No. 102795-8

SUPREME COURT
OF THE STATE OF WASHINGTON

IAN ATKERSON, individually and as
Personal Representative of the Estate of Rustin Atkerson,

Petitioner,

v.

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

Respondents.

PETITIONER'S ANSWER TO AMICUS CURIAE

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A. INTRODUCTION

The *amicus* memorandum of the well-respected firm of Ressler & Tesh ("R&T") reinforces the point that Division III's published opinion on the interpretation of RCW 4.24.595(1) merits this Court's review.[1]

This case is one for the Supreme Court for *numerous* reasons:

- Division III's *published* opinion is precedential. GR 14.1(a);

- The opinion involves a first impression issue of statutory interpretation and this Court has the final say on the interpretation of legislative enactments; Division III's statutory interpretation of RCW 4.24.595(1) is wrong;

- Division III's interpretation of RCW 4.24.595(1) overrules this Court's decisions in *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000)/*M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003);

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[1] R&T did not address the other issue addressed in Division III's published opinion – the admissibility of former Judge Van Doorninck's largely legal opinion under ER 403. The Estate believes review is merited on that issue for all the reasons set forth in its petition at 21-27.

- Division III's published opinion is contrary to this Court's decision in *Desmet v. State*, 200 Wn.2d 145, 514 P.3d 1217 (2022) on RCW 4.24.595(2);

- Division III's erroneous interpretation of RCW 4.24.595(1) has already been cited in child abuse cases, amicus memo. at 5, and will be replicated in cases all across Washington, affecting the cases brought by children against the State for its negligence in child abuse investigations.

In sum, this case fully meets the criteria for review established in RAP 13.4(b)(1), (4).

B. STATEMENT OF THE CASE

R & T adopted the Statement of the Case set forth in the Division III opinion as supplemented by the Estate's recitation of the facts/procedure in its petition at 2-8.

Those statements of fact belie the State's claims that there were no indications that two-year-old Rustin was in imminent risk of harm. Photos of his *repeated* bruising, his broken arm caused by trauma that landed him in the hospital ER, CP 864-67, and reports from an ER physician's assistant and an orthopedist should have put any reasonable investigator on notice that this

non-verbal toddler was at risk, CP 865, 868.

Moreover, contrary to the State's contention, CPS caseworkers were specifically advised by Rustin's grandmother that his mother was living with a boyfriend in East Wenatchee, who was later implicated in his abuse. Supp. CP 184.

The parties here agree that nothing in the record evidenced an "emergency" on the part of the CPS caseworkers investigating Rustin's obvious signs of abuse. That is clear from DCYF's own argument that Rustin allegedly was not in any imminent risk of harm. The caseworkers created no safety plan for Rustin, nor did they seek to place him outside the parents' care when signs of his abuse were patent. CP 310-12, 901-03. No shelter care hearing was ever set for Rustin.

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) Division III's Published Opinion Wrongly Interprets RCW 4.24.595(1), Contrary to this Court's Decision in *Desmet*

As R&T note in their *amicus* memorandum at 1-2, Division III's published opinion erroneously gives far too broad

a sweep to RCW 4.24.595(1), which was focused on *emergency* placement investigations "conducted prior to a shelter care hearing under RCW 13.34.065." As Division III itself acknowledged, op. at 16, a shelter care hearing under RCW 13.34.065 looks to determine whether an abused child can be safely returned home *after the child has been removed from the home because of safety concerns*. Both Division III, op. at 3-8, and DCYF (resp. at 14-16) simply remove "emergent" from the statute's interpretation to *broaden* its scope to *any* DCYF investigation, effectively overruling *Tyner/M.W.* Op. at 19. Essentially, if DCYF "investigates" the possible abuse of the child in *any* fashion, Division III believed the statute was satisfied, and a gross negligence standard applied to the Atkerson *Tyner/M.W.* cause of action.[2]

Division III's opinion recognizes and discusses the

[2] While Division III recognized that such an interpretation is in derogation of the common law, op. at 19, its assertion that its interpretation of RCW 4.24.595(1) as being "strict" rings hollow.

implied right of action arising out of the State's duty under RCW 26.44.050 to investigate reported child abuse or neglect. Op. at 14-15. DCYF concedes the existence of such a duty. Resp. at 13-14. This Court created a *negligence* standard in those cases.

The 2012 Legislature afforded CPS caseworkers a *limited* exception to this Court's decisions in *Tyner/M.W.* in RCW 4.24.595(1). That exception was limited to *emergent* placement investigations *only*. The Legislature's express language is the "bedrock principle" of statutory interpretation in our state. *Federal Home Loan Bank of Seattle v. Credit Suisse Securities (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019).

Not only is such an interpretation contrary to the *express* language of RCW 4.24.595(1), it is contravened by the 2012 legislative history in which the witnesses for the State in legislative hearings specifically denied such a result, and agreed that RCW 4.24.595(1) was confined to *emergencies*. Pet. at 18-20.

Nothing in the record in this case, and certainly *nothing* in

Division III's opinion (op. at 3-8) or in DCYF's response documents that the CPS caseworkers treated Rustin's case as an emergency – no safety plan for the toddler was ever created; there is no sense that the caseworkers acted in any way as if Rustin's case was an emergency (until Rustin died), and certainly no shelter care was ever considered or scheduled.

Division III's published opinion is clearly contravened by this Court's *Desmet* opinion, analyzing RCW 4.24.595(2). The *Desmet* court adopted a *narrow* interpretation of RCW 4.24.595(2), a statute that gives the State actual immunity for compliance with "shelter care and other dependency orders." 200 Wn.2d at 154-65.

The *Desmet* court's analysis of RCW 4.24.595(2) also has direct implications for the proper analysis of RCW 4.24.595(1). The Court reviewed the legislative history of RCW 4.24.595, 200 Wn.2d at 157 n.12; noting the *narrow* scope of RCW 4.24.595(1):

Even accepting, arguendo, that RCW 4.24.595(2) is

ambiguous, legislative history does not reveal an intent to grant the Department immunity from claims of negligent investigation, NIED, or false light. The statue was presented as a resolution to the conundrum created by *Tyner v. Department of Social & Health Services*, 141 Wash.2d 68, 1 P.3d 1148 (2000), whereby department employees could face individual liability in emergent placement investigations, whether they decided to remove a child or keep them in the home, because the employees had been "charged with an equal duty to both the parent and the child." Hr'g on H.B. 2510 Before the H. Judiciary Comm., 62d Leg., Reg. Sess. (Wash. Jan. 25, 2012), at 1 hr., 2 min., 32 sec. through 1 hr., 5 min. (noting employees "can be sued no matter which decision they make"), 1 hr., 13 min., 05 sec. through 1 hr., 13 min., 33 sec. (emphasizing caseworkers felt equal duty to parents and children "does affect their freedom to act"), video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/house-judiciary-committee-2012011124/?eventID=2012011124. The legislature clearly intended to emphasize that although the Department and its employees owe a duty of care to both parents and children, the Department's primary duty when presented with allegations of child abuse/neglect is to protect the interests of the child; legislative testimony, especially, focused on limiting caseworker liability in emergent placement investigations. See S. Floor Debate, 62d Leg., Reg. Sess. (Mar. 7, 2012) at 1 hr., 10 min. through hr., 10 min., 20 sec. (noting statute was intended to "fix" *Tyner* by providing department caseworkers with "a different standard

> of liability prior to the shelter care hearing") https://www.digitalarchives.wa.gov/Record/View/2C347189DA5A35EF3A7515C4DB9AF6B2. The legislature also granted witness immunity to Department employees to prevent parents from filing lawsuits based on what those employees report and recommend to the court, with the caveat that this protection would not apply to employees who lied or falsified evidence. Hr'g on H.B. 2510, supra, at 1 hr., 5 min., 09 sec. through 1 hr., 6 min., 44 sec. As discussed in note 11, supra, witness immunity is not applicable in this case.

Division III's overruling of *Tyner/M.W.* by its exceedingly *broad* interpretation of the statute requires this Court's review. RAP 13.4(b)(1), (4).

(2) Division III's Published Opinion Overruling *Tyner/M.W.* Sub Silentio, Contrary to this Court's Decision in *Desmet*, Involves an Issue of First Impression

As R&T notes, amicus memo. at 2, the statutory interpretation in Division III's published opinion overrules *Tyner/M.W.*, imposing a gross negligence standard in cases arising out of RCW 26.44.

As R&T notes at 5-7, this case is one of first impression. No Washington court has construed that statute. DCYF does not

deny that fact.

This Court, not Division III, should provide the *definitive* interpretation of RCW 4.24.595(1), as befits this Court's role as the ultimate voice on the interpretation of the Legislature's enactments. This is particularly so where abused or neglected children across Washington will be so profoundly impacted by Division III's restriction of this Court's *Tyner/M.W.* policy. Review is merited. RAP 13.4(b)(4).

D. CONCLUSION

This Court should grant review of Division III's published opinion, RAP 13.4(b), and affirm the trial court's November 14, 2022 order denying summary judgment to DCYF.

This document contains 1,523 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 23rd day of May, 2024.

Respectfully submitted,

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APPENDIX

RCW 4.24.595:

(1) Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

(2) The department of children, youth, and families and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of children, youth, and families are entitled to the same witness immunity as would be provided to any other witness.

DECLARATION OF SERVICE

On said day below I electronically delivered a true and accurate copy of the ***Petitioner's Answer to Amicus Curiae*** Supreme Court Cause No. 102795-8 to the following:

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

DATED: May 23, 2024 at Seattle, Washington.

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May 23, 2024 - 4:04 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,795-8
Appellate Court Case Title:	Ian Atkerson v. State of Washington Dept. of Children, Youth and Families, et al.
Superior Court Case Number:	20-2-00357-8

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