NO. 103368-1

SUPREME COURT OF THE STATE OF WASHINGTON

ANITA ASPHY and TONY ASPHY,

Respondents,

v.

STATE OF WASHINGTON,

Appellant.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals holding(s) in *Asphy v. State*, 552 P.3d 325 (July 15, 2024) were completely consistent with Washington law. This case does not meet any of the criterion outlined under RAP 13.4 for acceptance of review. The Court of Appeals followed the controlling precedent published as *HBH v. State*, 192 Wash. 2d 154, 429 P.3d 484 (2018). There was *nothing* novel about the Court of Appeals rulings. The State owes a duty of care to children which are entrusted to welfare. *H.B.H*. did not declare that only foster children with a certain type of "dependency" file are owed a duty. Moreover, the evidentiary record, as closely scrutinized by the Court of Appeals and the trial court, supports the conclusion that the plaintiffs were placed in State supervised foster care. In the most recent brief, the State basically wrote a book about the history of foster care in Washington State (dating back to the 1950s) but failed to submit any other plausible explanation as to the plaintiffs'

placement other than being in State sanctioned foster care. There is no legitimate basis upon which to grant review.

II. THE STATE'S ARGUMENT CONCERNING THE HOLDING OF *H.B.H.* IS MIGUIDED AND INCORRECT

The children were involuntarily removed premised upon the fact that their mother was in jail[1] Coupled together, there is only one logical inference on this evidentiary record – the Asphy were in dependent and placed foster care and therefore owed a duty under *HBH v. State*, 192 Wash. 2d 154, 429 P.3d 484 (2018). Moreover, the existence of a "duty" *is not* dependent upon a threshold showing of a specific court order commonly referred to as a "dependency." *Id*. The "duty" attaches when the State takes over control of a child's welfare: "Contrary to DSHS's contention, our case law confirms that entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship." *Id*. at 173.

[1] CP 329-30

A brother, Tyrone, testified that the "*reason that I was removed was because my mother had to spend time in jail out of state. I was involuntarily separated from my siblings, and I was not given a choice about where I was placed*."[2] The aunt was not permitted to watch the children: "*I was caring for the plaintiffs as children in or around 1969 while my sister (Margie) was taken. Against my will, the children taken away by White people I did not know even though I would have preferred to care for them while my sister was gone*."[3] Under any version of events, the State had taken over for the care of Anita and Tony and therefore owed them a duty under *H.B.H.*:

> *See Niece,* 131 Wash.2d at 50, 929 P.2d 420 (finding that "[t]he duty to protect another person from the intentional or criminal actions of third parties arises where one party is 'entrusted with the well being of another' " (quoting *Lauritzen v. Lauritzen,* 74 Wash.App. 432, 440, 874 P.2d 861, *review denied,* 125 Wash.2d 1006, 886 P.2d 1134 (1994))); *Nivens,* 133 Wash.2d at 202-03, 943 P.2d 286 (finding that the duty to protect arises where a business invitee "entrusts himself or herself

[2] *Id.*
[3] CP 331-2

> to the control of the business owner over the premises and to the conduct of others on the premises"); *C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wash.2d 699, 721-22, 985 P.2d 262 (1999) (finding that the duty to protect arises where vulnerable children of a congregation are delivered into the custody and care of a church, whether on or off church premises); *Caulfield,* 108 Wash.App. at 255-56, 29 P.3d 738 (finding that the duty to protect arises where the relationship between the defendant and the plaintiff involves an element of entrustment, "i.e., one party was, in some way, entrusted with the well-being of the other party"). Certainly, many of our § 315 cases involve factual scenarios where the plaintiff is in the physical custody of the defendant, as DSHS points out. But not a single decision identifies physical custody as a necessary condition for recognizing a § 315(b) special protective relationship.

Id. at 173-4.

In *Asphy*, the Court of Appeals parroted this reasoning:

> The State's focus on the statutory provisions in effect at the time of H.B.H. is too narrow. The Supreme Court's discussion began with the State's "compelling parens patriae interest in protecting the physical, mental, and emotional health of children in this state." H.B.H., 192 Wash.2d at 163, 429 P.3d 484 (citing In re Dependency of Schermer, 161 Wash.2d 927, 941, 169 P.3d 452 (2007)). When the State "exercises its parens patriae

right" to place children in foster care, the State has not merely a "statutory" but a "constitutional" duty to ensure those children are free from unreasonable risk of harm. Id. at 164, 429 P.3d 484 (citing Braam, 150 Wash.2d at 699, 81 P.3d 851). As early as 1905, the Washington Supreme Court recognized, " 'It is the unquestioned right and imperative duty of every enlightened government, in its character of parens patriae, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy ... are unable to take care of themselves.' " Russner v. McMillan, 37 Wash. 416, 419, 79 P. 988 (1905) (quoting County of McLean v. Humphreys, 104 Ill. 378, 383 (1882)). While the statutory provisions in effect at any given time inform the nature of the State's relationship with dependent children,7 H.B.H. is clear that it was addressing not merely the particular statutory framework in effect when it was decided but more generally the State's "exercise[ ]" of its enduring parens patriae right and responsibility. 192 Wash.2d at 164, 429 P.3d 484. Underscoring this, H.B.H. described the nature of the State's relationship with dependent children by examining the current statutory framework in 2018, id. at 163-68, 429 P.3d 484, without ever indicating its analysis depended on the statutory provisions in effect at the time of the placements at issue, the first of which was 20 years earlier in 1998, id. at 159, 429 P.3d 484.

¶31 H.B.H. concluded, as a matter of tort law, that "entrustment and vulnerability" are "at the heart" of the special protective relationship. Id. at 172, 429 P.3d 484. Rejecting ***338** the State's contention there that physical custody was the key to triggering the duty, the court said

> "special protective relationships 'are based on the liable party's assumption of responsibility for the safety of another.' " Id. at 173, 429 P.3d 484 (quoting Niece v. Elmview Grp. Home, 131 Wash.2d 39, 46, 929 P.2d 420 (1997)). The foundation of a special protective relationship, and thus the duty of care, is "entrustment for the protection of a vulnerable victim." Id. Such a relationship exists when "children are involuntarily removed from their homes by an affirmative act of the State" and are confined to "a state *system* of foster care." Id. at 174, 429 P.3d 484 (emphasis added) (citing DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 n.9, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). The court likewise cited other authority holding that "involuntary foster care placement constitutes state custody." Id.

Asphy, 558 P.3d at 337-8. The Court of Appeals holding in *Asphy* was wholly consistent with *H.B.H*. *Id*.

III. THIS COURT HELD THAT FAILING TO CONDUCT HEALTH AND SAFETY VISITS IS NEGLIGENT AND MAKES IF FORESEEABLE THAT FOSTER CHILDREN COULD BE ABUSED

The undersigned counsel won the landmark Supreme Court precedent establishing that the State of Washington owes a an actional tort duty of care to all children placed in foster: *HBH*, 192 Wash. 2d 154. *HBH* held that failing to properly

monitor children while in foster placements breaches the duty of care. *Id*. Specifically, the Supreme Court affirmed that failing to conduct proper health and safety checks (even with no other indication that the children are in harm's way) creates an inference from which a jury could find that the assigned social workers were negligent:

> While the trial testimony was certainly mixed, the Court of Appeals correctly identified evidence that showed DSHS breached its duty by failing "to conduct required health and safety checks—either at all or with sufficient regularity" during the preadoption period—and fell below the standard of reasonable care. *H.B.H.,* 197 Wash. App. at 92, 387 P.3d 1093. As for causation, the Court of Appeals correctly credited the jury's ability to draw the inference that "but for the allegedly deficient health and safety checks, SAH or one of the other girls would have disclosed the abuse and the State would have intervened." *Id.* at 94-95, 387 P.3d 1093.

Id. at 181-2.

In this case, the plaintiffs were placed in a home described by their own mother as a "foster placement."[4] The plaintiffs were surrounded by other children also saddened by the removal

[4] CP 133-42

from their birth homes.[5] A social worker routinely visited to inquire about the health and safety of the children.[6] When Anita Asphy disclosed the abuse, her mother reported the information to the child welfare office premised upon concerns for the safety of the remaining children.[7] Anita Asphy testified during a hearing at the child welfare office during which she was questioned about her experiences while in foster care.[8] On this uncontradicted evidence, there is only *one* inference: the plaintiffs were placed in foster care wherein they were abused.[9]

"Negligence and proximate cause are ordinarily factual issues, precluding summary judgment." Tegland and Ende, 15A Washington Practice: Washington Handbook on Civil Procedure Section 69:20, at 581 (2012 ed.). Proximate cause is an essential element of any negligence theory; it consists of two elements: (1) factual or "but for" causation and (2) legal causation. *Baughn v.*

[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.

Honda Motor Corp., 107 Wash.2d at 142, 727 P.2d 655 (1986.); *Hartley v. State,* 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Factual causation is established between a defendant's act and a subsequent injury only where it can be said the injury would not have occurred "but for" the defendant's act. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Torts* § 42, at 273 **1184 (5th ed. 1984). As noted in *Baughn,* 107 Wash.2d at 142, 727 P.2d 655: "Cause in fact refers to the ... physical connection between an act and an injury." The existence of factual causation is generally a question of fact for the jury. *Id.* at 142.

According to a landmark case from the Washington Supreme Court, "[w]hether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of the particular kind which was expectable. Rather, the question is whether the actual harm fell within the general field of danger which should have been anticipated." *Rickstad v. Holmberg*, 76 Wash.2d 265, 269, 456 P.2d 355 (1969); *see also Shepard v.*

Mielke, 75 Wash. App. 201, 877 P.2d 220 (1994) (duty owed to those that cannot protect themselves); *Hansen v. Friend*, 118 Wash.2d 476, 824 P.2d 483 (1992), *McLeod v. Grant School District*, 42 Wash.2d 316, 255 P.2d 360 (1953) (children being assaulted in unsupervised room foreseeable); 16 Wash. Prac., Tort Law And Practice § 5:13 (4th ed.) "The sequence of events need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpectable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are met." *Rickstad,* at 269.

In terms of breach and foreseeability in this case, according to expert testimony, the assigned social worker failed to conduct proper health and safety checks.[10] Specifically, the assigned social worker should have reacted to Anita Asphy's crying disposition and statements about not wanting to remain in

[10] CP 143-50

the home and/or Tony Asphy's statements about his anal area hurting and interviewed the children outside the presence of the foster parents.[11] *See Desranleau v. Hyland's, Inc*., 10 Wash. App. 2d 837, 450 P.3d 1203 (2019) (appellate law won by the undesigned counsel indicating that expert testimony of this nature presents a question of fact for the jury). Both plaintiffs testified that they yearned for such a safe opportunity to disclose the ongoing abuse.[12] Based upon the failure to properly interview the children *privately*, the abuse continued for perhaps an entire year.[13]

In *HBH*, the Supreme Court ruled that it is *always* foreseeable that a foster child could be left in an abusive environment if the assigned social worker botches the health and safety checks:

> Evidence at trial showed that the Hamricks abused all five girls physically, sexually, and psychologically during the preadoption period from 1998 to 2003. DSHS did not obtain any information

[11] *Id*.
[12] *Id*.
[13] *Id*.

> concerning abuse during this period, however, and the social workers in contact with the children reported that the children seemed happy in the Hamricks' home.

Id at 488. Regardless, in the absence of any other notice of potential harm, the Supreme Court held that failing to conduct proper health and safety checks presented a question of fact for the jury to determine liability. *Id*. at 498. In terms of breach and foreseeability in this case, according to expert testimony, the assigned social worker failed to conduct proper health and safety checks.[14] Specifically, the assigned social worker should have reacted to Anita Asphy's crying disposition and statements about not wanting to remain in the home and/or Tony Asphy's statements about his anal area hurting and interviewed the children outside the presence of the foster parents.[15] *See Desranleau v. Hyland's, Inc*., 10 Wash. App. 2d 837, 450 P.3d 1203 (2019) (appellate law won by the undesigned counsel indicating that expert testimony of this nature presents a question

[14] *Id*.
[15] *Id*.

of fact for the jury). Both plaintiffs testified that they yearned for such a safe opportunity to disclose the ongoing abuse.[16] Based upon the failure to properly interview the children *privately*, the abuse continued for perhaps an entire year.[17] The Court of Appeals holding in *Asphy* was wholly consistent with *H.B.H*. *Id*.

IV. THE STATE'S APPENDIX AND ARGUMENTS ABOUT "PAYOUTS" WAS NOT RAISED BELOW

The State submitted a lengthy appendix of documents that were never presented to the lower courts. Based upon those newly submitted appended documents, the State makes arguments such as that the total number of claims filed raises an issue of public import. None of these newly raised arguments were raised below. And the law does not provide that the number of claims filed should impact the legal landscape. The fact of the matter is that the State failed multiple generations of foster children and is now being held accountable. The Catholic

[16] *Id*.
[17] *Id*.

Church was not absolved of liability based upon the volumes of claims of childhood sex abuse. The State should not be either.

V. CONCLUSION

None of the criterion under RAP 13.4(d) are satisfied. The Court of Appeals opinion in *Asphy* (1) is *not* in conflict with *H.B.H*, (2) is *not* in conflict with any other appellate decision, (3) does *not* raise any novel issues, and (4) the existing opinion is conformity with Washington law that favors protecting children in foster care. This Court should deny review.

This response contains 3,542 words.

DATED this 5th day of September, 2024.

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DECLARATION OF SERVICE

I hereby declare that on the 5th day of September, 2024, I caused to be electronically filed the foregoing documents with the Clerk of the Court using the CM/ECF system which also will send notification of such filing to the following parties.

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DATED this 5th day of September, 2024.

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September 05, 2024 - 12:38 PM

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