

Defendant - Respondent.

RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES' ANSWER TO AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

Amicus curiae Ressler & Tesh does not explain how the Court of Appeals' plain-text interpretation of RCW 4.24.595(1) is incorrect. Nor can it do so, because the statute expressly requires applying a gross negligence standard to emergent Child Protective Services (CPS) investigations where a child remains in parental care and is not removed pursuant to RCW 13.34.065(1) for a custodial shelter care hearing.

Amicus contends that the Court of Appeals has made children less safe by following both the Legislature's intent in enacting RCW 4.24.595(1) and this Court's precedent. But nothing in the Court of Appeals' decision concerning the proper liability standard alters the Department of Children, Youth, and Families' (DCYF's) responsibility to protect children. DCYF must continue to preserve family unity when possible—a principle that amicus' position would abrogate by incentivizing shelter care hearings as a predicate to the protection of gross negligence.

Because amicus does not identify a valid reason warranting review based on RAP 13.4(b)(1) or (4), this Court should reject its reasoning and deny Atkerson's petition.

II. ARGUMENT

A. The Court of Appeals Decision Does not Conflict with Supreme Court Precedent to Support Review Under RAP 13.4(b)(1)

Although amicus does not expressly advocate for granting review under RAP 13.4(b)(1), it argues the Court of Appeals "effectively overruled" *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003) and *Tyner v. Department of Social & Health Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000). Amicus Br. at 2. Moreover, amicus states the Court of Appeals decision is "at odds" with *Desmet v. State*, 200 Wn.2d 145, 153, 514 P.3d 1217 (2022). Amicus Br. at 4 (citing RAP 13.4(b)(1)). Amicus is incorrect on all accounts.

Tyner explained that DCYF's investigatory duty under "RCW 26.44.050 has two purposes: to protect children and preserve the integrity of the family." 141 Wn.2d at 80. In *M.W.*,

this Court articulated the narrow bounds of a negligent investigation cause of action if DCYF breaches its statutory duty and makes a harmful placement decision. 149 Wn.2d at 601-02. In 2012, the Legislature enacted RCW 4.24.595 to address DCYF's potential liability resulting from its compliance with RCW 26.44.050. *See*, *e.g.*, *Desmet*, 200 Wn.2d at 157 n.12.

Later, in *Desmet*, this Court addressed "whether RCW 4.24.595(2) grants the Department immunity for its postplacement conduct." 200 Wn.2d at 153. While the *Desmet* Court did not consider RCW 4.24.595(1) or emergent preplacement investigations, it determined that subsection (2) "does not effectively nullify precedent [such as *Tyner*] establishing the Department's liability for negligent investigation resulting in a harmful placement decision." *Id*. at 165.

In this case, the Court of Appeals likewise adhered to well-established principles giving effect to legislative intent. *Atkerson v. State*, -- Wn. App. 3d --, 542 P.3d 593, 602 (2024) (citing *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014))

("[W]e look at the plain language of the statute, consider the text of the provision, the context of the statute, any related statutory provisions, and the statutory scheme as a whole."). In doing so, the Court of Appeals recognized "the legislature chose to limit liability even for DCYF determinations resulting in a child being left with a parent," as happened during the investigation here. *Id*.

Following the plain language of RCW 4.24.595(1), the Court of Appeals concluded the statute's gross negligence standard "applies even when an investigation results in no shelter care hearing." *Id*. at 602. This plain-meaning interpretation of RCW 4.24.595(1) is consistent with controlling precedent.

By contrast, the argument amicus and Atkerson advance conflicts with *Tyner*, because their position would disrupt family integrity if adopted. Even after the Court of Appeals' decision in this case, DCYF must still either investigate screened-in reports of abuse or neglect (completing any investigation within 90 days), or develop a family assessment response. RCW 26.44.030(12)-(15). Holding DCYF and its social workers to a

gross negligence standard only when they *remove* a child from parental care to pursue a shelter care hearing incentivizes court action, contrary to the purposes of RCW 26.44.050. *See Tyner*, 141 Wn.2d at 80; RCW 13.34.065(1) (shelter care hearings occur "when a child is taken into custody" after removal from a parent or guardian); *see also In re Dependency of A.W.*, 24 Wn. App. 2d 76, 87, 519 P.3d 262 (2022) ("[T]he Department must meet a high evidentiary burden before a court can issue an ex parte pick-up order.").

Here, DCYF followed a court-ordered joint parenting plan, keeping Rustin in the care of both parents during an emergent investigation into Rustin's arm injury. CP 700-08, 727. That placement determination falls squarely within the scope of RCW 4.24.595(1). Accordingly, the Court of Appeals did not err in ruling that the relevant inquiry is whether DCYF exercised slight care. *Atkerson*, 542 P.3d at 602-03 ("[O]ur strict construction of the statute's scope is based on the statute's

express language."). This Court should not accept review under RAP 13.4(b)(1) or (4).

B. Amicus Misstates the Facts in an Unpersuasive Attempt to Obtain Review under RAP 13.4(b)(4)

In addition to disregarding the plain language of RCW 4.24.595(1), which applies a gross negligence standard to all emergent placement investigations, including those that maintain parental rights, amicus misrepresents the factual record to inaccurately argue DCYF is liable here and that this case should be reviewed because it presents "issues of substantial public importance." Amicus Br. at 3-4.

First, amicus falsely accuses CPS investigator Mabee of not interviewing "medical professionals reporting abuse." Amicus Br. at 3. However, the physician's assistant who initiated CPS's involvement stated *no concern* about abuse or neglect, and noted Rustin's arm injury was likely caused by an accidental fall. CP 596, 600. When a surgeon contacted CPS a week later to discuss his review of Rustin's condition, there was likewise *no concern* about abuse or neglect. CP 639-40. Mabee planned to

follow up with the surgeon. CP 563-64, 637. In the interim, Mabee ordered hospital records and spoke with Rustin's primary care doctor, who also expressed *no concern* about abuse or neglect. CP 561, 565-66.

Second, amicus contends CPS did not explore Rustin's mother cohabiting "with a known abuser." Amicus Br. at 3-4. This is untrue; Rustin's mother withheld any information about her new boyfriend Steven Rowe until after the ultimately fatal injury to Rustin occurred at Rowe's home. CP 566. In *Harper v. State*, 192 Wn.2d 328, 343, 429 P.3d 1071 (2018), this Court expressly rejected the same suggestion being made by both Atkerson and amicus: that there was a failure to exercise slight care because the State "should have done more to uncover these lies." Here, once Rowe's identity became known to Mabee, she researched his CPS history, conducted a welfare check on Rustin's step-brother, and interviewed Rowe alongside law enforcement. CP 667-71.

Third, amicus contends CPS failed to institute a safety plan despite "physical evidence of … abuse." Amicus Br. at 4. However, in *W.M. by Olson v. State*, 19 Wn. App. 2d 608, 625, 498 P.3d 48 (2021), *review denied*, 1 Wn.3d 1012, 527 P.3d 1141 (2022), the Court of Appeals determined an identical contention was unsupported based on analogous facts. As the *W.M.* court observed, there was no evidence the child's mother would have followed a voluntary safety plan or that CPS would have automatically removed the child if such hypothetical plan had been violated. *Id*. at 625.

Moreover, contrary to amicus' argument, there was no determination that Rustin's broken arm resulted from abuse. No one could explain what occurred, and both parents blamed each other with conflicting information about whether the injury was intentional or accidental. CP 561-62, 851-60. The superior court entered a joint custodial parenting plan, finding neither parent had problems that may harm Rustin's best interests. CP 318. These facts are what led CPS to fulfill its statutory duty under

RCW 26.44.030 to investigate—a process that was continuously taking place over the course of two weeks until Rustin's mother chose to place him in the home of her undisclosed boyfriend.

In sum, amicus' misstatements of fact do not lead to the conclusion that Atkerson has "met the requirements" for his claim. Rather, applying the gross negligence standard found in RCW 4.24.595(1) to the factual record, Atkerson cannot show "substantial evidence of serious negligence." *See Harper*, 192 Wn.2d 345-46. Nor can Atkerson prove CPS made a harmful placement decision that proximately caused Rustin's fatal injury. *See*, *e.g.*, *M.W.*, 149 Wn.2d at 602; *W.M.*, 19 Wn. App. 2d at 624 ("The State did not make the decision to place W.M. in a home and/or with a caregiver that ultimately resulted in the harm to W.M.").

In this case, the facts of a single investigation into conflicting accounts of Rustin's arm injury are insufficient to establish a substantial issue of public interest justifying this Court's review. RAP 13.4(b)(4).

C. The Publication of an Opinion Does Not Meet the Criteria of RAP 13.4(b)(4)

That other courts may adopt the reasoning in the Court of Appeals' published decision in this case does not create an issue of substantial public interest that should be determined by this Court. *See* Amicus Br. at 5. Otherwise, *every* published decision would merit this Court's review, rendering RAP 13.4(b) meaningless. *See*, *e.g.*, *State v. Griepsma*, 25 Wn. App. 2d 814, 525 P.3d 623, *review denied,* 1 Wn.3d 1023, 532 P.3d 163 (2023) (victim penalty assessment upheld); *Downing v. Losvar*, 21 Wn. App. 2d 635, 641, 507 P.3d 894 (2022) (issue of first impression), *review denied sub nom. Downing v. Textron Aviation, Inc*, 200 Wn. 2d 1004, 516 P.3d 384 (2022); *Freedom Found. v. Dep't of Soc. & Health Servs.*, 9 Wn. App. 2d 654, 445 P.3d 971 (2019) (Public Records Act claim against state agency), *review denied*, 194 Wn.2d 1017, 455 P.3d 133 (2020).

This Court should not grant review under RAP 13.4(b)(4) simply because the Court of Appeals elected to publish its

decision in this matter, particularly when it did so without articulating a basis for publication under RAP 12.3(d).[1]

D. A Purported Issue of "First Impression" Does Not Necessitate Review under RAP 13.4(b)(4)

Amicus next argues that "issues of first impression" frequently qualify for review under RAP 13.4(b)(4). Amicus Br. at 5-6. But this case involves debatable legal issues, not novel ones, as the trial court certified. *See* RAP 2.3(b)(4); CP 1035-36.

Even issues of first impression—which are not present here—are often adequately addressed by the Court of Appeals alone, without subsequent Supreme Court review. *See*, *e.g.*, *Wash. State Nurses Ass'n v. MultiCare Health Sys.*, 28 Wn. App. 2d 288, 296, 535 P.3d 480 (2023) (analyzing regulation not previously considered by appellate courts), *review denied,* 2 Wn.3d 1023, 544 P.3d 36 (2024); *State v. Hartman*, 27 Wn. App.

[1] In fact, the Court of Appeals clarified an established principle of law, namely the correct liability standard related to emergent placement investigations as stated in the plain text of RCW 4.24.595(1). *See* RAP 12.3(d)(2). Such a determination does not, by itself, merit review under RAP 13.4(b)(4).

2d 952, 967, 534 P.3d 423 (2023) (analyzing privacy rights in DNA evidence), *review denied,* 2 Wn.3d 1014, 540 P.3d 778 (2024); *Jha v. Khan*, 24 Wn. App. 2d 377, 383, 520 P.3d 470 (2022) (analyzing the "first appellate dispute" under the Uniform Public Expression Protection Act), *review denied,* 1 Wn.3d 1014, 530 P.3d 182 (2023); *Malvern v. Miller*, 24 Wn. App. 2d 173, 178, 520 P.3d 1045 (2022) (analyzing standard of review under the civil arbitration rules), *review denied,* 1 Wn.3d 1008, 528 P.3d 354 (2023).

The Court of Appeals' reading of RCW 4.24.595(1) is based on its plain text, not a novel theory, and remains consistent with *both* purposes of CPS investigations as expressed in *Tyner*, *i.e.*, protecting children *and* preserving family unity. Further appellate review is unnecessary.

E. This Case Does Not Involve a Common Law Claim and Merely Bringing a Claim against the State Does Not Satisfy RAP 13.4(b)(4)

Amicus lastly argues that issues involving "diminution of a common law duty" and actions against the State should *per se*

satisfy the criteria of RAP 13.4(b)(4). Amicus Br. at 7. The cases amicus cites do not support this conclusion.

As to actions against the State, *Boeing Co. v. State*, 89 Wn.2d 443, 444, 572 P.2d 8 (1978), cited by amicus, involved an appeal by the City of Auburn from a jury award and judgment in favor of The Boeing Company. The State was not a party on appeal because it prevailed at trial. *Id*. at 445. The Supreme Court granted the *City's* application for direct review pursuant to RAP 4.2(a)(4). *Id*.

State v. Jones, 95 Wn.2d 616, 617, 628 P.2d 472 (1981), also cited by amicus, was accepted for direct review under RAP 4.2(a)(4), not RAP 13.4(b)(4). *Jones* involved a murder conviction, not a civil action against a state agency. *Id*. In comparison, claims related to CPS investigations often conclude in the Court of Appeals. *See*, *e.g.*, *W.M.*, 19 Wn. App. 2d at 622 (negligent investigation claim); *R.N. v. Kiwanis Int'l*, 19 Wn. App. 2d 389, 397, 496 P.3d 748 (2021), *review denied*, 199 Wn.2d 1002, 504 P.3d 825 (2022) (negligence claim);

M.E. through McKasy v. City of Tacoma, 15 Wn. App. 2d 21, 33, 471 P.3d 950 (2020) (negligent investigation claim); *Petcu v. State*, 121 Wn. App. 36, 52, 86 P.3d 1234 (2004), *review denied*, 152 Wn.2d 1033, 103 P.3d 201 (2004) (negligent investigation claim).

Moreover, the issue here does not concern whether a duty exists under the common law. Rather, it concerns which of two *liability* standards—ordinary or gross negligence—applies to a *statutorily* implied cause of action under RCW 26.44.050 based on the legislative enactment of RCW 4.24.595(1).

Further, amicus' assertion that RCW 4.24.595(1) is in derogation of the common law is not a self-executing ground to obtain Supreme Court review under RAP 13.4(b)(4). Amicus Br. at 8; *cf.*, *e.g.*, *StarKist Co. v. State*, 25 Wn. App. 2d 83, 96, 522 P.3d 594 (2023) (analyzing authority under Consumer Protection Act to include preexisting common law power), *review denied,* 1 Wn.3d 1011, 528 P.3d 361 (2023); *In re Estate of Mower*, 193 Wn. App. 706, 720, 374 P.3d 180 (2016) (interpreting a statute

that affects will provisions), *review denied*, 186 Wn.2d 1031, 385 P.3d 111 (2016). Amicus' attempt to suggest otherwise is unfounded.

Neither the pursuit of a case naming DCYF as a defendant nor a question of statutory interpretation is sufficient to establish a substantial public interest. Review is not warranted under RAP 13.4(b)(4).

III. CONCLUSION

The Court of Appeals did not err when it followed precedent in holding that RCW 4.24.595(1) applies where a child remains in parental care during an emergent CPS investigation. In contrast, amicus favors an untenable reading of RCW 4.24.595(1) that is contrary to its plain language and would limit the application of a gross negligence liability standard to only shelter care removals, creating an incentive for removal disruptive to family unity. This Court should deny review.

This document contains 2,491 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23rd day of May 2024.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the **RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES' ANSWER TO AMICUS CURIAE MEMORANDUM** with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 23rd day of May 2024 at Olympia, Washington.

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