NO. 45123-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KELSEY BREITUNG,

Appellant,

v.

STATE OF WASHINGTON; and COMMUNITY COUNSELING INSTITUTE, a Washington non-profit corporation,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

This case arises from an inappropriate sexual relationship between 17½ year old Appellant Kelsey Breitung and her former substance abuse counselor Andrew Phillips, with whom she was placed pursuant to orders issued by the juvenile court in her dependency action.

Kelsey intentionally made false statements to the juvenile court so that she could continue to live with Andrew Phillips and his wife, Betsy Phillips. When she made her false statements to the court Kelsey had already begun a sexual relationship with Andrew.[1] Kelsey's brazen determination to remain in the Phillips home was striking. As the trial court observed, Kelsey "stood there in front of that court and perjured herself. There's no other way to put it. She flat out lied to that court . . ." RP 53.

Based on her false statements, the Juvenile Court Commissioner ordered Kelsey's placement with Phillips to continue. Unbeknownst to the Commissioner, Betsy Phillips and DSHS, Kelsey's intentionally false statements also allowed her sexual relationship with Andrew to continue. Although Kelsey now attributes most, if not all, of her claimed injuries and damages to her inappropriate sexual relationship with Andrew, she chose not to name him as a defendant in this lawsuit. Instead, Kelsey seeks to hold Respondent State of Washington Department of Social and Health Services

[1] Kelsey Breitung and her mother, April Breitung are referred to by their first names for clarity. Similarly, Andrew Phillips and his wife Betsy Phillips are referred to by their first names. No disrespect is intended by this practice.

(DSHS) liable for complying with the juvenile court's placement decision that she and her attorney specifically advocated for and Kelsey lied to secure. Kelsey's claims against DSHS arising from her placement with the Phillips lack merit and were properly dismissed by the trial court as a matter of law. CP 1124. That order should now be affirmed.

First, DSHS is statutorily immune for the placement recommendations it made to the juvenile court, and for the actions it took to comply with the juvenile court's placement orders. RCW 4.24.595(2). For this reason alone, the Court should affirm the trial court order.

Second, the equitable doctrine of judicial estoppel precludes Kelsey from financially benefiting in this lawsuit from the intentionally false representations she made to the court in her dependency proceedings. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009) ("Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.").

Third, as the trial court ruled, except for the information that Kelsey alone knew and intentionally withheld, the juvenile court had all material information in its possession when it ordered her placement with the Phillips. RP 52-53. Thus, even if DSHS were not already immune under RCW 4.24.595(2), the juvenile court's placement decisions operate as superseding intervening acts that sever any remaining liability of DSHS for the injuries caused by her placement with the Phillips. *Petcu v. DSHS*,

121 Wn. App. 36, 56, 86 P.3d 1234, *rev. denied*, 152 Wn.2d 1033 (2004).

For each of the above reasons, this Court should affirm the trial court order that dismissed all claims and damages related to Kelsey's placement in the Phillips' home.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly rule that DSHS is statutorily immune under RCW 4.24.595(2) for the placement recommendations it made to the juvenile court and the actions it took to comply with the juvenile court's placement decisions?

2. Did the trial court correctly rule that Kelsey is judicially estopped from recovering damages in this lawsuit for injuries that resulted from a placement decision Kelsey and her attorney specifically requested, and continued to advocate for in court even after she began her sexual relationship with Phillips?

3. Did the trial court correctly rule that the juvenile court's placement decisions operated as superseding, intervening acts that broke the chain of causation and severed any liability of DSHS?

III. COUNTERSTATEMENT OF THE CASE

A. Kelsey's Dependency Action And Placement History

The material facts are not in dispute. Indeed, the unchallenged facts the trial court relied upon to reach its placement decisions were primarily taken from Kelsey's own admissions, the juvenile court pleadings and

orders, and from the transcripts of Kelsey's dependency proceedings. The undisputed facts that follow provide context for the recommendations made by the DSHS social workers and the placement decisions ordered by the Juvenile Court Commissioner. On July 27, 2009, DSHS received a referral from Andrew Phillips that 17 year old Kelsey had run away from home after she was physically abused by her mother, April Breitung. Andrew also reported that Kelsey was living at the home of a "family friend." The referral was assigned to Jessica Chaney, an experienced Child Protective Services (CPS) worker employed by DSHS. CP 457.

That same day Ms. Chaney went to the Breitung home to meet with April. No one answered the door, so Ms. Chaney left her business card with a note asking April to call. Ms. Chaney also attempted to contact Kelsey at the number of the "family friend" where she was allegedly staying, but no one answered. Ms. Chaney left a voicemail message asking Kelsey to contact her. CP 457.

On August 10, 2009, DSHS received another referral, this time from Betsy Phillips, the wife of Andrew Phillips. Betsy reported that Kelsey had been going from "home to home" living with various individuals. At that specific point in time Kelsey was staying with a couple who had taken Kelsey to a party. According to Betsy, Kelsey "got drunk and had sex with a 19-year-old military man (no name available)." Betsy also reported that Kelsey had intentionally cut on herself in an act of self-mutilation.

CP 457-58. No address or phone number was provided for the place where Kelsey was staying. The following day Ms. Chaney called and left a voicemail message for Betsy. That message was returned the same day by Andrew Phillips.

Andrew explained that Betsy was his wife, and her referral to DSHS was based on information that was obtained from him. Andrew reported that Kelsey moved in with Rose Sialana a week earlier. Andrew's only concern was that Ms. Sialana had alcohol in her home, which Kelsey had already accessed. CP 458.

Still trying to locate Kelsey, Ms. Chaney contacted Rose Sialana. Ms. Sialana reported that Kelsey had lived in her house for approximately two weeks. Explaining the incident reported by Betsy, Ms. Sialana said the events followed a barbeque that Kelsey attended with Ms. Sialana and her boyfriend the previous weekend. There was no drinking at the barbeque, and she and her boyfriend did not permit Kelsey to drink alcohol at their house. They brought Kelsey home after the party, and one of their military friends came over. After Ms. Sialana and her boyfriend went to bed, Kelsey found a fifth of alcohol, drank it all, and engaged in sex with their 19-year-old military friend. According to Ms. Sialana, Kelsey knew her poor decisions were going to land her in trouble, so Kelsey cut on herself. Ms. Sialana made an appointment for Kelsey to be seen at Good Samaritan Hospital on August 20, 2009. CP 459.

On August 13, 2009, Ms. Chaney separately interviewed Kelsey, who confirmed each of Ms. Sialana's earlier statements. Kelsey also provided a history of where she had lived, and described the physical abuse that caused her to run away from her mother's home. Kelsey did not know the whereabouts of her mother. Kelsey also relayed that Ms. Sialana had threatened to prohibit her from receiving drug/alcohol treatment from Andrew Phillips. CP 459-60.

Ms. Chaney then met with Ms. Sialana and her boyfriend. Ms. Chaney shared her concern about pulling Kelsey out of drug/alcohol treatment with Andrew. Kelsey had voluntarily placed herself in treatment with Andrew. Equally important, Kelsey, who was almost 18 years old, threatened to quit substance abuse treatment altogether if she was not allowed to continue treating with Andrew. At the conclusion of their meeting, Ms. Sialana said she would decide whether to allow Kelsey to continue treating with Andrew after she met with Andrew's supervisor at Respondent Community Counseling Institute (CCI) later that day. CP 460-61.

That very evening, Ms. Sialana decided that she no longer wanted Kelsey in her home. At approximately 11:00 p.m., Kelsey was placed into protective custody by the Tacoma Police Department. CP 461. Kelsey was taken to South King County Youth Shelter (SKYS), a licensed group home. CP 461. On August 18, 2009, DSHS filed a dependency petition pursuant to

RCW 13.34. CP 462.

On August 19, 2009, a shelter care hearing was held.[2] At that hearing attorney Matt McCoy was appointed to represent Kelsey at all future dependency hearings. A continued shelter care hearing was held on September 16, 2009. At that hearing the juvenile court asked Kelsey where she wanted to be placed:

> THE COURT: Okay. Has there been any discussion with you about placement with any individuals as opposed –
>
> KELSEY BREITUNG: Yes. Betsy and Andrew are a good stable couple and they have offered to take me and I feel -- to live with them.
>
> THE COURT: Where do they live?
>
> KELSEY BREITUNG: In Tacoma. Close to the -- they both work close to Stadium so . . .
>
> THE COURT: And how do you know them?
>
> KELSEY BREITUNG: Well, first Andrew was my counselor for a brief period of time, and then we started going to church together and that's where I met his wife. And so we go to church every Friday together and hopefully every Sunday soon . . .

CP 431-32.

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[2] An initial shelter care hearing must be held within 72 hours of the date the child is taken into custody. RCW 13.34.065(1)(a). The primary purpose of a shelter care hearing is to determine whether the "child can be immediately and safely returned home while the adjudication of the dependency is pending." *Id.* Thereafter, a child can only remain in shelter care for longer than 30 days if specifically approved by court order. RCW 13.34.065(7)(a).

Following that hearing the Commissioner entered an order that allowed Kelsey to be placed with an "other suitable person."[3] DSHS assigned Social Worker Gabrielle Rosenthal to handle Kelsey's ongoing case. CP 357.

The SKYS group home only provides short term placement. So, Ms. Rosenthal began looking for a more permanent placement for Kelsey. CP 357. Kelsey again asked to live with Andrew and Betsy Phillips. CP 358-59.

Kelsey had already established a good relationship with both Andrew and Betsy Phillips: Andrew was Kelsey's former drug/alcohol counselor; Kelsey attended church with Andrew and Betsy each week; and Andrew and Betsy introduced Kelsey to "Celebrate Recovery," a faith based 12-step substance abuse program that was held at their church. Kelsey also reported that Andrew and Betsy were supportive and caring, and wanted to serve as a placement resource for her. CP 358-59.

Ms. Rosenthal also took into account that Kelsey was almost 18 years old, had demonstrated a willingness to run away from placements she did not like and "couch surf" at the houses of people she met. CP 358. Ms. Rosenthal was understandably concerned that, if placed with someone this independent 17 ½ year old teenager found objectionable, Kelsey might

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[3] An "other suitable person" is a separate statutory placement category. RCW 13.34.130(1)(b)(ii). The other statutory placement categories available to the juvenile court included placement of the child in the parent's home, with a relative, or in foster care. *Id.* It is undisputed that the Phillips were the only "other suitable persons" ever considered or approved by the juvenile court.

run from the placement and/or refuse to participate in any services in the short time that remained before Kelsey turned 18 and her dependency action was dismissed. Accordingly, Ms. Rosenthal investigated whether Andrew and Betsy were capable of caring for Kelsey. CP 358-59.

Ms. Rosenthal spoke with the Phillips and visited their home. The home itself was clean, well kept, and provided Kelsey with her own room and bathroom. CP 359. Andrew and Betsy were required to complete written forms that addressed whether they: (i) had ever been convicted of a crime, (ii) had ever been accused of sexual abuse, physical abuse, neglect, abandonment, or exploitation of a child, juvenile or adult, (iii) had ever been denied, terminated, revoked or suspended any contract or license by any court or state agency, or (iv) had a written order of protection or restraining order issued against them arising from an allegation of abuse, neglect, financial exploitation, domestic violence, or abandonment of a child, juvenile or adult. CP 359. On his written statement Andrew admitted that he had a fourteen year old conviction from 1995 for attempted possession of stolen property in the second degree. Under DSHS policy, the nature and age of that conviction did not disqualify Andrew from serving as a placement resource for Kelsey.[4] CP 359.

The Phillips were also fingerprinted. Their fingerprints were then run through the Washington State Patrol (WSP) database and the National

[4] Appellant did not challenge this policy or its application to Andrew Phillips at the trial court nor did she raise any objection to it in her opening brief.

Crime Information Center (NCIC) database maintained by the FBI. CP 359-60. The background check confirmed Andrew's reported conviction, but nothing more. The WSP and NCIC confirmed that Betsy had no record of any conviction or other negative action. *Id.* In addition, from the research she conducted of DSHS' own records, Ms. Rosenthal confirmed there had never been any reports or allegations of child abuse, neglect, or endangerment by either Andrew or Betsy Phillips. *Id.*

However, concerned that his past role as Kelsey's drug/alcohol counselor might present a professional conflict of interest, Ms. Rosenthal asked Andrew to check with his employer to make sure there were no restrictions that prevented him from serving as a placement resource for Kelsey. Ms. Rosenthal reported this to the juvenile court at the September 16, 2009 hearing.[5] It is undisputed that Andrew told Ms. Rosenthal that he checked with CCI and determined there was no conflict in having Kelsey placed in his home. CP 360.

On September 30, 2009, the juvenile court signed an agreed order of dependency as to Kelsey's biological mother, April Breitung. *See* CP 368-77. Again, the court was informed of Kelsey's desire to live with the Phillips. However, April opposed that placement. In a written objection

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[5] As she did below, Kelsey asserts that Ms. Rosenthal assumed responsibility for contacting CCI about this potential conflict of interest. *Br. of App.* at 11. However, as the hearing transcript shows, the juvenile court was specifically informed that DSHS had directed Andrew to "ask his employer and to double-check his code of ethics to make sure we can place Kelsey there." CP 430 (Sept. 16, 2009 hearing transcript, p. 11, lines 15-21). Neither the parties nor the court expressed any concern about this at that hearing.

filed with the juvenile court, April asserted that Kelsey had an "unhealthy attachment and relationship" with Andrew, had dreams about Andrew, and sprayed perfume in Andrew's office "so he thinks of her." CP 378-79. It is undisputed that Kelsey specifically denied each of April's allegations, and repeatedly denied there was anything improper between her and Andrew. CP 363. However, given April's objection, the juvenile court allowed DSHS to place Kelsey with these "other suitable adults" under the following qualification:

> If [Kelsey] is going to be placed with a suitable adult the department will seek the agreement of the parties. If the department decides to place her during the month of [October], the mother agrees to a temporary placement until a hearing can be held to contest it in [November].

CP 372.

The juvenile court scheduled a contested hearing for November 3, 2009, to decide whether Kelsey should live with the Phillips. CP 368. Pursuant to that juvenile court order, Kelsey moved in with the Phillips on October 16, 2009. CP 361.

On October 21, 2009, dependency was established as to Kelsey's father, Robert Breitung, who had been incarcerated at Stafford Creek Correctional Facility. CP 361-62; CP 388. At the hearing, the court was informed that Kelsey had just moved in with the Phillips.

> [Examination by AAG] And where is Kelsey currently placed?
>
> [Ms. Rosenthal] She is currently placed as of this weekend with suitable adults that she provided to me which is Elizabeth and

Andrew Phillips in Tacoma.

Q. Okay. And where has she been previously placed?

A. She was at SKYS.

Q. Okay. And how does she know -- could you describe the couple that she's placed with and how she came to know them?

A. Mr. Andrew Phillips is Kelsey's previous drug and alcohol counselor. I believe the last time she probably had any counseling sessions was like in August. She's created a relationship with both him and his wife. She attends Celebrate Recovery with them every Friday and they're -- she's [sic] explains that they're a great support system for her.

CP 436 (October 21, 2009 transcript, pp. 4-5).

Kelsey was represented by her attorney at this hearing. Neither he nor Kelsey raised any concerns or objections about her placement with the Phillips. *Id.* As it had done in April Breitung's earlier dependency order, the juvenile court continued Kelsey's existing placement with the Phillips pending the November 3, 2009 contested placement hearing. CP 437.

Prior to the November 3rd hearing, April filed declarations with the juvenile court from Rose Sialana and Debbie Jones, both of whom opposed Kelsey living with the Phillips. In her declaration Ms. Sialana claimed it would be "unhealthy" for Kelsey to live with her former counselor.

> I have spoken to the facility [Andrew] is employed with because I feel he has crossed the line by picking Kelsey up and taking her to church and home from classes. I feel she is obsessed with [Andrew]. Kelsey shared with me that the first time she was in the facility she didn't always drug test because Andrew was wrapped around her finger and she got out of it. Andrew has shared things that have happened at the facility with his wife. Andrew has also shared information with Gina

> Thayer, a friend Kelsey was staying with, and she was not on the papers to be able to share information with. I feel [Andrew's] emotions are clouding his judgment in this matter. I also believe he gave his personal cell phone number to Kelsey. This was confirmed by both parties.

CP 407.

Debbie Jones also warned against allowing Kelsey to live with the Phillips.

> I've talked with Andrew on the phone and met him at the Center. Even though he thinks he would be helping Kelsey, I feel it would be unhealthy for her. I feel she looks at Andrew as her hero[,] that this is a friend not a mentor or counselor. Kelsey told me and Gina Thayer that she would spray Andrew's office with her perfume so he could think about her when he would smell it.

CP 409.

Ms. Jones also described a dream that Kelsey reported having about Andrew rescuing her. *Id.* Again, Ms. Rosenthal specifically asked Kelsey about each of the concerns and statements made by April, Ms. Sialana, and Mrs. Jones. It is undisputed that Kelsey flatly denied every allegation and, further, denied there was anything improper about her relationship with Andrew. CP 372.

By the time the November 3, 2009 hearing too place, Kelsey had already lived with Andrew and Betsy Phillips for 2 ½ weeks. Again, unbeknownst to the juvenile court, Ms. Rosenthal, the other parties, and Betsy Phillips, Kelsey and Andrew had already begun their sexual

relationship.[6] CP 444-49.

Kelsey's attorney was one of the first to advocate for Kelsey's continued placement with the Phillips:

> MR. MCCOY: Your Honor, Kelsey is doing really well where she's at right now. Actually told me this, she's doing better than she's ever done in her life. She's close to school, she's doing good in school, she's ROTC. Friday she does her -- their meetings for –
>
> KELSEY BREITUNG: Celebrate.
>
> MR. MCCOY: -- for Celebrate Sobriety. She goes to church on Sundays. I met the people she's staying with. They seem to be wonderful people and she gets along really well with them. *They're -- and they just -- really good for her. And I think the allegations that her mother is bringing I think are unfounded. There's no evidence of any kind of impropriety there.* There's nothing any more than -- any -- any person that has a relationship with a counselor, if you're going to be in a close relationship with them but there's nothing more than that.

CP 440. (emphasis added).

Kelsey followed and immediately confirmed every statement her attorney had just made to the court:

> KELSEY BREITUNG: I agree with everything my lawyer said. Everything is going really well. There is no reason for me to be moved or anything like that. It's been more of a

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[6] Kelsey told Tacoma Police Detective Heath Holden that Andrew never threatened her or forced her to engage in any act against her will. Indeed, Kelsey was convinced that Andrew would never hurt her and believed that, had she asked, Andrew would have immediately stopped their sexual encounters. Kelsey admitted to Detective Holden that she never asked Andrew to stop, nor did she ever express any objection to Andrew about their sexual relationship. CP 447-49. This in no way diminishes or excuses Andrew Phillips' wholly inappropriate actions towards Kelsey. Her admissions do, however, establish that Kelsey's intentionally false statements to the juvenile court and to her DSHS social worker did not result from any threat of harm by Andrew. Instead, Kelsey freely chose to lie to the juvenile court and DSHS so she could continue to live with the Phillips. Of course, because of Kelsey's intentional misrepresentations, that is precisely what the juvenile court ordered.

family environment, best one I've ever had and so yeah.

CP 440.

Ms. Rosenthal also addressed the court:

> MS. ROSENTHAL: Yeah. So basically my interaction with Kelsey in regards to being placed with Andrew and Betsy, I've never had any sense from Kelsey that she's like fixated on Mr. Phillips. It's always been Betsy and Andrew. And a lot of my communication actually has been with Betsy. And I don't know, Betsy is a social worker herself so we've talked about the need of counseling, we've talked about setting really good boundaries, we've talked about giving her rules that she needs to follow at home. And I personally don't see any particular attachment to Mr. Phillips. I do see that Kelsey's equally attached to both of them and that she has -- she's talked to me about having this ultimate respect for them, and she's -- has a really good relationship that she's building on trust. She talks to them about a lot of things and I think that's really important.
>
> And like I said, I've met with Ms. Phillips in her home and she's very welcoming and they're very open. And it's particularly to their engagement into Celebrate Recovery that I think Kelsey's really a big part of and that's part of her treatment. Instead of doing AA meetings she does the Celebrate Recovery which is equivalent . . . And like I said, I've talked to Ms. Phillips and I don't have any concerns with the placement.

CP 441.

Neither Kelsey nor her attorney disputed or corrected Ms. Rosenthal's statements. Had Kelsey disclosed her sexual relationship with Andrew, Ms. Rosenthal would never have recommended the placement to the juvenile court, nor, it's safe to say, would the Commissioner have allowed Kelsey to live with the Phillips. CP 363. This, too, is undisputed.

The Commissioner gave Kelsey every opportunity to be truthful at

the November 3rd hearing. He even offered Kelsey the opportunity to speak to him privately about her placement in the Phillips' home.

> THE COURT: Okay. In these hearings, and I think I've talked to you about this before, you have the opportunity to speak with the Court privately. I know we go over this every time and that but -- but as I've told you before, you have that opportunity at each hearing.
> Do you have any desire to have a private conversation with me today?
>
> KELSEY BREITUNG: No.

CP 439-40.

Kelsey's intentionally false statements cemented her continued placement with the Phillips and, unfortunately, facilitated her ongoing sexual relationship with Andrew.

> THE COURT: Okay. Thank you. I don't have any concerns about the placement either . . . And while I -- I think that there's -- there's always a risk of an improper attachment between an older foster child and a foster parent, there's -- I don't think that there's any reason to believe that that's anything more than the risk that is involved in any parent/child re -- or foster parent/child relationship . . . I've signed the order and the Court approves the placement where you are . . .

CP 441-42.

In its written order the juvenile court found that Kelsey was "in an appropriate placement that adequately meets all of [her] physical, emotional and educational needs," that Kelsey's continued placement with the Phillips was "in [Kelsey's] best interest," and approved Kelsey's continued placement with the Phillips. CP 414, 416, 442. In compliance with that order, Kelsey

continued to live with the Phillips until her sexual relationship with Andrew was disclosed to Ms. Rosenthal on November 25, 2009. That same day, over Kelsey's strong objections, Ms. Rosenthal removed Kelsey from the Phillips home and temporarily placed her back at SKYS. CP 364-65.

B. Procedural History

On April 17, 2012, Kelsey filed the present lawsuit alleging that DSHS negligently placed Kelsey in the Phillips' home. CP 72. Her lawsuit also demanded damages from Community Counseling Institute (CCI) for "negligently hiring, training and supervising Andrew Phillips," and for its failure to "protect [Kelsey] while she was under their care and supervision." CP 72. She amended her complaint on November 12, 2012, alleging additional claims of negligent investigation by DSHS. CP 73.

On May 30, 2013, DSHS filed a motion for partial summary judgment.[7] Citing the immunity provided by RCW 4.24.595(2), the doctrine of judicial estoppel, and Kelsey's inability to establish the essential element of proximate cause in her negligence claim, DSHS asked the trial court to dismiss all liability and damage claims related to Kelsey's six-week placement in the Phillips' home.[8] *See* CP 330. Relying only on the "admissible portions of the declarations and exhibits submitted" by the

[7] Respondent CCI moved for summary judgment that same day.

[8] Kelsey's amended complaint asserts that DSHS failed to properly investigate referrals dating back to 1997. DSHS moved for partial summary judgment on those claims as well, relying on the unchallenged deposition testimony of Barbara Stone, Kelsey's own standard of care expert. Ms. Stone opined that DSHS' investigation of those referrals conformed with accepted standards of practice. *See* CP 452-55. Nevertheless, the trial court denied that portion of DSHS' motion. *See* CP 1124.

parties, the trial court granted DSHS' motion on June 28, 2013, and dismissed "all claims and damages asserted against DSHS that arise from [Kelsey's] placement in the home of Andrew and Betsey Phillips." CP 1124. At the same hearing, the trial court granted CCI's motion and dismissed Kelsey's claims against CCI with prejudice. CP 1126-27.

On July 12, 2013 the trial court designated its partial summary judgment order in favor of DSHS as a 'final order' pursuant to CR 54(b). CP 1139.[9] On July 12, 2013, Kelsey timely appealed both summary judgment orders to this Court.

IV. STANDARD OF REVIEW

Generally, when reviewing a motion for summary judgment, the appellate court conducts the same inquiry as the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary judgment is properly granted where the admissible evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*,

[9] By stipulation of the parties, the trial court stayed the remaining claims against DSHS. CP 1143.

131 Wn.2d 1, 9, 929 P.2d 396 (1997). Argumentative assertions, unsupported speculation, suspicions, beliefs, and conclusions, as well as inadmissible evidence that unresolved factual issues remain are insufficient to create a genuine issue of fact. *Id.*; *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The Court reviews questions of law, including statutory interpretation, de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). The trial court's application of the doctrine of judicial estoppel is reviewed for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). To establish an abuse of discretion, Kelsey must show that the trial court's application of judicial estoppel was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *See Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

V. ARGUMENT

A. DSHS Cannot Be Held Liable For The Placement Recommendations It Made To The Court Or For The Actions DSHS Took To Comply With The Juvenile Court's Placement Orders

As a matter of law, DSHS is statutorily immune from liability for the placement recommendations its social worker made to the juvenile court, and for complying with the court orders that placed Kelsey in the Phillips home. RCW 4.24.595(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.

RCW 4.24.595(2) (emphasis added).

Ignoring this statute's plain language, Kelsey argues that RCW 4.24.595(2) only applies to "emergent placement investigations." Alternatively, she contends, without any meaningful analysis, that RCW 4.24.595(2) does not apply to the 2009 placement orders issued by the juvenile court. *Br. of App.* at 3, 34-38. She is mistaken on both counts.[10]

1. The Plain Language Of RCW 4.24.595(2) Protects DSHS From Liability For Actions Performed In Compliance With Dependency Orders Issued By The Juvenile Court

The clear, unambiguous language in RCW 4.24.595(2) protects DSHS and its employees from liability "for acts performed to comply" with the "shelter care and dependency orders" issued by the court. The juvenile court orders that placed Kelsey with the Phillips were, by

[10] As she did below, Kelsey suggests that this case is somehow governed by *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). *Br. of App.* at 48-49. She misunderstands the nature of DSHS' argument and the trial court's ruling. *Babcock* concerned the common law immunity available to DSHS social workers. *Id* at 619. Conversely, the immunity sought by DSHS here arises not from the common law, but from a specific legislative enactment – RCW 4.24.595(2). Of course, a cause of action that exists only by virtue of a statute may be limited or eliminated by the legislature at any time. *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 617-18, 146 P.3d 914 (2006).

definition, "dependency orders."[11] RCW 13.34.130(1) (requiring the court to issue a placement order once the child is found "dependent" within the meaning of RCW 13.34.030). Thus, as a matter of law, DSHS cannot be held liable for complying with the placement orders of the juvenile court. RCW 4.24.595(2).

Apparently realizing the plain language of the statute is fatal to her claim, Kelsey invites this Court to judicially amend subsection (2) so that it only applies to emergent placement investigations. *Br. of App.* at 35-36. Kelsey's argument lacks merit and should be rejected.

First, Kelsey does not contend that subsection (2) is ambiguous, nor could she.[12] Contrary to Kelsey's suggestion, this Court does not construe clear, unambiguous statutory language. It simply applies the language as written. *Coronado v. Orona*, 137 Wn. App. 308, 315, 153 P.3d 217 (2007); *see also Kilian v. Atkinson*, 147 Wn.2d 16, 20,

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[11] Relying on the declaration of Barbara Stone, Kelsey contends that, despite the juvenile court orders placing her with the Phillips, DSHS "retained discretion at all times to change Kelsey's placement." *Br. of App.* at 14-15. Initially, Ms. Stone's legal conclusion does not create a question of fact. *Orion Corp. v. State*, 103 Wn.2d 441, 4621-62, 693 P.2d 1369 (1985) (legal conclusions in the declaration must be disregarded when considering a motion for summary judgment); *Stenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655 (2001), *rev. denied*, 144 Wn.2d 1006 (2001) ("Experts may not offer opinions of law in the guise of expert testimony."). Second, Ms. Stone's unsupported legal conclusion that DSHS is free to ignore the placement decision of the juvenile court following a contested hearing is just plain silly. However, even if one accepted Ms. Stone's erroneous conclusion of law, Kelsey's argument still fails. Specifically, it is still undisputed that DSHS *did* comply with the juvenile court placement orders, and, thus, it is immune from liability for those actions as a matter of law. RCW 4.22.595(2).

[12] A statute is ambiguous "if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable." *Kilian*, 147 Wn.2d at 20. There is no ambiguity here. The statute clearly provides immunity to DSHS for actions taken in compliance with "shelter care *or other dependency orders*." RCW 4.24.595(2).

50 P.3d 638 (2002) ("an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it"). Furthermore, there is no tool of judicial construction that permits the Court to rewrite a statute so that it conforms to what Kelsey believes the legislature intended.

> [T]he drafting of a statute is a legislative, not a judicial, function. Therefore, courts will not read into a statute matters which are not there, nor modify a statute by construction. Further, courts may not read into a statute things which it conceives the legislature has left out unintentionally.

State v. Enloe, 47 Wn. App. 165, 170, 734 P.2d 520 (1987); *see also Kilian*, 147 Wash. 2d at 20; *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 426, 686 P.2d 483 (1984).

Second, even if subsection (2) was ambiguous, which it is not, the rules of construction do not permit the strained interpretation Kelsey invites this Court to adopt. While subsection (1) specifically addresses "emergent placement investigations," RCW 4.24.595(2) does not. Furthermore, subsection (2) neither incorporates nor refers back to subsection (1). That is because RCW 4.24.595, which the Legislature placed in RCW 4.24 ("Special Rights of Action and Special Immunities"), provides two separate and distinct forms of immunity. Subsection (1) focuses on "emergent placement investigations" made by "government entities, and their officers, agents, employees and volunteers." Subsection

(2) provides immunity to "the department of social and health services and its employees" for actions taken to comply with court orders, and immunity for recommendations DSHS employees make to the court. The purpose of this statutory immunity is to encourage and enable DSHS to make recommendations and take actions ordered by the court without the sometimes chilling threat of being sued hanging over its head. *See* RCW 26.44.280. This case highlights both the reasons and need for this immunity.[13]

Kelsey seeks to hold DSHS liable for complying with placements order issued following hearings where all parties, including Kelsey, were represented by counsel. All parties had the ability to present evidence and cross examine adverse witnesses. RCW 13.34.090(1). Just as important, the placement decisions that Kelsey now demands damages for were exactly the decision that she and her specifically sought, and, indeed, was the placement decision that Kelsey lied in open court to secure. RCW 4.24.595(2) protects DSHS from this type of "gotcha" justice in

[13] While not determinative, the title of this statute is instructive. It identifies the subject of the statute as "liability immunity," and then separately references the two specific areas of immunity it provides. *See Covell v. City of Seattle*, 127 Wn.2d 874, 887-88, 905 P.2d 324 (1995) ("The title of a legislative act may also be referred to a s a source of legislative intent."); *State v. Weaver*, 161 Wn. App. 58, 64, 248 P.3d 1116 (2011).

which a party seeks to hold DSHS liable for complying with the very court orders that she sought in her dependency proceeding.[14]

Third, the statutory interpretation advanced by Kelsey simply makes no sense. RCW 4.24.595(1) already provides DSHS employees with immunity for acts or omissions in their "emergent placement investigation" of child abuse or neglect. If, as Kelsey argues here, the entire statute is limited to emergent placement investigations, then subsection (2) is superfluous. That is, under Kelsey's proposed interpretation, RCW 4.24.595(2) is rendered all but meaningless since it does nothing more than grant DSHS and its employees the same immunity they already enjoyed under subsection (1). It is well established that statutes must be construed so that all language in the statute is given effect and no portion is rendered meaningless. *Kilian*, 147 Wn.2d at 21 ("The

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[14] Hoping to shift attention away from her own intentionally false courtroom statements, Kelsey points to the unsupported conclusion of Ms. Stone that juvenile court's give "substantial weight" to the placement recommendations of DSHS social workers. *Br. of App.* at 15. Not only is there no foundation for Ms. Stone's conclusory statements, this Court has already rejected the inherently flawed speculation that Ms. Stone offers here:

> We reject [the plaintiff's] argument that the trial court gives more weight to information DSHS presents than to information he presents. We assume that the trial court reviews all credible material evidence properly submitted without giving undue weight to one side.

Petcu v. State, 121 Wn. App. 36, 59 (n. 5), 86 P.3d 1234 (2004), *rev. denied*, 152 Wn.2d 1033 (2004).

Moreover, even if Ms. Stone's baseless characterization were believed, as a matter of law, DSHS and its employees cannot be held liable for the reports and recommendations made to the juvenile court. RCW 4.24.595(2) ("employees of [DSHS] are entitled to the same immunity as would be provided to any other witness"); *see also Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989) (witnesses, including experts, are "absolutely immune from suit based on their testimony . . . . The scope of witness immunity is broad.").

Court must also avoid constructions that yield unlikely, absurd or strained consequences."). For this reason as well the Court should reject Kelsey's flawed interpretation of RCW 4.24.595.

It is clear that Kelsey disagrees with the Legislature's decision to protect DSHS from liability for complying with the dependency orders issued in her case. However, her dissatisfaction with the plain language of subsection (2) and its effect here is a matter for Kelsey to address to the legislature, not the courts. *See Enloe*, 47 Wn. App. at 170.

2. RCW 4.24.595(2) Applies To The 2009 Dependency Orders

Although enacted in 2012, the immunity provided by RCW 4.24.595(2) protects DSHS from liability here. First, the precipitating event that triggers the application of RCW 4.24.595(2) is the threatened imposition of liability against DSHS. This statute prospectively prevents liability from being imposed on DSHS and its social workers *after* the effective date of the statute. *In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013). Second, even if the triggering event of this statute was the 2009 juvenile court placement orders, RCW 4.24.595(2) retroactively protects DSHS from liability because it is a remedial statute that does not affect a substantive or vested right of Kelsey. *Ballard*, 158 Wn.2d at 617-18. As a matter of law, the immunity in this statute protects DSHS from liability, and this Court should, therefore, affirm the trial court order.

Generally, a statute is presumed to apply prospectively. *Estate of Haviland*, 177 Wn.2d at 75. The *Haviland* case arose from the 2009 amendments to what is commonly referred to as "the slayer statute" (RCW 11.84). Dr. James Haviland's will was written in 2006, and largely benefitted his much younger wife Mary. Dr. Haviland, who suffered advanced dementia, died in November 2007 at the age of 97. Dr. Haviland's children contested the will. Following a hearing, the trial court invalidated the will, concluding there was clear, cogent, and convincing evidence that it was the product of "undue influence." *Id.* at 72-73. That decision was affirmed on appeal. While that will challenge was pending, however, the legislature expanded the scope of the slayer statute to include abusers as well as slayers. *Id* at 73.

In light of this change, the personal representative of the estate filed a petition asking the court to adjudicate whether Mary was an abuser under the amended slayer statute. The trial court declined, concluding the event triggering event for application of the statute was the abuse itself which occurred before the statute became effective. The Court of Appeals reversed, holding that the "triggering event" under the amended statute was the filing of the probate petition which occurred four months after the effective date of the statutory amendment. *Id.* at 74.

On review, the Supreme Court held that "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." *Estate of Haviland*, 177 Wn.2d at 75. To determine the precipitating event, the court must look to the "subject matter regulated by the statute and consider its plain language. . . " *Id.* The Supreme Court concluded the 2009 statutory amendments applied to the adjudication of Dr. Haviland's will.

> Here, the abuser statutes intend to regulate the receipt of benefits, not the financial abuse itself. Thus, despite the fact that abuse occurred prior to the amendments at issue, the triggering event is the attempt by the abuser to receive property or any other benefit from the estate of the abused person.

Id. at 77-78.

Similarly, in the present case, the event that "triggers" the application of RCW 4.24.595(2) is the imposition of liability against DSHS, e.g., the point at which judgment is entered and DSHS becomes liable for complying with an earlier dependency order, not the order placing Kelsey with the Phillips. RCW 4.24.595(2). Accordingly, DSHS' motion for partial summary judgment requires a prospective application of RCW 4.24.595(2), one which achieves the purpose and intent of this legislative enactment: to prevent DSHS from being held liable "for acts performed to comply" with orders issued by the juvenile court.

However, even if this Court concludes that the trial court retroactively applied RCW 4.24.595(2) to the 2009 dependency orders, the

order granting partial summary judgment should still be affirmed. As a matter of law, as a remedial statute that does not affect a substantive or vested right, RCW 4.24.595(2) applies to events that occurred prior to its enactment. *Ballard*, 158 Wn.2d at 617-18.

A statute is remedial "when it relates to practice, procedure, or remedies." *Id.* By definition, RCW 4.24.595(2) provides a remedy to DSHS: immunity from liability for actions it previously took to comply with the court's dependency orders.[15] *See Robinson v. McHugh et ux*, 158 Wash. 157, 291 P. 330 (1930) (holding that a statutory amendment that created immunity in the worker's compensation system was remedial and applied retroactively to accidents and injuries that occurred prior to that statute's passage). Furthermore, RCW 4.24.595(2) does not impact any substantive or vested right of Kelsey. As Kelsey concedes, her negligence claims against DSHS arise from an implied statutory duty created by RCW 26.44.050. *Br. of App.* at 33-34; *see also M.W. v. Dept. of Soc. & Health Serv.*, 149 Wn.2d 589, 597-98, 70 P.3d 954 (2003); *Tyner v. Dep't of Soc. & Health Serv.*, 141 Wn.2d 68, 77, 1 P.3d 1148 (2000). As a matter of law, the implied duty created by RCW 26.44.050 does not create any substantive or vested right.

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[15] In footnote 16 of her brief, Kelsey summarily concludes that RCW 4.24.595(2) "is not remedial." *Br. of App.* at 38. However, she fails to offer any analysis or legal authority explaining how or why statutory immunity does not qualify as a "remedy." Courts typically do not consider arguments that are unsupported by pertinent authority or meaningful analysis. *See State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012) ("Such passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").

> [A] cause of action that exists only by virtue of a statute is not a vested right and it can be retroactively abolished by the legislature. (Citations omitted). **Of particular importance here, the legislature may do so even if the lawsuit is pending.**

Ballard, 158 Wn.2d at 617-18 (emphasis added); *see also Haddenham v. State*, 87 Wn.2d 145, 149-50, 550 P.2d 9 (1976) (the abolition by the legislature of an accrued cause of action "does not violate any constitutional rights of plaintiffs because a tort cause of action is not vested until it is reduced to judgment").

The legislature was free to curtail or limit Kelsey's negligent investigation claim at any time. *Id.*; *see also Seek Sys., Inc. v. Scully-Walton, Inc.*, 55 Wash. App. 318, 320, 777 P.2d 560, 562 (1989) (remedial statutes adopted during the course of an appeal are also applied retrospectively to the case then under review). It did so by protecting DSHS from liability for its compliance with the dependency orders issued by the juvenile court. RCW 4.24.595(2).

In summary, it is undisputed the juvenile court issued multiple orders approving Kelsey's placement in the Phillips home. As a matter of law, DSHS cannot be held liable for complying with those dependency orders. RCW 4.24.595(2). Accordingly, the trial court order should be affirmed.

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B. Judicial Estoppel Bars Kelsey From Pursuing Damages In This Lawsuit For A Placement Decision That She And Her Attorney Specifically Sought In Her Juvenile Court Proceeding

The sexual relationship that Andrew Phillips engaged in with Kelsey during the six weeks she lived in the Phillips home was, in every sense of the word, despicable. Andrew should be held liable for his appalling actions. But Kelsey chose not to sue Andrew Phillips. Rather, Kelsey seeks to hold DSHS liable for the injuries caused by the intentionally false statements she made to the Commissioner in her earlier juvenile court proceeding. The trial court rejected this claim and ruled that judicial estoppel prevents Kelsey from benefiting from her intentional misrepresentations to the juvenile court. RP 53. Because Kelsey failed to demonstrate that the trial court abused its discretion in applying judicial estoppel, its order should be affirmed. *Arkison*, 160 Wn.2d at 538.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006); *Miles v. State*, 102 Wn. App. 142, 153 (n.21), 6 P.3d 112 (2000), *rev. denied*, 142 Wn.2d 1021 (2001) (judicial estoppel precludes a party from taking a position in open court during a dependency proceeding and then adopting a completely opposite position in a subsequent tort lawsuit). The purposes of judicial estoppel are to preserve respect for judicial proceedings without

the necessity of resort to the perjury statutes, to bar a party from gaining an advantage by adopting a position that is inconsistent with one taken at an earlier court proceeding, and to avoid inconsistency, duplicity, and waste of time. *Bartley-Williams*, 134 Wn. App. at 98.

Three core factors guide a court's determination of whether judicial estoppel applies: (1) whether a party's later position is clearly inconsistent with her earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or 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. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). Because each of these elements is readily satisfied here, this Court should affirm the trial court order.

1. Kelsey's Position In This Lawsuit Is Clearly Inconsistent With The Position She Took At The November 3, 2009 Contested Placement Hearing

The sole issue at the November 3, 2009 hearing was whether Kelsey should continue to live in the Phillips home. Ms. Rosenthal presented Kelsey with the objections raised by her mother, Rose Sialana, and Debbie Jones, all of which suggested, if not expressly stated, that an inappropriate relationship existed between Kelsey and Andrew Phillips.

> Kelsey specifically denied each of the allegations made in these declarations and by her mother. [Ms. Rosenthal] asked her about the claims that she and Andrew Phillips had an unhealthy relationship.

> Again, Kelsey denied those claims. [Kelsey] never hinted or suggested that Andrew Phillips had made any sexual advances towards her. Similarly, Kelsey did not tell [Ms. Rosenthal] that she was already engaged in a sexual relationship with Andrew Phillips.

CP 363 (Decl. of Rosenthal).[16]

But Kelsey did not just lie to Ms. Rosenthal. Kelsey lied in open court to the Juvenile Court Commissioner. First, Kelsey's attorney represented that Andrew and Betsy Phillips were "wonderful people" who were "really good" for Kelsey. CP 440 (p. 6-7 of the hearing transcript).[17]

> *And I think the allegations that her mother is bringing I think are unfounded. There's no evidence of any kind of impropriety there*. There's nothing any more than -- any -- any person that has a relationship with a counselor, if you're going to be in a close relationship with them but there's nothing more than that.

CP 440 (p. 6-7 of the hearing transcript).

Although she had already started her sexual relationship with Andrew Phillips, Kelsey wasted no time confirming these statements even though she knew they were untrue.

> KELSEY BREITUNG: *I agree with everything my lawyer said.* Everything is going really well. *There is no reason for me to be moved or anything like that.*

CP 440 (p. 7 of the hearing transcript) (emphasis added).

Ultimately, because of Kelsey's intentionally false statements, the Juvenile Court Commissioner ordered Kelsey's continued placement with

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[16] Tellingly, Kelsey did not challenge or dispute this statement from Ms. Rosenthal.

[17] There is no evidence that Kelsey's attorney intentionally misled the juvenile court. Rather, it appears that he, like the juvenile court, DSHS, and Betsy Phillips, was duped by the lies Kelsey convincingly delivered.

the Phillips. CP 441. Of course, the position Kelsey advocated for and lied about in open court to secure is completely at odds with the one she has adopted for this lawsuit. Kelsey now claims she should never have been allowed to remain with the Phillips.

Kelsey suggests that her earlier intentionally false statements to the juvenile court may be explained by a "delayed reporting phenomena" and/or "recantation phenomena." *Br. of App.* at 39-40. Initially, Kelsey did not advance either of these theories below, and the Court should not consider them for the first time in this appeal. *Brown v. Labor Ready Northwest, Inc.*, 113 Wn. App. 643, 655, 54 P.3d 166 (2002) (the appellate courts "will not consider a theory raised for the first time on appeal"). Even if this flaw were overlooked, Kelsey failed to produce any admissible evidence showing that her intentionally false statements to the Commissioner resulted from a "delayed reporting phenomena" or "recantation phenomena." For this reason, as well, the Court should disregard Kelsey's attempt to uncouple and distance herself from her earlier false statements. *White*, 131 Wn.2d. at 9 (argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions are insufficient to create a material issue of fact); *see also Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 459, 266 P.3d 881 (2011) (appellate courts will not consider argument that is unsupported by citation to the record).

Finally, Kelsey knew she was required to be truthful and honest in

her statements to the Commissioner – the truth just did not suit her objective: to continue living with the Phillips.

> **Q** You knew, though, to the extent that you gave information or answers to the court commissioner, you were required to tell the truth, right?
>
> **A** Yes.
>
> **Q** You were required and supposed to honestly answer each of the questions that the court asked of you; is that right?
>
> **A** Yes.
>
> **Q** You knew that at the time, didn't you?
>
> **A** Yes.

CP 1082-83 (Kelsey's deposition testimony).

Clearly, the position Kelsey now adopts to support her present demand for damages is wholly inconsistent from the one she took in her juvenile court proceeding. The first core factor of judicial estoppel is easily satisfied.

2. Kelsey's Position In This Lawsuit Confirms That She Lied To And Misled The Juvenile Court

Kelsey does not seriously contest this element. Indeed, she does not address it in her brief at all. It is sufficient to point out that allowing Kelsey to pursue damages for the inappropriate sexual relationship she was involved in while living with the Phillips would confirm that she intentionally misled the juvenile court commissioner at the November 3, 2009 hearing.

3. If Not Estopped, Kelsey Will Derive An Unfair Advantage To The Detriment Of DSHS

Again, Kelsey does not seriously challenge this element. Kelsey

seeks to financially benefit in this lawsuit from the placement decision she lied to secure and maintain in her juvenile court proceeding.

Still, as she did below, Kelsey refuses to accept any responsibility for her actions. It is undisputed that Kelsey lied to and manipulated Betsy Phillips, the woman who opened her home to Kelsey, and Gabrielle Rosenthal, the social worker who tried to help and support Kelsey. Kelsey also used her own attorney as a tool to manipulate the legal process so that she could continue living with the Phillips. And, of course, Kelsey openly lied to the Juvenile Court Commissioner so she could remain in the Phillips home. Nevertheless, Kelsey asks this Court to absolve her of any responsibility for her repeated lies. Indeed, Kelsey suggests that allowing her to benefit from her earlier intentionally false statements to the juvenile court somehow furthers the "societal goal of preventing child sexual abuse." *Br. of App.* at 41. Kelsey is mistaken.

As Kelsey's own experience demonstrates, permitting parties to make intentionally false statements in court does not prevent child abuse. Quite the opposite, it prevents the juvenile court, DSHS, and other interested parties from removing a child from an abusive home. Even Kelsey must concede that, had she been truthful in her statements to the Commissioner, she would never have been allowed to live with the Phillips, and most, if not all, of the injuries she seeks damages for in this lawsuit would have been avoided.

Moreover judicial estoppel also serves to protect and preserve the integrity of the judicial system which depends on the truthfulness of statements made by witnesses in court. *State v. Abrams*, 163 Wn.2d 277, 287, 178 P.3d 1021 (2008); *see also Bartley-Williams*, 134 Wn. App. at 98.

> Perjury must not be tolerated by courts of law. Perjury erodes the integrity of our judicial system. It is imperative that effective restraints exist to prevent perjury, which presents an obvious and flagrant affront to the basic concepts of judicial proceedings. The integrity and respect of our court system, founded on the search for truth and the adherence to principles of fundamental fairness, depends upon circuit court judges, attorneys that practice before them, and witnesses in all matters to act with forthright conviction and a commitment to truthfulness. Permitting perjury to go unchecked results in a war with justice, since it may produce a judgment not resting on truth.

In re A.Y., 2004 WI App 58, 271 Wis. 2d 242, 253, 677 N.W.2d 684 (2004); *see also U.S. v. Mandujano*, 425 U.S. 564, 576, 96 S. Ct. 1768, 48 L.Ed.2d 212 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings"); *West Virginia Dept. of Transp. Div. of Highways, v. Robertson*, 217 W.Va. 497, 508, 618 S.E.2d 506 (2005) (the judicial system "is not designed to promote 'footloose' tactics by litigants that lead to 'gotcha' justice. Our system is designed to dispense justice based upon truth-seeking fair and impartial proceedings. Truth is the foundation of our system. Without it, our system would be a complete farce and cease to dispense justice.").

Allowing Kelsey to receive financial compensation for a sexual relationship that continued only because Kelsey, herself, lied to the juvenile

court would needlessly undermine the integrity and authority of the juvenile court while doing absolutely nothing to prevent child abuse.

Kelsey cites two cases which, she contends, prevent the application of judicial estoppel to her case, *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) and *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008). Neither case supports the limitations on judicial estoppel that Kelsey asks this Court to adopt here.

In *Christensen*, the Supreme Court held that a 13 year old victim of sexual assault by her teacher while on school grounds cannot have contributory fault assessed against her under Washington's Tort Reform Act for her participation in that relationship. *Id.* at 64.

> [A]s a matter of law, a child under the age of 16 may not have contributory fault assessed against her for her participation in [such a relationship].

Id. at 64.

The Court held that a child under the age of 16 lacked the capacity to consent to such a relationship, and "the idea that a student has a duty to protect herself from sexual abuse at school by her teacher conflicts with the well-established law in Washington that a school district has an enhanced and solemn duty to protect minor students in its care." *Id.* at 67.

Initially, contrary to Kelsey's suggestion, the *Christensen* Court did not hold that a plaintiff's earlier false statements to the court could or should be ignored in a subsequent lawsuit. Indeed, the issue of judicial estoppel was

not raised or discussed in *Christensen.* In addition, unlike *Christensen*, the trial court's application of judicial estoppel in this tort lawsuit was not premised on Kelsey having a legal duty to protect herself from sexual abuse. It was based on Kelsey's recognized legal obligation to tell the truth in response to questions posed by the Commissioner during her dependency hearing. Again, as the trial court observed "[Kelsey] stood there in front of that court and perjured herself. There's no other way to put it. She flat out lied to that court. . . . You cannot lie to the court and then complain about the results after that." RP 53.

Kelsey also accuses the trial court of "ignoring" the *Miller* case. *Br. of App.* at 42. Actually, the trial judge did not ignore *Miller*, he simply disagreed with Kelsey's characterization of the Supreme Court's holding in that case. RP 24. In *Miller*, four years after going through bankruptcy, Michael Miller sued the estate of his deceased stepfather to recover damages for the sexual abuse inflicted by his stepfather when Miller was young. The trial court applied the doctrine of judicial estoppel to dismiss the suit because Miller did not disclose the potential claim as an asset in his prior bankruptcy proceeding. *See Miller v. Campbell*, 137 Wn. App. 762, 764, 155 P.3d 154 (2007). The Court of Appeals reversed, concluding "Miller's assertion of a claim against Campbell in 2003 is not clearly inconsistent with his failure to mention a claim based on childhood sexual abuse in his schedule of assets 1998." *Miller*,

137 Wn. App. at 773 ("[Miller] is pursuing a different claim, a claim for more serious injuries that he did not know about during his bankruptcy; a claim Miller says he did not begin to become aware of until the death of his stepfather triggered a new flood of memories and crippling symptoms.").

The Supreme Court granted the Estate's petition for review. While that appeal was pending, Miller filed a motion to substitute the bankruptcy trustee as the real party in interest, which the Supreme Court granted. *Miller*, 164 Wn.2d at 535. Contrary to Kelsey's representation, the Supreme Court did not affirm the reasoning of the Court of Appeals.[18] Instead, the Supreme Court held that the bankruptcy trustee was a separate and distinct party from Miller, and therefore not bound by Miller's earlier representations in his bankruptcy proceedings. *Id.* at 541 ("The bankruptcy trustee pursues the claim for the benefit of the bankruptcy estate, not the debtor, and therefore the trustee's position is not inconsistent with the debtor's own failure to disclose the claim in bankruptcy").[19] This holding prevented the Supreme Court from ruling on the Court of Appeals decision. The Supreme Court vacated the trial court order and remanded for further proceedings. *Id.* at 544-45.

Importantly, the Supreme Court held that judicial estoppel may

[18] Kelsey's brief represents the reasoning of the Court of Appeals as the holding of the Supreme Court. *Br. of App.* at 43. As demonstrated herein, the excerpt quoted is not even a complete description of the reasoning of the Court of Appeals.

[19] Even the Estate conceded that judicial estoppel could not be used to bind the bankruptcy trustee. *Id.* at 541-42.

still bar any distribution of funds in the bankruptcy estate to Miller. *Id.* at 543-44 (the bankruptcy court "may choose to apply the doctrine of judicial estoppel [against Miller] to protect the integrity of its own proceedings.").

Furthermore, even if one accepted Kelsey's incorrect recitation of the holding in *Miller*, that decision would still not support the position she advances in this appeal. First, Miller's claim in the second proceeding was for injuries he did not know about at the time of his initial bankruptcy proceeding. Here, Kelsey seeks damages for the sexual relationship that she and Phillips were engaged in at the time Kelsey made her false statements to the juvenile court. Second, unlike Miller, Kelsey admits that her false statements to the juvenile court were intentional. CP 1082-83. Third, unlike in *Miller*, Kelsey's misrepresentations to the juvenile court led to the very injuries that she now seeks damages for in this lawsuit. Thus, *Miller* simply has no bearing on the application of judicial estoppel here.

The trial court correctly applied judicial estoppel to prevent Kelsey from financially benefiting from the intentionally false statements she made to the juvenile court. This Court should, therefore, affirm that trial court order.

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C. The Juvenile Court's Placement Orders Operate As A Superseding Intervening Cause That Terminates DSHS' Liability

As demonstrated above, DSHS is statutorily immune from liability for complying with the court's placement determinations. RCW 4.24.595(2). In addition, the court's placement orders operate as superseding intervening events that cut off any liability of DSHS. *Tyner v. State Dep't of Soc. & Health Serv., Child Prot. Serv.* 141 Wn.2d 68, 77, 1 P.3d 1148 (2000); *Petcu*, 121 Wn. App. at 56. For this reason as well, the Court should affirm the trial court order that granted partial summary judgment to DSHS.

The narrow claim for negligent investigation arises from RCW 26.44.050, which creates an implied statutory duty for DSHS to investigate reports of child abuse brought to its attention. RCW 26.44.050 (DSHS's duty is triggered by "receipt of a report concerning the possible occurrence of abuse or neglect"); *Tyner*, 141 Wn.2d at 77.[20]

> The harm addressed by [RCW 26.44.050] is the abuse of children within the home and unnecessary interference with the integrity of the family. Therefore, a claim for negligent investigation against DSHS is available only to children, parents, and guardians of children who are harmed because DSHS has gathered incomplete or biased information that results in a harmful placement decision, such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home. We decline to expand this cause of action beyond these bounds

[20] In this case there was no report of any abuse by Phillips that generated this statutory investigation obligation prior to the date Kelsey disclosed her sexual relationship with Andrew Phillips. It is undisputed that upon learning of this report of child abuse, DSHS immediately removed Kelsey from the Phillips home. CP 364-65.

> because the statute from which the tort of negligent investigation is implied does not contemplate other types of harm.

M.W., 149 Wn.2d at 602.

When, like here, the 'harmful placement' alleged results from a court order, DSHS can only be held liable if the plaintiff produces admissible evidence that the harmful placement decision was proximately caused by DSHS' failure to disclose a material fact to the court. *Petcu*, 121 Wn. App. 56 ("To prevail, the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement.").

> In a lawsuit based on negligent investigation, a caseworker may be legally responsible for a parent's separation from a child, even when the separation is imposed by court order, but only if the court has been deprived of a material fact due to the caseworker's faulty investigation. Otherwise, court intervention operates as a superseding intervening cause that cuts off the caseworker's liability.

Id. (citing *Tyner*, 141 Wn.2d at 86, 88).

There are two components to proximate cause: 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. Legal cause involves the determination, in view of " 'logic, common sense, justice, policy, and precedent,' " of the extent to which a defendant should remain legally responsible for the harmful consequences of his acts. Legal cause generally is a question for the court.

Petcu, 121 Wn. App. at 56.

Proximate cause may be decided as a matter of law "when the court is aware of all material information and reasonable minds could not

differ on the issue." *Id.* at 58. A material fact is one that would have changed the outcome of the court's decision. *Id.* at 56. Here, the undisputed admissible evidence establishes that DSHS presented the juvenile court with every material fact in its possession. Specifically, the juvenile court was provided with the following information:

- Kelsey asked to live with the Phillips. CP 358-59 (decl. of Rosenthal); CP 431-32 (Kelsey's testimony from the 9/19/09 shelter care hearing).
- Andrew Phillips was Kelsey's former drug/alcohol counselor. CP 432 (Kelsey's testimony); CP 436 (Rosenthal testimony at 10/21/09 hearing); CP 403 (Rosenthal's report to the court); CP 407 (Sialana's decl.); CP 409-10 (Jones' decl.); CP 440-441 (transcript from 11/3/09 dependency hearing).
- Kelsey attended church with the Phillips, as well as Celebrate Recovery, which Andrew and Betsy Phillips helped lead. Andrew Phillips gave Kelsey rides from classes to her home, to church and to Celebrate Recovery. CP 432 (Kelsey's test. at 9/16/09 shelter care hearing); CP 436 (test. of Ms. Rosenthal at 10/21/09 hearing); CP 440-441 (transcript from 11/3/09 dependency hearing); CP 391-92 (Rosenthal report to court); CP 407 (Sialana decl.).
- Andrew Phillips shared confidential counselor-patient information with his wife without Kelsey's written approval. CP 407.
- Allegations that Kelsey had an unhealthy attachment and relationship with Andrew were shared with the court. CP 378-79 (objection filed on behalf of Kelsey's mother); CP 440
- Allegations that Kelsey had Andrew "wrapped around her finger" and that Kelsey was obsessed" with Andrew were provided to the court. CP 407.
- Andrew Phillips gave Kelsey his personal cell phone number. CP 407.
- Kelsey sprayed her perfume in Andrew's work office so he would think of her. CP 378; CP 409.
- Kelsey shared a dream she had about Andrew saving her. CP 409.
- Andrew and Betsy Phillips' fingerprints were run through data bases maintained by the Washington State Patrol and FBI –

neither of the Phillips had any disqualifying information. CP 359-60.

- DSHS checked its own records and, again, determined there had never been any reports or allegations of child abuse, neglect or endangerment made against Andrew of Betsy Phillips. CP 360.
- DSHS conducted a home check of the Phillips' home. The home was clean, organized and spacious. The home had a separate unused bedroom and bathroom for Kelsey to use. CP 360.

Kelsey does not dispute that all of this material information was shared with the juvenile court. Instead, Kelsey suggests that DSHS wrongfully withheld two other facts from the juvenile court. Kelsey, again, is mistaken.

First, Kelsey suggests, without citation to the record, that Ms. Rosenthal "did not investigate Phillips' ethical conflict with CCI in spite of her representation to the court that she would." *Br. of App.* at 17, 49. Kelsey's assertion is not borne out by the dependency hearing transcript that she purports to rely upon. That transcript shows that Ms. Rosenthal told the court she would ask Andrew whether there was a professional conflict of that prevented him from serving as a placement resource for one of his former clients. CP 430 (p. 11 of transcript, lines 15-21). It is undisputed that Ms. Rosenthal did this and was told by Andrew "there was nothing that prevented him from serving as a

placement resource for Kelsey."[21] CP 360. Of course, Kelsey's unsupported assertion does not create a material issue of fact, nor is it sufficient to defeat a motion for summary judgment. *White*, 131 Wn.2d at 9.

Second, Kelsey claims that Ms. Rosenthal failed to tell the court "that Kelsey's mental health counselor, Venier, had concerns about Kelsey's placement with Phillips." *Br. of App.* at 49. However, Kelsey failed to produce any admissible evidence demonstrating what 'concern' that counselor may have had, much less how its disclosure was material or would have "changed the outcome of the court's decision." *Petcu,* 121 Wn. App. at 56. Again, Kelsey's unsupported assertion is neither material nor sufficient to create a genuine issue of fact. *White*, 131 Wn.2d at 9.

In reality, the only party who withheld material information that would have altered the placement decision of the juvenile court was Kelsey herself. Unfortunately, Kelsey chose to lie to DSHS and the juvenile court rather than disclose the information that would have prevented the very injuries she now demands damages for in this lawsuit.

As the trial court found, the juvenile court's failure to learn about

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[21] Kelsey appears to suggest that the juvenile court would have rejected the Phillips as a placement had it known that Ms. Rosenthal's investigation into this "ethical question" was limited to questioning Andrew Phillips. Of course, Kelsey failed to produce any evidence supporting that speculation. Again, her argumentative assertions and unsupported speculation is insufficient to create a genuine issue of fact. *White*, 131 Wn.2d at 9.

Kelsey's sexual relationship did not result from any failure by DSHS. Rather, the "harmful placement" decision resulted from Kelsey's decision to "flat out lie" to the juvenile court. RP 53. It would defy logic, common sense, and justice to deny summary judgment because the court was deprived of information that then 17 ½ year old Kelsey knew, lied about, and intentionally withheld from the court. *Tyner,* 141 Wn.2d at 82 (the concept of legal cause permits courts to limit liability for policy reasons, even where duty and foreseeability might otherwise indicate liability).

As a matter of law, the juvenile court orders placing Kelsey in the Phillips' home operate as superseding intervening causes that sever any liability of DSHS arising from this placement, and this Court should affirm the order granting partial summary judgment to DSHS. *Petcu,* 121 Wn. App. at 56; *see also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (if the non-moving party fails to produce admissible evidence make a showing sufficient to establish the existence of a necessary element to that party's case "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.").

VI. CONCLUSION

The trial court correctly dismissed "all claims and damages asserted against DSHS that arise from [Kelsey's] placement in the home

of Andrew and Betsy Phillips." CP 1124. That order should be affirmed on any one of three separate grounds: (1) statutory immunity shields DSHS from liability for the placement recommendations it made to the court and for complying with the court's order placing Kelsey with the Phillips; (2) Kelsey is judicially estopped from financially benefiting in this lawsuit from the false statements she and her attorney made to the juvenile court; and (3) the juvenile court placement orders are superseding intervening events that prevent Kelsey from establishing a causal link between the alleged negligent investigation by DSHS and the injuries she attributes to her placement in the Phillips home.

Accordingly, for each of the reasons identified herein, DSHS respectfully asks this Court to affirm the trial court order granting partial summary judgment to DSHS.

RESPECTFULLY SUBMITTED this 16th day of January, 2014.

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