No: 46347-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by and through Fearghal McCarthy, his father; and CORMAC MCCARTHY, a minor, by and through Fearghal McCarthy, his father,

Appellants

vs.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CHILDREN'S PROTECTIVE SERVICES,

Respondents

Appeal from the Superior Court of Clark County
Case No: 08-2-04895-4

OPENING BRIEF OF APPELLANT FEARGHAL MCCARTHY

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I. INTRODUCTION

Fearghal was falsely arrested because a law officer wanted a court to issue no-contact orders to separate Fearghal from his children. A DSHS caseworker, under special supervisory review for fabricating records and scores of shoddy investigations "that had a direct bearing on child safety", investigated. Wanting Fearghal to have no chance of getting custody of his children in a divorce, a City prosecutor stepped outside her advocacy role directing Fearghal's spouse, Patricia, to go fact-finding; instructing her on what to say to police so as to falsely report new criminal allegations, and on what to testify to in civil court so as to stop Fearghal's contact with his children. Upon multiple violations of domestic violence restraining orders by Patricia, police did not intervene. When Fearghal reported abuse and neglect regarding his children, DSHS and police did not investigate. These actors individually and collectively prevented courts from having material information from unbiased non-faulty investigations, causing Fearghal's criminal matter resolution and harmful separation from his children to be prolonged; exposing Fearghal to risk of deportation that would irreparably sever his bond with his children; and causing Fearghal severe emotional distress and economic injury. They acted intentionally and recklessly.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to Clark County for false arrest, false imprisonment, outrage, negligent investigation, negligence and negligent infliction of emotional distress; and in denying reconsideration of summary judgment.
2. The trial court erred in granting summary judgment to DSHS for negligent investigation, negligence, outrage, reckless disregard, and negligent infliction of emotional distress.

3. The trial court erred in granting summary judgment to the City of Vancouver for malicious interference with parent-child relationship, outrage, negligent investigation, negligence, gender discrimination and negligent infliction of emotional distress; in denying reconsideration of summary judgment; and in awarding the City its costs.

4. The trial court erred by suppressing Patricia's corrections to her deposition testimony.

Issues pertaining to assignments of error

a. Is summary judgment error on the claims against the County when, viewing factual inferences in the light most favorable to Fearghal: the same officer who arrested Fearghal controlled the flow of information to the judge who made the probable cause finding; and the officer did not have probable cause to arrest? (Assignment of Error 1).

b. Is summary judgment error on the claims for breaches of duty under RCW 26.44 against the County when, viewing factual inferences in the light most favorable to Fearghal: upon being asked to investigate possible child neglect, abuse or endangerment, their law officers either failed to investigate or conducted faulty investigations. (Assignments of Error 1).

c. Is summary judgment error on the claims for breaches of duty under RCW 10.99, RCW 26.50 and RCW 10.31.100(2) against the County and City when, viewing all factual inferences as favorable to Fearghal: (1) their law officers took no action upon having probable cause to believe a domestic violence crime has been committed; (2) their law officers enforced criminal complaints made by Fearghal against Patricia differently than if a complainant had made the same criminal complaint against a non-family member; and (3) their law officers failed to enforce domestic violence laws because enforcement would impact child placement decisions? (Assignments of Error 1 & 3).

d. Is summary judgment error on the claims against the City when, viewing all factual inferences in the light most favorable to Fearghal: the City prosecutor stepped into a non-advocacy role; (1) conducting investigative activities and controlling the flow of information being reported to the police, and (2) directing Patricia to testify falsely in civil proceedings so as to affect child placement decisions so that they would be adverse to Fearghal? (Assignment of Error 3).

e. Is summary judgment error on the claims against the County and the City when, viewing all factual inferences in the light most favorable to Fearghal: the prosecutor breached her statutory duties owed to Fearghal under RCW 10.99.060? Did the Legislature intend for a remedy to be available when prosecutors breach their duties owed a person under RCW 10.99.060? (Assignments of Error 1 & 3)

f. Should a jury determine if DSHS recklessly committed acts harmful to Fearghal and demonstrated wanton misconduct when, viewing all factual inferences as favorable to Fearghal: DSHS willfully retained and assigned Dixson to investigate the McCarthy referrals regardless of supervisory concerns that Dixson's history of fabricating reports and faulty investigations had "a directing bearing on child safety"; and Dixson then conducted a faulty investigation causing the prolonged harmful separation of Fearghal from his children, Fearghal's severe emotional distress and other injury? (Assignment of Error 2)

g. Is summary judgment error on the claims against DSHS when, viewing all factual inferences as favorable to Fearghal: DSHS failed to deliver findings of an unbiased non-negligent investigation within the 90-day timeframe specified in RCW 26.44.030(12)(a), thus denying material information to (1) Clark County courts that made civil child placement decisions, and (2) Clark County courts and the City prosecutor who made decisions to seek or impose no-contact orders precluding Fearghal from seeing his children, and to continue prosecution of the matter being investigated by DSHS? (Assignment of Error 2)

h. Is summary judgment to the County, DSHS and City error when, viewing all factual inferences in favor of Fearghal: the defendants fail to prove the absence of genuine issues of material fact that evidence liability for Fearghal's claims? (Assignment of Error 1, 2 & 3).

i. Should proximate cause be determined in this action using the substantial factor standard because the defendants individually and collectively caused the prolonged harmful separation of Fearghal from his children, Fearghal was a member of a protected class under RCW 26.44 and RCW 10.99, and the defendants had duties to exchange information under RCW 26.44.035. (Assignments of Error 1, 2 & 3)

j. Is suppressing Patricia's corrections to her deposition testimony error? Is Ms. Kraemer's deposition testimony moot because it was not obtained in compliance with CR 31? (Assignments of Error 1, 2, 3 & 4).

III. STATEMENT OF FACTS

A. Background Facts

Fearghal (/Far-gal/) and Patricia McCarthy married in 1998 and have two children, Conor (born 7/16/99) and Cormac (born 5/10/03). CP 406-407. During the marriage, Patricia experienced panic attacks, insomnia and depression, and was referred for mental health treatment. CP 401. In June 2004, Patricia's bipolar sister suicided. Patricia began reporting visions of her dead sister and other delusions. Id. Patricia suffered from various paranoid fears such as hospital staff plotting against her, "frightening visions that are not real", that she was going to harm Cormac, and more. CP 407,¶2.11. Patricia's psychiatrist recommended psychiatric evaluation and cognitive behavior therapy. Id. Patricia took psychotropic drugs for her mental health issues along with prescription narcotics for complaints of pain and became drug dependent. CP 408,¶2.13. By Spring 2005, Patricia's drug abuse was substantial. CP 401. She believed her dead sister and an angel visited her at night; and a raptor behind their backyard was her dead sister. CP 1938, 2010. Marital discord developed regarding Patricia's drug dependency. CP 410,¶2.16. Patricia became fearful that she would lose custody of the children in the event of a divorce. Id.

B. Kingrey's Investigation

As the one year June anniversary of her sister's suicide approached, Patricia was relying on medications more and more. CP 1955. On 6/1/05, Patricia was out of medications and having panic attacks. CP 401. Late afternoon on 6/2/05, Patricia came home high on narcotics obtained on a new prescription. Id. Fearghal and Patricia quarreled about Patricia's

escalating drug abuse resulting in Fearghal threatening divorce. Fearghal and Patricia later reconciled before going to bed. CP 401-402.

At 12.51pm on 6/3/05, Kingrey contacted Patricia by phone. Patricia told Kingrey she was with the children and her mother, Regina, at St. Joseph's Church to seek shelter. Patricia alleged, the evening prior on 6/2/05, Fearghal struck Cormac twice on his head "so hard that he hit his head on the table then fell on the floor." Kingrey "asked if Cormac had any injuries." Patricia reported "no visible marks." CP 1825-1827.

Kingrey went to the McCarthy residence and interviewed Fearghal. CP 1806-1807, p16, p24. Fearghal reported he did not strike Cormac and denied ever having physically abused his wife, saying "I've gotten angry and yelled on occasion, but never touched her." CP 1828. Fearghal told Kingrey that Patricia had been abusing pain medications, had been high on prescription pain medications the night before, had been reporting various delusions in the last year since her sister committed suicide, and was also taking medication for anxiety and other mental health issues. CP 1789.[1]

Kingrey then arrested Fearghal on two charges of Assault IV-DV: i) Cormac and ii) Patricia. CP 1828, 1556. Kingrey took Fearghal to CCLEC (i.e. jail). Kingrey returned to the McCarthy home where he met Patricia for the first time in person and obtained a DV Victim Statement from her. Patricia then told Kingrey that she didn't need shelter after all because she would stay with her parents who lived locally. CP 1828.

At a domestic violence scene, Kingrey is supposed to assess whether

[1] See also CP 1828, Fearghal reported "Patricia takes medication for anxiety and I think the medication is making her delusional." When questioned as to Patricia's mental health Fearghal reported, "Her older sister committed suicide and its affected her, I believe."

drugs are being abused but he did not do so. CP 1544:p42,17-25, p43,1-9. Kingrey ignored Fearghal's statements that Patricia was high on drugs on the early evening of 6/2/05, and that a quarrel ensued over Patricia's drug abuse. CP 401-2,¶9-10. Kingrey dismissed Fearghal attempts to explain Patricia's history of anxiety, panic attacks and drug use. Id.¶10. Fearghal showed Kingrey the various medications Patricia was taking; but Kingrey told Fearghal it did not matter. CP 1789. Kingrey doesn't recall been shown the bathroom medicine cabinet, but testified that a collection of opiates in the cabinet would not have caused him concern about Patricia's veracity; and Fearghal's statements about Patricia's psychiatric history had no impact on his assessments of veracity. CP 1540:p26,10-21;p28,14-17. After being told about Patricia's drug abuse, Kingrey did not ask for any evidence or proof to validate substance abuse as a factor in his investigation. CP 1542:p35-36. Kingrey testified he did not raise Fearghal's statements about Patricia's drug abuse and mental health status with Patricia prior to arresting Fearghal because he "was convinced in his own mind that she was telling the truth and these facts actually happened." CP 1541:p30,4-14. *Kingrey testified he made no allowance that Fearghal's statements to him might have been true.* CP 1542: p32,18-21.

Even though there was no imminent threat to Patricia or the children; Kingrey arrested Fearghal because "*he thought a no-contact order would be a good thing to have at the time and the only way to get that was to book [arrest] Mr. McCarthy*"; because he knew the "no-contact order would preclude Fearghal from seeing the children"; and because he knew the no-contact order and arrest would become factors in Fearghal not

having access to his children and future determinations about Fearghal being allowed by courts to see his children. CP 1543: p38-39.

Kingrey testified he had "of course" come across situations where a spouse used an abuse allegation to gain advantage in a domestic dispute,[2] there is a risk of false allegations in domestic violence settings; and he would typically interview third party witnesses who had observed an alleged assault because "you couldn't be sure who was telling the truth." CP 1544:p41,19-25, p42,1-16. Kingrey knew that Conor was a witness. CP 1827. Kingrey was unable to explain why he did not interview Conor, the only third party percipient witness. CP 1544 p43,17-22.

Kingrey typically must assess a witness's demeanor and credibility by meeting with them in person. CP 1545:p46,6-10 CP 1549:p63,8-12. The 911 call evidences this protocol with the operator telling Patricia that a deputy would first need to come to talk to her in person prior to talking with Fearghal. CP 535. Kingrey didn't bother go see Patricia in person at 12:51pm *prior* to making the arrest; he testified he didn't do so due to time constraints; nonetheless, he drove the 24 miles from the McCarthy home (passing St. Joseph's Church) to the CCLEC and back to the home to meet Patricia for the first time *after* arresting Fearghal; Kingrey's shift didn't end until 6pm; and Kingrey says he didn't interview or examine the minor children because overtime would have to be authorized by the sergeant. CP 1545-1546:p46-p47,p52,18-25. Kingrey testified that it would not have made any difference to his decision to arrest Fearghal if Patricia and her

[2] After Fearghal was arrested, Patricia withdrew approximately $70,000 from Fearghal and Patricia's joint checking account. Patricia later admitted she called the police to get control over the children and marital assets in the event of a divorce. CP 1427, ¶5

mother had significant issues with veracity. CP 1545, p50.

Kingrey testified he would have expected to see bruising on Cormac based on the violent nature of the alleged assault. CP 1544:p44.1-14. Kingrey had knowledge and experience of bruise progression and bruises turning from red to dark-purple to green fading to yellow after a week to ten days CP 1541-1542:p31-33. Kingrey confirmed there was no evidence of any physical trauma suffered by any of the complainants and no signs of any disturbance in the house the night prior CP 1544-1545: p44,22-25; p45,1-6. Kingrey didn't independently verify whether Cormac had any bruising or injury; and did not recall seeing the children at all. CP 1541: p31,14-19. Kingrey did not take any photographs because "there was nothing there to take any photographs of" CP 1544:p43,23-25. When asked to reconcile the lack of bruising on Cormac with the violent nature of the acts alleged, Kingrey admitted "I have no knowledge of injuries because I didn't see the boy". CP 1547, p54, 20-25.

Kingrey did not check or confirm that Fearghal had no prior criminal history, or inquire with neighbors to see if they'd observed anything violent CP 1543, p40 Kingrey testified that Fearghal was not enraged or threatening in any way. CP 1542: p36,23-25. Yet, Kingrey felt Fearghal displayed the classic behavior of an abuser based on "denial, you know, shifting the blame, that's about it", but he did not know how Fearghal's behavior was any different from how an innocent person would respond to a false complaint. CP 1545-1546: p48,18-25, p49,1-2.

Kingrey showed no concern that, if Patricia's allegations were actually true, Cormac should have been promptly taken to hospital for examination for

head trauma. Kingrey did not form an opinion as to whether Cormac was actually injured, he didn't tell Patricia to take Cormac to the hospital; but nevertheless concluded "if my child had a severe injury, I would certainly look into getting it treated". CP 1550:p67,1-18;p68, 6-13. Kingrey did not refer the incident to CPS for further investigation. CP 1825 - 1828.

Petty interviewed Conor in January 2006. Petty told Patricia to leave the room when Patricia yelled at Conor for contradicting her allegations. One week later, on 1/11/06, Conor was interviewed by Petty and attorney Jon McMullen. Conor was emphatic that Fearghal did not hit Cormac and was not abusive; that Patricia was not being honest; and that she would get angry at him if he would not say "her truth". CP 413,¶2.24. CP 1780, ¶5.

Lieutenant Hall testified as an expert. CP 1851-1854. Hall's expert opinion was that (i) Kingrey lacked probable cause to arrest Fearghal, (ii) Kingrey's investigation "was rife with many errors", and (iii) Kingrey displayed an unwarranted predisposition toward arrest. CP 1851-2.[3] Hall

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[3] Lt. Hall testified that his expert opinion was based upon the following factors:
(1) Kingrey made the arrest based on a cold report taken telephonically 18 hours after the incident without any independent evidence to corroborate a crime. Significantly, Kingrey had ample time to make a thorough investigation prior to arresting Fearghal because there was no imminent danger to Patricia or the children. CP 1852.
(2) Kingrey had little or no interest in information provided by Fearghal about his wife's drug abuse. At a minimum, Kingrey should have inquired for proof as a means of either proving or disproving what may have been exculpatory evidence offered by the alleged perpetrator. CP 1852.
(3) Kingrey had a complete lack of interest in evidence Fearghal offered as to Patricia's mental imbalance, which may have played a role in her perception of the events she was reporting. Patricia's coherence at midday on June 3 on the telephone was not necessarily evidence of her coherence at the time of the alleged incident on June 2. Kingrey could have deferred the arrest in order to resolve inconsistencies in the evidence, which would have obviated the need for any arrest. CP 1852-3.
(4) Regina, Patricia's mother, was not an eye-witness to the incident and therefore could not offer relevant testimony. CP 1853. There were only three percipient witnesses who had capacity to testify: Conor, Patricia, and Fearghal. CP 1852.

noted substantial concerns that Kingrey made an arrest in order to affect later child placement decisions, evidenced by Kingrey's comments in deposition as to his rationale behind his decision to arrest. CP 1854.

On 6/3/05, Kingrey submitted a Declaration of Probable Cause (the "PC Declaration") to Judge Schreiber for a finding of probable cause. CP 1557-8. Kingrey's PC Declaration omitted exculpatory evidence that: (1) there were no injuries or bruises of any kind on either Cormac or Patricia; (2) no-one took Cormac to hospital for examination for head trauma; (3) Kingrey was unable to reconcile the lack of bruises on Cormac with the violent nature of the alleged assault, (4) Patricia was taking medication for mental health issues (5) Patricia had been experiencing delusional thoughts exasperated by her sister's suicide, (6) Patricia was abusing pain medications, (7) Patricia was high on narcotics from a new prescription at the time of the alleged incident, and (8) Patricia lied when she reported to Kingrey she would stay in a shelter when she knew she would stay with her parents who lived nearby. On 6/5/05, relying solely on Kingrey's PC Declaration, Judge Schreiber found there was probable cause.

On 6/6/05, Fearghal was arraigned, released, and issued with a five-year no contact order (the "NCO") prohibiting him from any contact with Cormac or from "coming within 500ft of the residence or workplace - includes school and daycare of the children." CP 1670.

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(5) Kingrey was looking to arrest Fearghal evidenced by: (a) Kingrey did not make any attempt to interview or observe the children, (b) Kingrey only had to ask for Fearghal's cell phone to verify Fearghal's attempts to locate Patricia instead of reporting Fearghal was only "acting", and (c) Kingrey's supervisor, Sergeant Shea, testified that time or budgetary considerations do not restrict deputies from interviewing a complainant who is in the County. CP 1853

C. DSHS's Investigation

Two days after the incident, on 6/4/05, Regina took Cormac to Kaiser Clinic. CP 1996. Only Regina and Cormac were present per the medical report. Id The physician saw "nothing of permanent physical concern" noting a "slight yellow bruise non-tender". CP 1996-7. The physician called CPS after Regina recounted Patricia's allegations. CP 1997. The physician referred Patricia for neglect because of the delay in having Cormac medically examined for head trauma. CP 1373, 1375.

On 6/13/05, Mr. Patrick Dixson of DSHS met Patricia at the McCarthy home, he instructed Patricia to sign a safety plan requiring her to ensure Conor and Cormac did not have any contact with Fearghal, he referred Patricia to a divorce attorney and told Patricia that if she didn't file for divorce she would be failing to protect the children and violating the signed safety plan. CP 411,¶2.19 Dixson told Patricia that if she allowed Fearghal to see the children, the children would be removed from her care and put in foster care CP 1594, 155. Patricia told Dixon that "her back was turned, she just saw the end of the incident" CP 1818, p32.

Within 90 days of a referral, CPS standards require Dixson to complete an Investigative Risk Assessment ("IRA") and issue a CAPTA letter stating abuse allegations as founded, inconclusive or unfounded. CP 1973. The CAPTA letters on the referrals for Fearghal and Patricia were not issued until more than ten months later on 4/21/06. CP 1404,1409.

CPS standards require the subjects of an investigation to be interviewed CP 1972 Dixson admitted he never spoke to Fearghal and instead deferred to Kingrey's police report. CP 1216, p59-60. Fearghal

was not contacted by CPS or informed about Dixson's investigation until receipt of the 4/21/06 CAPTA letter. CP 1796,¶16. Except for 1-2 weeks in June 2005 when Fearghal was overseas, Fearghal was available to be contacted by Dixson by phone or by letter. CP 1796, ¶16

CPS standards require Dixson to interview collateral resources. CP 1972. The Service Episode Records ("SERs") evidence Dixson did not speak to the referring Kaiser physician; CP 1374-5; and Dixson doesn't recall speaking to any healthcare provider about Cormac, CP 1216, p57.

CPS standards require face to face interviews with each child victim. CP 1972. Dixson testified he was mandated to contact the children; CP 1944; and that he interviewed Patricia, Conor and Cormac in person on 6/13/05 between noon and 1.30pm. CP 1216, 1323, 1945. Contrary to this: (1) daycare records evidence Cormac was in daycare constantly from 8.50 am until 3.40pm on 6/13/05; CP 2038-9; (2) Conor was at school; CP 154:8, (3) the Family Face Sheet Dixson completed evidences he only met with Patricia on 6/13/05; CP 1993,¶1, (4) Conor testified he did not meet with Dixson, a black male he would have remembered; CP 1781,¶7; and (5) Dixson gave conflicting testimony stating he didn't recall interviewing Conor or asking Conor what he had witnessed. CP 1945-6 Dixson testified that a determination as to whether Conor had witnessed the alleged incident was significant to his investigation. CP 1947.

An IRA form listed various risk factors for investigation including, substance abuse, mental and emotional impairments, and protection of the child by the caregiver. CP 1418-20. Dixson testified: (1) he made the risk assessments in the IRA form, CP 1217; (2) his risk assessments for

substance abuse lacked basis; CP 1217,p64. (3) evidence of parental delusions would impact his risk assessments because "it places the child at risk of harm and injury", CP 1218,p69; and (4) a parent who does not get up to feed her children would affect his risk assessments. Id But, neither Patricia's substance abuse, nor her mental health issues, nor her propensity for delusions were listed as risk factors in Dixson's risk assessment. CP 1374. Dixson did not perform these investigative risk assessments until just before he closed the case. CP 1217.

D. Closing of DSHS Investigation

SER records evidence: i) Conor and Cormac are listed as victims, ii) Fearghal and Patricia are listed as subjects of the investigation, and iii) no medical attention was required for Cormac. CP 1371-3. Dixson closed his investigation on 4/12/06. CP 1325. After interviewing Patricia on 6/13/05, Dixson developed no new information. CP 1324. Yet, Dixson didn't make any findings until he was about to close his investigation CP 1216,p59. Dixson did not create an SER for his 6/13/05 interview of Patricia until 4/12/06, the day he closed his investigation, or an SER for his purported 6/13/05 interview of Conor until 7/15/05. CP 1363-4

Dixson says he relied on Kingrey's report to make risk assessments. CP 1218,p72. But not until 5/23/06 and 6/5/06 did he request Kingrey's report stating "this is very important" because "there had been a request for a hearing" by Fearghal. CP 1396 CP 1967. Not until 6/9/06, months after he closed his investigation, did Dixson receive Kingrey's report. CP 1385. Dixson relied instead on "SER notes" that were excerpts from Kingrey's report CP 1371. These "SER notes" omitted risk information

and exculpatory evidence in Kingrey's report relevant to Dixson's investigation and risk assessment.[4] CP 1380-1.

The SER history evidences Dixson: (1) failed to notify Fearghal of the investigation, his purported interviews of the children, and the safety plan for the children, (2) failed to complete his investigation and send a CAPTA letter within 90 days of referral; (3) failed to document Patricia's statement that "her back was turned" so did not actually see the alleged incident; (4) failed to create SERs within timeframes specified by CPS standards; and (5) failed to interview Fearghal and the referring physician. CP 1974-5. Nonetheless, Dixson concluded the referral was founded for Fearghal but unfounded for Patricia; and he made a bonus finding of founded against Fearghal for negligent treatment of Conor. CP 1375 Dixson found that substance abuse was not a factor for Patricia. CP 1419.

On 4/21/06, DSHS sent Fearghal a letter stating they had conducted an investigation and made findings of "founded". CP 1409-10. This was the first notice to Fearghal of DSHS's investigation. CP 1796. On 5/8/06, Fearghal requested a review. CP 1319. On 6/15/06, DSHS affirmed the finding of founded. CP 1405. Fearghal appealed for an administrative hearing. Fearghal presented exculpatory evidence much of which was available to DSHS if only Dixson had contacted him during the investigation. CP 1796,¶16. As a result, on 10/5/06 prior to the administrative review, DSHS changed its founded finding to inconclusive. CP 1301 This change was made upon exculpatory evidence including the

[4] For example, the SER notes did not document statements in Kingrey's report that i) Cormac had no injuries or bruises whatsoever, ii) Patricia was having delusions, and iii) Patricia was taking medication for mental health issues.

referring physicians' medical report, the Petty/McMullen interview of Conor, evidence that Patricia was coaching Conor, together with concerns about Patricia's motivations and credibility CP 1398, 1391.

E. Dixson's Performance Evaluation

Dixson's annual performance for 11/1/04-11/1/05 was reviewed by his supervisor, Denise Serafin (the "Review"). CP 1968-1982. Serafin knew that Dixson fabricated reports, backdated events, failed to meet collateral contacts, did not timely create SER records, and was grossly out of compliance with CPS investigative standards. Id Dixson did not feel he received adequate training to perform his job. CP 1970. Dixson was performing at a sub-standard level Id. Out of 12 referrals identified for special supervisory review in February 2005, Dixson was out of compliance on all 12 referrals, another 71 referrals had questionable documentation; Dixson cut and pasted from previous investigations to create SERs; and face-to-face meetings documented in the SERs could not be supported by Dixson's handwritten notes. CP 1972. Dixon documented face-to face meetings on days that were either a state holiday or that he was off sick Id. Serafin wrote that records fabricated by Dixson "*represent a serious data integrity concern which could have a direct bearing on child safety*." Id. Of 83 referrals assigned to Dixson between 11/04 and 6/05, 95% had limited or no collateral contacts documented. CP 1973. Dixson failed to make collateral contacts when directed to do so Id. On 7/20/05, Dixson admitted "he had a bad habit of not completing the Safety Assessments and IRA's until he was physically closing the case." Serafin investigated Dixon's "ability to complete an IRA so far after the

investigation"; and found that Dixson kept "insufficient notes to help him complete the IRA." Id. Dixson had closed only 18% of his referrals by 11/17/05. Id. Dixson had a compliance rate of only 16.9% for IRA's and CAPTA letters. Id. Dixson backdated entry of a 90 day Health and Safety visit into SER even though "he had not seen the children" and "never been to the caregiver's home." CP 1974. On 8/2/05, Dixon's superiors decided that Dixson "would not have case carrying responsibility as there was serious concern about the integrity of his documentation and the quality of his investigations." Id. "*Management had sufficient concerns about the quality of Dixson's work and safety of children on his caseload that he was removed from casework in early August*." CP 1980.

F. Fearghal's reports of abuse and neglect to DSHS

On 1/8/06, during Dixson's investigation, Fearghal reported various concerns about the safety and welfare of his children to DSHS. CP 1998. Fearghal reported that Cormac, who was just two years old, suffered four dog bites to his face as a result of being left unsupervised. CP 2002. Fearghal reported that Conor, who was just six years old, was permitted to ride his bike unsupervised, without a helmet, for about a mile stretch along a busy county road with sharp bends and no sidewalks. CP 1791, 2002. Fearghal reported that Conor was being exposed to sexual activity, had imitated the sex act, and was being bathed naked with Patricia's boyfriend's three year old daughter in the same tub. Id. Fearghal reported that Cormac was being locked in his bedroom with a chain lock and left alone in the care of Conor for extended periods of time. CP 1791. DSHS

declined to investigate these reports because Fearghal had been arrested for assaulting Cormac. CP 2003, 1971.

G. Petty's Involvement, Order of Protection

The City of Vancouver assigned Petty to prosecute the charges from Fearghal's arrest. CP 360. Petty first contacted Patricia on 6/6/05. CP 150. Petty expressed her outrage at what Kingrey had reported telling Patricia that she herself had a two year old. CP 411,¶2.20 Patricia told Petty she had been angry at Fearghal, she had over-reacted, and was mistaken in her allegations made to Kingrey. CP 745, #76; CP 411. Petty told Patricia that she couldn't recant; Fearghal "fit the profile of a typical abuser"; Patricia "fit the profile of the typical domestic violence victim"; and threatened Patricia could lose her kids if she recanted. CP 411-2; 585; 611.

On 7/8/05, Petty amended Kingrey's citation dropping the assault charge on Patricia. CP 248; 360 But, Petty threatened Patricia with prosecution for making a false police report if she recanted her allegations as regards Cormac CP 412 CP 745 #81,82. CP 1901.76; CP 217,¶3. On 7/20/05, the court clarified the NCO did not apply to Patricia or Conor. CP 1428. The same day, Patricia told Fearghal he risked deportation from the DV charge on Cormac, but she would recant her allegations and allow Fearghal see the children if he ceded the family business and marital home to her. CP 1428, CP 1790,¶2 Patricia allowed Fearghal to spend all day July 21st and 23rd with Conor. CP 1428.

Petty contacted Patricia multiple times characterizing Fearghal as an abuser. CP 412 Petty told Patricia if she recanted she would lose her kids because Petty would notify CPS who would put the children in foster care.

CP 585; 412. Petty told Patricia to get an Order of Protection precluding Fearghal from contact with the children; to file for divorce; that "*Fearghal had no chance of getting custody of the children with a criminal conviction for child abuse*", and that Patricia would lose all credibility and lose custody of her children in any divorce action if she recanted. CP 412; CP 754,#224. Patricia complied with Petty's demands. CP 412.

On 7/28/05, Patricia obtained a temporary protection order barring Fearghal from any contact with her, Conor and Cormac. CP 1350. Patricia filed for divorce on 8/9/05. CP 196. On 8/10/05, the temporary protection order was extended until 8/31/05 for hearing on the divorce docket. CP 1355. Patricia obtained the protection order and then requested the family court to terminate Fearghal's visits with Conor, based also on Fearghal's arrest and criminal charges. CP 402. Patricia reported Fearghal's arrest and criminal charge in a declaration supporting her motion to terminate Fearghal's contact with Conor, and to give credibility to Patricia's other allegations. CP 207-212. On 8/31/05, the family court restricted Fearghal's contact with Conor, issued a mutual DV restraining order between Patricia and Fearghal (the "DVRO"), and appointed Dr. Kirk Johnson to do a child custody evaluation. CP 1357-1361, ¶1.1, 3.1, 3.2P, 3.4.

Patricia testified Petty "wanted to see Patricia prevail in the family matter", "wanted to help her as much as possible with her [divorce] case, that she had a two-year old son of her own, and it got personal with her." CP 524. Patricia testified that the child custody dispute in the divorce action and the assault charge proceedings on Cormac became interwoven; CP 614; Petty and Patricia's divorce attorney, Ms. Miles, strategized

together. "the two were linked", Petty gave Miles information "and they together used that for strategy in the family dissolution." CP 525.

> "Ms. Petty. . had coached me to blacken Fearghal in the declarations that were drafted by Ms. Miles to be used as evidence in the criminal matters and to win custody of the children " CP 740,#3. "Ms. Miles and Ms. Petty were collaborating on the child custody issue and I was told to sign [the declaration] " CP 746,#95.
>
> "I don't know if the word is ethical or not, but I believe [Petty] was operating outside the boundaries of her job." "I think having conversations with my divorce attorney and discussing a strategy would be outside the boundaries." CP 614-615.

Petty instructed Patricia to find more information to report against Fearghal in order to make the assault charge against Fearghal stand and in order to strengthen Patricia's divorce case. CP 518; 592; 593:4-10.

> "What else can you think of? What else can you come up with? We need to get as much on this guy as we possibly can to protect you and to protect the children. And I guess general, that was the nature of the conversation." CP 592 "She [Petty] encouraged me to file charges." Id
>
> "What are the other things that we can find...if something happens it needs to be reported...the more we have the better chance of a conviction", CP 593-4: "anything else that we can add to it, it will only help strengthen the case in getting a conviction CP 518.
>
> "[T]he understanding I got was that you needed to do – you needed to find – it didn't really matter, you know, morally if it was a coincidence or whatever it was, what mattered is that in order to keep my children and prevail in the – and prevail, was to see what else we could get on Fearghal Whether it was exactly true or not or taken out of context or not " "She didn't ask me to make up pure fantasy, okay, but it was oaky if it was an exaggeration or it was taken out of context or it could be construed in a different manner." CP 616-617.

Petty told Patricia that "it would strengthen her [divorce] case" if Fearghal violated the NCO and that any type of contact would violate the NCO. CP 593. Patricia "would not have known that unless [Petty] had told me." CP 594. On 8/12/05, Patricia told Officer Kortney Langston that

Fearghal had been arrested for assaulting Cormac and Petty had told her to report Fearghal for violations of the NCO. CP 75,77. Patricia alleged Fearghal had violated the NCO on three occasions; June 30th, July 23rd, and July 25th, 2005. CP 75-79. Patricia provided log-in sheets from Bally's Fitness Club purporting to support her allegations. CP 81-88. Langston did not arrest Fearghal, or find probable cause to arrest, and referred the matter back to Petty CP 75. Despite this, on 11/10/05, Petty filed three DV charges against Fearghal for violating the NCO. CP 337-8.

Patricia testified that in July 2005 she went to Fearghal's hotel room to get business materials and inadvertently picked up personal notes of Fearghal including notes related to discussions about the assault charge with his attorney. CP 748,#128. CP 754,#223. CP 318. CP 412; Patricia "came across these notes months later" and remembered Petty instructions to "see what else you can find... to strengthen the case." CP 748,#19; CP 613:20-24. On 10/18/05, Patricia reported Fearghal for witness tampering. CP 412 On 1/31/06, Fearghal was charged with witness tampering. CP 252. A substitute NCO was issued on 2/21/06 because the assault charge was transferred from district court to superior court. CP 252; 1464, 1671.

Patricia testified: (1) *Petty kept asking her all sorts of questions including if Fearghal had any contact with the children; Petty instructed Patricia to go back to Bally's Fitness Club and "get the records and show them to her*", after which Petty coached Patricia on what to say to the police and directed Patricia on the specific precinct to report the alleged NCO violations. CP 746,#100; CP 754, #220; and (2) Petty pressured Patricia to report the witness tampering charge to the police, and Petty

instructed Patricia on what to say to the police. CP 751,#172. When asked if Petty directed her to make up allegations, Patricia testified she had conversations with Petty "in that regard, in that manner". CP 613:7-10. Patricia testified that Petty asked her to exaggerate. CP 613:14.

> "Yes, Jill Petty had so much invested personally and professionally in this case by now that the concept of Fearghal not getting a conviction was intolerable to her, and I became her pawn with her and her advocate brainwashing me with their rigid belief system founded on charts, generalizations and anti-male agenda. They instilled fear in me that I would lose my children unless I made more allegations to help them get a conviction. *They told me I should perpetuate allegations both to the police and in divorce declarations in order to eradicate any possibility of Fearghal gaining any custody of the children in the divorce.* She said that if I felt abused it was okay to make allegations to support my feelings. In addition, she was clear that making exaggerated claims was par for the course, perfectly legal, and any lack of cooperation on my part would be viewed as being an unfit mother. I was always under the threat of being put in foster care and this threat was wrapped in a cloak of victim support as long as I played my role." CP 755-6,#235 (emphasis added).

When asked if she had undertaken any investigation with regard to actions taken against Fearghal, Petty testified: "it's not my job to investigate, it's the police officer's job to investigate." CP 1002:17-24.

Dr. Johnson informed Fearghal that his 6/3/05 arrest by Kingrey would be a major factor in his parenting evaluation. In December 2005, Dr Johnson suspended his parenting evaluation until the criminal allegations against Fearghal were resolved. CP 415

H. Investigations by Deputies Young & Paulson

The DVRO restrained both parties from i) harassing or disturbing the peace of the other party or any child, and ii) "from going into the grounds of or entering the home of the other party." It also notified each

party, in bold caps, that a violation of the DVRO is a criminal offense and the violator is subject to arrest under RCW 26.50. CP1357, 1359.

Patricia violated the DVRO on 10/5/05, when she phoned Fearghal three times and was verbally abusive to both him and his mother. Deputy Todd Young responded. Patricia told Young that Fearghal "had been arrested in June for assaulting her and their two year old son." Despite his confirmation of an active DVRO, and Patricia's admission of violating the DVRO, Young declined to arrest her. CP 1676-7. Young reported the offense as "violation of protection order" under RCW 26.50.110. CP-1675.

Patricia violated the DVRO a second time on 1/11/06 when she barged into Fearghal's home, threatened Fearghal, and was assaultive. CP 1794, ¶11. Off-duty Vancouver Police Officer, Bill O'Meara was present and physically intervened so as to prevent Patricia from striking Fearghal. Id. O'Meara testified Patricia threw open the front door, came running at Fearghal; she was screaming, she was in a rage; and she "appeared very unstable and out of control." O'Meara "felt uneasy and afraid that [Patricia] was going to be assaultive", and felt "if he had not been standing between her and Fearghal, she would have attacked him". CP 668-669.

Fearghal called 911 reporting Patricia was distraught and that he feared for the safety of his two children. CP 1681. Deputy Doug Paulson and Deputy Young responded. CP 1794. Young told Paulson about the prior 10/5/05 incident and the DVRO, verifying the DVRO number for Paulson. CP 1681. When Paulson contacted Patricia, she "had a third party at her home ready to take the boys in case she was arrested". Id. Patricia admitted she had gone onto the grounds of Fearghal's residence, opened

the front door and yelled at Fearghal. Id. Patricia further admitted that "she could have stepped into the home". CP 1682. Patricia told Paulson that Cormac "has a no-contact order with his father" and that criminal charges were pending. CP 1681. Upon arriving at Fearghal's residence, Paulson interrogated Fearghal as to why he had struck Cormac on June 2nd and started blaming Fearghal. CP 1794,¶11. Fearghal reported Patricia had threatened "that she was going to get him and that she would make sure he went down in court" and "to watch his back because she would be back later to get him". CP 1682. Paulson refused to look at the DVRO when Fearghal showed it to him. Id. Paulson told Fearghal that he wasn't going to make a report and refused to give Fearghal a police report number for the incident. Id. Fearghal felt victimized by Paulson and broke down in tears. Id. O'Meara told Paulson that "Patricia was very enraged", "was yelling at Fearghal that he would pay in court soon enough", and had he not intervened Patricia "would have rushed Fearghal and there might have been a physical confrontation." CP 1681-2. Paulson reported: "Fearghal told me that he is in fear for his safety, and he too had been crying off and on as he relayed the details to me." CP 1682. Despite the uncontroverted evidence of domestic violence crimes, Paulson did not arrest Patricia. Id.

Conor witnessed the incident. CP1780, ¶6. Conor was so distressed, he threw up. CP 1681. Conor testified that Patricia was screaming at him, calling him a liar; and after Paulson left, Patricia told him she was going to take him to Dr. Johnson the next day to say "her truth" and that "*if I didn't she was going to call the police on me and I would go to jail.*" CP1780, ¶6. The next day, Patricia brought Conor to Dr. Johnson with instructions

to say Fearghal made him lie to Petty the previous day. CP 413, ¶2 25.

Patricia then asked the family court again to terminate Fearghal's contact with Conor. On 1/17/06, based on Fearghal's arrest, the pending criminal charges, and Dr. Johnson's concerns about the domestic conflict on 1/11/06, the family court granted Patricia's motion to terminate all contact between Fearghal and Conor. CP 1456, 1460. In May 2006, the Domestic Violence Prosecution Center sent a letter acknowledging that Fearghal was a victim of domestic violence on 1/11/06. CP 414, ¶2.26.

I. Deputy Farrell's investigation of forged checks

On 5/5/06, Fearghal reported Patricia forged a $5000 check drawn on a credit-card account for which he was solely liable. CP 1795¶14, CP 673-4. Fearghal told Deputy Richard Farrell that this was a second $5,000 check Patricia had forged on his account. Id The credit card company instructed Fearghal to report the second forgery and theft as a crime CP 1795,¶14. Copies of the forged checks were provided to Farrell along with an Affidavit of Fraud. CP 675, 676-7. When questioned, Patricia reported Fearghal had violated a no-contact order several times, but admitted to altering the checks to cash them against Fearghal's credit-card account. CP 674. Rather than arrest Patricia for her admitted crime of forgery, Farrell told Fearghal that this was a civil issue. Id.

J. Deputy Farrell's refusal to investigate endangerment of Cormac

On 12/17/06, Patricia again violated the DVRO. CP 414. Fearghal went to retrieve community property from Patricia's home, as ordered by the family court, and was met by six men including Patricia's father and boyfriend. CP 1795,¶14. The situation became volatile, Fearghal called

911 and Deputy Farrell responded. CP 1795,¶14. Fearghal reported that he was poked by Patricia's boyfriend so as to provoke a physical altercation; he was threatened, and Patricia's father was verbally abusive. Id. Fearghal was in fear of his safety Id Farrell told Fearghal he was aware of the history but refused to write-up a report. Id. Inside the house, Fearghal discovered a chain-lock on a bedroom door corroborating accounts of Cormac being locked in his bedroom. Id. Fearghal showed Farrell the chain lock and advised Farrell of his concerns about Cormac's safety. Id. Instead of investigating, Farrell refused to write-up a report. Id The family court held Patricia in contempt for violating the DVRO holding her responsible for the actions of the six men as Patricia's agents. CP 414.

K. Resolution of criminal charges

Petty resigned. CP 360. On 8/1/06, the assault and witness tampering charges were dismissed and Fearghal was charged with disorderly conduct for abusive language. CP 1687. Concerned about the catastrophic damage to his children from the risk of deportation from a DV conviction, even if small, Fearghal entered an *Alford/Newton*[5] plea to disorderly conduct (non-dv). CP 1695 Fearghal's sentencing restricted him from leaving the county for two years and renewed the NCO pertaining to Cormac and Patricia. CP 1699. CP 1475-8. Each of the three charges filed by Petty for DV violation of the NCO were also later dismissed. CP 412.

L. Deputy Zimmerman's Investigation

On 12/13/06, the family court ordered reunification counseling for

[5] State v. Newton, 87 Wn 2d 363, 552 P 2d 682 (1976) See also North Carolina v Alford, 400 U S 25, 37, 91 S Ct 160, 27L Ed 2d 162 (1970).

Fearghal and the children. CP 352. On 4/6/07, the criminal court rescinded the NCO for Cormac and renewed its NCO for Patricia. CP 332. CP 334.

On 11/18/07, Patricia brought Cormac to the hospital and alleged that Fearghal struck Cormac. CP 1796,¶14. CP 413,¶2.23. Deputy Zimmerman investigated. CP 1796, ¶14. Zimmerman determined Patricia was lying but needed to talk with Fearghal. Id. Fearghal complained to Zimmerman that there had been multiple false allegations, that this false allegation was another violation by Patricia of the DVRO, and that false allegations of child abuse were a crime. Id. Zimmerman declined to intervene or arrest Patricia Id On 11/19/07, DSHS discontinued an interview of Cormac as Patricia was prompting Cormac on what to say. CP 414, ¶2.25. DSHS determined the allegation was unfounded. CP 413.

M. Officer Taylor's investigation

At 6.12am on 11/29/07, Officer Tyson Taylor was dispatched to Southwest Medical Center when Fearghal reported Patricia was there in violation of the DVRO. CP 64. Fearghal brought Cormac to the hospital for minor surgery. Patricia would not release Cormac when called by the doctor and hospital security had to intervene. CP 64-65. Taylor confirmed the DVRO protecting Fearghal and the NCO protecting Patricia. Id. When Taylor arrived, Patricia was at the hospital in violation of the DVRO Patricia told Taylor she had a criminal NCO that superseded the DVRO, but Fearghal shouldn't "go to jail if at all possible." Id Taylor told Patricia she was in violation of the DVRO. Patricia then alleged Judge Poyfair had lifted the DVRO and put it in writing. Id When Taylor said he was going to confirm if this was true, Patricia told him he "would not find any

paperwork" and she was going to leave. Id. Fearghal reported the DVRO was in place to protect him from Patricia using the NCO to get him arrested for a DV violation which could result in him getting convicted and deported. Taylor declined to arrest Patricia. Id.

Later that day, Patricia obtained an ex-parte order allowing her to be at the hospital. CP 355. Patricia presented this to Dr. Vien who was now doing the child custody evaluation saying she had not violated the DVRO and Fearghal was responsible for the parental conflict. CP 643,¶3. Dr. Vien relied on Taylor's non-arrest of Patricia in his conclusions on child custody. Id. On 9/5/08, Judge Poyfair found: (1) the ex-parte order was granted based on false statements made to the court; CP 642,¶2.2; and (2) Patricia in contempt for violating the DVRO on 11/29/07. CP 644,¶3.1.

N. Resolution of child custody

The child custody dispute was resolved in October 2008. Patricia admitted all her allegations against Fearghal were false. The parenting plan designated Fearghal as primary parent with sole-decision making. CP 1790,¶3. In Stipulated Findings of Fact entered in the divorce action, Patricia admitted she made false allegations to Kingrey on 6/3/05, and that all the other criminal allegations were false. CP 410, 412. Patricia participated in drafting the Stipulated Findings and agreed to them of her own free will to resolve the child custody dispute. CP 216,¶1. CP 595-6.

O. Harm, Emotional Distress, Injury

Not until 10/5/06, sixteen months after the 6/4/05 referral, did DSHS make an "inconclusive" finding just prior to administrative adjudication

pertaining to DSHS's investigation.[6] CP 1301. Thus, findings from a non-negligent DSHS investigation were unavailable to Fearghal within 90 days of the 6/4/05 referral.[7] Meanwhile, Clark County courts issued orders of protections, restraining orders and no-contact orders in both civil and criminal proceedings, but did so without the benefit of 90 day non-negligent investigative findings from DSHS. CP 1441-68.

The Stipulated Findings supporting the parenting plan evidence:

> "The children were forcibly estranged from [Fearghal] for a period of approximately two years as a result of court decisions based on Fearghal's June 3, 2005 arrest. During this time, while the children were in the sole care and custody of Patricia, they suffered harm and neglect as a result of their forced estrangement from Fearghal, Patricia's drug abuse, Patricia's mental health impairments and other stressors." CP 415-416, ¶2.30.

After he was arrested, Fearghal's "life became a living hell". CP 1790,¶2. Fearghal risked deportation from the criminal charges and was told to cede the family business and marital home to Patricia if he wanted to see his children again. Id. DSHS's refusal to investigate Fearghal's concerns about his children's safety and welfare gave Fearghal feelings of futility and hopelessness. CP 1971. Fearghal suffered greatly from feelings of fear, anxiety and depression; and was "worried sick" while the criminal matter remained unresolved. CP 1791-2, ¶6. Fearghal felt victimized by numerous false allegations and the fact that the police refused to intervene upon Patricia's violations of the DVRO. CP 1792. Often, Fearghal had nightmares. Id. Hearing reports of his children being endangered and being left unsupervised was extremely distressing. Id. Losing custody of

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[6] An "inconclusive" finding precludes administrative review of a DSHS investigation.
[7] It is undisputed that DSHS did not issue a CAPTA letter with findings prior to 9/5/05.

his children was an overwhelming worry. Id. Deportation was an ongoing worry due to Patricia's many attempts to engage him in conflict when she violated the DVRO. Id. Fearghal had great difficulty functioning normally, lived in constant fear and at times was so distraught that he contemplated suicide. Id. Family members would visit Fearghal from Ireland to provide emotional support. Id. Fearghal joined a male Bible study group and a church-based support group for emotional support and because medical counseling records would be discoverable in the divorce action CP 1973.¶8. During this time, Fearghal lost his family skincare business, that was his livelihood, and was unable to work due to constant anxiety, fear and depression arising from Patricia's false allegations, her violations of the DVRO, not being able to see his children, and because no-one with the authority to intervene to protect his children would do so. CP 1797. ¶17.

Dr. James Boehnlein, a qualified specialist from OHSU, reviewed Fearghal's declarations and concluded "elements of multiple diagnosable mental health conditions are present"; and strong indicators supported diagnosable conditions of "depression and/or anxiety" for Fearghal.

P. Petty's involvement in Patricia's September 2009 deposition

Patricia was first deposed on 9/28/09. Patricia testified: (1) Petty and Patricia met in the restroom on every break during her 9/28/09 deposition; (2) Petty offered Patricia legal assistance to pursue changing the parenting plan; (3) Petty coached Patricia on what to say in deposition, "you need to be mean and here's what you need to say." CP 528. Patricia testified she was emotionally charged and angry at Fearghal going into her 9/28/05 deposition because Fearghal wouldn't modify the parenting plan; and so

she reverted back to Petty's prior coaching to blacken Fearghal in her testimony. CP 589; 508-9; 740.#3. Patricia testified to Petty "walking [her] step by step" on what to say in deposition in order to lay groundwork for pursuing a protective order and changing the parenting plan; and this was similar to Petty's actions back in 2005. CP 611-612. By the end of the day, Petty had a plan for Patricia as to how Petty was going to help Patricia get custody of the children; CP 1933-1934. As a result, Patricia's testimony was unduly influenced. CP 1934. CP608:13. Patricia testified:

> "On the first day of deposition in September 2009, after the first recess, my answers lacked integrity and were not rooted in fact. This was due to Jill Petty, former DV prosecutor and one of the defendants in this matter, taking advantage of my highly emotionally charged state and feelings of loss and hopelessness in order to give her an advantage, as well as assist in her expressed plan to represent me pro-bono in the divorce/custody proceedings. Petty told me to portray Fearghal as an angry abusive man, and that I must be strategic in how I answer questions **in order to lay the groundwork to get a protective order against Fearghal and then use it against him in the divorce.** All this took place during the first and all successive breaks throughout the day (except lunch), when she followed me into the ladies restroom." CP 742-3, #35.

Petty admitted to talks with Patricia during bathroom breaks in the 9/28/09 deposition, but refused to give testimony about these conversations asserting she formed an attorney-client relationship with Patricia. CP 801-803. Petty testified that when she offered Patricia legal help, she was aware Patricia did not have custody of the children; CP 804; and she offered to represent Patricia pro-bono, "it wasn't a question of her paying me." CP 802.

Q. Suppression of Patricia's deposition correction pages

Patricia's deposition took place over five days; 9/28/09, 3/4/10, 3/4/10, 3/24/10 and 3/25/10. CP 896. On 9/28/09, the City stated it was adjourning Patricia's deposition. CP 425. The County acknowledged the

4/3/10 deposition was a continuation from prior days of deposition. CP 506. Plaintiffs began their examination of Patricia on 4/4/10. CP 505.

Patricia reserved signature on her deposition transcripts evidenced by a Notice of Filing Deposition filed on 3/17/10. CP 892. On 4/12/10, a "Jenny", not the court reporter Cheryl Vorhees, filed a Notice of Filing Deposition purporting that Patricia waived her signature for the last two (of the five total) volumes of her deposition CP 894. Notably, Schmitt & Lehman failed to comply with CR 30(e) and did not provide Patricia with a full set of deposition transcripts for all five days for her examination. Nor did they copy Patricia on the Notices of Filing Deposition. CP 892, 894. Moreover, a review of the transcripts and word index to the deposition transcripts of 3/24/10 and 3/25/10 evidences Patricia did not change mind and did not waive her signature. CP 1046, 1050-1066.

Patricia received hardcopies of the deposition transcripts sometime in April 2010 from Plaintiffs' attorney, Mr. Boothe. CP 1068. Patricia then went to the public library to read them and made corrections. CP 1068,¶3. Toward the end of the day on 5/7/10, Patricia dropped off all her correction sheets to Schmitt & Lehman. CP 1068,¶7. Patricia did not make a second trip or mail in her correction sheets. Id. The first 17 pages of Patricia's correction sheets are numbered sequentially in typeface: 1 of 18, 2 of 18, etc. CP 740-756. CP 912-928. The last signature page is manually numbered "18 of 18", signed by Patricia and notarized by Robyn Kraemer, an administrative assistant at Schmitt and Lehmann. CP 757. CP 911.

On 7/15/10, the City of Vancouver served a CR31 Notice of Deposition Upon Written Questions to depose Kraemer on 7/22/10. CP-

898-900. On 7/20/10, Kraemer submitted answers to her deposition. CP 909. On 7/22/10, the City then filed Kraemer's deposition answers with the court as an exhibit to a declaration. CP 815, 818. CP 903-909

According to Kraemer: (1) Patricia did not submit any correction pages when she came in to get the signature page numbered "18 of 18" notarized; CP 904; (2) Schmitt and Lehman sent Patricia's original notarized signature page to the State's attorney Ms. Pamela Anderson; CP 905; (3) Patricia mailed her correction sheets but no records support what date they was purportedly mailed. CP 905-6. Contradicting Kraemer, Ms Anderson testified she never received the original notarized sworn signature page, nor did she receive the correction pages from the court reporter; and only saw the correction pages for the first time upon receiving a copy of Kraemer's Deposition on Written Questions. CP 814.

On 7/30/10, the court granted the City of Vancouver's motion to suppress Patricia's correction pages as corrections to her deposition, but instead allowed them into the record as a declaration. CP 1096-1098.

IV. ARGUMENT

A. Preamble, Adoption Statement

At issue in this appeal are the defendants' wrongful acts in violation of strong public policies set forth in RCW 26.44, RCW 10.99 and RCW 49.60. These legislative mandates merit paramount consideration in review of the decisions being appealed. Fearghal hereby adopts all the legal arguments of his co-appellant children, Conor and Cormac.

B. Standard of Review

The Court reviews summary judgment de novo performing the same inquiry as the trial court.[8] Evidentiary rulings made in conjunction with summary judgment are also reviewed de novo.[9] A trial court's ruling on a motion for reconsideration and its decision to consider new or additional evidence is reviewed for an abuse of discretion.[10]

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears this burden and is held to a strict standard, with any doubts as to the existence of a genuine issue of material fact resolved against the moving party; and all facts and reasonable inferences considered in the light most favorable to the nonmoving party.[11] If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating material facts are in dispute.[12] Summary judgment is proper only if reasonable persons could, from all the evidence, reach but one conclusion.[13] The decision to consider additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion; and in the context of summary judgment, there is no prejudice if the court considers additional facts on reconsideration.[14] In this case, the Respondents are the moving parties for summary judgment, so Appellants receive the benefit of all factual inferences.

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[8] Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004)
[9] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).
[10] Martini v. Post, 178 Wn. App. 153, 164, 313 P.3d 473 (2013)
[11] Atherton Condo. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990)
[12] Id.
[13] Lilly v. Lynch, 88 Wn. App. 306, 312, 945 P.2d 727 (1997)
[14] Martini v. Post at 164

C. Summary judgment dismissing the false arrest and false imprisonment claims was error because: (1) as a matter of law, the Alford plea has no preclusive effect, Judge Schreiber's finding does not break proximate cause, qualified immunity does not apply to a cold misdemeanor arrest; and (2) genuine issues of material fact exist.

1. The County was not entitled to summary judgment as a matter of law

On summary judgment the court correctly ruled: "Fearghal entered an *Alford/Newton* plea to disorderly conduct as opposed to a traditional conviction." CP 1267-69. On reconsideration, the court ruled the *Alford/Newton* plea did not bar Fearghal's claims, but that instead Judge Schreiber's probable cause finding established probable cause as a matter of law. CP 1293-5. The Supreme Court has held:

> "Applying collateral estoppel to give an *Alford* plea preclusive effect in a subsequent civil action is uniquely problematic. Where a defendant is convicted pursuant to an *Alford* plea not only has there been no verdict of guilty after a trial but the defendant, by entering an *Alford* plea, has not admitted committing the crime." Clark v. Baines, 150 Wn.2d 905, 916, 84 P 3d 245 (2004).
>
> "Unlike a defendant making an ordinary guilty plea, a defendant making an *Alford* plea maintains his innocence of the offense charged. As such an *Alford* plea cannot be said to be preclusive of the underlying facts and issues in a subsequent civil action. Id, (citations omitted).

Fearghal's *Alford* plea has no preclusive effect on factual determinations or issues pertaining to probable cause or to his causes of action.

Judge Schreiber's probable cause finding based on the information, controlled by Kingrey does not "cleanse the transaction". Bender v. City of Seattle, 99 Wn.2d 582, 592, 664 P .2d 492 (1983). For purposes of officer liability, there is "no distinction between an officer who makes an invalid, warrantless arrest and one who knowingly withholds facts in order to obtain a warrant." Id. Thus, Bender is apposite because, for purposes of

determining whether probable cause exists as a matter of law, a judicial finding based upon Kingrey's post-arrest probable cause statement is no different than a judicial finding of probable cause for a pre-arrest warrant. In Bender, the Court held:

> "[An officer] in a position to control the flow of information to a magistrate upon which probable cause determinations are made... should not be allowed to cleanse the transaction by supplying only those facts favorable to the issuance of a warrant." Bender at 592.
>
> "The exception we now announce to the general nonliability rule of *Pallett* and *Cavitt* only prevents an officer from asserting the facial validity of a warrant as an absolute defense to a false arrest or false imprisonment action. The officer can still establish a defense to such an action by proving, to the satisfaction of the jury, the existence of probable cause to arrest under the circumstances." Id.

Kingrey controlled the flow of information to Judge Schreiber, who relied solely upon Kingrey's probable cause statement in making his finding of probable cause. Thus, the County is precluded as a matter of law from relying on Judge Schreiber's probable cause finding as a defense.

Qualified immunity for a warrantless misdemeanor arrest is limited to where the arresting officer had reasonable cause to believe the crime was *committed in his presence* and he acted in good faith on that belief.[15] It undisputed that Kingrey arrested Fearghal based upon a "cold report" of an alleged misdemeanor the day prior. Because Kingrey had no reason to believe a misdemeanor was committed in his presence, qualified immunity does not shield the County from liability. In any event, qualified immunity is not available to an officer who provides incomplete information or controls the flow of information to a judge.[16]

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[15] Staats v. Brown, 139 Wn 2d 757, 778, 991 P 2d 615 (2000)
[16] Bender at 592, Guffey v. State, 103 Wn.2d 144, 150, 690 P 2d 1163 (1984)

2. Probable cause is ordinarily a question of fact for a jury; the County cannot prove the absence of material facts as to probable cause

A false arrest occurs when a person with actual or pretended legal authority to arrest unlawfully restrains or imprisons another person.[17] A false imprisonment occurs whenever a false arrest occurs.[18] A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice by physical force, or by threat of force, or by conduct reasonably implying that force will be used.[19] An officer lacks legal authority to make an arrest if there is no probable cause.[20] Probable cause is the objective standard by which the reasonableness of an arrest is measured.[21] Probable cause for a warrantless arrest exists when the facts and circumstances known to an arresting officer, from reasonably trustworthy information, are sufficient to permit a person of reasonable caution to believe that an offense has been committed.[22] Mere speculation or an officer's personal belief will not suffice.[23] Probable cause cannot be supported by information gained after an arrest.[24] *"[U]nless the evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to determine whether an arresting officer acted with probable cause."*[25] An after-the-

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[17] Jacques v. Sharp, 83 Wn. App. 532, 536, 922 P.2d 145 (1996).

[18] Heckart v. City of Yakima, 42 Wn. App. 38, 39, 708 P.2d 407 (1985).

[19] Kilcup v. McManus, 64 Wn.2d 771, 777, 394 P.2d 375 (1964).

[20] Graham v. Connor, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). (An arrest made without probable cause is a violation of the Fourth Amendment).

[21] State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982).

[22] State v. Gluck, 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974).

[23] State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001).

[24] State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996).

[25] Daniel v. State, 36 Wn. App. 59, 62, 671 P.2d 802 (1983). See also Bender, 99 Wn.2d at 594, (when there is conflicting testimony as to probable cause, a factual issue exists and the plaintiff is entitled to have his claim put before the jury).

fact evaluation of probable cause serves as a crucial safeguard that probable cause existed when the magistrate issued the warrant.[26]

Considering all factual inferences in Fearghal's favor, material facts exist as to the issue of probable cause. Kingrey arrested Fearghal on two charges of assault on on 6/2/05; i) Patrica; and ii) Cormac. Not a scintilla of evidence existed to substantiate that Fearghal assaulted Patricia, and that assault charge was dismissed by Petty. The fact that Kingrey charged Fearghal with assaulting Patricia without any evidence of that crime, evidences that Kingrey acted unreasonably and arbitrarily in making his arrest decision without any care about establishing probable cause.

Lieutenant Hall provided expert testimony evidencing that another law officer would not have reasonably found probable cause to support arresting Fearghal. Kingrey did not interview Conor nor did he examine Cormac (or Patricia) for any bruises, new or old; nor did he bother to meet the children. Kingrey made no effort to obtain independent corroborative evidence to substantiate Patricia's allegations, relying instead on hearsay from Patricia's mother who was not a percipient witness.[27] Kingrey made no inquiry to reconcile the violent nature of the allegation with the fact that Cormac had no bruising or that Patricia did not take Cormac for medical examination for internal head trauma, despite Kingrey's own testimony that he would have done so if it was his child. Kingrey ignored

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[26] State v. Maddox, 152 Wn. 2d 499, 508, 98 P. 3d 1199 (2004)

[27] "When the probable cause affidavit is based on an informant's hearsay, it must show the informant is probably trustworthy and has personal knowledge regarding the facts asserted under *Aguilar-Spinelli*. Under *Aguilar-Spinelli*, the informant's statements are tested by the familiar two-pronged test, (1) credibility/reliability, and (2) basis of knowledge." State v. Merkt, 124 Wn. App. 607, 613, 102 P.3d 828 (2004).

exculpatory evidence making no allowance that Patricia's mental health issues had deteriorated since her sister's suicide, that she was experiencing delusions and had been high on drugs on 6/2/05, or for the collection of prescriptions in her medicine cabinet evidencing drug abuse including the overused narcotic prescription obtained on 6/2/05. Kingrey had no reason to believe that Fearghal's statements were not reasonably trustworthy. Fearghal did not have a prior criminal record, was not enraged or threatening in any way, and had been phoning Patricia concerned about her welfare. To explain why he ignored all these facts, Kingrey testified he "*was convinced in his own mind*" that Patricia was telling the truth and "*he thought a no-contact order would be a good thing*", so he "*made no allowance*" that Fearghal's statements to him might have been true. Kingrey testified in deposition that he didn't care whether Patricia or her mother had issues of veracity; and he arrested Fearghal merely because Fearghal denied the allegation and supposedly "shifted the blame" by reporting Patricia's drug abuse and mental health issues. In short, Kingrey set his mind to arrest Fearghal regardless of any exculpatory evidence. But Kingrey's speculative and subjective beliefs are not determinative of probable cause. To establish probable cause, Kingrey was required to resolve the "he said/she said" scenario with reasonably trustworthy evidence that overcame the exculpatory evidence before him. The County makes much hay out of the DV Victim Statement Kingrey received from Patricia. But this was received after the arrest when Kingrey first met Patricia in person, and thus is not a defense to false arrest.

Kingrey controlled the information going to Judge Schrieber.

Kingrey didn't bother to interview Conor, the only other percipient witness who, when interviewed by Petty, was emphatic that Patricia was not truthful. None of Fearghal's statements about Patricia suffering from delusions following her sister's suicide, Patricia's abuse of narcotics, and Patricia being high on narcotics the early evening of the alleged incident are mentioned in Kingrey's probable cause statement.

3. Material facts evidence injury caused by Kingrey's false arrest

Fearghal presents material facts evidencing emotional distress and other injury he suffered as a result of Kingrey's arrest. Kingrey started a chain of events that snowballed into Fearghal not seeing his children for two years, facing the possibility of deportation, losing the family business that was his livelihood, nightmares, feeling suicidal and more. Dr. James Boehnlein testified Fearghal presented strong indicators that supported diagnosable conditions of depression and/or anxiety. Clark County courts, faced with addressing the "he said/she said" scenario between Patricia and Fearghal in order to making decisions affecting child placement, relied on and gave great weight to the fact that Kingrey, a law officer, had made a prior determination by arresting Fearghal for child abuse. The County fails to prove the absence of material facts as to probable cause, false arrest, false imprisonment, causation and damages; and thus, these factual issues should properly go to a jury for determination.

D. Both the County and DSHS breached duties owed to Fearghal under RCW 26.44 that proximately caused a harmful placement decision.

1. Procedural History, Elements of Claim

In 2011, Judge Nichols ruled to *deny* the County summary judgment

dismissal of the negligent investigation claim. CP 1270. In 2014, Judge Collier overturned that ruling granting summary judgment. The elements of any negligence claim are duty, breach, injury and causation.

2. Duty

The Legislature has emphasized the paramount importance of protecting the parent-child relationship, and any intervention into the life of child is also an intervention into the life of the parent RCW 26.44.010. Rodriguez v. Perez, 99 Wn. App. 439, 444, 994 P.2d 874 (2000). This mandate includes protecting the family unit from unnecessary disruption. RCW 26.44.100(1). Rodriguez, at 444.

The Washington Supreme Court has made clear that RCW 26.44 "has two purposes: protection of children and the preservation of the integrity of the family."[28] Both the children who are suspected of being abused and their parents comprise a protected class under RCW 26.44. [29] When a duty is owed to a specific individual or class of individuals, that person or persons may bring an action in negligence for breach of that duty.[30] Law enforcement agencies and DSHS have a duty to investigate possible occurrences of child abuse. RCW 26.44.050. Rodriguez, at 444. Thus, a parent who is subject to a child abuse investigation may bring an action for negligent investigation under that statute. Rodriguez, at 445.

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[28] Roberson v. Perez, 156 Wn.2d 33, 50, 123 P 3d 844 (2005), citing Tyner v. DSHS, 141 Wn 2d 68, 80, 1 P 3d 1148 (2000).

[29] Rodriguez, 99 Wn. App at 445, citing Tyner v. DSHS, 92 Wn App 504, 512, 963 P.2d 215 (1998), ("The Legislature has recognized a duty to the parent as well as the child. .")

[30] Rodriguez, 99 Wn. App at 444 "It is well established that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action where the statute is violated and the injured party was one of the persons designed to be protected." Id, citing Yonker v. DSHS, 85 Wn App 71, 78, 930 P.2d 958 (1997)

Other specific duties are imposed by RCW 26.44 for example duties; to maintain privacy, RCW 26.44.031; to coordinate investigations, RCW 26.44.035, to train employees, RCW 26.44.170; to notify parents, RCW 26.44.100; and more. These duties are derived from the paramount duty to protect the child's welfare, which includes "avoiding unnecessary disruption of the parent-child relationship." Rodriguez, at 444. Thus, for any duty owed under RCW 26.44, a parent has the right to seek a remedy if such duty is breached.[31] On these grounds, Fearghal asserts his claims against Clark County and DSHS.

3 First Breach by County - Kingrey's Negligent Investigation

Kingrey investigated Patricia's child abuse allegations and thus owed duties under RCW 26.44.050. Material facts evidence that Kingrey conducted a negligent investigation. Fearghal reported Patricia's drug abuse and showed Kingrey her medicine cabinet. Kingrey does not deny been shown the medicine cabinet testifying that he "made no allowance" for anything Fearghal was telling him, and that a collection of opiates in the medicine cabinet would not have given him any concern. Kingrey minimized Patricia's substance abuse as Patricia taking medications for anxiety. But Fearghal reported Patricia had been high on narcotic pain medication the evening prior, not anxiety medication. When conducting a child abuse investigation, evidence of a parent's substance abuse *shall* be given great weight. RCW 26.44.195(2). Kingrey admitted he gave this evidence no weight at all. Kingrey predetermined to arrest Fearghal

[31] See Tyner v. DSHS, 141 Wn.2d at 80. ("Thus, by recognizing the deep importance of the parent-child relationship, the Legislature intends a remedy for both the parent and the child if that interest is invaded.")

merely on Patricia's say-so. Lieutenant Hall testified that Kingrey's investigation was "rife with errors". These errors are stated in the Statement of Facts above. Kingrey didn't interview Conor or examine Cormac for any injury, despite Kingrey's testimony that he would have expected to see bruises of some sort if Patricia's allegations had been true, and, if he was the parent, he would have taken Cormac to hospital for head trauma examination. Because material disputed facts exist, Judge Nichols properly denied summary judgment prior to being overturned.

4 Second Breach by County - Paulson's Negligent Investigation

On 1/11/06, when Fearghal called 911 to report Patricia violated the DVRO, he also reported that he feared for the safety of his two children CP 1681. Fearghal feared for the safety of his children because Patricia was enraged, had issues with substance abuse and with her mental health stability. After 45 minutes of waiting, Fearghal called back a second time again reporting he feared for the safety of his two children. CP 1681. Young and Paulson were dispatched Notably, the duo went to Patricia's house first in response to Fearghal's fears of safety for his children. Young and Paulson's dispatch to investigate Fearghal's fears of safety for his children vested them with duties under RCW 26.44

Conor endured emotional abuse from Patricia before and after Paulson's investigation CP 1780,¶6. Conor's testimony evidences that he was living in an abusive neglectful home, a material fact resolved in favor of the non-moving plaintiffs. Upon receiving a phone call from Petty that day,[32] Patricia started screaming at Conor, calling him a liar. Conor "had

[32] In his declaration, Conor remembers Ms. Petty's name as "Ms. Penny." CP 1780

never seen her so mad." Conor saw Patricia banging on Fearghal's door yelling at him. Patricia reported to Paulson that Conor was physically sick and threw up when he got home, blaming Fearghal to deflect from her own emotional abuse. CP 1681 Patricia told Paulson that Conor said Fearghal "made him lie about hitting Cormac" to Petty. CP 1681. Paulson came over to Fearghal's house and began reinvestigating the child abuse allegation, interrogating Fearghal as to why he struck Cormac on June 2nd. CP 1794,¶11. By now, Paulson's duties under RCW 26.44 had fully ripened. Because Paulson failed to interview Conor, his investigation was negligent. A jury could certainly find so. Paulson could have asked Conor if it was true that Fearghal had made him lie. Paulson could have asked Conor if he felt safe and why he felt sick. But he failed to do so.

5. Third Breach by County - Farrell's Negligence (Failure to Investigate, Failure to Report)

On 12/17/06, Farrell responded to a call. Fearghal was at Patricia's home to retrieve community property, as ordered by the family court Once inside, Fearghal discovered a chain-lock on a bedroom door corroborating prior accounts of Cormac being locked in his bedroom. Fearghal showed Farrell the chain lock, advised Farrell of his concerns about Cormac's safety, and asked him to investigate. Farrell refused.

> "[U]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency... *must* investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW" RCW 26.44.050 (emphasis added).

Resolving all factual inferences in favor of the non-moving plaintiffs, discovery of a chain lock installed on the outside of then three year old Cormac's bedroom door gave reasonable cause to believe that

Cormac was being endangered and thus suffered abuse and/or neglect. This triggered Farrell's duty to make a report by either making a police report himself, or report the endangering chain lock to DSHS. RCW 26.44.030(1)(a). Farrell's breach of his duty to report is distinguishable from his duty to investigate and gives rise to a separate negligence claim.

6. First breach by DSHS – Dixson's Negligent Investigation

Dixson was assigned to investigate referrals on both Fearghal and Patricia and owed duties under RCW 26.44.050. Dixson's investigative failings mirrored those stated in his performance evaluation. Dixson falsely reported he interviewed Conor. Dixson failed to interview Fearghal. If he had, Dixson would have learned about Patricia's drug abuse, a factor statutorily required to be given great weight in child abuse investigations, together with Patricia's mental health issues and other factors affecting his investigative risk assessments and findings. When Fearghal provided this evidence to DSHS, through an administrative hearing, DSHS changed its findings. Not until 11 months after intake did Dixson bother to get Kingrey's report that stated Cormac had no bruises and referenced Patricia's mental health issues. Other investigative failings by Dixson are stated in the Statement of Facts and are incorporated herein.

Dixson failed to follow DSHS procedures for investigation of child abuse as set forth in the CPS Practices and Procedures Guide. Dixson failed to notify Fearghal of the allegations made against him at the earliest point of contact. CPS Guide, ¶2331.4.f & g, WAC 388-15-045 & .049. In fact, Fearghal wasn't contacted at all. Dixson failed to interview Fearghal, or alternatively document that Fearghal was unwilling or unavailable to be

interviewed. Id. ¶2331.4.h & i. He failed to interview the children within 10 days of the referral. Id. ¶2331.4.b. .And nothing evidences Dixson's compliance with DSHS child interview standards, such as conducting child interviews outside the presence of Patricia. Id. ¶2331.4.b.ii. Dixson failed to contact the referring physician. Id. ¶2331.4.a. Dixson was required to complete his investigative risk assessment and findings within 90 days, but failed to do so. Id. ¶2540. [33] Dixson was required to create SER's in the DSHS records system with 30 days to as to ensure recording accuracy.[34] He did not do so making SER entries more than 10 months later. DSHS fails to meet it burden of proving the absence of material facts that evidence Dixson conducted a negligent investigation.

7 Second breach by DSHS -Negligence (Training, Supervision, Retention)

DSHS has a duty to train its employees to identify substance abuse. RCW 26.44.170(2). This is because in child abuse investigations, evidence of a parent's substance abuse *shall* be given great weight. RCW 26.44.195(2). Patricia was a subject of the investigation. Dixson admitted in deposition to making risk assessments for substance abuse arbitrarily. Dixson complained he did not have sufficient training and wrote an email to his supervisor's superior "about not receiving the training [he] needed to do [his] job effectively." Viewing the facts in favor of the non-moving plaintiffs, DSHS failed to provide adequate training to Dixson so that he could identify substance abuse in his investigations.

Negligent supervision is a cause of action in Washington. Wheeler v. Catholic Archdiocese of Seattle, 65 Wn. App. 552, 565-8, 829 P.2d 196

[33] The current requirement in the CPS Guide is 60 days.
[34] Children's Administration Operations Manual, ¶153043.1

(1992). Dixon's performance evaluation for 11/1/04 - 11/01/05 documents that Dixson was a reckless employee who fabricated reports, created SER entries without supporting evidence months outside CPS regulations, and had only a 16.9% compliance rate for timely completion of investigative risk assessments and findings. In *February* 2005, a *special* supervisory review of 12 of Dixson's cases evidenced his non-compliance with CPS procedures on all 12 cases. In 95% of cases, he failed to make collateral contacts. Dixson cut and pasted from other sources to create reports. He backdated reports. His supervisor, Serafin, knew all this sending Dixson approximately 19 emails between March and July 2005 about his faulty investigative work, concluding there was "*a serious data integrity concern which could have a direct bearing on child safety.*" CP 1972. Not until 8/2/05 was Dixson removed from investigative duties due to "*management concerns about the quality of Dixson's work and safety of children on his caseload*." CP 1980. Despite this, Dixson was assigned to investigate the referrals against Fearghal and Patricia in June 2005. Worse, even after his termination from casework in August 2005, nine months later in April 2006 Dixson was still performing investigative work on the McCarthy referrals completing the investigative risk assessment and findings. Worse again, DSHS sent Dixson scrambling to get a copy of Kingrey's police report as late as June 2006, one year after the referral and after Fearghal requested review. Resolving all factual inferences in Fearghal's favor, DSHS negligently retained Dixson to do investigative work on the 6/2/05 referrals both before and after Dixson was terminated from casework.

8. Third breach by DSHS – Negligence (Failure to Investigate)

On 1/8/06, while Dixson's investigation was still open, Fearghal reported child abuse/neglect including that: i) two year old Cormac suffered four dog bites to his face while left unsupervised; ii) six year old Conor, was riding his bike unsupervised, without a helmet, along a busy, curvy, county road with no sidewalks, iii) Conor was exposed to sexual activity, had imitated the sex act, and was being bathed naked with Patricia's boyfriend's three year old daughter. Fearghal also reported Cormac being locked in his bedroom with a chain lock and left in Conor's care for extended periods of time. DSHS declined to investigate these reports. CPS *must* assess or investigate all reports of alleged child abuse or neglect RCW 26.44.050. Material facts evidence DSHS failed to investigate abuse/neglect allegations reported by Fearghal.

9. Other breaches by DSHS - Negligence (Failure to Timely Complete Investigation, Failure to Notify)

For reports of abuse or neglect accepted by DSHS, "in no case shall the investigation extend longer than 90 days from the date the report was made". RCW 26.44.030(12)(a). DSHS received the referral on 6/4/2005. But its investigation was not concluded until 4/21/06, over seven months late. DSHS did not amend its findings until 10/5/06, over 13 months late.

DSHS had a duty to notify a parent of a child of any allegations of child abuse or neglect made against that parent at the initial point of contact with that parent. RCW 26.44.100(2). This duty is further explained in WAC 388-15-045 and the CPS Guide.

"CPS *must* notify the parent...at the earliest possible point that will not jeopardize the investigation or the safety or protection of the child

> when: (1) CPS is investigating a report alleging an act or acts of child abuse or neglect, and: (a) The child is alleged to be the victim: and/or (b) CPS interviews a child in relation to an alleged act of child abuse or neglect." WAC 388.15.045
>
> "The assigned social worker *must*, notify the alleged perpetrator of the allegations of CA/N at the earliest point in the investigation that will not jeopardize the safety or protection of the child or the course of the investigation." CPS Guide, ¶2331.4.f

Material facts exist that DSHS failed to act with haste by failing to timely notify Fearghal and to complete its investigation within 90 days.

10. Injury

A claim for negligent investigation under RCW 26.44 arises when DSHS or a law enforcement agency "conducts a biased or faulty investigation that *leads* to a harmful placement decision, such as placing the child in an abusive home, removing the child from a nonabusive home, or failing to remove a child from an abusive home."[35] Thus, liability under RCW 26.44 is not limited to harmful placement decisions made solely by DSHS or law enforcement agencies, but properly includes the harmful placement decisions made by courts and others who would ordinarily rely on these agencies to deliver a non-negligent investigation. Under RCW 26.44, any harmful placement decision satisfies the element of injury.

The involuntary separation of Fearghal from his two children for a period of almost two years is factually undisputed. This involuntarily separation by itself, constitutes a harmful placement decision. Additionally, the findings entered in support of the parenting plan in the dissolution matter evidence that the children suffered harm and neglect while in the sole care and custody of Patricia.

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[35] M.W. v. DSHS, 149 Wn.2d 589, 591, 70 P.3d 954 (2003). (emphasis added)

11. Legal Causation, Qualified Immunity, Probable Cause,

Proximate causation consists of. cause in fact and legal causation. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998). Legal cause is grounded in policy determinations. Id. A determination of legal liability depends on mixed considerations of logic, common sense, justice, policy, and precedent Id. at 479. The issues regarding whether duty and legal causation exist are intertwined. Id. Legal cause rests on whether the defendants owed a duty to protect the plaintiff from the event which did in fact occur Id Here, the ultimate events that occurred were the harmful placement decisions that separated Fearghal from his children. The duties owed by the County and DSHS to Fearghal under RCW 26.44 are all purposed to avoid and/or minimize the harmful placement resulting from Fearghal's separation from his children. Thus, legal causation for the injury of harmful placement exists.

To receive qualified immunity from liability under RCW 26.44, a DSHS caseworker or police officer must (1) carry out a statutory duty, (2) according to procedures dictated by statute or superiors, and (3) act reasonably.[36] Material evidence exists that DSHS and the County, through their employees, did not follow the statutory procedures and did not act reasonably. Whether DSHS and the County acted reasonably presents issues of fact that withstand summary judgment.[37] Before the trial court, the County argued that Petcu v. State provided qualified immunity.[38] But

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[36] Babcock v. State, 116 Wn.2d 596, 618, 809 P.2d 143 (1991), Guffey v State, 103 Wn.2d 144, 152, 690 P 2d 1163 (1984)

[37] Lesley v. DSHS, 83 Wn. App 263, 275-276, 921 P 2d 1066 (1996)

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

Petcu is inapposite because that case analyzed qualified immunity in the context of federal civil rights violations, and explicitly distinguished its analysis from that in Babcock, which addresses qualified immunity from liability in the context of common law negligence. Petcu v. State, at 64

As a policy matter, a finding of probable cause does not impose a limitation on liability under RCW 26.44. [39]

12 Cause-in-fact

> "'Cause in fact' refers to the actual, 'but for', cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured. Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." Schooley, at 478.

The County and DSHS will argue that there are intervening cause-in-facts that protect them from liability consisting of the protection and restraining orders entered by the Clark County courts. But this argument fails. The Supreme Court has held that liability under RCW 26.44 accrues from negligent conduct that "*leads* to a harmful placement decision." M.W. v. DSHS, 149 Wn 2d at 591. Thus liability under RCW 26.44 is not limited to placement decisions made by DSHS or law enforcement themselves, but includes situations where others, such as a judge or prosecutor, make decisions that ordinarily rely upon material information from a timely non-negligent child abuse investigation. This is because minimizing disruption to the parent-child relationship is paramount. In Tyner, the Supreme Court held that negligent conduct of DSHS may "be the legal cause of a parent's separation from a child even when the separation is imposed by court

[39] "Applying only a standard of probable cause does not fulfill the legislative purpose of protecting children and their parents from unnecessary disruption in their relation to one another. An investigation can be conducted negligently and yield false information which may then be used to support a finding of probable cause." Rodriguez v. Perez, at 449

order" depending on whether all material information was placed before the court. Tyner, 141 Wn.2d at 83-84. Thus, whether a later court order is an intervening cause is a question of fact to be made by a jury, and not one of legal causation." Tyner, at 86. Only where the facts are not in dispute is legal causation decided as a matter of law. Schooley, at 468. Fearghal presents evidence that Clark County courts (1) relied on Kingrey's deficient report, and (2) were deprived of findings from timely non-negligent investigations from Dixson, Paulson and Farrell.[40] Dixson's untimely negligent investigation and the non-investigations of Paulson and Farrell prolonged the harmful separation of Fearghal from his children by impeding Fearghal's ability to convince courts to remove no-contact and restraining orders that were in place. 'But for' the breaches of duty by the County and DSHS, Clark County courts would have made different decisions affecting harmful placement. This is best evidenced by the fact that Fearghal ultimately ended up as primary parent of Conor and Cormac in the dissolution proceedings with sole decision making.

Both DSHS and the County had forseeability of how their duties under RCW 26.44 affect child placement decisions. Kingrey unashamedly testified he made the arrest because "*he thought a no-contact order would be a good thing*", he fully knew this would be the inevitable consequence of arresting Fearghal. Kingrey testified as to his forseeability of abuse allegations being used to gain advantage in divorce proceedings answering with "of course" CP 1544:p42. Dixson referred Patricia to a divorce

[40] See Lesley v. DSHS, at 274 where the Court recognized that DSHS must respond expediently in order to prevent or reduce harmful placements of children, and that the CPS manual emphasizes the need for expedient responses.

attorney and told her she needed to get a divorce so as to comply with the safety plan, evidencing forseeability that his investigation would impact decisions by the family court. Law enforcement agencies and DSHS are required to coordinate their investigations and keep each-other apprised of progress. RCW 26.44.035. A law enforcement agency includes the prosecuting attorney. RCW 26.44.020(14). Thus, both DSHS and the County had forseeability that any untimely or negligent investigation or non-investigation would affect prosecutorial and judicial decisions as to the assault charge on Cormac, the resulting no-contact orders, and other placement decisions impacting separation of father from child. Thus, material facts exist evidencing that the harmful separation of Fearghal from his children was caused by DSHS and the County.

13. Substantial Factor Test

In Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995), the Supreme Court reviewed the substantial factor test in a gender discrimination claim. Due to Washington's strong policy and disdain for discrimination, the Court declined to impose the "determining factor" standard for proximate cause on policy grounds, holding instead that the "substantial factor" test was proper. Mackay, at 309-310. The Court explained its holding was bolstered by the fact that the "substantial factor" test is also generally applied in multiple causation cases

> "In...multiple causation cases - those in which the conduct of more than one defendant or set of circumstances play a part in bringing about a plaintiff's injury - the application of the "but for" test is deemed unfair, as a matter of policy and social justice, in reaching a just result. The "substantial factor" test is generally applied in the multiple causation cases. This test states that a defendant is liable for a plaintiff's injury if the defendant's conduct was a

substantial factor in bringing about the injury even though other causes may have contributed to it." Mackay, at 310, citing Allison v. Housing Auth., 118 Wn 2d 79, 93-94, 821 P.2d 34 (1991).

Similarly, the nexus of claims under RCW 26.44 is a strong public policy that the bond between parent and child is paramount and there should be no unnecessary disruption of the parent-child relationship. Because of this strong public policy and because this is a multiple causation case with more than one set of circumstances, the "substantial factor" test is the proper standard for proving proximate cause of harmful child placement. Also, since DSHS and law enforcement agencies have a duty to coordinate their investigations under RCW 26.44.035, it would be unjust for the defendants to be able to blame eachother in order escape liability.

E. Both the County and City breached duties owed to Fearghal under RCW 10.99 and RCW 26.50 that proximately caused injury.

1. Duty, Qualified Immunity

On 8/31/05, the family court entered an order with mutual DV restraining provisions, the DVRO, restraining Patricia and Fearghal from i) "assaulting, harassing, molesting or disturbing the peace of the other party or any child"; and ii) "from going into the grounds of or entering the home of the other party." The DVRO notified each party that a violation of the DVRO would subject the violator to arrest under RCW 26.50

Duties of law officers regarding domestic violence are governed under RCW 10.99, RCW 26.50 and RCW 10.31.100(2).

"The primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party. RCW 10.99.030(5).

"A peace officer in this state shall enforce an order issued by *any* court in this state restricting a defendant's ability to have contact with a victim by

> arresting and taking the defendant into custody...when the officer has probable cause to believe that the defendant has violated the terms of that order." RCW 10.99.055.

When an officer has probable cause to believe a domestic violence crime has been committed, the officer has a duty to (1) make an arrest, and (2) provide notice of victim's rights. RCW 10.99.030(6)(a). A law officer's duty to make an arrest is also set forth in RCW 26.50.110(2) and RCW 10.31.100(2). A public prosecutor shall advise a victim of the decision whether or not to prosecute within five days, and if charges are not filed, shall advise of procedures available to the victim. RCW 10.99.060. The statement of intent of the Domestic Violence Act declares:

> "The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010

The statutory meaning of domestic violence includes the infliction of fear of imminent physical harm, bodily injury or assault, along with stalking. RCW 26.50.010(1). The meaning of stalking includes intentionally and repeatedly *harassing* or following another person. RCW 9A.46.110.

Qualified immunity does not apply to non-enforcement of domestic violence laws so as not to "undercut the purpose of the Domestic Violence Act, which is to recognize the necessity of early intervention in domestic violence cases." Roy v. City of Everett, 118 Wn.2d 352, 357-359, 823 P.2d 1084 (1992). Thus, upon responding to criminal complaints being made among "family or household" members, the City and County owed duties to Fearghal pursuant to the domestic violence statutes, and qualified immunity does not apply.

2. Breaches by the County – Young, Paulson, Farrell, Zimmerman

On 10/5/05, Patricia made three abusive phone calls to Fearghal, threatening he would never see his children again. Young investigated. Patricia admitted she violated the DVRO. On 1/11/06, Young and Paulson investigated a second complaint. Patricia admitted to violating the DVRO by coming onto the grounds of Fearghal's residence. Off-duty officer Bill O'Meara told Paulson that Patricia entered Fearghal's home and was assaultive. Thus, Patricia committed the crime of residential burglary, a Class B felony. RCW 9A.52.025. Young and Paulson had a duty to take Patricia into custody for violating the DVRO. RCW 26.50.110(2); RCW 10.99.055; RCW 10.31.100(2)(a) They also had a duty to give Fearghal notice of his rights. RCW 10.99.030(6)(a) They failed to do either.

On 5/5/06 Fearghal complained to Farrell that Patricia forged and cashed a (second) $5,000 check on his bank account Forgery is a Class C felony. RCW 9A.60.020. By cashing a forged check on Fearghal's bank account, Patricia violated the DVRO by "molesting and disturbing the peace" of Fearghal. Patricia's forged checks were just one more incident of spousal abuse - and the intent of the domestic violence statute, as well as the DVRO, is to ensure abusive behavior, especially criminal behavior, in domestic situations is stopped by early police intervention. Farrell did nothing despite Patricia's second admitted felony offense.

On 12/17/06, Patricia again violated the DVRO. CP 414. Fearghal called 911 because he was in fear of his safety, reporting that he had been physically assaulted by Patricia's boyfriend poking him with his finger in order to provoke a physical altercation. The family court held Patricia in

contempt for violating the DVRO, on the basis that Patricia used her boyfriend and others as her agents to violate the DVRO. Farrell refused to take a report and did nothing "to enforce the laws allegedly violated and to protect the complaining party." RCW 10.99.030(5).

On 11/18/07, Patricia brought Cormac to the hospital and alleged that Fearghal struck Cormac. Zimmerman investigated. Unlike Kingrey, Zimmerman did conduct a reasonable investigation talking to percipient third parties to corroborate or disprove Patricia's allegations. Zimmerman came to Fearghal reporting that he had already determined Patricia's child abuse allegation was false. Fearghal complained that, by disturbing his peace and making a false child abuse allegation, Patricia was violating the DVRO. False allegations of child abuse are a crime. RCW 26.44.060(4). Zimmerman took no action to respond to Fearghal's complaint.

In summary, Clark County officers did nothing to intervene in the series of criminal behavior where Patricia was the perpetrator.

3 Breach by the City - Taylor

Upon resolution of the false criminal charges made against Fearghal, his contact with his children was restored. A criminal NCO remained in place making it a crime for Fearghal to have any contact with Patricia; and the DVRO protected Fearghal from Patricia. Patricia opposed medical treatment for Cormac, but the family court granted Fearghal permission to take Cormac for surgery. Patricia was denied permission to attend. Patricia showed up at the hospital, physically took Cormac from Fearghal and refused to release Cormac back to Fearghal. This was custodial interference, also a crime. RCW 9A.40.070. Taylor responded to

Fearghal's 911 call. Upon arrival at the hospital, Taylor determined that Patricia was in violation of the DVRO. Patricia attempted to get Fearghal arrested telling Taylor that her NCO issued by the criminal court superseded the civilly issued DVRO. Patricia told Taylor she had written permission to be at the hospital from Judge Poyfair, but when Taylor said he was going to check Patricia admitted that he "would not find any paperwork." Despite telling Patricia that she was in violation of the DVRO, and reporting the offense as a "violation of a protection order" under RCW 26.50.110, Taylor did not arrest Patricia or provide Fearghal with information about his rights as required by RCW 10.99.030(6)(a).

4 Breach by the City & County Prosecutors

The City of Vancouver and Clark County jointly created the Domestic Violence Prosecution Center in order to prosecute all domestic violence cases within the City and County. CP 93.

Young, Paulson, Zimmerman, Taylor and Farrell (for the forgery) all submitted reports to the prosecutors' office. Young, Paulson and Taylor specifically reported Patricia's offenses as a violation of a protection order under RCW 26.09.060 or RCW 26.50.110. Upon deciding not to prosecute these separate offenses, no prosecutor advised Fearghal of the procedures available to him pursuant to RCW 10.99.060. Thus, factual issues exist as to prosecutorial breach of duties owed to Fearghal under RCW 10.99.

Qualified immunity does not apply when statutory duties owed to a protected class are not carried out. Roy v. City of Everett, at 357-359. Babcock v. State, at 618. Any doubts that the City and County breached duties owed to Fearghal are questions of fact for a jury.

5. Injury

Material evidence of Fearghal's emotional distress is set forth in the Statement of Facts. Paulson, in his report, evidences Fearghal's emotional distress stating Fearghal had been crying off and on. Following Paulson's non-arrest, Patricia threatened Conor with calling the police and putting him in jail, if he did not tell Dr. Johnson " her truth " Patricia then took Conor to Dr. Johnson the next day, and filed a motion to terminate Fearghal's contact with Conor blaming Fearghal for the conflict on 1/11/06. The family court then made a harmful placement decision terminating Fearghal's contact with Conor.

Taylor's report evidences Fearghal's fears of Patricia's prior efforts to get *him arrested* and deported by alleging Fearghal was violating the NCO/ DVRO, and that was exactly what Patricia attempted again when she talked with Taylor. The child custody evaluation was delayed and compromised when Patricia used Taylor's non-arrest to blame Fearghal for the conflict in an effort to get herself recommended as primary parent

Because the City and County prosecutors failed to advise Fearghal of the procedures available to him upon deciding not to prosecute Patricia for her DV crimes, Fearghal was unable to exercise those procedures. Not being able to exercise those procedures precluded Fearghal from being able to present material information to the courts, including the criminal court that issued the NCO, when they made child placement decisions

Resolving all factual inferences in Fearghal's favor, the failures by the County and the City to fulfill duties owed under the domestic violence statutes prolonged the harmful separation of Fearghal from his children

and caused Fearghal severe emotional distress and other injury detailed in the Statement of Facts, ¶.O. A jury could certainly agree

6 Legal Causation

The issues regarding whether duty and legal causation exist are intertwined. Schooley at 478. Legal cause rests on whether the defendants owed a duty to protect the plaintiff from the event which did in fact occur. Id. The domestic violence statutes are rooted in strong public policy.

> "to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide", "the necessity for early intervention by law enforcement agencies", and recognition "of the serious consequences of domestic violence to society and to the victims." RCW 10.99.010.

By recognizing the deep importance of responding to domestic violence, the Legislature intended a remedy if duties under the domestic violence acts were breached. (See Tyner v. DSHS, 141 Wn.2d at 80, using this same reasoning for RCW 26.44). A pattern of inaction by law enforcement in enforcing domestic violence statutes is not immunized and gives rise to legal liability. Roy v. City of Everett, at 358.

In addition to legal liability accruing for inaction on DV crimes, one of the express purposes of RCW 10.99 is to ensure that the enforcement and prosecution of non-domestic violence crimes is not treated differently when occurring between family or household members.

> "[P]revious societal attitudes have been reflected in policies and practices of law enforcement agencies *and prosecutors* which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers." "Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship." RCW 10.99.010 (emphasis added).

> "RCW 10.99 created no new crimes but rather emphasized the need to enforce *existing* criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor." Roy v. City of Everett, at 358.

Yet that is exactly what happened in this case, with prosecutors and law enforcement turning a blind eye to Patricia's felony criminal offenses, while they pursued Fearghal on a misdemeanor charge. Patricia's forgery was a Class C felony and her assaultive entry into Fearghal's home on 1/11/06 was a Class B felony, yet law enforcement and prosecutors took no action because they treated these offenses differently due to Fearghal's family relationship with Patricia. Thus, *legal causation exists both for the* non-enforcement of the DVRO and the discriminatory non-enforcement and non-prosecution of Patricia's criminal offenses.

7 Cause-in-fact

> Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." Schooley, at 478.

In this case, abusive use of conflict was a material factor in the child custody evaluations conducted in the dissolution proceeding. Fearghal presents material evidence that the criminal complaints, DVRO violations and non-arrests by law enforcement were *inputs into child placement* decisions, and prolonged the harmful placement of Conor and Cormac. Fearghal presents material evidence of suffering emotional distress as a result of inaction by police officers to enforce the DVRO, and Patricia's *attempts to engage Fearghal* so as to get him arrested and deported. Deportation could have been the ultimate placement decision separating Fearghal from his children. Patricia relied on law enforcement's inaction to make a series of false abuse allegations against Fearghal in order to

affect child custody decisions in the family court

> "As one court noted, "[c]harges of child abuse leveled against a parent and ineptly handled strike at the core of a parent's basic emotional security, providing ample justification for the imposition of liability." Tyner v. DSHS, 141 Wn.2d at 80, citing Gray v. State, 624A.2d 479, 485 (Me. 1993)

The same rationale applies to the inept handling of criminal reports in a domestic violence context. Viewing all factual inferences in favor of Fearghal as the non-moving party, the City and County fail to prove the absence of material issues of fact to support summary judgment.

8 Substantial Factor Test.

As discussed in ¶D.13, the substantial factor standard should apply to proximate cause on public policy grounds and because this is a multiple causation case. Washington State had adopted a strong public policy advocating for prevention of domestic violence, early intervention by law enforcement, and nondiscriminatory application of policies and practices by both prosecutors and law-enforcement to complainants with a family relationship to a suspect. In Mackay, *supra*, the Court reasoned that actions alleging breaches of public policy, such as a discrimination action, are generally "multiple causation cases." On these same grounds, Fearghal contends that the substantial factor test is proper for determining proximate cause on Fearghal's claims against the County and City for breach of duties under the domestic violence statutes.

F. Petty's investigative and non-advocacy activities are not sheltered by prosecutorial immunity. Petty controlled the flow of information to police officers. Material facts exist to evidence Petty's out of scope actions caused injury and harmful child placement. All Fearghal's claims against the City withstand summary judgment.

1. Petty's investigative activities are not sheltered by immunity

"When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."[41] Whether an employee acts inside or outside the scope of their duties is ordinarily a question of fact for the jury. Gilliam at 585

Material facts exist evidencing Petty took on an investigative role. Petty engaged in fact-finding using Patricia as her proxy. Petty instructed Patricia to go fact-finding to support filing new charges against Fearghal (see Statement of Facts; "what are the other things we can find?", "what else can you come up with?"). Patricia testified Petty kept asking her all sorts of questions and whether Fearghal had any contact with *the children*. Petty instructed Patricia to go to Bally's Fitness Club and "get the records and show them to her" When Patricia obtained the records, Petty then coached Patricia on what to say to police in order to allege violations of the NCO by Fearghal. Patricia reported the alleged violations to Officer Langston Langston's report evidences that Patricia talked with Petty prior to reporting the NCO allegations to him. CP 75. Langston was statutorily obligated to arrest Fearghal if he believed he had probable cause. RCW 10.31.100(2)(a). Langston declined to arrest Fearghal imputing that he did not have probable cause He sent his report back to Petty. Regardless, Petty filed criminal charges against Fearghal. Langston did little more than

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[41] Gilliam v. DSHS, 89 Wn. App. 569, 583, 950 P.2d 20 (1998), citing Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), see also Anderson v. Manley, 181 Wash. 327, 331, 43 P.2d 39 (1935), Rodriguez v. Perez, 99 Wn. App at 450

an administrative act. At all times, Petty was controlling the information. This situation is analogous to Bender v. City of Seattle where the Court held the prosecutor's decision to file charges was not a superseding cause because the same police officer that arrested Bender also gave information to the prosecutor, and controlled the flow of information. Here, Langston is not a superseding cause because Petty initiated and directed the fact-finding against Fearghal using Langston as merely a pass-through.

Patricia admitted she fabricated witness tampering charges against Fearghal, testifying Petty gave her cues to manipulate facts out of context. When asked if Petty directed her to make up allegations, Patricia testified she had conversations with Petty "in that regard, in that manner". In Buckley v. Fitzsimmons, the United States Supreme Court held that a prosecutor's alleged misconduct in using an expert willing to fabricate testimony was an investigatory function. This is analogous to Petty using Patricia as her proxy to report fabricated allegations to police based upon distorted facts so that Petty could then file new charges against Fearghal.

2. The City has liability under RCW 26.44 and RCW 10.99

Petty threatened Patricia with arrest, prosecution and the children being put into foster care if Patricia recanted or did not comply with Petty's fact-finding directions. This is analogous to Rodriguez v. Perez where the Court held that an actionable claim existed under RCW 26.44 for negligent investigation against Perez for threatening interviewees with arrest, prosecution and separation from their children. Petty took on a non-advocacy role outside her prosecutorial function purposed to affect child placement decisions made by the civil court. Petty instructed and

threatened Patricia to get an Order of Protection precluding Fearghal from contact with the children to lay groundwork for Patricia filing for divorce. Patricia testified Petty strategized with her divorce attorney and told Patricia to "perpetuate allegations both to the police and in divorce declarations in order to eradicate any possibility of Fearghal gaining any custody of the children in the divorce." When Patricia was deposed in September 2009, Petty repeated this conduct, coaching Patricia on how to testify in deposition and offering Patricia free legal assistance to represent her in family court. When questioned, Petty refused to testify, answering that she had formed a client-attorney relationship with Patricia. The City fails to prove the absence of material issues of fact as to whether Petty stepped outside her prosecutorial role. It is a question of fact for a jury.

As argued in ¶E.1, qualified immunity does not apply to the non-enforcement of domestic violence laws. Roy v Everett, at 357-359. The stated intent of RCW 10.99 includes ensuring that *prosecutors* do not treat crimes between household members any differently than the same crimes between strangers. RCW 10.99.010. The City will argue that absolute immunity supersedes the statutory purpose of RCW 10.99. But, RCW 10.99.060 imposes duties on prosecutors. Prosecutorial compliance with RCW 10.99.060 is a non-advocacy duty that cannot be abrogated by absolute immunity. A contrary conclusion would shutter compliance and "defeat the stated purpose of the statute as a whole." Roy v Everett, at 359. Petty directed investigative fact-finding activities and Patricia's false reporting to police so as to support false domestic violence charges against Fearghal, while declining to prosecute Patricia's Class B domestic

violence felony for residential burglary, Patricia's Class C felony for forgery, and Patricia's multiple violations of the DVRO. Surely this is exactly the type of misconduct the statute is purposed to prevent and for which a remedy should be available?

3. Duty, Injury, Causation, Substantial Test

Upon stepping outside her advocacy role to conduct investigative work purposed to affect child placement decisions in the civil courts, Petty took off the cloak of prosecutorial immunity and vested herself with a duty to perform a non-negligent investigation pursuant to RCW 26.44.050. See Rodriguez v. Perez, 99 Wn. App at 450.

The City fails to prove the absence of material facts evidencing that Fearghal was injured due to the harmful separation of Conor and Cormac from Fearghal for almost two years, the resulting emotional distress suffered by Fearghal; together with economic injury from the loss of the family business which was his livelihood. (See Statement of Facts ¶.O; and ¶C.3 for more detail) Cause-in fact are ordinarily questions for a jury. Schooley, at 478. 'But for' Petty's out of scope investigative activities, directing Patricia to get an Order of Protection and to make false police reports, harmful child placement and other injuries suffered by Fearghal could have been avoided. Because this is a multiple causation case, and for the policy reasons set forth in ¶D.13 and ¶E.8 above, the "substantial factor" test is the proper standard for determining proximate causation.

4. Malicious Interference with Parent-Child Relationship

To prevail a claim of malicious interference with the parent-child relationship, it must be proven that a defendant intended a plaintiff to lose

the affection of his children. Waller v. State, 64 Wn. App 318, 339, 824 P.2d 1225 (1992). But this is a factual issue that is not resolvable on summary judgment. Id. Material evidence exists that Petty had intent to interfere with Fearghal's relationship with his children. Petty told Patricia what she needed to write in divorce declarations. Petty pressured Patricia to get an Order of Protection, first in July 2005 and again in September 2009. Patricia testified "it got personal for [Petty]", that Petty "wanted to see Patricia prevail in the family matter"; and "she had so much invested personally" that "the concept of Fearghal not getting a conviction was intolerable to her" At the September 2009 deposition, Petty again walked Patricia through "step-by-step-by-step" on what to say in her testimony in order to pursue a protective order before asking the family court to change the parenting plan. Material evidence exists that meet all the elements of this claim of malicious interference as set forth in Waller v. State.

5. Gender Discrimination Claim

The right to be free from discrimination because of gender is a civil right. RCW 49.60.030(1). The statutes specifically states: "This right shall include, *but is not limited to*. " Thus, the application of the statute is not limited and applies to prosecutorial discrimination, especially so, if that discrimination encompasses investigative activities. Any person deeming himself injured by an act of sex discrimination is entitled to bring suit to recover damages together with the cost of the suit. RCW 49.60.030(2). Gender-based *harassment* need not be sexual in nature and is actionable as discrimination under this statute. Kahn v. Salerno, 90 Wn. App 110, 118, 951 P.2d 321 (1998). Petty harassed Fearghal and treated him disparately

based on his gender. Despite indisputable evidence of Patricia's Class B domestic violence felony of residential burglary, Patricia's multiple other violations of the DVRO, and her Class C felony of forging checks; Petty declined to prosecute Patricia and instead directed Patricia to fabricate false criminal charges against Fearghal, and suborned Patricia's perjury in sworn statements she made to the police; in court declarations to support motions precluding Fearghal from having contact with his children, and in Patricia's uncorrected September 2009 deposition. Patricia testified.

"I became her pawn with her and her advocate brainwashing me with their rigid belief system founded on charts, generalizations and *anti-male agenda*. They instilled fear in me that I would lose my children unless I made more allegations to help them get a conviction. They told me I should perpetuate allegations both to the police and in divorce declarations in order to eradicate any possibility of Fearghal gaining any custody of the children in the divorce She said that if I felt abused it was okay to make allegations to support my feelings. In addition, she was clear that making exaggerated claims was par for the course, perfectly legal, and any lack of cooperation on my part would be viewed as being an unfit mother. I was always under the threat of [the children] being put in foster care and this threat was wrapped in a cloak of victim support as long as I played my role." CP 755-6,#235

Resolving all factual inferences in favor of Fearghal as the non-moving party, an issue of material fact exists as to whether Petty discriminated against Fearghal based on his gender. A jury should resolve this question.

6 The award of costs to the City was error.

The court awarded costs to the City of $1,095. CP 2171. Because Fearghal's claims withstand summary judgment, this award was error Further, $827.05 in costs were awarded in violation of RCW 4.84.010(7), because i) only deposition transcripts and not transcripts of hearings are an allowable cost, and ii) the City prevailed in summary judgment *as a matter of law* based on the defense of prosecutorial immunity and not

based on factual evidence from Patricia and thus, the deposition transcript of Patricia was not a necessary expense for the City.

G. The outrage claims against the County, DSHS and the City withstand summary judgment because material facts demonstrate that reasonable minds could differ as to whether defendants' conduct was sufficiently intentional or reckless to result in liability.

In 2011, Judge Nichols ruled to *deny* the County summary judgment dismissal of the claim of intentional infliction of emotional distress prior to Judge Collier overturned that ruling.

Claims of outrage and intentional infliction of emotional distress are synonyms for the same tort Kloepfel v. Bokor, 149 Wn.2d 192, 193, 66 P.3d 630 (2003). Outrage requires proof of three elements. (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. Id at 195. Objective symptomatology of emotional distress is not required. Id. at 193. "The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability."[42] "A case of outrage should ordinarily go to a jury so long as the court determines the plaintiff's alleged damages are more than 'mere annoyance, inconvenience, or normal embarrassment' that is an ordinary fact of life."[43] The factors that a court considers are (1) the position of the defendant, (2) whether the defendant knew the plaintiff was particularly susceptible to emotional distress and consciously proceeded

[42] Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989)
[43] Brower v. Ackerley, 88 Wn. App. 87, 101-102, 943 P.2d 1141 (1997), citing Spurrell v. Block, 40 Wn. App. 854, 862, 701 P.2d 529 (1985)

anyway, (3) whether the defendant's conduct was privileged, and (4) the severity of the emotional distress. Pettis v. State, 98 Wn. App. 553, 563-564, 990 P.2d 453 (1999). Recovery of emotional distress damages has been allowed in conjunction with many intentional or willful acts which violate a clear mandate of public policy. Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 916, 726 P.2d 434 (1986). Washington courts have *liberally* construed damages for emotional distress as being available merely upon proof of an intentional tort." Id. Here, all three defendants willfully violated clear mandates of public policy.

Kingrey, Paulson, Young, Farrell, Dixson, Taylor and Petty were all in a position of power. Fearghal suffered severe emotional distress due to false criminal allegations initiated by Petty through Patricia as her proxy, separation from his children, being a victim of domestic violence crimes, and under the threat of deportation. Kingrey ignored exculpatory evidence arresting Fearghal because *"he thought a no-contact order would be a good thing, and the only way to get that was to book [arrest] Mr. McCarthy"*. Paulson, Young, Farrell and Taylor were all respondents to Fearghal's call for assistance due to Patricia violating the DVRO – they all had access to and knew the case history, and that Fearghal was in fear of Patricia making false allegations to get him arrested and deported. Dixson knew his shoddy investigation would impact Fearghal's ability to see his children. DSHS knew Dixon was reckless, that he fabricated records and had conducted numerous faulty investigations that "could have a direct bearing on child safety". Petty knew her manipulation of Patricia as her proxy to do her bidding were purposed to separate Fearghal from his

children to cause Fearghal emotional distress. In a civilized society, no one expects law enforcement to make arrests solely to separate a father from a child; or a prosecutor to manipulate a mother struggling with mental health and substance abuse issues to go fact-finding and fabricate false charges; or law officers to turn a blind eye to admitted DV violations and child safety issues, such as a chain-lock on a door, or DSHS to retain workers who fabricate reports, or a DSHS worker to fabricate reports.

The Statement of Facts presents material facts evidencing that Kingrey, Dixson, Petty, Farrell, Young, Paulson and Taylor acted intentionally and/or recklessly by disregarding their duties to (1) enforce the domestic violence laws, and/or (2) conduct non-negligent investigations. Patricia testified Petty acted intentionally to separate Fearghal from his children, that it became personal for her, she directed Patricia step-by-step. Petty claimed an attorney-client relationship with Patricia and then excused herself from having to provide testimony. Petty acted outside the scope of her advocacy roles as a prosecutor.

Material facts exist that Fearghal endured severe emotional distress. Fearghal testified that his "life became a living hell". He suffered greatly from feelings of fear, anxiety and depression; and was "worried sick" while the criminal matter remained unresolved. He felt victimized by numerous false allegations and police refusal to intervene when Patricia violated the DVRO attempting to get him arrested. He had nightmares. Worrying about his children being endangered and being left unsupervised was extremely distressing. Worrying about losing custody of his children and being deported was overwhelming. Fearghal had great difficulty

functioning normally, lived in constant fear and at times was so distraught that he contemplated suicide. Family members would visit Fearghal from Ireland to provide emotional support. He lost his family business and was unable to work due to constant anxiety, fear and depression. Dr. James Boehnlein, concluded "elements of multiple diagnosable mental health conditions are present" in Fearghal's testimony and strong indicators supported diagnosable conditions of "depression and/or anxiety"

Material facts evidence that defendants' conduct was more than a 'mere inconvenience or normal embarrassment' and that reasonable minds could differ on whether defendants' conduct was outrageous. That is why defendants' liability for outrage is a question of fact for a jury.

H. Material facts evidence that DSHS intentionally acted with reckless disregard in retaining Dixson to do investigative casework. A jury should determined liability for the claim of wanton misconduct.

"Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. It is the intentional doing of an act, or intentional failure to do an act, in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another." Adkisson v. Seattle, 42 Wn.2d 676, 687, 258 P.2d 461 (1953)

Plaintiffs claim of reckless disregard is a synonym for the claim of wanton misconduct. The arguments set forth in ¶D.6 and ¶D 7 are adopted herein. DSHS knew Dixson was a reckless employee who fabricated reports, had only a 16.9% compliance rate with CPS investigative standards; and whose faulty investigative work *"had a direct bearing on child safety."* In February 2005, a special supervisory review confirmed Dixson's shoddy work. Despite this, Dixson was assigned to investigate

referrals on Patricia and Fearghal. Not until 8/2/05 was Dixson removed from investigative duties due to supervisory concerns about "the *safety of children* on [Dixon's] caseload." Despite being removed from casework, Dixson continued to do investigative work on the McCarthy referrals. As a result, Fearghal suffered prolonged harmful separation from his children. Cormac suffered physical injury from dog-bites to his face due to being left unsupervised; and both children endured neglect and emotional abuse.

I. Summary judgment dismissal of the NIED claim against the County, DSHS and the City was error, because the defendants fail to prove the absence of genuine issues of material fact as to liability.

"A plaintiff may recover for negligent infliction of emotional distress [NIED] if she proves negligence, that is, duty, breach of the standard of care, proximate cause, and damage, and proves the additional requirement of objective symptomatology." Strong v. Terrell, 147 Wn. App. 376, 387, 195 P.3d 977 (2008). Each of these issues is a question of fact for the jury to resolve. Id. Argument as to the elements of negligence are set forth in ¶D, E and F above are incorporated herein. The County, DSHS and City all owed Fearghal duties pursuant to RCW 26.44 & RCW 10.99. When Petty stepped outside her advocacy role by directing investigative activities so as to affect child placement decisions, she became vested with duties under RCW 26.44.

To satisfy the objective symptomology requirement for NIED, a plaintiff's emotional distress must be *susceptible* to medical diagnosis and proved through medical evidence Hegel v. McMahon, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). The symptoms of emotional distress must also

"constitute a diagnosable emotional disorder." Id. "Nightmares, sleep disorders, intrusive memories, fear, and anger may be sufficient." Id.

A plaintiffs' satisfaction of the objective symptomology requirement is a question for a jury Hunsley v. Giard, 87 Wash.2d 424, 436, 553 P.2d 1096 (1976). Material facts evidence a prima facie showing of objective symptomology of Fearghal's severe emotional distress. See Statement of Facts, ¶O. Fearghal suffered greatly from feelings of fear, anxiety and depression, and had nightmares. Fearghal had great difficulty functioning normally, lived in constant fear and at times was so distraught that he contemplated suicide A specialist from OHSU, Dr. James Boehnlein, testified that "elements of multiple diagnosable mental health conditions are present" in Fearghal's testimony as to his emotional distress, and that "there are strong indicators" that Fearghal may have had "significant depression and/or anxiety over several years" Thus, expert medical evidence supports that Fearghal's emotional distress is susceptible to medical diagnosis for the disorders of depression and anxiety This is sufficient to withstand summary judgment. This question of fact is properly belongs to a jury. Hunsley, at 436.

The availability of an NIED claim is not limited to bystanders who physically see a loved one injured. "A negligent infliction of emotional distress claim can exist in an employment context." Chea v. Men's Wearhouse Inc., 85 Wn. App. 405, 412, 932 P.2d 1261 (1997); see also Strong v. Terrell, *supra* An NIED claim is also permitted for torts that

violate public policy.[44] This is the case here, viewing all factual inferences in Fearghal favor, all defendants have committed one or more wrongful acts in breach of public polices enacted by RCW 10.99, 26.44 and 49.60. Further, the Washington Supreme Court has held that once liability is established for a tort in breach of public policy, damages for emotional distress are recoverable without establishing that emotional distress was foreseeable. Cagle, *supra*, at 919-920.

> "Accordingly, we hold that upon proof of the tort....in violation of public policy, the claimant only is required to offer proof of emotional distress in order to recover those damages attributable to the [tort]". Id. at 920.

Because material facts evidence Fearghal's severe emotional distress, a factual determination on this issue should be made by a jury.

J. Suppressing Patricia's corrections to her deposition testimony is error because (1) Patricia corrected her deposition testimony pursuant to CR 30(e), (2) Kraemer's written deposition testimony was not obtained in compliance with CR 31 and (3) substantial evidence exists that Petty improperly influenced Patricia's testimony.

The trial court erroneously suppressed Patricia's corrections to her deposition testimony, but allowed the corrections into the record as a declaration. CP 1096-1098. This order prejudicially affected the decisions under review because defendants rely on phantom uncorrected testimony from Patricia that she subsequently corrected. Thus review of this order is proper under RAP 2.4(b) . Review is de novo. Folson, *supra* at 663.

Patricia's deposition was taken over five days: 9/28/09, 3/4/10, 3/4/10, 3/24/10 and 3/25/10. It was a single deposition with a five volume

[44] See Griffin v. Eller, 130 Wn.2d 58, 922 P.2d 788 (1996). (sexual harassment in workplace), Goodman v. Boeing Co , 127 Wn.2d 401, 899 P.2d 1265 (1995), (disability discrimination in workplace), Wheeler v. Catholic Archdiocese, 65 Wn. App. 552, 829 P.2d 196 (1992), (disability discrimination in workplace).

transcript with the deposition being adjourned or continued at day's end. Patricia reserved signature on her deposition transcript evidenced by (1) a Notice of Filing Deposition Notice filed on 3/17/10, (2) a review of the transcripts and its word index for the last two days of deposition, and (3) Patricia's post-deposition testimony. CP 1067-70. CR 30(e) required the court reporter firm to submit the transcripts to Patricia for examination, but they did not do so. Nor did they copy Patricia on their Notice of Filing Deposition filed on 4/12/10. The unexamined deposition transcripts were mailed to Plaintiffs' attorney, Mr. Boothe, on 4/7/10. He forwarded them to Patricia at some unknown date in April. Patricia then corrected errors in her deposition testimony, including testimony she asserts "lacks integrity and is not rooted in fact" due to being unduly influenced by Petty on every single deposition break. Patricia numbered 18 pages of correction sheets sequentially - 1of 18, 2 of 18, etc – with the last signature page numbered 18 of 18. Patricia then dropped off all 18 pages to the court reporting firm on 5/7/10, which was within 30 days of the transcripts being forwarded to Mr. Boothe and the later Notice of Filing Deposition. Thus, Patricia's corrections were timely pursuant to the 30-day requirement of CR 30(e).

Patricia testified she made the corrections because her uncorrected 9/28/09 deposition "lacked integrity and were not rooted in fact" as a result of Petty meeting Patricia in the bathroom during every deposition break, during which: (1) Petty offered to represent Patricia in family court pro-bono so as to change the parenting plan in exchange for Patricia agreeing to "blacken" Fearghal in her deposition testimony; and (2) Petty walked Patricia "step-by-step" on what to say in her deposition testimony

to lay the groundwork for getting a protection order that would preclude Fearghal from seeing his children and give Patricia leverage in family court. When deposed about the specifics of the conversations during these deposition interludes to the bathroom, Petty refused to answer asserting the conversations were privileged attorney-client communications. Petty did admit she offered Patricia legal representation pro-bono and that she knew Patricia did not have custody of her children when she offered her legal services. Viewing all factual inferences in the light most favorable to Fearghal, Petty suborned Patricia to perjure herself on the day of her 9/28/09 deposition. See Statement of Facts, ¶P. for more detailed facts.

A deposition under written questions requires. notice to be given of the designated officer before whom the deposition is to be taken; 15 days for submission of questions by other parties; and the designated officer to take the witness testimony of *all* deposition questions from *all* the parties. CR 31. The City did not comply with this procedure. Instead, on 7/15/10, the City served a CR 31 notice of deposition on Robin Kraemer without designating an officer; solicited a reply on or before 7/22/10 denying Plaintiffs the required 15 days for cross questions; and on 7/22/10, filed the improperly taken responses in support of its motion for summary judgment and motion to suppress Patricia's correction pages heard on 7/30/10. Plaintiffs objected. CP 1035-1039. Kraemer's written deposition responses were obtained in complete disregard of CR 31 in a manner prejudicial to Plaintiffs. Their consideration by the trial court was error.

It is undisputed that Patricia went to the offices of Schmitt and Lehman on 5/7/10. According to Kraemer, however, Patricia only dropped

off a single signature page numbered "18 of 18" and did not present the other 17 pages numbered sequentially - 1of18, 2of18, etc. Kraemer asserts Patricia mailed in the other 17 pages at some later date, but acknowledges Schmitt and Lehman have no records to substantiate that this is in fact true. Kraemer also asserts she mailed Patricia's original signature page to Ms. Pamela Anderson, an attorney for DSHS. Ms. Anderson's testimony disputes Kraemer's veracity in this regard. CP 814. Patricia vehemently disputes the veracity of Kraemer's assertions that she didn't deliver all 18 sequentially numbered pages of her corrected deposition pages on 5/7/10.

Notwithstanding that Patricia did not waive signing her deposition, at no time did the Plaintiffs stipulate to waiving Patricia's signature on her depositions. Nothing in the record supports that the parties, *by stipulation*, waived Patricia signing her deposition.

> " The deposition shall then be signed by the witness, *unless the parties by stipulation waive the signing* or the witness is ill or cannot be found or refuses to sign." CR 30(e).

Thus, neither Patricia nor the Plaintiffs, by stipulation, waived Patricia's signature to her deposition. Patricia's correction pages are revisions to her deposition testimony and not merely conflicting testimony. Suppressing Patricia's revisions to her deposition testimony was error.

K. Fearghal is entitled to costs on appeal

Pursuant to RAP 18.1, Fearghal requests attorney fees and expenses. The cost of a suit together with reasonable attorney's fees is recoverable on a discrimination claim. RCW 49.60.030(2). A fixed cost of two hundred dollars to be called the attorney fee is allowed on appeal. RCW 4.84.080. Expenses are allowable to a prevailing party as set forth in RCW

4.84.010. In any action in the superior court of Washington, the prevailing party shall be entitled to his or her costs and disbursements. RCW 4.84.030. Where a statute allows for the award of attorney fees to the prevailing party at trial it is interpreted to allow for the award of attorney fees to the prevailing party on review as well. Puget Sound Plywood, Inc. v. Master, 86 Wn.2d 135, 542 P.2d 756 (1975). Therefore, if Fearghal prevails on this appeal, he is entitled to his costs and disbursements.

V. CONCLUSION

The defendants committed wrongful acts in breach of public policy enacted under RCW 10.99, RCW 26.44 and RCW 49.60. Contrary to Const. Art. IV, §20. the trial court took fourteen months after the summary judgment hearing to issue its order summarily dismissing all Plaintiffs' claims, overturning rulings denying summary judgment by the prior trial judge. All of Fearghal's claims withstand summary judgment as a matter of law. Defendants fail to meet their burden of leaving no doubt as the existence of genuine issues of material fact that evidence their liability. The trial court erred in granting summary judgment to defendants. Fearghal asks this Court to reverse and remand for a jury trial.

RESPECTFULLY SUBMITTED ON THIS March 9th, 2015.

Fearghal Mc Carthy

Fearghal Mc Carthy,
Appellant, pro-se

APPENDIX A

DSHS CHILDREN'S ADMINISTRATION REGULATIONS

1. Practices and Procedures Guide, ¶2331
2. Practices and Procedures Guide, ¶2540
3. Operations Manual, ¶153043.1

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Children's Administration

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2331. Investigative Standards

1. A CPS social worker shall investigate all intakes screened in for investigation.
2. A DLR/CPS social worker shall investigate all intakes when child abuse or neglect is alleged that meets the sufficiency criteria in facilities licensed or certified to care for children by DSHS or the Department of Early learning, and facilities subject to licensure to care for children.
3. The social worker gathers information for assessing safety and service needs of the family rather than gathering evidence for criminal prosecution. The social worker is not a law enforcement agent but is expected to work cooperatively with law enforcement.
4. The assigned social worker must:
    a. Contact the referrer if the intake information is insufficient or unclear and may provide information about the outcome of the case to mandated referrers.
    b. Conduct a face-to-face **investigative** interview with child victims within 10 calendar days from the date the intake is received.
        i. An investigator or professional skilled in evaluating the child or condition of the child must interview all child victims involved in the report and capable of being interviewed through face-to-face contact at the earliest possible time. Local protocol or the special needs of the child may dictate that someone other than the CA social worker interview the child regarding allegations of abuse.
        ii. If an investigator or qualified professional first conducts the interview regarding child abuse, the assigned social worker is still responsible for interviewing the victims face to face for the purpose of assessing child safety. The social worker must interview alleged child victims outside the presence of their siblings, caregivers, parents and alleged perpetrators.

            The social worker may conduct the interview on school premises, at child day care facilities, at the child's home, or at other suitable locations. When the interview is conducted at school, the social worker will ask the school staff where they will be during the interview.

            The interviews should uphold the principles of minimizing trauma and reducing investigative interviews (SB 5127). RCW 26.44.030

        iii. During the interview, the social worker will confirm the interviews are voluntary by:
            A. Asking the child during the introduction, if they are willing to talk with them.
            B. Asking the child if they want a third party present.
            C. Making a reasonable effort to have the interview observed by a third party so long as the child does not object and the presence of the third party will not jeopardize the investigation. RCW 26.44.030

D. Asking school staff in the presence of the child, where they will be, if the child wants to have a third party present, or wants to ask school staff a question.

E. Re-asking the child during the interview if it is okay to continue taking or if they want a break. This can be done when they appear uncomfortable during the interview, or at any time.

iv. The initial interview with the child may be critical to later dependency and/or criminal hearings. The social worker needs to make every effort to avoid saying or doing anything that could be construed as leading or influencing the child.

v. CA CPS social workers must make reasonable efforts to use audio recordings to document child disclosure interviews on sexual and physical abuse cases whenever possible and appropriate. CA CPS social workers may also use audio recording on neglect cases. Follow steps to audio record CPS interviews in the Quick Reference Guide - Audio Recording CPS Child Interviews. (An optional resource for staff is the one page summary sheet called Interview Protocols.

A. An audio recording should not be undertaken when:

I. The age or developmental capacity of the child makes audio recording impractical.

II. The child refuses to participate in the interview if audio recording occurs. If this occurs, CA staff should proceed with the interview, documenting it in near verbatim form.

III. In the context of a joint CPS/Law Enforcement investigation, the investigation team determines that audio recording is not appropriate.

IV. The child may be negatively impacted due to additional emotional distress or use of the equipment may impact the child's willingness to disclose abuse.

V. Another agency is conducting the interview and local protocol does not permit CA recording of their interview.

B. When audio recording is not possible or appropriate CA CPS staff must use near verbatim recording any time an alleged child victim or a child witness makes statements to the CPS staff relating to allegations of child sexual and physical abuse. Such statements include disclosures and denials of sexual abuse and provision of information directly related to the specific allegation.

CA CPS social workers must document interviews that are not audio recorded, by including the following information in the electronic case notes:

I. Questions establishing a voluntary interview and the child's responses, i.e., permission for the interview and whether a child wanted a third party present.

II. Who was present for the interview.

III. Where the interview occurred.

CA staff may summarize child and adult interviews that do not include discussions of the allegations. See the Operations Manual, chapter 13000, section 13100, for documentation requirements.

C. When it is necessary to interview the child to make an initial assessment of the child's safety or the child's safety is endangered, the legal custodian's permission to record the interview is not necessary.

D. When CA staff have assessed the child is safe in the home and determined an in-depth

interview be scheduled at a later date, the legal custodian's permission to record the interview should be sought. In the event the legal custodian declines, staff should document the interview in near-verbatim form.

E. When CA is supervising the care of a child in out-of-home placement subject to a shelter care or other court order, CA has the authority to consent to the interview and audio recording of the child interview.

F. The child being interviewed should provide his or her verbal consent to having the interview recorded and this consent should be recorded at the start of each interview.

G. Whenever a child interview is conducted by law enforcement, a child advocacy center, another agency, or forensic interviewer pursuant to a local protocol for the investigation of child abuse cases, the terms of the local protocol regarding recording and documentation of interview shall supersede any contrary provisions of this policy and shall be followed by CA staff.

I. Whatever form of documentation is specified in the local protocol is acceptable for CA use.

II. If CA staff are present during a child disclosure interview conducted by another agency or individual pursuant to a local protocol, CA equipment may be used to make an audio recording of the interview if local protocol permits.

vi. When recording interviews in languages other than English:

A. If you are conducting an interview with a child who speaks a language other then English, follow your office procedures to request a qualified interpreter.

B. If you are certified to conduct child interviews in Spanish, you may record the entire interview in Spanish without interpretive services.

c. Asses intake accepted as sexually aggressive youth (SAY) for the following factors:

i. Whether or not the youth has been abused or neglected.

ii. The youth's potential for re-offending.

iii. The parents' willingness to protect, seek and utilize services, and cooperate with case planning.

d. If needed, photograph any child identified as a victim for the purpose of providing documentary evidence of the physical condition of the child. RCW 26.44.050. Investigative photograph are stored in the electronic file cabinet associated with each case.

e. See Child Safety Section Policy for additional requirements

f. Notify the parents, guardian, or legal custodian of a child of any CA/N allegations made against them at the initial point of contact, in a manner consistent with the laws maintaining the confidentiality of the person making the allegations. CA/N investigations should be conducted in a manner that will not jeopardize the safety or protection of the child or the integrity of the investigation process. RCW 26.44.100

g. Notify the alleged perpetrator of the allegations of CA/N at the earliest point in the investigation that will not jeopardize the safety or protection of the child or the course of the investigation.

h. Conduct individual and face-to-face interviews with the child's caregiver(s) and all alleged perpetrators if reasonably available. If DV is identified, all persons (e.g., children, caregivers or alleged perpetrators) should be interviewed separately. The social worker may coordinate interviews with local law enforcement agencies in accordance with local community protocols that may authorize interview of the perpetrators by a person other than the social worker.

i. CPS staff must use near verbatim recording any time an alleged perpetrator of child sexual

abuse makes statements to the CPS staff regarding the alleged sexual abuse.

ii. CPS staff may summarize the nature of questions and the nature of the responses when other adults provide information related to allegations of child sexual abuse. See the Operations Manual, chapter 13000, section 13100, for documentation requirements. For the CA social worker to rely on near verbatim reporting prepared by a law enforcement officer or other community participant, the department's local community protocol must provide that the law enforcement or other participant will provide the near verbatim report within 90 days of the interview.

i. Document in the record when the alleged perpetrator is unavailable or unwilling to be interviewed

j. Notify law enforcement in accordance with local protocol. The social worker must ensure that notification has been made to law enforcement following instructions in section 2220 of this chapter. When in the course of an investigation there is reasonable cause to believe a crime against a child has been committed, the social worker or supervisor must notify the law enforcement agency with jurisdiction.
RCW 26.44.030 and 74.13.031

k. Request the assistance of law enforcement to:
   i. Assure the safety of the child(ren) or staff.
   ii. Observe and/or preserve evidence.
   iii. Take a child(ren) into protective custody.
   iv. Enforce a court order.
   v. Assist with the investigation.

l. See chapter 4000, section 43022, for notification to parents of their rights when a child is taken into temporary custody.

m. Secure medical evaluation and/or treatment. The social worker considers utilizing a medical evaluation in cases when the reported, observable condition or the nature and severity of injury cannot be reasonably attributed to the claimed cause and a diagnostic finding would clarify assessment of risk. Social workers may also utilize a medical evaluation to determine the need for medical treatment.

n. Make every effort to help the parent or legal guardian understand the need for, and obtain, necessary medical treatment for the child. The social worker must arrange for legal authority to secure necessary available treatment when the parent or legal guardian is unable or unwilling. The social worker must ask the parent to arrange for prompt medical evaluation of a child who does not require medical treatment, if indicators of serious child abuse or neglect exist. The social worker may seek legal authority for the medical examination if the parent does not comply with the request.

o. Contact the statewide Medical Consultation Network in your region whenever identification or management of CA/N would be facilitated by expert medical consultation.
For consultation with a pharmacist on prescribed or non-prescribed medications, contact the Washington Poison Control Center at 1-800-222-1222 (TTY 1-800-222-1222), identify self as a CA social worker, and ask to speak to the pharmacist on duty.

p. The assigned CPS social worker must refer a child ages birth to 3, identified with a developmental delay to a Family Resources Coordinator with the Early Support for Infants and Toddlers (ESIT).
   i. Referrals are made by calling the Healthy Mothers, Healthy Babies hotline at 1-800-322-2588 or through the ESIT web site. The referral must also be discussed with the child's parents/caregivers. The parents/caregivers should also be informed that services from ESIT

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are free and do not commit the family to participate in the program.

ii. The referral must be made no more than two working days after a concern(s) has been identified. The family may request that the referral timeline be extended beyond two days. This request must be documented in FamLink.

q. Seek professional and expert consultation and evaluation of significant issues. Examples include having the housing inspector or other local authority assess building safety or having the county sanitarian assess sewage and septic treatment issues.

r. Interview, in-person or by telephone, professionals and other persons (physician, nurse, school personnel, child day care, relatives, etc.) who are reported to have or, the social worker believes, may have first-hand knowledge of the incident, the injury, or the family's circumstances.

s. When requested, contact the referrers regarding the status of the case. More specific case information may be shared with mandated reporters; e.g., the disposition of the intake information and the department activity to protect the child. Take care to maintain confidentiality and the integrity of the family.

t. Notify all persons named in the intake as alleged perpetrators of the abuse or neglect of the outcome of the investigation and the alleged perpetrators' rights of review and appeal, using the Client Notification Letter.
RCW 26.44.100

u. IF DV is identified, the social worker must assess the danger posed to the child and adult victim by the alleged DV perpetrator. To assess the danger, social workers must complete the specialized DV questions in the Safety Assessment.

v. Send a letter by certified mail to any person determined to have made a false report of child abuse or neglect informing the person that this determination has been made and that a second or subsequent false report will be referred to the proper law enforcement agency for investigation.

5. Response to Serious Physical Abuse and Sexual Abuse

a. The requirements in this subsection apply to all CA staff conducting investigations of serious physical abuse or sexual abuse. CPS staff must follow these procedures in addition to all other required investigative requirements in chapter 2000 of this guide:

i. Social must obtain medical examinations of children when:

A. They are seriously injured, or

B. There is a pattern of injury to young children as a result of alleged child abuse or neglect.

C. There is an allegation of sexual abuse that includes physical injury to the child or the potential for the child to have a sexually transmitted disease.
The social worker should consult with the Statewide Medical Consultation Network (Med-Con) or with a Child Advocacy Center (CAC) physician when there is a concern about whether or not a child is alleged to be sexually abused needs a medical examination.

ii. The physician examining the child must be affiliated with the Statewide Medical Consultation Network (Med-Con) or with a Child Advocacy Center (CAC). If a child is examined or was previously examined by a physician who is not affiliated with the Statewide Med-Con or a CAC the social worker must also consult with Med-Con or a CAC physician. The Med-Con or a CAC physician must be made aware of the current allegations and available medical information, previous injuries and indications the child has been abused or neglected in the past.

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iii. Children who are in the following categories must be placed in out-of-home care (except when the court has determined the child is safe to remain in the home):
   A. Children who have suffered a serious non-accidental injury and an in-home safety plan cannot be developed which will assure the separation of the child from the alleged perpetrator(s).
   B. Siblings of children who have been fatally or seriously injured due to abuse or neglect and an in-home safety plan cannot be developed which will assure the separation of the child from the alleged perpetrator(s).
   C. Caregiver has been determined to be unwilling or incapable (i.e., due to mental illness or substance abuse) of supervising or protecting the child and an in-home safety plan cannot be developed which will assure supervision/protection of the child.
   D. Sexual abuse of a child and an in-home safety plan cannot be developed which will protect the child from the alleged perpetrator(s).

iv. Any child who has an identified safety threat on the safety assessment must have a safety plan in place. The safety plan must include:
   A. Separation of the child from the person who poses the safety threat.
   B. Independent safety monitors such as regular contact by a mandated reporter aware of the safety threat and understands their reporting duty. Plans based mainly on promises made by the caregiver are not appropriate.
   C. A caregiver who will assure protection of the child.
   D. Regular contact by the social worker with all Safety Plan participants in the safety plan.

v. Prior to contact between the alleged perpetrator and victim the social worker must:
   A. Consider the psychological harm as well as physical safety of the child.
   B. Consult with law enforcement, treatment providers or others involved with the family.
   C. Obtain reliable supervision of the contact between the child and the person who poses the safety threat so that the threat is addressed.
   D. Have supervisor approval.

‹ 2330. Accepted Intake Standards up 2332. Family Assessment Response ›

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CA

Business Groups

Advancing Child Welfare

Adolescents

Adoption

Child Safety and Protection

Contracted Providers

Appendix A-2-1

2540. Investigative Assessment

Policy

The Investigative Assessment (IA) must be completed in FamLink within 60 calendar days of Children's Administration receiving the intake.

1. A complete Investigative Assessment will contain the following information:
    a. A narrative description of:
        i. History of CA/N (prior to the current allegations, includes victimization of any child in the family and the injuries, dangerous acts, neglectful conditions, sexual abuse and extent of developmental/emotional harm).
        ii. Description of the most recent CA/N (including severity, frequency and effects on child).
        iii. Protective factors and family strengths.
    b. Structured Decision Making Risk Assessment (SDMRA) tool.
    c. Documentation that a determination has been made as to whether it is probable that the use of alcohol or controlled substances is a contributing factor to the alleged abuse or neglect.
    d. Disposition; e.g., a description of DCFS case status.
    e. Documentation of Findings regarding alleged abuse or neglect. Findings will be base on CA/N codes designated in the intake according to the following definitions:
        i. Founded means: Based on the CPS investigation, available information indicates that, more likely than not, child abuse or neglect did occur as defined in WAC 388-15-009.
        ii. Unfounded means: The determination following an investigation by CPS that, based on available information, it is more likely than not that child abuse or neglect did not occur or there is insufficient evidence for the department to determine whether the alleged child abuse did or did not occur as defined in WAC 388-15-009. RCW 26.44.020
        iii. If a court in a civil or criminal proceeding, considering the same facts or circumstances contained in the CA case being investigated, makes a judicial finding by a preponderance of the evidence or higher that the subject of the pending investigation has abused or neglected the child, CA shall adopt the finding in its investigation.
        iv. When a criminal or civil finding differs from an unfounded finding on a completed investigation or closed case, CA will, upon request, consider the changing the CA/N finding to founded.

            Procedure

            When CA staff considers a criminal or civil findings that differs from an unfounded finding on a completed investigation or closed case, they must:

 Appendix A-2-2

A. Compare the court case with the department case to ensure the same facts are considered.
B. Discuss the judicial findings with the CPS supervisor and Area Administrator to determine if the CA findings should be changed.
C. Send a new CPS Founded letter and follow regular CAPTA procedures, if it is determined the findings should be changed.

v. When a third founded finding is made involving the same child or family within the previous 12 months, CA must promptly notify the Office of the Ombudsman of the contents of the report and disposition of the investigation.

‹ 2530. Service Outcomes up 2541. Structured Decision Making Risk Assessment®(SDMRA) ›

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CA

Business Groups

Advancing Child Welfare

Adolescents

Adoption

Child Safety and Protection

Contracted Providers

Domestic Violence

Foster Parenting

Indian Child Welfare

Parent Resources

Publications

Appendix A -3

153043. Procedures

1. CA staff must complete the SER (narrative case recording) in CAMIS as soon as possible after an event, activity, or contact occurs to ensure accuracy of recording. In no case will the recording occur more than 30 calendar days from the date of the event or case activity except for the near-verbatim documentation of disclosure interviews as required by RCW 26.44.035. ("Written records involving child sexual abuse shall, at a minimum, be a near verbatim record for the disclosure interview. The near verbatim record shall be produced within fifteen calendar days of the disclosure interview, unless waived by management on a case-by-case basis.")
2. CA staff shall use the CAMIS Service Episode Record to record activities and events related to referrals, cases, licenses, facility complaints, and persons. For additional details on timelines and format for DLR/CPS investigation SERs, see the Child Abuse and Neglect Section Practice Guide: INVESTIGATING ABUSE AND NEGLECT IN STATE-REGULATED CARE.
3. If the local office allows, based upon agreement between DCFS and/or DLR social work supervisors and clerical supervisors, clerical staff may input case activity information in the SER at the request of a social worker. The social worker must review the clerical staff's input and enter an SER to the effect that SER is accurate as written.
4. Supervisors need to ensure that any significant activity on the part of the supervisor or management related to case activities is entered into the SER. This can be accomplished either by direct input by the supervisor, or with agreement by the social worker, entered by the social worker on behalf of the supervisor.
5. DCFS staff must document all case activity in CAMIS. DCFS staff must relate the referral or case ID and the person IDs of children that are directly associated with the SER. Exceptions to this documentation are listed below.
    a. The SER is related only to the child(ren)'s person ID if:
        i. The child is legally free; or
        ii. The child is in Dependency Guardianship status; or
        iii. The person is between 18 and 22 and is in an open placement episode and has signed a voluntary agreement for continued placement beyond the age of 18; or
        iv. The child is placed with someone other than the child's parent or guardian through the Interstate Compact Program (see CAMIS Policy 14 regarding documentation of child's custody).
    b. SERs on prospective Adoptive Parents must not use a child's person ID.
6. SER recording will include the following:
    a. When - full dates (month/day/year and time) when the event occurred;
    b. Who - full names of persons present, identifying their roles in the case (e.g. "child's mother, Mary

DECLARATION OF SERVICE

I hereby declare that on March 9th, 2015, I served the foregoing OPENING BRIEF OF APPELLANT FEARGHAL MC CARTHY on:

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by the following indicated method or methods:

[x] by **transmitting via electronic mail in accordance with the agreement of the person(s) served,** a full, true and correct copy thereof to the attorney at the e-mail address number shown above, which is the last-known e-mail address for the attorney's office, on the date set forth below.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct on March 9th, 2015 at Vancouver, Washington.

Fearghal McCarthy