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Sep 20, 2016, 3:12 pm

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Supreme Court No. 93280-8

**IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON**

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FEARGHAL MCCARTHY; CPM, a minor, by and through  
Fearghal McCarthy his father; and CCM, a minor, by and through  
Fearghal McCarthy, his father,

Plaintiffs and Appellants

Vs.

COUNTY OF CLARK, CITY OF VANCOUVER,  
DEPARTMENT OF SOCIAL AND HEALTH SERVICE,

Defendants and Respondents

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**CCM'S AND CPM'S ANSWER TO RESONDENTS' JOINT MOTION  
TO STRIKE CCM/CPM'S REPLY**

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ATTACHMENT TO EMAIL

 ORIGINAL

## **I. IDENTITY OF PETITIONER**

Petitioners CCM and CPM, are the McCarthy (“CCM/CPM or children”) children who have alleged they were injured as a result of a negligent investigation by the Clark County Sheriff’s office, by DSHS, and by the City of Vancouver.

## **II. STATEMENT OF RELIEF SOUGHT**

The McCarthy children request that this Court deny Respondents’ Joint Motion to Strike the majority of CPM/CCM’s reply to Respondents’ Answer to Petition for Review.

## **III. ISSUE PRESENTED**

The Respondents argued in their Answers to the children’s petition for review that RCW 26.44.280 limits liability, that the doctrine of stare decisis applies, and that the children did not properly preserve the issue of prosecutorial immunity. Were these new issues that warrant a reply even though they were placed in the argument section?

## **IV. ARGUMENT**

The children’s Reply does not violate RAP 13.4 (d). They identified new issues raised by the Respondents in their respective Answers and the children had a good faith belief that the Respondents raised new issues for the Court’s review. Respondents fail to demonstrate

any violation of RAP 13.4(d) to warrant striking the majority of the children's Reply. DSHS placed the new issue of whether RCW 26.44.280 limits liability in certain placement situations, within its argument section and both DSHS and Clark County placed the new issue of whether the doctrine of stare decisis applies within their argument sections. See DSHS Answer to CCM/CPM's Pet. For Rev. at 2, 11-12; CC's Answer to CCM/CPM's Pet. For Rev. at 12-13.

But, an "issue" retains its character regardless of where it is placed within the briefing. See e.g. *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13 (2006) (State's argument about merger was a new issue that should have been placed in the concise statement of the issues presented for review); accord *State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993) (When petitioner argued his right to bear arms issue in the argument section, but did not list it in the concise statement of issues presented for review, it was treated as a new issue that was not properly preserved).

If placing a new issue in the argument section is insufficient to preserve review, then it necessarily follows that placing a new issue in the argument section is insufficient to preclude a reply.

Both DSHS and Clark County argued in their Answers that the doctrine of stare decisis should be applied to limit the Court's scope of review. See DSHS Answer to CCM/CPM's Pet. For Rev. at 2, 11; CC's Answer to CCM/CPM's Pet. For Rev. at 12. DSHS further argued that the children were required to show that *M.W. v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 589, 70 P.3d 954 (2003), *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), and *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005) were incorrect and harmful. See DSHS Answer to CCM/CPM's Pet. For Rev. at 2, 11-12. This is a new issue.

*State v. Otton*, 185 Wn.2d 673, 677-78, 374 P.3d 1108 (2016) is inapposite because there Otton did not "challenge the manner in which the court exercised its discretion; he challenge[d] the way this court previously interpreted [an evidentiary rule]." In that case, Otton admittedly asked this Court to review the precise question it had previously addressed. Here, the Respondents framed the question as if the children had asked this Court to review the precise question it has previously addressed, but that is not what the children asked this Court to do. They simply petitioned this Court to consider how previously decided case law applies to their new facts, which does not conflict with the

doctrine of stare decisis. *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 173, 256 P.3d 1193 (2011).

Therefore, whether the doctrine of stare decisis even applies to this case, is a new issue that the Respondents raised in their answers and the children correctly identified it in their Reply. See CCM/CPM Reply at 1-2.

In the Joint Motion to Strike, the Respondents concede that the County raised the new issue of whether RCW 26.44.280 limits liability for certain placement decisions. Joint Mot. To Strike at 6. But, they argue that the children were not authorized to reply to it unless they ask this Court to deny review of that issue. However, Respondents have failed to point to any authority to support this assertion. RAP 13.4(d) does not support their contention because it plainly and unambiguously allows a reply when the answering party seeks review of an issue not raised in the petition for review including any issues that were raised, but not decided in the Court of Appeals. The argument about RCW 26.44.280 was not raised in the children's petition for review. It was, however, raised by the City of Vancouver below, but was not decided by the Court of Appeals. See CCM/CPM's Reply to PFR citing COV Br in Resp. at 38.

Clark County should not be permitted to raise a new issue and then ask the court to disallow the children to reply to the merits of that issue.

Under RAP 13.4 (d) the children could only reply if the Respondents raised a new issue. It does not serve the ends of justice to cut off the children's right to reply to a new issue, especially one that creates a new test, simply because the Respondents characterized the issue as an alternative basis for dismissal.

In addition, DSHS also made the same argument in support of the County's new issue. See DSHS answer to CCM/CPM's Pet. For Rev. at 17-18. As argued above, DSHS should not be permitted to re-characterize a new issue as argument by placing it within the argument section and leaving it out of the statement of precise issues. This is an impractical interpretation of RAP 13.4(d) because it leads to unjust results by convoluting the issues.

Finally, the City raised the new issue of whether the children properly preserved the prosecutorial immunity issue by placing it in their concise statement of issues presented for review. And the children were entitled to reply.

## **V. CONCLUSION**

The children's Reply does not violate RAP 13.4(d). Therefore, the children respectfully request that the Joint Motion to Strike be denied and that their Reply remain on the record.

DATED this 20<sup>th</sup> day of September, 2016

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DECLARATION OF SERVICE

I hereby declare that on September 20, 2016, I served the foregoing ANSWER TO JOINT MOTION TO STRIKE on:

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By the following indicated method or methods:

[X] by transmitting via electronic mail in accordance with the agreement of the persons served, a full, true and correct copy thereof to the attorney at the email address shown above, which is the last known email address for the attorney's office, on the date set forth below.

DATED this 20<sup>th</sup> day of September, 2016

/s/ Erin C. Sperger

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## OFFICE RECEPTIONIST, CLERK

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**From:** Erin Sperger <erin@legalwellspring.com>  
**Sent:** Tuesday, September 20, 2016 3:02 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** McCarthy v. Clark County et. al. No. 932808 Petitioner's answer to Joint motion to strike  
**Attachments:** McCarthy\_CCM and CPM Answer to Motion to Strike CCM CPM Reply .pdf

Dear Clerk,

Please file the attached answer to the Joint Motion to Strike for:

McCarthy v. Clark County Et. al.  
No. 932808  
My contact information is listed below.

Sincerely,  
Erin Sperger, Attorney for CCM and CPM

--

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