NO. 45123-9-II

IN THE
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KELSEY BREITUNG,

Appellant,

v.

STATE OF WASHINGTON and
COMMUNITY COUNSELING INSTITUTE

Respondents,

Appeal from the Superior Court of Washington
for Pierce County

(Cause No. 12-2-08149-8)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 3

III. ISSUES RELATED TO ASSIGNMENT OF ERROR 3

IV. STATEMENT OF THE CASE 4

A. Procedural History. 4

B. Kelsey Breitung's Treatment At CCI. 4

1. CCI Hired Phillips As A Chemical Dependency Trainee, Though He Did Not Meet The Minimum Requirements 4

2. CCI Was Aware Of Phillips' Multiple Violations Of Boundaries Before Discharging Kelsey. 5

3. CCI Received A Complaint About The Sexual Nature Of Phillips' Relationship With Kelsey, Precipitating Her Discharge. 9

4. DSHS Negligently Investigated Phillips' Dual-Relationship With Kelsey. 10

C. Kelsey Breitung's Unrebutted Expert Testimony. 14

1. DSHS Retained Placement Discretion Over Kelsey Breitung Who Remained At All Relevant Times In DSHS's Legal Custody. 14

Table of Contents, continued

Page

2. Expert Barbara Stone Established That DSHS Withheld Material Information During The November 3, 2009 Contested Placement Hearing. 16

3. Expert Sharon Fenton Established That CCI Owed Kelsey A Continuing Duty To Prevent A Foreseeable Sexual Relationship Between Phillips And Kelsey. 18

V. ARGUMENT 20

A. This Court Reviews Summary Judgment Motions De Novo, Engaging In The Same Inquiry As The Trial Court. 20

1. General Principles. 20

2. The Extent Of CCI's Duty Depends on Disputed Facts, Precluding Summary Judgment. 20

B. Kelsey Submitted Sufficient Evidence To Establish A Genuine Issue Of Material Fact As To Her Negligent Hiring, Supervision, And Retention Claims Against CCI. 23

1. CCI Had The Duty To Protect Kelsey From Phillips' Sexual Contact With Her. 23

2. CCI Owed Kelsey Breitung A Continuing Duty After They Discharged Her. 26

Table of Contents, continued

Page

C. DSHS Is Liable For Negligently Investigating And Placing Kelsey With Phillips, And Is Not Entitled To Immunity. 33

1. RCW 4.24.595 Does Not Apply To This Negligent Investigation Claim. 34

D. Kelsey Is Not Judicially Estopped From Prosecuting A Sexual Abuse Claim Based On Her Statements In Court On November 3, 2009. 39

E. The Court's November 3, 2009 Ruling Allowing Kelsey To Continue Residing With Phillips Was Not A Superseding Cause That Absolves DSHS Or CCI From Liability 44

1. The November 3, 2009 Ruling Did Not Supersede CCI's Negligence. 44

2. DSHS Negligently Placed Kelsey With Phillips Well Before November 3, 2009. 47

3. DSHS Failed To Disclose All Material Information To The Court On November 3, 2009 48

VI. CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Afoa v. Port of Seattle,
176 Wn.2d 460, 296 P.3d 800 (2013) 20

Ang v. Martin,
154 Wn.2d 477, 114 P.3d 637 (2005) 45

Arkinson v. Ethan Allen, Inc.,
160 Wn.2d 535, 160 P.3d 13 (2007) 41, 42

Bartley-Williams v. Kendall,
134 Wn. App. 95, 138 P.3d 1103 (2006) 41, 42

Beggs v. Dep't of Social and Health Services,
171 Wn.2d 69, 247 P.3d 421 (2011) 34

Borden v. City of Olympia,
113 Wn. App. 359, 53 P.3d 1020 (2002) 21

Briggs v. Nova Services,
135 Wn. App. 955, 147 P.3d 616 (Div. 3 2006) 23

Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.,
113 Wn.2d 123, 776 P.2d 666 (1989) 37

C.J.C. v. Corporation of Catholic Bishop of Yakima,
138 Wn.2d 699, 985 P.2d 262 (1999) 33

Carlton v. Vancouver Care LLC,
155 Wn. App. 151, 231 P.2d 1241 (2010) 40

Christen v. Lee,
113 Wn.2d 479, 780 P.2d 1307 (1989) 45

Christensen v. Royal School Dist. No. 160,
156 Wn.2d 62, 124 P.3d 283 (2005) 40, 41

Cloud v. Summers,
98 Wn. App. 724, 991 P.2d 1169 (1999) 43

Estate of Jones v. State,
107 Wn. App. 510, 15 P.3d 180 (2000) 49

Hertog v. City of Seattle,
138 Wn.2d 265 979 P.2d 400 (1999) 24

Table of Authorities, continued

Page

Hisle v. Todd Pac. Shipyards Corp.,
151 Wn.2d 853, 93 P.3d 108 (2004) 20

In re Det. of Boynton,
152 Wn. App. 442, 216 P.3d 1089 (2009) 35

In re Estate of Haviland,
177 Wn.2d 68, 301 P.3d 31 (2013) 37

J.N. v. Bellingham Sch. Dist.,
74 Wn. App. 49 871 P.2d 1106 (1994) 25

Kaltreider v. Lake Chelan Comm. Hosp.,
153 Wn. App. 762, 224 P.3d 808 (2009) 28, 29

Kim v. Budget Rent A Car Sys., Inc.,
143 Wn.2d 190, 15 P.3d 1283 (2001) 45

King v. City of Seattle,
84 Wn.2d 239, 525 P.2d 228 (1974) 45

Koker v. Armstrong Cork, Inc.,
60 Wn. App. 466 (1991) 46

Kuehn v. White,
24 Wn. App. 274 (1979) 24

La Lone v. Smith,
39 Wn.2d 167, 234 P.2d 893 (1951) 24

Lybbert v. Grant County,
141 Wn.2d 29, 1 P.3d 1124 (2000) 20

M.H. v. Corp. of Catholic Archbishop of Seattle,
162 Wn. App. 183, 252 P.3d 914 review denied,
173 Wn. 2d 1006 (2011) 32, 44

M.W. v. Dep't of Social and Health Servs.,
149 Wn.2d 589, 70 P.3d 954 (2003) 34

McLeod v. Grant Cy. Sch. Dist. 128,
42 Wn.2d 316, 255 P.2d 360 (1953) 25, 32

Miller v. Campbell,
137 Wn. App. 762 (2007) 42, 43

Table of Authorities, continued

Page

Miller v. Campbell,
164 Wn.2d 529, 192 P.3d 352 (2008).....43

Millson v. City of Lynden,
174 Wn. App. 303, 298 P.3d 141 (2013).....20

Minahan v. West. Wash. Fair Assoc.,
117 Wn. App. 881, 73 P.3d 1019 (2003).....45

Munich v. Skagit Emergency Communications Ctr.,
161 Wn. App. 116, 250 P.3d 491 (2011),.....20, 21

N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,
175 Wn. App. 517, 307 P.3d 730 (2013).....29, 31, 33

Niece v. Elmview Group Home,
131 Wn.2d 39, 929 P.2d 420 (1997).....23, 24, 28, 29

Petcu v. State,
121 Wn. App. 36, 86 P.3d 1234 (2004).....49

Petersen v. State,
100 Wn.2d 421, 671 P.2d 230 (1983).....24, 33

Pettis v. State,
98 Wn. App. 553, 990 P.2d 453 (1999).....38

Qualls v. Golden Arrow Farm,
47 Wn.2d 599, 288 P.2d 1090 (1955).....46

Rikstad v. Holmberg,
76 Wn.2d 265, 456 P.2d 355 (1969).....25

Rodriguez v. Perez,
99 Wn. App. 439, 994 P.2d 874 24

Rucshner v. ADT, Sec. Systems, Inc.,
149 Wn. App. 665, 204 P.3d 271 (2009).....31, 32

Schooley v. Pinch's Deli Market, Inc.,
134 Wn.2d 468, 951 P.2d 749 (1998).....25, 32, 45

Shepard v. Mielke,
75 Wn. App. 201, 877 P.2d 220 (1994).....25, 32

Table of Authorities, continued

Page

Sherman v. State,
128 Wn.2d 164 (1995) 44

Simmons v. United States,
805 F.2d 1363 (9th Cir.1986) 24

Sjogren v. Props. of Pac. Nw., LLC,
118 Wn. App. 144, 75 P.3d 592 (2003) 20

Smith v. Sacred Heart Med. Ctr.,
144 Wn. App. 537, 184 P.3d 646 (2008) 30

State v. Cleveland,
58 Wn. App. 634, 794 P.2d 546 (1990) 40

State v. Ervin,
169 Wn. 2d 815, 239 P.3d 354 (2010) 35

State v. Graham,
59 Wn. App. 418, 798 P.2d 314 (1990) 40

State v. Holland,
77 Wn. App. 420, 891 P.2d 49 (1995) 40

State v. Landrum,
66 Wn. App. 791, 832 P.2d 1359 (1992) 40

State v. Madison,
53 Wn. App. 754, 770 P.2d 662 40

State v. Middleton,
294 Or. 427, 657 P.2d 1215 (1983) 40

State v. Parmelee,
172 Wn. App. 899, 292 P.3d 799 (2013) 38

State v. Petrich,
101 Wn.2d 566 39

State v. Stevens,
58 Wn. App. 478, 794 P.2d 38 (1990) 40

State v. Sullivan,
69 Wn. App. 167, 847 P.2d 953 40

State v. T.K.,
139 Wn.2d 320, 987 P.2d 63 (1999) 38

Table of Authorities, continued

Page

State v. Young,
62 Wn. App. 895, 802 P.2d 829 (1991) 40

Taggart v. State,
118 Wn.2d 195 (1992) 48

Thompson v. Everett Clinic,
71 Wn. App. 548, 860 P.2d 1054 (1993) 24

Torres v. City of Anacortes,
97 Wn. App. 64, 981 P.2d 891 (1999) 21

Tyner v. Dep't of Soc. & Health Servs.,
141 Wn.2d 68, 1 P.3d 1148 (2000) 34, 44, 48, 49

Tyner v. Dep't of Social & Health Servs.,
92 Wn. App. 504, 963 P.2d 215 (1998) 49

Washburn v. City of Fed. Way,
87906-1, 2013 WL 5652733 (Wash. Oct. 17, 2013) 20, 29

Washburn v. City of Federal Way,
169 Wn. App. 588 283 P.3d 567 (2012) 20, 21

Yankee v. APV North America, Inc.,
164 Wn. App. 1, 262 P.3d 515 (2011) 21

Statutes

RCW 13.34.030(5) 2, 12
RCW 13.34.065 38
RCW 26.44.030 33
RCW 4.24.595 ..... passim
RCW 4.24.595(2) 34, 36, 38

Rules

CR 54(b) 4
CR 56(c) 20

Regulations

WAC 246-16-100 ..... 27, 28

Table of Authorities, continued

Page

Other Authorities

Foreseeability in Breach, Duty, and Proximate Cause, 44 Wake Forest L. Rev. 1247 (2009) 21
Restatement (Second) of Agency § 213 (1958) 24
Restatement (Second) of Torts § 281 29
Restatement (Second) of Torts § 315 (1965) 24
Restatement (Second) of Torts § 315(a) & (b) 29
WPI 15.01 45
WPI 15.05 46

I. INTRODUCTION

Appellant Kelsey Breitung ("Kelsey") was sexually abused by respondent Community Counseling Institute's ("CCI") employee, Andrew Phillips ("Phillips"). Kelsey was 17 years old. Phillips was 46 years old.

Kelsey was in counseling with Phillips at CCI for treatment of severe chemical dependency issues on two separate occasions. During the course of her counseling relationship with Phillips in the summer of 2009, he repeatedly violated therapeutic boundaries to the end of grooming her for a prohibited sexual relationship.

CCI had knowledge of Phillips' improper relationship. Rose Beitler, Kelsey's temporary guardian, reported concerns to CCI about the sexual nature of the relationship between Kelsey and Phillips.[1] CCI's investigation of her complaint exposed additional violations of therapeutic boundaries by Phillips. Rather than firing Phillips, CCI terminated Kelsey's counseling and gave Phillips a raise.

By September 16, 2009, within two weeks following CCI's decision to terminate Kelsey from their rehabilitation program, Phillips and his wife, Elizabeth Phillips ("Betsy Phillips"), petitioned to become Kelsey's foster parents.

The State of Washington, through the Department of Social Health & Services ("DSHS"), investigated whether the Phillipses qualified as an

[1] During the relevant period of time herein, Rose Beitler's last name was "Sialani." She will be referred to as "Rose Beitler" or "Beitler."

"other suitable placement" for Kelsey. During the investigation, Kelsey was a dependent child, in DSHS's custody pursuant to RCW 13.34.030(5). DSHS social worker, Gabrielle Rosenthal ("Rosenthal"), retained authority over Kelsey's custody, safety and well-being.

Exercising her authority and discretion, Rosenthal authorized overnight visits and placed Kelsey in the Phillipses' home without court approval in October 2009. Rosenthal failed to properly investigate Phillips as an "other suitable placement" before permitting the overnights, placing Kelsey with Phillips, and before recommending the court overrule her mother's objection to the placement. In doing so, she ignored warnings from Kelsey's counselor on at least two occasions that the relationship between Phillips and Kelsey was improper. Rosenthal also recognized but failed to resolve the conflict between Phillips' dual role as counselor and foster parent. Despite her representations to the court that *she* would consult with CCI about any possible placement conflicts, Rosenthal did not do so. Rosenthal never reported the counselor's placement concerns to the court.

Kelsey and Phillips began having sex in October 2009, immediately after Rosenthal placed her in his home and before the contested placement hearing of November 3, 2009. The sexual relationship continued until November 24, 2009, when Kelsey first disclosed the relationship to a recovery group member.

The Trial Judge, misconstruing the duties that CCI and DSHS owed Kelsey and deciding issues of fact instead of permitting the jury to do so, dismissed Kelsey's claims as unforeseeable and/or superseded by a commissioner's ruling approving DSHS's placement recommendation. The Superior Court did so contrary to the law, and despite genuine issues of material fact raised by the evidence Kelsey presented.

Kelsey respectfully asks this Court to reverse the summary judgment dismissals and remand for trial, because genuine issues of material fact exist as to her claims.

II. ASSIGNMENT OF ERROR

Appellant Kelsey Breitung assigns error to the Superior Court's grant of summary judgment in favor of Respondents State of Washington and Community Counseling Institute where there are disputed issues of material fact.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Did the Superior Court err in ruling, as a matter of law, that it was unforeseeable that Phillips would continue his improper relationship with Kelsey after CCI discharged her from treatment?

2. Did the Superior Court err in applying RCW 4.24.595 to this non-emergent, negligent investigation placement case when the statute is intended to narrowly and prospectively grant caseworkers limited immunity in emergent placement investigations?

3. Did the Superior Court err in ruling that Kelsey Breitung was judicially estopped from asserting that DSHS is liable for negligence because she did not disclose the relationship with Phillips at the November 3, 2009 hearing?

4. Did the Superior Court err in ruling that the juvenile court commissioner's orders were a superseding cause that absolved DSHS and CCI from liability?

IV. STATEMENT OF THE CASE[2]

A. Procedural History.

Kelsey filed this lawsuit April 17, 2012. CP 1-6. She filed an Amended Complaint on November 13, 2012. CP 68-74. DSHS moved for summary judgment dismissal on May 31, 2013. CP 330-355. CCI also moved for summary judgment dismissal on May 31, 2013. CP 464-554. The Superior Court granted the motions by Orders dated June 28, 2013.[3] CP 1123-1127. This appeal timely followed. CP 1128-1138.

B. Kelsey Breitung's Treatment At CCI.

1. CCI Hired Phillips As A Chemical Dependency Trainee, Though He Did Not Meet The Minimum Requirements

CCI hired Phillips as a chemical dependency counseling trainee ("CDPT") on October 1, 2008. CP 489, 491. The minimum qualifications

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[2] *See* Appendix 1.

[3] Pursuant to CR 54(b), the Superior Court dismissed all remaining claims against DSHS, directed an entry of final judgment and ruled that there was no just reason for delaying appeal. CP 1139-1142.

required that the candidate have "at least one year of experience in providing chemical dependency counseling." CP 491. CCI's clients included vulnerable teenagers ordered to substance abuse treatment by Pierce County Juvenile Court. CP 838. Sharon Fenton, Kelsey's chemical dependency expert, testified that CCI did not follow best practices when it hired Phillips. CP 1011 at ¶6. First, Phillips had no prior experience working with youth. CP 525 at 135:19-20. Second, Phillips misrepresented prior counseling experience on his resume. CP 1112 at 24:21-25. He falsely claimed he had been a licensed Registered Counselor since January 2008 (CP 888) when in reality, he received his Registered Counselor certification on April 11, 2008. CP 884. CCI could have easily discovered this discrepancy and, had it done so, would have recognized it as a "red flag" of Phillips' non-suitability for the CDPT position at CCI, particularly since he would be working with vulnerable teenagers. CP 1116 at 73:18-75:10. Ms. Fenton's testimony was unrebutted by CCI.

2. CCI Was Aware Of Phillips' Multiple Violations Of Boundaries Before Discharging Kelsey.

Misguided by her mother, Kelsey started developing substance abuse problems at an extremely young age. She first used alcohol at age 9, marijuana at age 11, and was regularly using them both, along with methamphetamines, by age 14. CP 825.

On June 17, 2008, Kelsey was referred to juvenile court for a misdemeanor assault while intoxicated. CP 836. She was ordered to participate in treatment at CCI in lieu of incarceration. CP 838. Kelsey complied with this order and reported to CCI on February 25, 2009, as required. CP 838, 961. CCI assigned Phillips to be Kelsey's counselor and she began treatment on March 4, 2009. CP 961. Her treatment ended, without incident, on March 25, 2009. CP 916, 961.

However, shortly after her first discharge from CCI, Kelsey moved out of her mother's home after a fight. CP 916. Kelsey then temporarily stayed with various family friends. *Id.* At the end of July 2009, she relapsed and voluntarily returned to CCI and treatment with Phillips. *Id.*; CP 848 at 81:6-8.

During a second assessment completed by Phillips on July 24, 2009, Kelsey admitted using alcohol, marijuana, mushrooms, adderall, methamphetamines, ecstasy, keyboard spray, codeine, morphine, oxycontin, valium, and muscle relaxers. CP 920-930. She showed symptoms of depression, conduct disorder, avoidant disorder, and suicidal ideation. *Id.* She had attempted suicide twice and tried to hurt herself the prior month. *Id.* She also reported prior sexual abuse that Phillips documented on her assessment form:

> **Physical/Emotional/Sexual Abuse History** (include past and current abuse): Pt has suffered emotional/physical abuse from mom. Suffered sexual abuse.
>
> Risk of Abuse?: (High) from family friend and other men you got drunk with.

Id. (emphasis in original).

Kelsey reported a desire to change, but her mother refused to agree to in-patient treatment, which Phillips believed she needed. *Id.* After the July 2009 assessment was completed, CCI once again assigned Phillips to be Kelsey's counselor. *Id.*

Phillips admitted becoming "enmeshed" with Kelsey during the counseling relationship. CP 852 at 167:13-15. By no later than August 14, 2009, CCI supervisors knew Phillips had violated multiple professional and ethical boundaries with Kelsey during her treatment. CP 946 at 27:8-947 at 29:16; 950. These significant violations included encouraging Kelsey to become involved in Celebrate Recovery.[4] CP 841 at 18:7-14. Phillips was a leader of Celebrate Recovery at Trinity Church. CP 847 at 66:13-16; *see also* CP 933 at 14:6-11. Phillips encouraged plaintiff to attend the group at his church. CP 841 at 18:7-14. CCI prohibited this activity because it violated proper counselor-client boundaries. CP 908 at 34:3-8; CP 909 at 40:2-17. Before Kelsey's situation, CCI knew Phillips encouraged other CCI clients to attend Celebrate Recovery but did nothing

[4] Celebrate Recovery is a faith-based group similar to Alcoholics Anonymous, but with a religious emphasis. CP 845 at 44:7-16; *see also* CP 914 at 106:20-24.

to prevent its continuation. CP 907-908 at 32:19-33:3; CP 908 at 34:9-35:5; 36:5-17. Ms. Fenton, Kelsey's chemical dependency expert, attested that encouraging clients to attend an outside recovery program is a prohibited practice in chemical dependency programs because it equalizes the counselor-client relationship and diminishes the counselor's professionalism. CP 1010-1013 at ¶7. In addition, a conflict is created because, in an outside recovery program, when the counselor becomes aware of treatment or law violations that he should report he does not because recovery programs are confidential. *Id.*

At least two weeks before discharging Kelsey, CCI also became aware that Phillips gave Kelsey his cell phone number, (CP 845 at 42:23-43:1), and that Phillips routinely gave Kelsey rides to and from Celebrate Recovery, church and home. CP 842 at 24:6-13; CP 845 at 42:21-23. Such outside contact is rife with problems, according to Ms. Fenton. CP 1120 at 109:1-110:3. As in this case, such activity often leads to an improper personal relationship.

CCI also knew that during the counseling relationship Phillips introduced Kelsey to his wife (CP 958-959), disclosed confidential information about Kelsey to his wife (CP 950; 956), and failed to notify CPS of a mandatorily reportable incident because Kelsey "begged" him not to. CP 941.

3. CCI Received A Complaint About The Sexual Nature Of Phillips' Relationship With Kelsey, Precipitating Her Discharge.

In addition to meeting with CCI supervisors on August 13, 2009, Beitler also met with CCI's Associate Director, Bernie Bell ("Bell"). CP 946-947 at 28:20-31:22.[5] Beitler reported that Phillips had inappropriately shared information about Kelsey with his wife, Betsy Phillips. *Id.* at 28:22-29:12, 31:17-22. Beitler voiced several other concerns about Phillips' relationship with Kelsey, including that (1) she felt the relationship between Phillips and Kelsey was inappropriate, (2) Kelsey told her she sprayed perfume in Phillips' office so he would think about her when she was gone, and (3) she believed Kelsey was sexually interested in Phillips. *Id.* at 25:25-26:7, 30:23-31:5, 31:17-22.

Beitler's report to CCI is confirmed by a contemporaneous Critical Incident Report that Bell wrote on August 13, 2009, documenting that Beitler "shared concern w/Andrew [sic] disclosure to wife who contacted CPS & **Rose expressed concern about Andrew's relationship w/Kelsey** [sic]." CP 950.

CCI discharged Kelsey from treatment on August 30, 2009, telling her to "attend treatment at another agency." CP 965.

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[5] Kelsey was living with Beitler at the time. CP 608.

4. DSHS Negligently Investigated Phillips' Dual-Relationship With Kelsey.

On August 13, 2009, Kelsey's guardian, Bietler, met with DSHS social worker Jessica Chaney ("Chaney") about Phillips' unauthorized disclosure of therapeutic information. CP 608-609. Bietler also told Chaney she was concerned about the lack of boundaries between Kelsey and Phillips. *Id.*

On August 14, 2009, DSHS placed Kelsey at South King County Youth Services ("SKYS") after Bietler indicated she could no longer care for Kelsey. CP 967; 969. Kelsey, at that time, also started counseling with Andrea Venier ("Venier") at Auburn Youth Services ("AYR"). CP 617-624.

On August 19, 2009, in the dependency action related to Kelsey's mother, the court ordered Kelsey to remain in DSHS's legal custody with authority to place Kelsey with a suitable person. CP 628-631.

On September 13, 2009, Kelsey first mentioned the Phillipses as a placement option to her new social worker, Gabrielle Rosenthal. CP 971. Rosenthal noted "counselor-patient relationship ethics" as a placement concern. *Id.* On September 16, 2009, Rosenthal contacted Phillips and his wife, Betsy, by phone. CP 635. Rosenthal asked him if his code of ethics would allow placement of Kelsey with him. *Id.* He said he would inquire and report back. *Id.*

Also, on September 16, 2009, a 30-day shelter care hearing was held in King County Superior Court. CP 649-651. DSHS, represented by Mary Ann Dorsey ("AAG Dorsey"), recognized that DSHS retained authority to place Kelsey in licensed care, with a suitable relative or with another suitable person ("the Department already has the discretion to do that..."). *Id.* AAG Dorsey advised the commissioner that Phillips was Kelsey's prior counselor and that Rosenthal would consult with CCI to determine if the therapeutic relationship would prohibit the Phillipses as a placement option. *Id.* Kelsey's mother, April Breitung, was present at the hearing and her lawyer expressed concern about Phillips' relationship with Kelsey. *Id.* The commissioner noted that Rosenthal should further investigate that concern. *Id.* The court order continued DSHS's custody, care and supervision of Kelsey, who remained at SKYS pending investigation of a suitable placement. CP 653-661.

On September 19, 2009, April Breitung submitted a letter to the court from Bietler noting an objection to Kelsey's placement with Phillips. CP 663-664. Bietler reported that Kelsey was obsessed with Phillips and reported she had Phillips wrapped around her finger. *Id.* On September 20, 2009, April Breitung also submitted a letter from acquaintance Debra Jones, who reported that Kelsey sprayed perfume in Phillips' office so he would think about her. CP 666-667.

On September 21, 2009, Kelsey's AYR counselor, Andrea Venier, voiced concern about placement with Phillips because of Kelsey's relationship with him. CP 669. Venier objected to Rosenthal again on September 24, 2009, about placing Kelsey with Phillips. CP 637; 671. Despite Venier's warnings, the next day, September 25, 2009, Rosenthal authorized Kelsey to stay overnight with Phillips. CP 637-638.

On September 30, 2009, April Breitung filed a motion contesting Kelsey's placement with Phillips. CP 673-674. The court did not rule on April Breitung's motion but issued an order confirming Kelsey was a dependent child pursuant to RCW 13.34.030(5) and that she remained "in the custody and supervision of DSHS...." CP 676-683. The order also provided DSHS authority to "make a temporary placement prior to hearing to contest" set for November 3, 2009. Neither that nor any other order designated DSHS to place Kelsey with the Phillipses. *Id.*

On October 2, 2009, Rosenthal authorized Kelsey to stay overnight with the Phillipses. CP 685. Two weeks later, on October 15, 2009, Rosenthal told Kelsey that DSHS would approve placement with the Phillipses. CP 690.

On October 16, 2009, Rosenthal visited the Phillipses home for the *first time*. CP 640-641. Betsy Phillips was present, Phillips was not. *Id.* Rosenthal cautioned Betsy about not leaving Phillips and Kelsey alone. *Id.* Rosenthal said she would meet with Andrew later but there is no evidence

that she did. *Id.* Kelsey moved into the Phillipses' home on the same day. CP 361 at ¶17. On the way home, Phillips made his first overt sexual overture to Kelsey. CP 988. Within a few days, Phillips engaged Kelsey in a sexual relationship. CP 989-999.

On October 21, 2009, in the dependency action related to Kelsey's father, the court ordered Kelsey to remain under DSHS's legal custody with authority to place Kelsey with a suitable person. CP 692-698. At that time, Rosenthal informed the court that Kelsey moved in with the Phillipses over the weekend. *Id.* CP 436 at 4:24-5:2. Once again, the court's order did not designate the Phillipses as "other suitable persons" or order DSHS to place Kelsey with the Phillipses. CP 692-698.

On November 3, 2009, April Breitung's contested placement motion was heard. CP 438-442. During that hearing, Rosenthal (a) did not report Vernier's concern about Kelsey's placement with Phillips and (b) did not inform the court that she had not contacted CCI regarding the conflict of Kelsey's placement with Phillips. *Id.* Rosenthal recommended placement with the Phillipses. CP 441 at 4:1-3. When the court asked Kelsey, in open court, whether she had a concern with her placement with the Phillipses, she predictably said no. CP 439-440.

On November 12, 2009, Betsy reported to Rosenthal that Phillips was having an affair and that he would be moving out of the home. CP 642-643. Betsy stated she wanted to keep Kelsey in her home. *Id.* On

November 18, 2009, Betsy reported to Rosenthal that Phillips was still residing in the family home with her and Kelsey. CP 643.

On November 24, 2009, Kelsey disclosed the sexual relationship with Phillips to her Celebrate Recovery group. CP 703. On November 25, 2009, she disclosed the relationship with Phillips to Betsy. CP 645.

On November 25, 2009, Betsy reported child sexual abuse to DSHS, identifying Kelsey as the child and Phillips as the perpetrator. CP 364-365 at ¶29. DSHS removed Kelsey from the Phillipses home and placed her at SKYS on the same date. *Id.;* CP 645.

On November 30, 2009, Phillips admitted to Dr. James at CCI that he became Kelsey's foster father and engaged Kelsey in a sexual relationship. CP 516 at 17:7-25. Dr. James fired Phillips. *Id.*; CP 705.

C. Kelsey Breitung's Unrebutted Expert Testimony.

To establish genuine issues of material fact regarding DSHS's and CCI's duties and breaches, Kelsey submitted the unrebutted expert testimony of Barbara Stone and Sharon Fenton in three areas.

1. DSHS Retained Placement Discretion Over Kelsey Breitung Who Remained At All Relevant Times In DSHS's Legal Custody.

Barbara Stone is the former Statewide Director of all foster and childcare licensing for the Children's Administration – a DSHS agency. CP 741 at ¶2). Her career with DSHS spanned over 33 years as a social worker and supervisor with CPS's Child Sexual Abuse Division. *Id.* She

reviewed DSHS files regarding Kelsey, including the Commissioner's orders from September 16, 2009, September 30, 2009, October 21, 2009 and November 3, 2009. CP 742 at ¶3.

After reviewing these orders, Ms. Stone opined that DSHS retained discretion to place Kelsey with relatives or other suitable adults. CP 744 at ¶16. Though April Breitung contested the placement with Phillips and the court overruled Breitung's objection, DSHS retained discretion at all times to change Kelsey's placement. *Id.* DSHS submitted no evidence to rebut Ms. Stone's testimony, and the fact DSHS had the authority is demonstrated by Rosenthal's approval of overnight visits and actual placement in the Phillipses' home without court approval.

Ms. Stone also attested that Kelsey's placement with Phillips was not emergent. CP 742 at ¶7. She was not in danger in the Phillipses placement. There were other individuals besides Phillips that DSHS considered. *Id.* While courts take an older child's placement preference into account, courts give substantial weight to a social worker's placement recommendations. CP 742 at ¶6. Nonetheless, a child's placement preference does not negate DSHS's duty to properly investigate and evaluate a potential placement. *Id.* Indeed, DSHS's duty to investigate placements is why courts rely heavily on social worker's placement recommendations. CP 744 at ¶15. DSHS offered no evidence to rebut this testimony.

2. Expert Barbara Stone Established That DSHS Withheld Material Information During The November 3, 2009 Contested Placement Hearing.

Ms. Stone attested that DSHS's placement of Kelsey with Phillips was a violation of its duties under State law, Washington Administrative Code, and DSHS policies. CP 742 at ¶4. In September 2009, when Kelsey's caseworker started considering placement with Phillips, the investigation of the caseworker needed to ensure the placement was safe and appropriate. CP 742 at ¶5. The process is delineated in DSHS's policies, which are based on State law. *Id.*

DSHS Policy 45274, Unlicensed Placements, required completion of the following steps **prior to placement**:

- A home study;
- Background checks (criminal);
- CAMIS or FAMLINK check (DSHS records);
- Assessment of the suitability of the placement resource; and
- Completion of a home visit.

CP 742-743 at ¶8.

According to Ms. Stone's unrebutted expert testimony, the home study, home visit and assessment of the suitability of the placement with the Phillipses were not completed prior to Kelsey's placement. CP 743 at ¶9. A "home study" requires a meeting with prospective "suitable persons," including an extensive interview of the prospective caregivers. CP 743 at ¶10; CP 756-763. The social worker must also review with the

prospective "suitable persons" the reasons for placement and the special needs of the child. CP 765.

Ms. Stone also attested that there were several obvious "red flags" regarding the placement with Phillips that were not adequately investigated and should have precluded placement in the Phillipses' home. CP 743-744 at ¶12. First, Rosenthal recognized Phillips' dual relationship as Kelsey's counselor and potential foster father was problematic. CP 744 at ¶13. As a consequence, Rosenthal represented to the court that *she* was going to check with CCI about the conflict related to Kelsey's placement with Phillips. *Id.* She did not do so, choosing instead to rely on Phillips' representation that there was no conflict. *Id.* Had Ms. Rosenthal contacted CCI, she would have learned that (1) Dr. James at CCI ordered Phillips to have no contact with Kelsey or any other individuals involved in her care and treatment and (2) that CCI prohibited current and former clients and counselors from having a relationship or living together. *Id.* Likewise, had Rosenthal fulfilled her duty to contact CCI regarding Phillips, CCI would have immediately learned that Phillips was still in contact with Kelsey. *Id.*

With regard to foreseeability of Kelsey and Phillips engaging in a sexual relationship, Ms. Stone testified that Rosenthal's warning to Betsy that she never leave Kelsey and Phillips alone is evidence that DSHS was aware of the high risk that improper contact would occur between Kelsey and Phillips. CP 744 at ¶14.

3. Expert Sharon Fenton Established That CCI Owed Kelsey A Continuing Duty To Prevent A Foreseeable Sexual Relationship Between Phillips And Kelsey.

Ms. Fenton attested that an employer's lack of proper emphasis on boundaries leads to improper personal relationships and conflicts of interest with patients. CP 1011 at ¶5. She attested that CCI has a duty to establish and enforce strict boundaries between clients and counselors and that CCI failed to train and monitor these boundaries with Phillips. CP 1011 at ¶5; CP 1012 at ¶8.

Ms. Fenton further opined that within the chemical dependency counseling profession, the prevalence of boundary issues is acute–a fact that chemical dependency agencies like CCI are always aware. CP 1011 at ¶5. Indeed, many chemical dependency professionals, such as Phillips, are recovering addicts and their ability to empathize and identify with clients may lead them to blur professional boundaries that must exist in a proper therapeutic relationship. *Id.* This understanding and knowledge of the need for stark professional boundaries is why chemical dependency agencies implement policies prohibiting conduct such as sharing personal cell phone numbers, meeting a client outside the agency, and giving a client rides. *Id.*

Ms. Fenton further attested that CCI did not follow best practices when it assigned Phillips to Kelsey's case. CP 1011-1012 at ¶6. In the substance abuse treatment context, assigning a male counselor to an

adolescent girl often results in boundary issues that can lead to unhealthy feelings and an inappropriate attachment to the male counselor. *Id.* This is especially true when the adolescent girl has experienced abuse and neglect. *Id.* If a treatment agency, like CCI, chooses to assign a male counselor to an adolescent girl with a history of abuse and neglect, the agency must at a minimum require significant training and supervision emphasizing clear boundaries. *Id.* Trainees, such as Phillips, must also receive extensive training in recognizing, reporting and managing a client's potentially flirtatious behavior. *Id.* CCI, however, provided Phillips little, if any, boundaries training and did not meet the minimal training and supervision requirements outlined by Ms. Fenton's unrebutted testimony. CP 897 at 102:22-24. For example, Ms. Fenton testified that Bernie Bell ("Bell") was assigned to be Phillips' clinical supervisor. CP 1116 at 75:13-16; CP 1122. However, at the time, Bell was also a CDPT. CP 1112 at 24:20-21.

Lastly, Ms. Fenton testified that it was her opinion that Phillips' violations of therapeutic boundaries while under the supervision of CCI, caused the sexual relationship that developed between Phillips and Kelsey. CP 1118 at 93:13-17.

V. ARGUMENT

A. This Court Reviews Summary Judgment Motions De Novo, Engaging In The Same Inquiry As The Trial Court.

1. General Principles.

An appellate court reviews summary judgment motion de novo. *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004); *see also Washburn v. City of Fed. Way,* 87906-1, 2013 WL 5652733 (Wash. Oct. 17, 2013). Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party—Kelsey Breitung. *Lybbert v. Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

2. The Extent Of CCI's Duty Depends on Disputed Facts, Precluding Summary Judgment.

"[S]ummary judgment is inappropriate where the existence of a legal duty depends on disputed material facts." *Afoa v. Port of Seattle,* 176 Wn.2d 460, 466, 296 P.3d 800 (2013) (citing *Sjogren v. Props. of Pac. Nw., LLC,* 118 Wn. App. 144, 148, 75 P.3d 592 (2003)); *Millson v. City of Lynden,* 174 Wn. App. 303, 312, 298 P.3d 141 (2013). *See also Washburn v. City of Federal Way,* 169 Wn. App. 588, 610-11 283 P.3d 567 (2012) ("duty arises from the facts presented."), *aff'd,* 2013 WL (Oct. 17, 2013). *See also Munich v. Skagit Emergency Communications Ctr.,* 161 Wn.

App. 116, 250 P.3d 491 (2011), *aff'd,* 175 Wn.2d 871, 288 P.3d 328 (2012) (denying summary judgment because genuine issue of material fact regarding existence of special relationship duty present).

In *Washburn*, this Court recently noted that whether a defendant owes a duty to a plaintiff sometimes requires a resolution of certain factual disputes.[6] *Id.* at 610-611. In such cases, the issue of duty does not present a pure question of law; rather, the court must determine whether there is sufficient evidence produced from which a jury could find facts giving rise to a duty. *Washburn,* at 611.[7]

Here, CCI agreed it owed Kelsey a duty while she was a client of the agency but claimed that its duty to Kelsey did not extend beyond the last counseling session.[8] But CCI's ongoing duty to Kelsey depends on the vigorously disputed material fact of foreseeability.

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[6] "(citing *Munich v. Skagit Emergency Commc'ns Ctr.,* 161 Wn. App. 116, 121, 250 P.3d 491, *aff'd* 175 Wn.2d 871 (2012)). *Torres v. City of Anacortes,* 97 Wn. App. 64, 75, 981 P.2d 891 (1999); *Yankee v. APV North America, Inc.,* 164 Wn. App. 1, 3-10, 262 P.3d 515 (2011) ("insufficient evidence to create a material issue of fact that APV had a duty to warn of asbestos exposure"); *Borden v. City of Olympia,* 113 Wn. App. 359, 370, 53 P.3d 1020 (2002) (facts sufficient to support finding that City actively participated in a project, and, if such finding is made, the City owed a duty of due care).

[7] Contrary to the court's reasoning in this case, "Courts overwhelmingly recognize that foreseeability is not itself sufficient to create a duty and that a variety of other considerations come into play." Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause,* 44 Wake Forest L. Rev. 1247, 1275 (2009).

[8] "CCI had no duty to protect [Kelsey] from the sexual relationship that started with Andrew Phillips some six weeks after the counseling relationship between them had been terminated...." Verbatim Report of Proceedings at 3:14-18.

The Superior Court mistakenly ruled that "some two months later, roughly, unbeknownst to CCI [Kelsey] ends up asking for and being placed with the Phillips, with Andrew, after a court hearing. That was not foreseeable." Verbatim Report of Proceedings at 49:6-8. But CCI's liability is not based on the foreseeability of foster home placement. It is based on the foreseeability of Phillips engaging Kelsey in a sexual relationship. Ms. Fenton's unrebutted expert testimony was that it was foreseeable that Phillips' would not heed CCI's instruction to end contact with Kelsey given the multiple violations of CCI's policies and ethical codes. Those boundary violations in combination with Beitler's complaint of a sexualized relationship made it imperative for CCI to ensure that Kelsey would not be subjected to harm by Phillips after Kelsey was discharged. Ms. Fenton also testified that, in her opinion, the possibility of sexual contact between a counselor and a young, vulnerable teenage client in these circumstances is wholly foreseeable.

CCI's decision not to discipline Phillips, but rather terminate Kelsey from their counseling program was egregious. In doing so, CCI failed to hold Phillips responsible for clear boundary violations and failed to recognize his conduct as an obvious demonstration that he could not (or would not) follow important rules and boundaries.

Kelsey submitted evidence that, at a minimum, raised a genuine issue of material fact of whether the sexual abuse by Phillips was a foreseeable harm.

B. Kelsey Submitted Sufficient Evidence To Establish A Genuine Issue Of Material Fact As To Her Negligent Hiring, Supervision, And Retention Claims Against CCI.[9]

1. CCI Had The Duty To Protect Kelsey From Phillips' Sexual Contact With Her.

An employer is liable for negligent supervision of an employee if the employer knew, or in the exercise of reasonable care should have known, that the employee presented a risk of danger to others or was otherwise unfit for the position. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). A negligent supervision claim requires showing: (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to others; (3) the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) that the employer's failure to supervise was a proximate cause of injuries. *Briggs v. Nova Services*, 135 Wn. App. 955, 966-67, 147 P.3d 616, 622 (Div. 3 2006) (no evidence that employee presented risk of harm to other employees).

Negligent supervision creates a duty to control an employee for the protection of a third person, even when the employee is acting outside the

[9] Irrespective of whether the claims are based on negligent hiring, supervision, and retention claims, Kelsey collectively refers to negligent supervision to define to who and under what circumstances the duty applies.

scope of employment." *Rodriguez v. Perez*, 99 Wn. App. 439, 451, 994 P.2d 874, *rev. denied*, 141 Wn.2d 1020, 10 P.3d 1073 (2000)(citing *Niece*, 131 Wn.2d at 48).[10]

> With respect to negligent supervision, an employer may be held liable for acts beyond the scope of employment because of its prior knowledge of the dangerous tendencies of its employee. *Simmons v. United States,* 805 F.2d 1363 (9th Cir.1986); *La Lone v. Smith,* 39 Wn.2d 167, 171, 234 P.2d 893 (1951); Restatement (Second) of Agency § 213 (1958); *see also* Annot., 34 A.L.R.2d 372 (1954); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser on Torts* § 33, at 201–03 (5th ed. 1984). With respect to the failure to warn, liability may be premised on a special relationship existing between the defendant and either the third party or a foreseeable victim of the third party's conduct. *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983); *Restatement (Second) of Torts* § 315 (1965).

Does 1-9 v. Compcare, Inc., 52 Wn. App. 688, 694-95, 763 P.2d 1237, 1241 (1988); *see also Hertog v. City of Seattle,* 138 Wn.2d 265, 282-83 979 P.2d 400 (1999) ("there remains a genuine issue of material fact as to whether defendants breached a duty to control Krantz so as to protect others from the risk of harm he posed.")

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[10] Many courts have applied respondeat superior liability to health care providers "stepping aside" from the master's duties to form a sexual relationship with a patient. Applying Washington law, the 9th Circuit in *Simmons v. United States,* 805 F.2d 1363 (9th Cir 1986), held "Washington agency law has long held that a master cannot excuse himself when...an unauthorized act is done in conjunction with other acts which are within the scope of duties the employee is instructed to perform." However, in *Kuehn v. White,* 24 Wn. App. 274 (1979), Washington courts interpreted the rule differently. "The master will not be held liable as a matter of law even though the employment situation provided the opportunity for the servant's wrongful acts or means for carrying them out." In *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993), following *Simmons*, the court affirmed the *Kuehn*-rule that a tort committed by an agent, even if committed while engaged in the employment of the principal, is not attributable to the principal if it emanated from a wholly personal motive of the agent and was done to gratify solely personal objectives or desires of the agent."

A duty to protect against foreseeable harm is not determined by the exact nature of the harm ultimately experienced by the plaintiff, but rather by whether that harm "fell within a general field of danger which should have been anticipated." *McLeod v. Grant Cy. Sch. Dist. 128,* 42 Wn.2d 316, 321, 255 P.2d 360 (1953); *J.N. v. Bellingham Sch. Dist.,* 74 Wn. App. 49, 58 871 P.2d 1106 (1994); *see also Rikstad v. Holmberg,* 76 Wn.2d 265, 269, 456 P.2d 355 (1969). All that is required on summary judgment is evidence that the [defendant] knew ***or in the exercise of reasonable care should have known of the risk*** that resulted in the harm's occurrence."

Foreseeability is a question of fact for a jury unless the circumstances of the injury "are so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod,* at 323, 255 P.2d 360. *See also Shepard v. Mielke,* 75 Wn. App. 201, 206, 877 P.2d 220 (1994); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998).

It is undisputed that in August 2009, before discharging Kelsey, CCI knew Phillips had violated therapeutic boundaries. It is also undisputed that in August 2009 Kelsey's guardian, Rose Bietler, complained about the sexual nature of the relationship between Kelsey and Phillips. Ms. Fenton testified that within the chemical dependency industry, it is foreseeable a personal relationship with a client may become

sexual and harmful to the client. Indeed, that is the reason agencies implement and emphasize the need for clear boundaries and have policies prohibiting non-therapeutic contact outside the agency setting. Ms. Fenton also testified that Phillips received minimal, if any, training on proper therapeutic boundaries. She also testified that CCI improperly supervised Phillips by assigning Bell, a fellow CDPT, as his clinical supervisor.

Moreover, it was foreseeable—indeed, undisputed, based on Ms. Fenton's expert testimony—that despite CCI discharging Kelsey as a client, Phillips' dangerous influence, evidenced by the violations already known to have occurred, would continue. Phillips' dangerous tendencies were not only known to CCI, but emboldened by the laissez-faire supervision and training of Phillips.

2. CCI Owed Kelsey Breitung A Continuing Duty After They Discharged Her.

CCI maintains it owed no duty to protect Kelsey from the sexual relationship because the relationship did not turn sexual until after she was discharged from CCI. This argument misstates the law and CCI's ongoing duty to a former patient with whom it had a special relationship.

First, the laws that regulate chemical dependency professionals prohibit a sexual relationship with a client until two years after termination of the healthcare relationship in or out of the healthcare setting:

> (1) A health care provider shall not engage, or attempt to engage, in sexual misconduct with a current patient, client, or key party, inside or outside the health care setting.

> Sexual misconduct shall constitute grounds for disciplinary action. Sexual misconduct includes but is not limited to:
>
> (a) Sexual intercourse;
>
> (b) Touching the breasts, genitals, anus or any sexualized body part except as consistent with accepted community standards of practice for examination, diagnosis and treatment and within the health care practitioner's scope of practice;
>
> (c) Rubbing against a patient or client or key party for sexual gratification;
>
> (d) Kissing;
>
> (e) Hugging, touching, fondling or caressing of a romantic or sexual nature;
>
> ....
>
> **(3) A health care provider shall not engage, or attempt to engage, in the activities listed in subsection (1) of this section with a former patient, client or key party within two years after the provider-patient/client relationship ends.**

WAC 246-16-100 (emphasis added).

CCI's own policies recognize the same prohibition by informing clients of their right to be protected from sexual abuse **at all times**. This protection is so significant that even after two years, having a sexual relationship with a former client violates the heath care provider duty under some circumstances:

> (4) After the two-year period of time described in subsection (3) of this section, a health care provider shall not engage, or attempt to engage, in the activities listed in subsection (1) of this section if:
>
> (a) There is a significant likelihood that the patient, client or key party will seek or require additional services from the health care provider; or

> (b) There is an imbalance of power, influence, opportunity and/or special knowledge of the professional relationship.

WAC 246-16-100.[11]

> While CCI attempts to shift blame to Kelsey, it cannot do so:
>
> (6) Patient, client or key party initiation or consent does not excuse or negate the health care provider's responsibility.

WAC 246-16-100.

CCI cited *Kaltreider v. Lake Chelan Comm. Hosp.*, 153 Wn. App. 762, 224 P.3d 808 (2009), contending that it did not owe a duty to protect Kelsey from an inappropriate sexual relationship with Phillips post-discharge. The facts of *Kaltreider* are distinguishable. In *Kaltreider*, the adult-plaintiff was an inpatient resident at an alcohol dependency treatment center when a registered nurse initiated a sexual relationship with her. *Id.* at 763. At issue was whether Kaltreider was owed a duty under the special relationship exception recognized in *Niece* and if so whether the harm from the sexual contact was foreseeable. *Kaltreider*, 153 Wn. App. at 765.

Kaltreider reiterated the long-held rule that while "a person has no legal duty to prevent a third party from intentionally, harming another," there are exceptions. *Id.* (citing *Niece*, 131 Wn.2d at 43). Specifically, "courts have recognized two types of 'special relationships' that are

[11] The circumstances that would have prohibited this relationship even after two years are present in this case.

exceptions to this general rule. *Kaltreider*, 153 Wn. App. at 765. A duty arises where, '(a) a special relation exists between the [defendant] and the third person which imposes a duty upon the [defendant] to control the third person's conduct or (b) a special relation exists between the [defendant] and the other which gives the other a right to protection.'" *Kaltreider*, 153 Wn. App. at 765 (quoting *Niece*, 131 Wn.2d at 43.); *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 175 Wn. App. 517, 525-26, 307 P.3d 730 (2013) (citing *Niece*, 131 Wn.2d at 43; *Restatement (Second) of Torts* § 315(a) & (b)).[12].

Kaltreider unsuccessfully argued that she was owed a duty under exception (a). Relying heavily on *Niece*, the court found no evidence that Kaltreider was a vulnerable adult and, therefore, was not owed a duty of protection from the nurse's sexual contact. But here there is evidence that Kelsey was vulnerable when she was in treatment and at discharge. Unlike Kaltrieder, Kelsey was a minor. Moreover, CCI was aware that Kelsey had significant mental health and behavioral issues on top of chemical dependency issues. She was the victim of recent physical and sexual abuse, had made several suicide attempts and was homeless. At the time of

[12] "Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts. *Restatement (Second) of Torts* § 281 cmts. c, d (1965). This duty requires actors to avoid exposing another to harm from the foreseeable conduct of a third party. *Restatement* § 302." *Washburn*, 87906-1, 2013 WL 5652733.

her assessment, based on this information, it was clear to CCI that Kelsey was at high risk for future physical and sexual abuse. Kelsey submitted sufficient evidence to permit a jury to decide whether she was "vulnerable" and, therefore, entitled to protection beyond discharge.

As a chemical dependency agency, CCI was aware of the acute prevalence of boundary issues in its industry. Indeed, Ms. Fenton testified that the primary purpose of maintaining boundaries is to avoid sexual relationships between therapists and clients. Moreover, unlike Kaltrieder, who was discharged because she no longer needed treatment, Kelsey was still in great need of treatment at the time of discharge.

CCI also relied on *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 184 P.3d 646 (2008), arguing that it does not owe Kelsey a duty after she was discharged. In that case, two *adult* women were psychiatric in-patients at Sacred Heart Medical Center. A certified nursing assistant, Judici, worked on the ward. Sacred Heart was unaware that Judici made inappropriate sexual comments, hugged and kissed the women while they were on his ward. They were discharged and Judici abandoned his job. A few days after the women's release, the three met at a bar and left to have group sex. The hospital was granted summary judgment because "there is no showing here that Sacred Heart knew or should have known that Mr. Judici was a danger to its patients."

That is not the case here, where CCI had clear knowledge that Phillips repeatedly crossed boundaries with Kelsey before she was discharged. This includes receiving Beitler's report that Kelsey was sexually interested in Phillips. Moreover, unlike the *Smith* plaintiffs, Kelsey was a minor.

CCI had a special relationship **with Kelsey** which gave her a right to CCI's protection against foreseeable sexual misconduct. *N.K.,* 175 Wn. App. at 526. In this type of special relationship, unlike the relationships in *Kaltreider* and *Smith*, Kelsey does not need to show CCI's prior specific knowledge that Phillips had propensities to sexually abuse children. *N.K.,*175 Wn. App. at 526.

More analogous to the facts of this case is *Rucshner v. ADT, Sec. Systems, Inc.*, 149 Wn. App. 665, 204 P.3d 271 (2009). In *Rucshner,* a security system "authorized dealer," Robinson, made a sales call at plaintiff's home. He met the 14-year-old plaintiff to whom he became attracted. Two months later, after wooing the young girl, their relationship became sexual.

The suit for negligent hiring against the security company, the authorized dealer, and the parent company was based on the fact none of them did a criminal background check. Had any of them done so, the perpetrator would not have been sent to plaintiff's home on a sales call because of his record. In reversing summary judgment, Division II held:

> As to the factual inquiry, a cause in fact refers to the actual, "but for," cause of injury, which involves a determination of some physical connection between an act and an injury that is generally left to the jury. *Schooley*, 134 Wn.2d at 478, 951 P.2d 749.
>
> ....
>
> **Whether Robinson's job or duties facilitated or enabled him to rape MH is a question of fact for the jury, not an issue of law for the court, in spite of the legal causation prong of proximate cause.**

Rucshner, 149 Wn. App. at 686-88 (emphasis added).

Here, it is a question of fact whether CCI's negligent hiring, supervision, training and retention of Phillips 'enabled or facilitated" the foreseeable consequence of his pattern of violating ethical boundaries and becoming enmeshed with Kelsey: a prohibited sexual relationship.

Kelsey need only establish CCI's knowledge of the "general field of danger" within which the harm occurred. *Id.* (citing *McLeod,* 42 Wn.2d at 321). Stated another way, the harm must be reasonably perceived as within the general field of danger which should have been anticipated. Foreseeability is a question for the jury unless the circumstances of the inquiry "'are so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *Shepard,* 75 Wn. App. at 206 (quoting *McLeod,* 42 Wn.2d at 323); *M.H. v. Corp. of Catholic Archbishop of Seattle,* 162 Wn. App. 183, 193, 252 P.3d 914, *review denied,* 173 Wn. 2d 1006 (2011). "[T]he focus is not on where or when the harm occurred, but on whether the [defendant] negligently caused the

harm by placing its agent into association with the plaintiffs when the risk was, or should have been, known." *C.J.C. v. Corporation of Catholic Bishop of Yakima,* 138 Wn.2d 699, 727, 985 P.2d 262 (1999). In *C.J.C.,* the "special relationship giving rise to a duty to prevent intentional harm need not be 'custodial or continuous,' but arises where ability to supervise is present and necessity for such supervision is or should be known." *Id.* at 724-725 (citing *Petersen v. State*, 100 Wn.2d 421, 428-29 (1983)(psychiatrist-patient relationship gives rise to duty to take reasonable precautions to protect all persons foreseeably endangered by mental patient's release into community)).

In *N.K.,* just as CCI argues here, defendants contended they did not owe the victim a duty of protection because they did not possess prior specific knowledge that the tortfeasor posed a threat to the boys he molested. *N.K.,* at 525-26. The court rejected that argument and concluded genuine issues of material fact existed to defeat summary judgment on the church's liability. *Id.* The same should hold true here.

C. DSHS Is Liable For Negligently Investigating And Placing Kelsey With Phillips, And Is Not Entitled To Immunity.

There is no question that DSHS owed Kelsey a duty to protect her from sexual abuse by Phillips or anyone else. Washington's Supreme Court expressly recognizes an implied cause of action for negligent investigation of child abuse allegations by DSHS under RCW 26.44.030.

Tyner v. Dep't of Soc. & Health Servs., 141 Wn.2d 68, 1 P.3d 1148 (2000). A claim for negligent investigation exists when the state conducts a biased or incomplete investigation that results in a harmful placement decision. *M.W. v. Dep't of Social and Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). To prevail, the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement. *Id.*, at 597, 601. "Victims of child abuse are certainly within the class for whose ['especial'] benefit the legislature enacted the reporting statute, as this court has acknowledged." *Beggs v. Dep't of Social and Health Services,* 171 Wn.2d 69, 77, 247 P.3d 421 (2011).

1. RCW 4.24.595 Does Not Apply To This Negligent Investigation Claim.

DSHS claimed, and the superior court concluded, that RCW 4.24.595(2) applies retroactively to immunize DSHS from the negligent investigation that led to Kelsey's placement in the Phillips home. This misapplication of the statute tortures it beyond recognition and violates both the legislature's intent and basic principles of statutory construction. As the plain language and the legislative history demonstrate, RCW 4.24.595 [13] (entitled "Liability immunity--**Emergent placement investigations** of child abuse or neglect--Shelter care and other

[13] Attached as Appendix 2.

dependency orders") does not apply to this non-emergent, negligent investigation claim.

When interpreting a statute, the court's objective is to determine the legislature's intent. *E.g., State v. Ervin*, 169 Wn. 2d 815, 820, 239 P.3d 354 (2010). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face," the court "give[s] effect to that plain meaning", *id.* (internal quotations omitted); and its inquiry is at an end. *In re Det. of Boynton*, 152 Wn. App. 442, 452, 216 P.3d 1089 (2009).[14]

In determining the plain meaning of a provision, the Court looks to the statute's text and "related provisions." *Ervin,* at 820. "Each provision must be read **in relation to the other provisions**, and we construe the statute as a whole." *Boynton*, at 452 (emphasis added). The court also looks to the context of the statute where that provision is found, and the statutory scheme as a whole. *Ervin,* at 820. After this inquiry, if the statute is susceptible to more than one reasonable interpretation, it is ambiguous, and the Court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning the legislative intent. *Ervin,* at 820.

[14] This is true even in a retroactivity analysis. *In re Estate of Haviland*, 177 Wn.2d 68, 75-76, 301 P.3d 31 (2013) ("'The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'")

In enacting RCW 4.24.595(2), the legislature wished narrowly to free DSHS caseworkers from tort liability for acts or omissions in **emergent** placement investigations of child abuse or neglect. HB2510-Digest; SE-Digest. The Bill Digests for subsection 2 both state, with regard to immunity, "Provides immunity from liability under **certain** circumstances, to governmental entities, and their officers, agents, employees, and volunteers, in tort for acts or omissions **in emergent placement** investigations of child abuse or neglect." HB2510-Digest; HB2510-S.E.-Digest (emphasis added). The Bill Analysis, House and Senate Bill Reports all make clear that the entire purpose of the statute was to ease the "dilemma" of caseworkers in "emergent placement investigations": "The bill's narrow exception creating a gross negligence standard in emergent placement investigations is agreed to because caseworkers need to be able to act quickly in these difficult situations." House Bill Report, ESHB 2510. *See also* House Bill Report HB2510 (same); Bill Analysis, House Judiciary Committee, HB2510 ("Governmental entities, and their officers, agents, employees, and volunteers, are not liable for acts or omissions in **emergent placement investigations** of child abuse or neglect unless the investigation was done

with gross negligence of whether there was reason to believe the child was in danger or neglect."); Senate Bill Reports (same).[15]

DSHS's retrospectively analysis is irrelevant, and far beyond the issues in this case. Nevertheless, in the context where RCW 4.24.595 (effective **June 7, 2012**, well after DSHS's negligent conduct in 2009) applies, it is presumed to apply prospectively, absent contrary legislative intent. *In re Estate of Haviland,* 177 Wn.2d 68, 75, 301 P.3d 31 (2013). "A statute operates prospectively when the precipitating event for the application of the statute occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute." *Haviland,* at 75 (quotations omitted). To determine what the "precipitating or triggering event" is, the Court "look[s] to the subject matter regulated by the statute and consider[s] its plain language." *Id.* The plain language of RCW 4.24.595, reading its provisions together, declares that the precipitating event is "acts" by DSHS and its employees "performed to comply with" orders relating to emergent placement investigations of child abuse or neglect. "Emergent placement investigations are those conducted prior to a shelter care

[15] DSHS cited *Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.,* 113 Wn.2d 123, 125, 776 P.2d 666 (1989), but that case has no bearing here, as it addresses **common law** immunity of an expert witness (an engineer), who was sued for allegedly negligent opinions on damages in prior litigation. Kelsey is not suing DSHS or caseworker Rosenthal for expert opinions, and DSHS is not defending its employees on grounds that they are immune from liability for negligent opinions.

hearing under RCW 13.34.065." It is this conduct, i.e., the "emergent placement investigation" that subsection (2) addresses. DSHS is "not liable" only for acts performed to comply with courts orders (including shelter care and other dependency orders) relating to emergent placement investigations, occurring on or after June 7, 2012.[16]

Since the legislature enacted RCW 4.24.595 to resolve the "narrow" "dilemma" of caseworkers in emergent placement investigations, to apply the statute retrospectively and out of context as DSHS urges, would allow this limited statutory exception to swallow the rule that governmental entities are no longer immune from negligence suits, and grant a broad governmental immunity the legislature never intended.

[16] DSHS also argued in reply that the statute should be applied retroactively on the ground that it is remedial. CP 1065-1067. While the presumption of prospectivity can be overcome if a statute is remedial, *State v. T.K.*, 139 Wn.2d 320, 332-33, 987 P.2d 63 (1999), this statute is not remedial. "A remedial statute is one that relates to "practice, procedures and remedies and is applied retroactively when it does not affect a substantive or vested right." *Pettis v. State*, 98 Wn. App. 553, 561, 990 P.2d 453 (1999). "A right is a legal consequence deriving from certain facts, while a remedy is a procedure prescribed by law to enforce a right." *Id.* (internal quotations omitted). *See also State v. Parmelee,* 172 Wn. App. 899, 909, 292 P.3d 799 (2013) ("A statute is remedial when it ... does not affect a substantive right.") As noted, in enacting RCW 4.24.595(2), the legislature narrowly wished to free DSHS caseworkers from tort liability for acts or omissions in **emergent** placement investigations of child abuse or neglect. HB2510-Digest; SE-Digest. "The distinction between remedial statutes, substantive statutes, retroactivity and prospectivity is frequently blurred." *Id.*

D. Kelsey Is Not Judicially Estopped From Prosecuting A Sexual Abuse Claim Based On Her Statements In Court On November 3, 2009.

The Superior Court ruled that an additional basis for granting summary judgment was that Kelsey "perjured herself" and "flat out lied" in her statements to the court. The Superior Court's ruling is both factually incorrect and misguided as a matter of public policy.

Kelsey's comments during the November 3, 2009 hearing were that she was doing well in her placement, participating in Celebrate Recovery, and feeling positive and supported by the Phillips. This was neither perjury nor a lie. She viewed the Phillipses as her perfect family. Even after the abuse was disclosed, she wanted to keep living with Betsy. They were nurturing, supportive, and on many levels, cared about Kelsey in a manner no one had for a long time.

Washington courts have long recognized the complex emotional dynamics of child sexual abuse. Courts admit expert testimony explaining child-victim statements that might appear to be false or even perjurious in other circumstances. In *State v. Petrich*, 101 Wn.2d 566, 683, P.2d 173 (1984), the court published its first case on the phenomena of "delayed reporting." The expert in *Petrich* testified that more often than not children delay reporting child abuse. The length of the delay correlates with the relationship between the abuser and the child. The testimony is permitted because the idea that a child would endure repeated acts of abuse and

never tell anyone is a concept unfamiliar to jurors. *State v. Graham*, 59 Wn. App. 418, 798 P.2d 314 (1990); *State v. Holland*, 77 Wn. App. 420, 891 P.2d 49 (1995); *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984); *State v. Sullivan*, 69 Wn. App. 167, 847 P.2d 953; *State v. Landrum*, 66 Wn. App. 791, 832 P.2d 1359 (1992); *State v. Cleveland*, 58 Wn. App. 634, 794 P.2d 546 (1990). The essence of Kelsey's conduct in this case is the universally recognized phenomena of delayed reporting.

A related dynamic recognized by Washington courts is the "recantation phenomena," where victims actually change their testimony and retract their statements of abuse. *State v. Madison,* 53 Wn. App. 754, 770 P.2d 662, *rev. denied*, 113, Wn.2d 1002 (1989); *State v. Young*, 62 Wn. App. 895, 802 P.2d 829 (1991); *Carlton v. Vancouver Care LLC,* 155 Wn. App. 151, 231 P.2d 1241 (2010); *see also State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983) (not error to use an expert to explain this "superficially bizarre behavior"). Courts have come to understand the unique and conflicting emotions in play when a child is sexually abused by an otherwise loving, caring adult.

In *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), the Supreme Court refused to allow a school district to allocate fault to a 13-year-old student sexually abused by a teacher, though

the plaintiff had arguably had lied during the district investigation of the relationship. The Supreme Court held:

> If, indeed, the District was thwarted in its efforts to ascertain if Leslie Christensen was abused by her teacher, that fact would likely be relevant on the issue of its alleged negligence.
>
> ....
>
> The child, in our view, lacks the capacity to consent to the sexual abuse and is under no duty to protect himself or herself from being abused.

Christensen at 71, 72. In other words, the court recognized that the adults in positions of authority are responsible for the abuse, not the children who are enticed and exploited to accept the relationship.

It is against the important societal goal of preventing child sexual abuse that the judicial estoppel argument must be balanced. Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in one court proceeding and later seeking an advantage by taking a clearly inconsistent position in another. *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)(citing *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). The doctrine seeks to preserve respect for judicial proceedings and to avoid inconsistency, duplicity and waste of time. *Id.*

Three core factors guide a trial court's determination whether to apply the judicial estoppel doctrine: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial

acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.*, at 538-39. These three factors are not an exhaustive formula, and additional considerations may guide the decision, including, e.g., whether a party's prior position was based on inadvertence or mistake. *Id.*

Kelsey's position in this lawsuit–that Phillips sexually abused her–is not inconsistent with her position at the hearing that things were going well at his home. She was involved in Celebrate Recovery, a faith-based program, attending school, and contemplating continuing counseling at Betsy's urging. She was extremely attached to Betsy as well as Phillips. Kelsey was similarly situated to hundreds of child sexual abuse victims who do not disclose abuse because it means losing the good in a familial relationship, along with the bad.

The trial court ignored the most analogous case applying judicial estoppel. *Miller v. Campbell*, 137 Wn. App. 762 (2007). *Miller* involved a sexual abuse victim who did not list a potential claim against his stepfather's estate in his bankruptcy proceeding. The abuse occurred from 1975 to 1984, plaintiffs ages 11 to 18. He filed bankruptcy in 1998 and did not list the claim because he was unaware of the seriousness of his

injuries. He filed a lawsuit against the estate of his abuser in 2003. The trial court dismissed his suit on the grounds he had a duty to list the potential claim in 1998 and was therefore estopped. The Court of Appeals reversed the dismissal.[17]

In affirming the Court of Appeals, the Supreme Court explained the ruling as follows:

> Miller appealed the order of dismissal, and the Court of Appeals reversed the trial court's decision. The court affirmed that Miller had a duty to disclose his potential claim against Campbell in the bankruptcy proceedings. *Miller v. Campbell*, 137 Wn. App. 762, 771, 155 P.3 154 (2007). However, the court went on to hold that his claim should not be barred by judicial estoppel because the unique nature of childhood sexual abuse "'may render the victim *unable* to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later.'" *Id.* at 772-73, 155 P.3d 154 (quoting *Cloud v. Summers*, 98 Wn. App. 724, 735, 991 P.2d 1169 (1999)). The court noted that a victim of abuse is effectively under a "'disability'" and that courts should not charge the victim with knowledge of the tort claim until the disability is lifted. *Id.* (quoting *Cloud*, 98 Wn. App. at 735, 991 P.2d 1169).

The child sexual abuse dynamic at work in *Miller* was the long process by which many child sexual abuse victims come to recognize the impact of the abuse. In this case, the dynamic is the widely, if not

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[17] At the Supreme Court in *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008), the debtor had substituted the trustee in bankruptcy as plaintiff. The court held the trustee was a different party and not judicially estopped from recovery and otherwise approved the COA holding.

universally, recognized delay in reporting by child abuse victims because of the complex emotional dynamics of the relationship.

At the November 3, 2009 hearing, Kelsey wanted to stay with the Phillipses despite the fact Phillips had already started having sexual contact with her. She did not stand to "gain" anything, but she was desperate to keep intact her new found "family" that she patently idealized.

This is not a situation where application of judicial estoppel is just or equitable.

E. The Court's November 3, 2009 Ruling Allowing Kelsey To Continue Residing With Phillips Was Not A Superseding Cause That Absolves DSHS Or CCI From Liability.

The Superior Court erred in holding that a November 3, 2009 ruling permitting Kelsey's continued placement with Phillips was a superseding cause, absolving CCI and DSHS from liability.

1. The November 3, 2009 Ruling Did Not Supersede CCI's Negligence.

Proximate cause is generally a factual question which can be decided as a matter of law only if reasonable minds could not differ. *M.H. v. Corp. of the Catholic Archbishop of Seattle,* 162 Wn. App. 183, 194 (2011) (citing *Sherman v. State*, 128 Wn.2d 164, 183-84 (1995)). Proximate cause includes two elements: cause in fact and legal cause. Cause in fact is a jury question, established by showing that "but for" the defendant's actions, the claimant would not have been injured. *Tyner v.*

Dep't of Soc. & Health Servs., 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). "Cause in fact, or 'but for' causation, refers to 'the physical connection between an act and an injury.'" *Ang v. Martin,* 154 Wn.2d 477, 482, 114 P.3d 637 (2005) (quoting *Hartley,* 103 Wn.2d at 778, 698 P.2d 77).

Legal cause depends on "'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Schooley,* 134 Wn.2d at 479 (quoting *King v. City of Seattle,* 84 Wn.2d 239, 250, 525 P.2d 228 (1974)); *Minahan v. West. Wash. Fair Assoc.,* 117 Wn. App. 881, 888, 73 P.3d 1019 (2003). Legal cause generally is a question for the court. *Kim v. Budget Rent A Car Sys., Inc.,* 143 Wn.2d 190, 204, 15 P.3d 1283 (2001); *Minahan,* 117 Wn. App. at 888. Legal causation is grounded in the determination of how far the consequences of a defendant's act should extend, and focuses on whether the connection between the defendant's act and the result is too remote or inconsequential to impose liability. *Hartley,* 103 Wn.2d at 779.

WPI 15.01 provides "[t]he term 'proximate cause' means a cause which in a direct sequence unbroken by any superseding cause, produces the [event] complained of and without which such [*event*] would not have happened." *See Christen v. Lee,* 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); *Hartley,* 103 Wn.2d at 768.

WPI 15.05 states:

> A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an *[injury]*.
>
> If you find that [the] [a] defendant was negligent but that the sole proximate cause of the *[injury]* was a later independent intervening *[cause]* ... that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the *[injury]*.
>
> ....
>
> It is not necessary that the sequence of events or the particular resultant *[injury]* be foreseeable. It is only necessary that the resultant *[injury]* fall within the general field of danger which the defendant should reasonably have anticipated.

See Qualls v. Golden Arrow Farm, 47 Wn.2d 599, 288 P.2d 1090 (1955); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.05 (6th ed.).

CCI contends that Phillips sexual relationship with Kelsey after her discharge from treatment was an unforeseeable superseding cause because it occurred after Phillips petitioned to become Kelsey's foster parent. But "[i]t is not the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant." *Jones v. Leon*, 3 Wn. App. 916, 924 (1970); *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 480 (1991). While CCI may not have anticipated that the sexual relationship would occur in the context of Phillips being Kelsey's

foster father, the risk of him continuing contact with Kelsey and engaging her in a sexual relationship was well within the "ambit of hazards" or "general field of danger" covered by the duty imposed upon CCI.

Further, the court's approval of DSHS's placement in November 2009 did not cause the sexual relationship; the relationship was ongoing at the time of the ruling affirming placement.

2. DSHS Negligently Placed Kelsey With Phillips Well Before November 3, 2009.

In an attempt to create a supervening cause, DSHS misrepresents how Kelsey came to be placed – both legally and factually – with the Phillips. Legally, DSHS had the discretion to place Kelsey with Phillips or anyone else during the entire time period. The court orders consistently placed Kelsey, a dependent child, under the custody and supervision of DSHS. DSHS could temporarily place her with relatives and suitable persons. She went on authorized overnights with three other potential suitable persons in August and September.

Babcock v. State is dispositive of DSHS's argument. *Babcock* explains the purpose of a dependency proceedings is to review whether a child continues to be dependent and unable to return home. It is not to determine placement. A case worker is entitled to qualified immunity for a placement decision if she followed the law and the agency directives and policies. In order for qualified immunity to apply, the case worker must

(1) carry out the statutory duty; (2) according to procedures dictated by statutes and superiors; and (3) act reasonably. *Babcock v. State*; *Taggart v. State*, 118 Wn.2d 195 (1992) (qualified immunity standard also applies to parole officers carrying out their supervision duties). Ms. Rosenthal's investigation of placement does not meet the requirements for qualified immunity.

Finally, and importantly, the individual worker's qualified immunity does not apply to the State:

> The existence of some tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility that those injured by DSHS's negligence can recover. It will also encourage caseworkers to attend carefully to their legal obligations without allowing the threat of personal liability to foster undue timidity in the performance of their duties.

Babcock, 116 Wn.2d at 622. The holdings of *Babcock* have been affirmed in *Tyner v. State* and *Gilliam v. DSHS,* 89 Wn. App. 569,950 P.2d 20, *review denied*, 135 Wn.2d 1015,960 P.2d 937 (1998).

3. DSHS Failed To Disclose All Material Information To The Court On November 3, 2009.

In a lawsuit based on negligent investigation and placement, a caseworker and DSHS may be liable for a parent's separation from a child, even when the separation is imposed by court order, if the court has been deprived of a material fact due to the caseworker's faulty investigation. *Tyner,* 141 Wn.2d at 86. Otherwise, court intervention operates as a

superseding intervening cause that cuts off the caseworker's liability. *Tyner,* 141 Wn.2d at 88.

> A material fact is one that would have changed the outcome of the court's decision. *Tyner v. Dep't of Social & Health Servs.,* 92 Wn. App. 504, 518, 963 P.2d 215 (1998), *rev'd on other grounds,* 141 Wn.2d 68, 1 P.3d 1148 (2000). **The question of materiality goes to the issue of cause in fact and is therefore a question for the jury unless reasonable minds could reach but one conclusion.** *Estate of Jones v. State,* 107 Wn. App. 510, 517-18, 15 P.3d 180 (2000), *review denied,* 145 Wn.2d 1025, 41 P.3d 484 (2002).

Petcu v. State, 121 Wn. App. 36, 56, 86 P.3d 1234, 1244-45 (2004). A court order will act as a superseding cause, breaking the causal chain to sever State liability for negligent investigation, "only if all material information has been presented to the court and reasonable minds could not differ as to this question." *Tyner* at 88.

Here, the superior court resolved materiality as a matter of law. Kelsey presented evidence that Rosenthal withheld material information from the court. First, Rosenthal did not investigate Phillips' ethical conflict with CCI in spite of her representation to the court that she would. This was particularly unreasonable in light of the concerns about the relationship between Phillips and Kelsey that had been expressed by several people. Second, Rosenthal failed to tell the court that Kelsey's mental health counselor, Venier, had concerns about Kelsey's placement with Phillips.

Certainly, a jury could conclude that the court would have given Venier's concerns significant weight.

VI. CONCLUSION

The Superior Court erred in dismissing Kelsey's claims against the State of Washington and CCI on summary judgment. Kelsey submitted ample evidence from which a jury could find CCI's negligent hiring, supervision and retention of Phillips was a proximate cause of Kelsey's sexual abuse. A jury could also find DSHS's investigation and placement of Kelsey with Phillips was negligent. Moreover, DSHS is not entitled to immunity under RCW 4.24.595 because the Washington State legislature intended that statute to be prospective and applicable only in the limited context of emergent placement investigations. Finally, the court erred in applying judicial estoppel and superseding cause justifications for the dismissal of Kelsey's claims. Appellant Kelsey Breitung respectfully asks the Court to reverse the Superior Court's grant of summary judgment Orders and remand this case for trial.

RESPECTFULLY SUBMITTED this 31st day of October, 2013.

SCHROETER, GOLDMARK & BENDER

s/ *M. Lorena González*
REBECCA J. ROE, WSBA #7560
M. LORENA GONZÁLEZ, WSBA# 37057
Counsel for Appellant Kelsey Breitung

CERTIFICATE OF SERVICE

On the 31st day of October, 2013, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Steve Puz, WSBA #17407 Amanda Bley, WSBA #42450 Assistant Attorney General 7141 Cleanwater Dr. SW P.O. Box 40126 Olympia, WA 98504-0126 SteveP@atg.wa.gov AmandaB3@atg.wa.gov	☒ Via Hand Delivery – ABC Legal ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☒ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☐ Via Email
Gregory S. Worden, WSBA #24262 Lewis Brisbois Bisgaard & Smith LLP 2104 Fourth Ave., Suite 700 Seattle, WA 98121 gworden@lbbslaw.com	☒ Via Hand Delivery – ABC Legal ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☒ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☐ Via Email

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

DATED at Seattle, Washington, this 31stday of October, 2013.

S/Darla Moran
Darla Moran
Legal Assistant

APPENDICES

Appendix 1 - Appellant Kelsey Breitung's Timeline

Appendix 2 - RCW 4.24.595

APPENDIX 1

APPENDIX 1

Appellant Kelsey Breitung's Timeline

04/11/08 Andrew Phillips becomes a registered counselor. CP 884.

10/01/08 CCI hires Phillips to work as a CDPT. CP 489, 491.

06/17/08 Kelsey Breitung referred to juvenile court for a misdemeanor assault while intoxicated. CP 836, 961. She was ordered to participate in treatment at CCI in lieu of incarceration. CP 838, 993.

02/25/09 Kelsey complied with the juvenile court's order and reported to CCI for drug and alcohol assessment. CP 838. CCI assigned Phillips to her care. CP 838.

03/04/09 Kelsey began treatment at CCI with Phillips. CP 961.

03/25/09 Kelsey completed required treatment at CCI without incident. CP 916.

07/24/09 Kelsey relapsed on alcohol and contacted CCI to request another drug and alcohol assessment. She is seen by Phillips, who recommends treatment. CCI assigns Phillips as Kelsey's counselor. CP 848 at 81:6-14, 918, 920-930.

08/10/09 Kelsey relapsed on alcohol, while living with Rose Beitler. She reported the relapse to Phillips in a counseling session. Phillips disclosed the relapse to his wife, Betsy Phillips. Betsy Phillips reported the incident to CPS. Phillips did not report the incident because Kelsey "begged" him not to. CP 939, 941, 943.

08/13/09 Bietler is concerned that Phillips disclosed confidential information to his wife. She meets with DSHS caseworker Jessica Chaney about Phillips' breach of confidence. Bietler also tells Chaney she is concerned about the lack of boundaries between Kelsey and Phillips. CP 608-609.

08/13/09 Bietler spoke with Bernie Bell, CCI's Associate Director, about Phillips' breach of confidentiality. She also told Bell she was concerned about Phillips relationship with Kelsey and stated that: (1) she felt the relationship between Kelsey and Phillips is inappropriate, (2) Kelsey told her she sprayed perfume in Phillips' office so he would think about her when she is gone, and (3) she believed Kelsey was sexually interested in Phillips. CP 946-947 at 28:22-29:16; 31:1-5.

8/13/09 Bell documented that Beitler "shared concern w/Andrew [sic] disclosure to wife who contacted CPS & Rose expressed concern about Andrew's relationship w/Kelsey [sic]." CP 950.

08/14/09 Dr. William James, CCI's Executive Director, met with Phillips, who admits he disclosed confidential information to his wife. CCI also learns of Phillips multiple violations of boundaries with Kelsey. CP 842 at 24:6-13; 845 at 42:23-43:1; CP 941; CP 950; CP 955-956; CP 958-959; CP 1120 at 109:1-110:3.

08/14/09 Beitler could no longer care for Kelsey and she was placed at South King County Youth Services ("SKYS"). CP 967, 969.

08/18/09 CCI gave Andrew Phillips a letter signed by CCI director William James informing him he is to have no further contact with Kelsey. CP 626.

08/19/09 The dependency action related to Kelsey's mother is heard. The court ordered Kelsey to remain in DSHS's legal custody with authority to place Kelsey with a suitable person. CP 628-631.

08/30/09 Kelsey was discharged from CCI and told to attend treatment at another agency. CP 965.

09/13/09 Kelsey first mentions Phillips as a placement option to her new social worker, Gabrielle Rosenthal. Rosenthal notes "counselor-patient relationship ethics" as a concern. CP 633-634.

09/16/09 Rosenthal contacted Phillips and his wife by phone. She asked Phillips if his code of ethics would allow placement of Kelsey with him. He said he would inquire and report back. CP 635.

09/16/09 A 30-day shelter care hearing was held in King County Superior Court. DSHS, represented by Mary Ann Dorsey, recognized that DSHS retained authority to place Kelsey in licensed care, with a suitable relative or with another suitable person ("the Department already has the discretion to do that..."). AAG Dorsey advised the court that Phillips was Kelsey's prior counselor and that Rosenthal would consult with CCI to determine if the therapeutic relationship would prohibit the Phillipses as a placement option. Kelsey's mother, April Breitung, was present at the hearing and her lawyer expressed concern about Phillips' relationship with Kelsey. The court noted that Rosenthal should further investigate that concern. The court order continued DSHS's custody, care and supervision of Kelsey, who remained at SKYS pending investigation of a suitable placement. CP 429-433.

09/19/09 April Breitung submitted a letter from Rose Beitler noting an objecting to Kelsey's placement with Phillips. Beitler reported that Kelsey was obsessed with Phillips and had him wrapped around her finger. CP 663-664.

09/20/09 April Breitung submitted a letter from acquaintance Debra Jones reporting Kelsey sprayed perfume in Phillips' office so he would think about her. CP 666-667.

09/21/09 AYR counselor Andrea Venier expressed concern about Kelsey's placement with Phillips because of Kelsey's relationship with him. CP 669.

09/24/09 Venier expressed concern to Rosenthal about Kelsey's placement with Phillips. CP 637, 671.

09/25/09 Rosenthal authorized Kelsey to stay overnight with Phillips. CP 637-638.

09/30/09 April Breitung filed a motion contesting Kelsey's placement with Phillips. The court did not rule on April Breitung's motion but issued an order confirming Kelsey was a dependent child pursuant to RCW 13.34.030(5) and that she remained "in the custody and supervision of DSHS ...." The order provided DSHS authority to "make a temporary placement prior to hearing to context" set for November 3, 2009, but did not designate the Phillipses or order DSHS to place Kelsey with the Phillipses. CP 673-674; CP 676-683.

10/02/09 Rosenthal authorized Kelsey to stay overnight with Phillips. CP 685.

10/15/09 Rosenthal tells Kelsey that DSHS would approve placement with the Phillipses. CP 690.

10/16/09 Rosenthal visits the Phillips home for the first time. Betsy Phillips was the only one present. Rosenthal cautioned her to not leave Phillips and Kelsey alone. Kelsey moved into Phillips' home the same day and, on the way home, Phillips made his first overt sexual overture to Kelsey. Shortly, thereafter, Phillips engaged Kelsey in a sexual relationship. CP 640-641.

10/21/09 Dependency action related to Kelsey's father is heard. The court ordered Kelsey to remain under DSHS's legal custody with authority to place Kelsey with a suitable person. Rosenthal informed the court Kelsey moved in with Phillips over the weekend. The court's order did not designate the Phillipses as "other suitable person" or order DSHS to place Kelsey with the Phillipses. CP 692-698.

11/03/09 April Breitung's contested placement motion is heard. Rosenthal (a) did not report Vernier's concern about Kelsey's placement with Phillips and (b) did not inform the court that she had not contacted CCI regarding Kelsey's placement with Phillips. Rosenthal recommended placement with the Phillipses. Kelsey did not report a concern with her placement. CP 411-420; CP 438-442.

11/12/09 Betsy Phillips reported to Rosenthal that Phillips was having an affair and that he would be moving out of the home. Betsy stated that she wanted to keep Kelsey in her home. CP 642-643

11/18/09 Betsy reported to Rosenthal that Phillips was still living in the family home with her and Kelsey. CP 643

11/24/09 Kelsey disclosed the sexual relationship with Phillips to her Celebrate Recovery group. CP 703.

11/25/09 Kelsey disclosed the relationship with Phillips to Betsy Phillips. CP 303. Betsy Phillips reported child sexual abuse to DSHS, identifying Kelsey as the child and

Phillips as the perpetrator. CP 364-365 at ¶29. DSHS removed Kelsey from the Phillipses' home and placed at SKYS. *Id.*; CP 645.

11/30/09 Phillips admitted to Dr. James at CCI that he became Kelsey's foster father and engaged Kelsey in a sexual relationship. CP 516 at 17:7-25. Dr. James fired Phillips. *Id.*; CP 705.

APPENDIX 2

APPENDIX 2

RCW 4.24.595

Liability immunity — Emergent placement investigations of child abuse or neglect — Shelter care and other dependency orders.

(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 social and health services 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 social and health services are entitled to the same witness immunity as would be provided to any other witness.

[2012 c 259 § 13.]

Notes:

Family assessment response evaluation -- Family assessment response survey -- 2012 c 259: See notes following RCW 26.44.260.

SCHROETER GOLDMARK BENDER

October 31, 2013 - 4:23 PM

Transmittal Letter

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Court of Appeals Case Number: 45123-9

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