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

REPLY BRIEF OF APPELLANTS CONOR AND CORMAC MCCARTHY

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Table of Contents

Table of Authorities

Washington Cases

Washington Statutes

Court Rules

Federal Court Cases

Bills

Washington Administrative Code

Secondary Authority

A. ARGUMENTS IN REPLY

1. PUBLIC POLICY DICTATES LIABILITY

This is a difficult and complex case as evidenced by Judge Collier's words, "I may just be a conduit to three wiser people and I recognize that that's – and I'm just the role of this court sitting here." Vol. II RP 263.

RCW 26.44.010 preserves the integrity of the family while ensuring the safety of the children. *M.W. v. Department of Social and Health Services*, 149 Wn.2d 589, 597, 70 P.3d 954 (2003) citing *Tyner v. State Dep't of Soc & Health Serv.*, 141 Wn.2d 68, 80, 1 P.3d 1148 (2000). A negligent investigation claim is a tort born out of public policy that furthers this goal. It can be brought by those members of the family whose relationships with one another have been disrupted by the negligence of those tasked with investigating child abuse. RCW 26.44.010; *M.W.* 149 Wn.2d at 597.

M.W. is not a narrow holding as the defendants read it. 149 Wn.2d 589 (2003). It actually expanded the needless and unwarranted separation standard to the "leads to a harmful placement decision" standard. Compare *Id.* at 591, to *Tyner*, 141 Wn.2d at 79. This includes protecting the family unit from unnecessary disruption. *Rodriguez v. Perez*, 99 Wn. App. 439, 444, 994 P.2d 874 (Ct. App. Div. I 2000); RCW 26.44.100(1).

An allegation of child abuse triggers a caseworker's or law enforcement's duty to investigate the children's living situation. *M.W. v. Dep't of Soc. and Health Servs.*, 110 Wn. App. 233, 237, 39 P.3d 993 (Ct. App. Div. II 1993) rev'd on other grounds by *M.W.*, 149 Wn.2d 589; RCW 26.44.050. The State's and County's liability arises from breaching their duty to investigate an allegation of abuse. *Tyner* 141 Wn.2d at 83. This inquiry focuses on whether the officer or caseworker has gathered sufficient information, regardless of whether the results may ultimately be presented to a court of law. See *Id.*

2. LAW ENFORCEMENT'S INVESTIGATION DID NOT RELIEVE THE STATE'S DUTY, NOR DOES RCW 26.44.030(11)

An adequate investigation by law enforcement and an adequate *investigation* by DSHS have different requirements. The Washington Administrative Code andcertain sections of the RCW and DSHS' own internal standards spell out what constitutes an adequate investigation. For example, DSHS has a duty to create a report and make it available to the parents within 90 days. See *Ducote v. State, Dept. of Social and Health Services*, 167 Wn.2d 697, 702, 222 P.3d 785, (2009); RCW 26.44.030(12)(a). Some other duties include informing parents of the referral (WAC 388-15-045 and 049), making risk assessments based on

the facts, documenting the findings, interviewing professional or other witnesses such as physicians or day care workers. See Practice and Procedure Guide and Operations Manual attached as Appendix A to Fearghal's opening brief.

When Dixson responded to the referral made by a nurse practitioner, Rebecca Hill, he was obligated to investigate the children's living situation. CP 1996; *M.W.*, 110 Wn. App. at 237. Importantly, both Patricia and Fearghal were the subjects of the investigation. CP 2000-01. However, Dixson believed Fearghal was the perpetrator based on his arrest and restraining order. See CP 1594. He told Patricia that if she agreed not let Fearghal have contact with the children then nothing else would happen. He then had her sign a safety plan. CP 1323. It was only voluntary in the sense that she chose to sign it rather than have the children sent to foster care. CP 1594. He did not do anything he was required to do and he even tried to cover up this fact by backdating and fabricating reports. 1972-74. Dixson's failure to gather any information from anyone other than Patricia resulted in a harmful placement. CP 1780-83, 1954-55, 1958-59. A CPS caseworker's duty to investigate is "statutorily mandated and must be completed regardless of whether its results may ultimately be presented to a court of law." *Tyner*, 141 Wn.2d at 83.

Dixson's investigations were so grossly inadequate that even his supervisor recognized that he was putting children at risk and he was taken off casework duties. CP 1972, 1980. When DSHS fails to investigate and the exposure to the abusive party continues and prolongs the abuse, the State is liable. *Lewis v. Whatcom County*, 136 Wn. App. 450, 458, 149 P.3d 686 (Ct. App. Div. 1 2006).

The State attempts to relieve its duty to investigate Fearghal's January 2006 report of abuse by arguing that the report was not screened in, and, therefore, did not meet the criteria for investigation. State Resp. at 26; CP 2003. See RCW 26.44.030(11). However, this decision not to investigate was negligent because when Fearghal reported the abuse there was still an open case. CP 1325. The case had already been screened in and accepted for departmental response and was under investigation. They did not inform Fearghal about the open case when he called and did not check up on Dixson's progress. CP 2003.

3. THE STATE'S LACK OF INVESTIGATION DEPRIVED THE COURT OF MATERIAL INFORMATION

The court is not an investigative agency, but relies on law enforcement and DSHS. *Tyner* recognized that in dependency cases, the courts rely heavily on a caseworker's judgment in making a determination. *Tyner*, 141 Wn.2d at 87. Even though the instant case is not a dependency

case, the analysis is still helpful because it shows that it is foreseeable that the results of a DSHS investigation will end up in the hands of a court. And for that reason, DSHS should carefully investigate. Holding the State liable for failing to investigate and failing to provide a report containing the results of that investigation does not expand its duty and would not require DSHS to seek out court cases involving the parent under investigation. See State Resp. at 19.

Instead, whether the results of their investigation were material information that was withheld from the court is a question of cause in fact, not duty. *Tyner* 141 Wn.2d at 86 citing *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

It violates public policy to give the government the power to cause a disruption in the family unit, and the power to influence the ultimate outcome of that disruption, but not hold them liable for remaining silent. Appellants have presented evidence to show that a reasonable jury could find that a report with "inconclusive" findings created by DSHS after an adequate investigation could have changed the outcome of the criminal and subsequent family court decisions.

The State points to *Petcu v. State*, 121 Wn. App. 36, 86 P.3d 1234 (Ct. App. Div. II 2004) to show that it does not have a duty to provide a report,

but that was not *Petcu*'s holding. *Petcu* stands for the proposition that when determining whether material information was withheld the court, information presented by the parent should not be excluded from the analysis. *Id.* at 58. In *Petcu*, the caseworker was not negligent in gathering information. She thoroughly investigated the children's living situation including interviewing collateral witnesses such as the children's doctor. Petcu complained that even though the information was presented in court, it was not presented by the caseworker. *Id.* at 60-61. The Petcu court found that because the results of the investigation were presented, nothing was withheld. *Id.*

Here, the complaint is not about who presented the results of the investigation, but rather that there were no results because DSHS did not complete an investigation. When the State argues that Fearghal had all the information and could have presented it himself, they are really trying to abrogate their investigative duty under RCW 26.44.050. It is not merely about the information that DSHS gathers, but the credibility assigned to the investigation by the courts.

The sole purpose of a DSHS investigation is to determine whether a child's living situation is safe or needs to be altered. In this case, if Dixson had completed his investigation, it would have revealed Patricia's drug

abuse, her emotional abuse of the children, such as making Conor tell "her truth", her leaving the children alone for whole days to find their own food while she slept, her locking Cormac's room with a chain lock, her telling Cormac that her boyfriend was his father and forbidding Conor to mention Fearghal's name and allowing him to think Fearghal was dead. CP 1781-83; 228. An adequate investigation would have revealed that the children needed to be removed from Patricia's care and contact with their father needed to be restored.

The State analogizes this case to *Cunningham v. City of Wenatchee*, 214 F. Supp. 2d 1103 (E.D. Wash. 2002), *In re Scott County*, 672 F. Supp. 1152 (D. Minn. 1987) and *Gausvik v. Abbey*, 126 Wn. App. 868, 886, 107 P.3d 98, (Wash.App. Div. 2 2005) because the "criminal investigation was already under way" before a DSHS social worker became involved, and there was "no evidence" that the social worker "altered the course of the criminal action." State Resp. at 23.

But, that was not a holding in any of those cases. In each case, the court found that the plaintiff failed to prove both but for and proximate causation when the social workers had minimal involvement. *Cunningham*, 214 F. Supp. 2d at 1112-13; *Gausvik*, 126 Wn. App. at 885-86; *Scott County*, 672 F. Supp. At 1165. It is also important to note that

both *Cunningham* and *Gausvik* arose out of the Wenatchee sex abuse sting and involved similar parties and conduct, which resulted in several civil rights cases before the federal district court to determine what liability, if any, each party had. But, neither case precluded legal or factual causation in a similar case.

Scott County, is also factually distinguishable because there, the caseworkers simply aided the police without making any decisions of their own. DSHS only assisted law enforcement in questioning the children, being present when the children were removed from their homes, and tending to the details of child foster care placement. 672 F.Supp. at 1166. In contrast, Dixson did not aid the police in their investigation. His duty to investigate was triggered when the Kaiser Clinic made a referral. His investigation was wholly separate from law enforcement's investigation. The State cannot abrogate its statutory duties to law enforcement, just because Fearghal was arrested prior to Dixson's involvement. . Nor can those investigative duties be abrogated to the courts just because the court became involved.

In *Cunningham*, the caseworker, Reiman, became involved after Cunningham's arrest and confession, but he conducted an investigation in accordance with CPS standards, interviewed the alleged victims, and

created a report for the dependency action. 214 F.Supp.2d at 1109. Because he followed procedure, reasonable minds could not find that his actions directly caused Cunningham's damages inherent to his conviction. *Id.* at 1113. The deciding factor in that case was that Reinman's investigation was not negligent.

In contrast, a reasonable mind could not possibly find that Dixson's investigation was not negligent. DSHS itself found him so negligent that they removed him from case work. CP 1980.

But for the State's inaction, Conor's and Cormac's separation would not have been prolonged. As argued above, if the results of a complete investigation by the State were available to Fearghal, it could have changed the outcome of the subsequent family court and criminal court decisions. This question must go to the jury unless reasonable minds could not differ. *Tyner*, 141 Wn.2d at 86.

4. THE COUNTY'S INADEQUATE INVESTIGATION DEPRIVED THE COURT OF MATERIAL INFORMATION

An adequate investigation by law enforcement is not as straightforward because the WAC does not specifically enumerate their duties. But, from the case law, it is clear that an officer has to do more than report allegations. For example, a probation officer is liable for a breach of his duty to investigate when he fails to monitor his probationer

close enough to discover a violation. In *Bishop* v. *Miche*, 137 Wn.2d 518, 526, 973 P.2d 465 (1999).

The United States Department of Justice (DOJ) found that the "failure to respond properly to child abuse cases" may result in an innocent person being falsely accused." U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquincy Prevention, Law Enforcement Response to Child Abuse at 4, available at https://www.ncjrs.gov/pdffiles/162425.pdf. (last visited 9/3/15). Because of that, and the risk of having a case dismissed when a child has actually been abused, the DOJ stressed the importance of investigators "objectively investigating child maltreatment, including conducting interviews of children and interrogating suspected offenders." *Id*

Specifically, it recommended that when law enforcement receives a referral he or she should "[i]dentify personal or professional biases" and "[d]evelop the ability to desensitize yourself to those issues and maintain an objective stance." *Id.* at 6. Relevant to the case at hand, it stressed the importance of interviewing the child alone and "focusing on corroborative evidence." *Id.* As part of the follow up investigation, the DOJ recommended arranging "for a medical examination and transportation to the hospital." *Id.* at 7.

In contrast, when Patricia made the child abuse allegation, Deputy Kingrey came to the scene with a personal and professional bias about Fearghal, and arrested the party he already believed to be the abuser. This was confirmed in his mind when Fearghal denied the abuse because he believed that was classic abuser behavior. CP 1545. Unfortunately for the children, he was wrong.

Kingrey had a duty to do more than just report Patricia's allegation. Most importantly, he should have interviewed the children, instead of relying of a statement from Patricia's mother that Conor told her about the incident. CP 1557. But, there were several other defects in his investigation such as his failure to examine the children, failure to arrange for a medical examination for Cormac and his failure to see, or even talk to, the children. CP 1541, 1543. There was no follow up investigation at all. Deputy Kingrey testified that the scene where the alleged abuse took place looked undisturbed. CP 1545.

The County oversimplifies the situation by stating that the only omissions Deputy Kingrey made to Judge Schreiber were Fearghal's statements that Patricia was using anxiety medication. County Resp. at 41. But, there were several other defects in his investigation. First, Fearghal told Deputy Kingrey that she was abusing *narcotics* as well as anxiety

medication, not simply using it. Fearghal also told him about Patricia's many delusions and her post-partum depression. CP 1789. The County seeks to minimize this by saying these were unfounded statements by a desperate man, but this was material information. Drug abuse is a factor in determining a parent's residential time with their children. RCW 26.44.191. Had Deputy Kingrey investigated and found drug abuse, the family court probably would not have left the children in her care or restricted Fearghal's time so severely. The County also forgets that Patricia's statements were unfounded and uncorroborated. They attempt to show that her statements were corroborated by her mother, but her mother was not present at the time of the incident. CP 1557.

In addition, Deputy Kingrey did not interview any collateral witnesses, he did not interview the children, or even attempt to examine Cormac. Another material fact that was left out of Deputy Kingrey's probable cause declaration was that Cormac had no visible injuries, a fact he includes in his police report. CP 241, 1541, 1547, 1550, 1667. Deputy Kingrey did not look in the bathroom where Fearghal told him Patricia kept her medication. CP 1789. The room where the incident allegedly occurred was undisturbed. CP 1133. Deputy Kingrey represented to the court that he had conducted a full investigation and that there was ample

cause to arrest Fearghal when he knew that was not the case.

Deputy Kingrey's deposition testimony shows that he placed Fearghal under arrest to affect a placement decision. The County argues that the appellants "twist" his words, but a jury could find that Kingrey intended to influence a placement decision. County Resp. at 36; CP 1542-43. This is especially true when Deputy Zimmerman, faced with the same allegation by Patricia in November 2007, investigated the situation, interviewed Cormac and Fearghal, and reviewed the results of Cormac's medical examination, and decided not to arrest Fearghal or cause any separation. CP 413, 1796 Kingrey also told Patricia that a no-contact order would be issued.

It is important not to confuse liability for negligent investigation with liability for false arrest. Whether he breached his duty to conduct an adequate investigation is not the same inquiry as whether he had probable cause and it is a question of fact for the jury unless reasonable minds could not differ.

Not only could reasonable minds differ on this issue, but reasonable minds did differ. Judge Nichols denied summary judgment on the negligent investigation claim because he found an issue of fact as to whether Deputy Kingrey left the children in an abusive home or removed

them from a non-abusive home. CP 1270. Deputy Zimmerman, faced with the same situation, did not disrupt the family unit. Therefore, a jury could find that Deputy Kingrey breached his duty to investigate the children's living situation and that his breach deprived the court of material information.

Fearghal was denied the benefit of a full, non-negligent investigation. He was stigmatized. Once he was labeled a child abuser by Kingrey, the courts relied on that. The family courts entered no-contact orders based on the arrest because it had nothing else to rely on, such as DSHS' report. It is also important to note that the first two family court no contact orders were temporary orders issued without the benefit of a full hearing and the third one was put in place pending the results of the criminal case. CP 1444, 1448, 1456, 1460, 1462.

Deputy Kingrey's negligence deprived each and every court of material information because each court that entered a no-contact order relied on his arrest as a basis for its issuance. And that investigation was negligently conducted.

The County cannot escape liability for Deputies Young, Paulson, and Farrell either. An officer's duty to investigate is triggered by a report concerning the possible occurrence of abuse, not a specific report of actual

abuse. *Yonker v. State Dept of Soc. and Health Servs.* 85 Wn. App. 71, 74, 80 930 P.2d 958 (Ct. App. Div. 1 1997) citing RCW 26.44.050. Even if Fearghal did only make a "passing reference" to Deputies Young, Paulson and Farrell, as the County contends, it was sufficient to trigger their duty to investigate. *Id.* See County Resp. at 22.

However, Fearghal did make more than a passing reference. When Patricia attacked him in his home in front of the children, on January 11, 2006, Fearghal called the police twice to report that he feared for the children's safety. CP 1681. Deputies Paulson and Young responded, and Deputy Paulson knew that Conor was so traumatized by the events that he was throwing up, but did not interview the children or make a report to DSHS as required by RCW 26.44.030(1)(a). He simply forwarded the report onto the prosecuting attorney's office. CP 1681. That was a breach of their duty to investigate.

The next day after Deputy Paulson breached his duty to investigate, Patricia took Conor to the court appointed custody evaluator and forced Conor to lie. CP 1781. She told him that if he did not lie about Fearghal hitting Cormac then he would go to jail. *Id.*; CP 413. Based on that visit, the court made the no-contact order final until the criminal matter was resolved. CP 1460-61. Had Deputy Paulson interviewed Conor, he would

have discovered that Conor was being emotionally abused by being forced to side with Patricia to lie about Fearghal hitting Cormac. If that information was before the family court on January 17 or February 15, 2006, it would not have cut off Conor's contact with Fearghal. See CP 1456, 1460.

5. THE COURT IS NOT A SUPERSEDING CAUSE FOR THE CHILDREN REMAINING IN AN ABUSIVE HOME.

Further, the State and County are liable for negligent investigation even if they did not actually place the children. *Lewis*, 136 Wn.App. at 458. In *Lewis*, DSHS was liable for Lewis' placement, even though the child's mother was the one placed her in a home where she was molested, because it conducted an incomplete investigate. *Id.* The court focused on DSHS' failure to follow through not on whether the children would have been removed had an investigation been conducted. She only had to show that they did not conduct an investigation and as a result she was harmed. *Lewis*, 136 Wn. App. at 458.

Conor and Cormac have adequately shown that Dixson failed to conduct an investigation and that, as a result, they suffered emotional trauma, physical neglect, and physical injury. For example, Patricia forced Conor to lie to the court appointed evaluator, Conor and Cormac witnessed Patricia's boyfriend's children being abused and locked in the

garage with no bathroom. Conor suffered a blow to the head that knocked his tooth out when Patricia's boyfriend was driving recklessly. Patricia would sleep for an entire day leaving Conor to take care of Cormac and find food, and Cormac suffered dog bites as a result of being left unsupervised. CP 1780-83, 1958-59.

On December 17, 2006, Deputy Farrell supervised while Fearghal retrieved some of his belongings from Trish's home. While he was there, Fearghal reported seeing locks on the outside of the children's doors. Deputy Farrell saw the chain locks, but refused to make a report or investigate any further. CP 1795.

Choosing not to investigate is a harmful placement decision. *Lewis*, 136 Wn. App. at 458. Further, the County's duty was to investigate the child's living situation, not the relationship between the mother and father. Because Deputies Paulson, Young, and Farrell chose not to investigate, the County is liable for Conor's and Cormac's continued placement with Patricia and the harm they suffered. *Id.*

Importantly, the State and the County both fail to explain how the subsequent no-contact orders affected their failure to remove the children from an abusive home while they were in Patricia's custody. The subsequent no-contact orders had no bearing on the children's prolonged

exposure to abuse. That was the direct result of Dixson's and the deputies' negligence. But for their inadequate investigations, Conor and Cormac would not have been left in an abusive situation. That is a harmful placement decision under *Yonker*, 85 Wn. App. 71 and *Lewis*, 136 Wn. App. 450.

The County also fails to explain how the subsequent court orders were a superseding cause of the children being left in an abusive home. They attempt to disassociate themselves by arguing that there is no evidence in the record of harm to the children between the entry of the No-Contact order on June 3, 2005, and when Patricia filed for dissolution on July 28, 2005. County Resp. at 34. But, they have cited no authority that the court issued no-contact order cuts off the chain of causation when a child is left in an abusive home. And, in fact, *Lewis*, 136 Wn. App. at 458, suggests that the causal chain in not broken under these circumstances. As a direct result of Kingrey's incomplete investigation and Paulson, Young, and Farrell's refusal to investigate, Conor and Cormac were harmfully placed.

6. A NEGLIGENT INVESTIGATION CLAIM IS NOT LIMITED TO DEPENDENCY CASES AND DEFINITIONS

The County and State essentially ask this court to restrict the claim of negligent investigation to dependency cases by applying the definitions

contained in RCW 13.34. County Resp. Br. at 33. The State further contends that *M.W.*, 149 Wn.2d 589 and its progeny stand for the proposition that DSHS cannot petition the court for relief, and then fail to offer the court complete information material to the court's decision. State Resp. at 22.

But, this directly contradicts the public policy behind the claim and conflicts with *M.W.* 149 Wn.2d 589, *Yonker*, 85 Wn. App. 71, and *Lewis*, 136 Wn. App. 450, which all recognize that a placement decision can occur outside the context of a dependency case and when DSHS has not petitioned the court for relief. In *Yonker* and *Lewis*, no hearing, no determination and no decision by the court deciding an aspect of the parent-child relationship took place, but the state was still liable for a harmful placement. *Yonker*, 85 Wn. App. at 73-74; *Lewis*, 136 Wn. App. 452-53.

7. JUDGE SCHREIBER'S ISSUANCE OF A NO-CONTACT ORDER WAS A HARMFUL PLACEMENT

M.W. made it clear that a placement decision is made when the parent-child bond is disrupted. 149 Wn.2d at 591, 597. Contrary to the County's assertion, Judge Schreiber's issuance of the no-contact order was a placement decision as defined by *M.W.* because it cut off Cormac's contact with his father, which is the most egregious disruption of the

parent-child bond that exists *Id.*; County Resp. at 32-33.

In addition, removing a child from a non-abusive home is a harmful placement decision. The separation is the injury because RCW 26.44.050 is designed to protect the "unnecessary interference with the integrity of the family." *M.W.*, 149 Wn.2d at 602. Between the entry of the No-Contact order on June 3, 2005, and when Patricia filed for dissolution on July 28, 2005 the harm was being separated from their father. See County Resp. at 34. Therefore, the County is liable for their separation unless the subsequent no-contact orders were a superseding cause. As argued above, they were not superseding because material information was withheld.

8. THERE WAS NO VOLUNTARY PREEMPTIVE PLACEMENT

The County is correct that a voluntary placement decision cannot be the basis of a negligent investigation claim. See *Roberson v. Perez*, 156 Wn.2d 33, 47, 123 P.3d 844 (2005). But, its contention that Patricia's actions before calling 911 could somehow be construed as a preemptive, voluntary placement by Fearghal is absurd. County Resp. at 30-31.

First, Fearghal did not voluntarily relinquish guardianship, where in *Roberson* both parents placed the child outside the home. *Id.*at 46. Second, Conor and Cormac did not leave Fearghal's legal custody before the investigation started and had Fearghal not been arrested, he would have

retrieved the children because Patricia had no authority to keep them from him. Therefore, Patricia's actions were not tantamount to a removal. Nor can it be considered preemptive by Fearghal because he did not remove the children to avoid an investigation and the Simms' did in *Roberson. Id*

Even if the Patricia did "remove" the children she did not directly cause the harm. It was Kingrey's investigation. He removed Fearghal from the home, and caused the separation, by arresting him. But for Kingrey's arrest, Fearghal could have retrieved the children.

9. THE COUNTY AND STATE CANNOT CLAIM THE IMMUNITY OF ITS EMPLOYEES, IF ANY.

Appellants did not wholly overlook qualified immunity, as the county suggest, but it is wholly irrelevant. Sovereign immunity was abolished in 1961. *Bender v. City of Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492, (1983). RCW 4.92.090 is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 447, 899 P.2d 1270 (1995) (holding qualified immunity of a probation officer does not extend to the State).

The County cannot claim the qualified immunity of its officers. *Babcock v. State*, 116 Wn.2d 596, 619, 809 P.2d 143 (1991). (Legislative policy requires us to hold that DSHS cannot claim the qualified immunity of its caseworkers). Qualified immunity, if any, belongs to the officer or

the caseworker, not the County or State.

10. THE SUBSTANTIAL FACTOR TEST WAS ARGUED IN THE TRIAL COURT AND TYNER DOES NOT PRECLUDE IT.

The substantial factor theory was argued at the summary judgment hearing before Judge Nichols and Judge Collier. RP at 49-50, 125, 181, 259, 260, 262. Trial counsel argued that the court had to look at all the factors and consider the actions of the defendants all together. Under CR 15(b)(2) any issue not raised in the pleadings, but tried by the parties' express or implied consent is treated as if it was raised in the pleadings. It does not matter that substantial factor was not pleaded because it was argued at both summary judgment hearings and no defendant objected.

The substantial factor test is not limited to categories of cases, but is applied when a case fits the criteria set out in *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985).

Applying the test does not offend *Tyner*, 141 Wn.2d at 82 because the substantial factor test does not replace the factual causation element of proximate cause. Rather, it merely adjusts the "but for" test for when there are additional contributing causes. In addition, the substantial factor test would not abrogate *Tyner*'s holding that a court can be a superseding cause if all material information is before it. *Id.* at 88. The categories of

cases in which the substantial factor test is applied is not a topical limitation on the test. Instead, toxic tort cases, medical malpractice cases and employment discrimination cases all fit within the criteria set out in *Daugert*, 104 Wn.2d at 262. That is why the test is applied in those cases. *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn. App 675, 684 (Ct. App. 2008) was not an absolute topical limitation on when the test could be applied as the County suggests. County Resp. at 28. It simply summed up when it has been applied.

Further, whether a category of cases fits the *Daugert* criteria is determined by public policy. For example, the court has applied the test to employment discrimination cases because public policy considerations "strongly favor eradication of discrimination and unfair employment practices." *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 420, 161 P.3d 406 (Ct. App. Div. 2 2007). If eradication of discrimination in employment is a sufficient policy consideration to apply the test, then surely the paramount importance of protecting the parent child bond and eradicating its disruption is an equally sufficient policy consideration to apply the test.

This is especially true in light of the requirement of inter-agency cooperation in child abuse investigations. RCW 26.44.035. It defeats the

purpose of chapter 26 to allow each defendant to essentially blame the other, or the court, to escape liability.

Lastly, *Gausvik* 126 Wn. App. 868 is not a blanket rejection of the substantial factor test because it ignored the application of the three *Daugert* critera and instead relied on the *Cunningham* Court's holding that the substantial factor test is dispositive in cases like Gausvik's. *Id.* at 887 citing *Cunningham*, 214 F.Supp.2d at 1114. Again, both Gausvik and Cunningham were actions brought as a result of the same Wenatchee sex abuse sting operation in the 1990s. The federal court had already decided several of these cases and found that DSHS had little to no involvement. Given the circumstances and the political undertone of those events, it is likely that when the Gausvik Court said "cases like Gausvik's" it meant it literally. They would not apply the substantial factor test to any of these Wenatchee sex abuse sting cases. The instant case is not a case like Gausvik's or Cunningham's.

This case fits squarely into the second criteria in *Daugert*, "where a similar but not identical result would have followed without the defendant's act." 104 Wn.2d at 262. Without Kingrey's act, DSHS' investigation would have resulted in harm to the children by leaving them in an abusive home. It would also have resulted in prolonged separation

because Dixson told Patricia that she could not let Fearghal see the children or she could also be separated from them. Without DSHS' inaction, the County's actions would have been mitigated.

Without Petty's acts of overlooking Patricia's abuse, if she agreed to collect evidence against Fearghal to charge him with new crimes, Conor's and Cormac's harm would have been mitigated and their reunification with Fearghal would have happened sooner.

11. THIS COURT SHOULD NOT EXPAND PROSECUTORIAL IMMUNITY TO INCLUDE ACTS PERFORMED OUTSIDE PETTY'S ROLE AS A PROSECUTOR

This case is not about whether prosecutorial acts are immune from liability, but whether prosecutorial immunity should apply solely because the actor is a prosecutor. Other courts have answered with a resounding no. *Babcock*, 116 Wn.2d at 610. ("Even prosecutors cannot claim unqualified immunity for performing investigatory functions."); *Robison v. Via*, 821 F.2d 913 (2d Cir.1987). ("The federal courts have accordingly denied immunity to prosecutors' and caseworkers' investigations of child abuse.").

There are two versions of the story relating to Petty's involvement. The City's version is that Petty only spoke with Patricia two to three times on the phone and met with her once as a witness in the assault case against

Fearghal. CP 161-63. (This is based on testimony Patricia later corrected). She had one conversation with Patricia's divorce attorney, where she told the attorney she could not participate in the family court proceeding. CP 497. Then the only other interactions she had with Patricia was when Patricia reported a crime that had already occurred (Fearghal's alleged violation of the no-contact order) and Petty simply referred her to the police. CP 805. The City also alleges that the entire investigation into the new charges was done by Officer Langston and that Petty filed new charges based on Langston's report. CP 337-38.

However, Patricia's story is very different. She alleges that Petty lorded her influence over her and told her to find evidence of new crimes (witness tampering and violation of no-contact order) even if she had to exaggerate. CP 613-15. Petty actually collaborated with Patricia's divorce attorney to make sure Fearghal's parental time was limited. CP 615. Petty threatened that she would make sure the children were put in foster care if she did not cooperate. CP 746, 755. Finally, Patricia reported that she ran into Fearghal at Bally's Fitness and Petty told Patricia to take the evidence to the police. Officer Langston took Patricia's statement, but did not make an arrest. CP 75. Under RCW 10.99.055, an officer is required to arrest if they find probable cause, so it is reasonable to infer that Officer Langston

did not find probable cause. In fact, Fearghal was never convicted of a violation of the no-contact order and the City's contention that Petty simply told Patricia to report a crime that already happened is inaccurate because no court ever determined that a crime had taken place. Petty's investigation started long before Officer Langston became involved. Petty filing of new charges for three violations of the no-contact order wasnot a result of Officer Langston's report, but was despite it. Even though Officer Langston did not find probable cause, she charged Fearghal anyway and directed Patricia to get more evidence, even if she has to exaggerate. CP 337-38, 755.

That is when Patricia took a journal she had inadvertently picked up with some business materials from Fearghal's hotel room to detective Boswell and contended that select journal pages were evidence of witness tampering with Petty's encouragement. CP 919, 920.

It is within the province of the jury to decide which version is true. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 818 P.2d 1056 (1991). The only appropriate inquiry on summary judgment is whether, if Patricia's version is true, it is enough to show that Petty acted outside the scope of her role as a prosecutor preparing for trial. For the sake of Vancouver residents, let us hope that she stepped outside of her

prosecutorial role.

Patricia's testimony shows that Petty conducted her own investigation, unrelated to the assault charge, to find, and fabricate if necessary, evidence to support new charges against Fearghal in order to prolong the criminal case and to influence court placement decisions, so the children would be separated from their father. These acts were not done in preparation for trial on the assault charge. Therefore, she is not shielded by prosecutorial immunity. *Gilliam v. Dep't of Soc. and Health Servs.*, 89 Wn. App. 569, 583, 950 P.2d 20 (Ct. App. Div. 1 1998) (A prosecutor does not "enjoy immunity for investigative work merely because the conduct complained of occurs after charges are filed."). Nor do Petty's actions fall into any of the situations cited by the City. City Resp. at 30.

The City cites *Demery v. Kupperman*, 735 F.2d 1139, 1143 (9th Cir. 1984) for the proposition that a prosecutor has absolute prosecutorial immunity if her actions were performed as part of her preparation of the assault case against Fearghal, even if they can be characterized as "investigative" or "administrative." But, the Ninth Circuit questioned its decision in *Demery* and held that to the extent Demery relied on that theory it was incorrect because "[a]lmost any action by a prosecutor,

including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Milstein v. Cooley*, 257 F.3d 1004, 1009 (9th Cir. 2001) n. 5. *Schmitt v. Langenour*, 162 Wn. App. 397, 401-02 256 P.3d 1235 (Ct. App. Div. 2 2011) does not shed any light on the instant case because the deputy prosecutor simply followed up with a witness and asked the sheriff to supply the report he had created to determine whether charges were warranted.

It is true that whether prosecutorial immunity applies is a question of law, but whether Petty acted outside her prosecutorial role is a question of fact in this case because it does not readily fit into one of the scenarios described in the cases cited by the City. See *Gilliam*, 89 Wn. App. 569. If it were purely a question of law, the trial court would have dismissed Petty as a party. Instead, it allowed her to be deposed to find out whether she was immune. The City is really asking this court to expand prosecutorial immunity to include any and all action taken by the prosecutor.

But, the paramount importance of protecting the family from government interference outweighs any public policy concern that might warrant such an expansion of prosecutorial immunity.

Here, there are two versions of the story, an issue closely tied to Patricia's deposition corrections. If Patricia's testimony in those correction sheets is true then there is enough evidence to show that Petty acted outside the bounds of her prosecutorial role and does not have immunity. Even if the correction sheets are treated as a declaration, as they were in the summary judgment hearing before Judge Nichols, it is an issue of credibility, which is within the province of the jury.

Petty's actions, as described by Patricia, were not performed in preparation for trial, but in preparation for the family and civil courts in order to effect child placement. It would be absurd to allow a prosecutor to conduct an investigation for the purpose of influencing a child placement, but then claim she is not liable for any harm.

Petty's investigation resulted in a harmful placement decision in two ways. First, blinded by her bias toward Fearghal, she remained silent when she witnessed Patricia emotionally abusing Conor. Instead of trying to remove Conor from the situation, Petty indicated that she would make sure the children were put in foster care if Patricia did not act as her proxy to gather evidence for new charges. CP 746. Second, Petty's actions contributed to the children's continued separation from Fearghal. The fabricated evidence of no-contact order violations that she directed Patricia

to collect prolonged the family court proceedings because they were essentially stayed until the criminal proceeding was resolved. During the stay the no-contact orders were kept in place. CP 1460-61.

The City's liability arises from Petty's investigation into the child abuse case because she conducted investigative activities outside her prosecutorial role in order to separate the children from Fearghal. As soon as she stepped out of her prosecutorial role, she stepped into the shoes of a detective and has the same liability as law enforcement. Significantly, an officer's qualified immunity does not extend to his or her employer, so even if Petty retained qualified immunity when she was acting as an investigator it does not extend to the city. See *Babcock*, 116 Wn.2d at 619.

12. APPELLANTS FOLLOWED CORRECT PROCEDURE TO CORRECT PATRICIA'S DEPOSITION TESTIMONY

CR 30(e) simply states that a deposition is to be submitted to the witness after it is fully transcribed. Then the witness has 30 days to make corrections. Patricia did not waive her signature, as the City suggests. The waiver in CP 894 is not signed by Patricia and none of the parties stipulated to the waiver of her signature. In fact, on the notice of filing deposition for volumes II and III Patricia reserved her signature, so she could review and correct all the volumes together. CP 892.

Appellants do not contend that the court reporter mistakenly submitted

the deposition to Patricia too early. See City Resp. at 46. They contend that even though the first three volumes were submitted after each one was completed, the 30 days to correct any mistakes did not commence until all five were submitted. Therefore, there was no need to bring a motion to suppress the deposition because there was no defect in the way the deposition was prepared or dealt with. See City Resp. at 46.

Patricia's corrections are important because the city relies on testimony that was corrected to show that Petty was acting within her role as a prosecutor. For example, Patricia states in her corrections that the "vast majority" of her declaration was fabricated by her divorce attorney, Marcine Miles, in which she was collaborating with Petty on the child custody issue. CP 746. Petty indicated she would see that the children went into foster care if Patricia did not cooperate in stopping Fearghal from seeing the children. *Id.* Patricia corrected her deposition testimony to reflect that Petty used the word exaggerate and indicated it was perfectly legal. Petty instilled fear in Patricia that if she did not make more allegations she would lose the children. CP 755-56.

In her correction sheets, Patricia did not contradict her testimony, she corrected it, this time without the influence of Petty. Petty's behavior during Patricia's deposition was a continuation of her prior attempts to

change child placement decisions by acting outside her prosecutorial role while in the employ of the City

13. ALL EVIDENCE IS ADMISSIBLE AGAINST THE CITY BECAUSE ITS SUMMARY JUDGMENT ORDER WAS NOT FINAL

When there are multiple defendants and multiple claims, an order that adjudicates fewer than all the claims against all the parties is only a partial summary judgment and it is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." CR 54(b).

The only exception to this rule is if the court certified it as a final order. In that case, four things are required under CR 54(b): "(1) more than one claim for relief or more than one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment." *Fluor Enterprises, Inc. v. Walter Const., Ltd.*, 141 Wn. App. 761, 766-67, 172 P.3d 368, (Ct. App. Div. 1 2007).

The rule is strictly construed. For example, in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 299-300, 840 P.2d 860 (1992) the plaintiff used this rule to successfully reinstate a party that was previously

dismissed. The *Beal* court reasoned that because the partial summary judgment order was not properly certified, it was not a final judgment and the trial court had the authority to modify the order at any time prior to final judgment. *Id.* at 300. If a trial court can modify the ruling based on new discovery then certainly the plaintiff has the right to keep discovering evidence against a dismissed defendant.

The order granting summary judgment to the city on July 30, 2015 was not a final order, but was still subject to revision if more evidence was discovered. The City recognized this dilemma when it sent a letter to Judge Collier informing him that the City could not be dismissed until he decided the State's and County's motions. CP 2068-69.

Although Appellants did not move to have the City reinstated, the trial court certainly had the right to review all new evidence against the City and the City could have objected to any evidence presented against it, but it did not. Therefore, it cannot object now. The City attempts to limit what evidence this court can review. But, all evidence contained in the clerk's papers was before the trial court, either Judge Nichols or Judge Collier, and the City did not object.

Even if this court does not review evidence admitted after July 30, 2010, there is ample evidence in the record of the harm suffered by Conor

and Cormac while they were left in Patricia's care and they were separated from Fearghal, including the parenting plan between Patricia and Fearghal. Patricia admitted being addicted to prescription drugs during the time of the children's separation from Fearghal. CP 220-21.

Patricia also admitted coaching Conor and using him in trying to set up false allegations against Fearghal and berating him, telling him he had to lie. CP 225. Patricia also admitted that she told Cormac to lie about who actually hit him when questioned regarding her November 18, 2007 allegation of abuse against Fearghal. During the time the children remained in Patricia's home she admitted she neglected them and even led Conor to believe that Fearghal was dead. She led Cormac to believe that her boyfriend was his father. CP 228.

14. THE CLAIMS OF OUTRAGE AND MALICOUS INTERFERENCE AGAINST THE CITY FOR THE ACTIONS OF JILL PETTY WERE NOT ABANDONED

A plaintiff does not abandon a claim asserted in a complaint if he presents evidence to support the claim in response to a summary judgment motion seeking dismissal of the entire complaint. Cf. *West v. Gregoire*, ___ Wn. App. ___ para. 16, 336 P.3d 110 (Ct. App. Div. 2 2014) citing *Cano-Garcia v. King Cnty*, 168 Wn. App. 223, 248, 277 P.3d 34, review denied, 175 Wn.2d 1010 (2012). The City argues that Plaintiffs abandoned

all claims other than negligent investigation against Petty. City Resp. at 23. But, in Plaintiff's supplemental briefing and attached declarations they presented evidence to support the other claims. CP 726-35

Evidence of outrage and malicious interference included Petty controlling Patricia's statements, directing her to gather evidence by any means necessary on Petty's behalf, conducting her own investigation, coercing Patricia into gathering evidence against Fearghal even if it was exaggerated, threatening to take away her children if she did not cooperate, and coercing Patricia into giving false testimony.

This is evidence of outrageous conduct. It is also evidence of malicious interference as argued more fully in Fearghal's opening brief. Petty used the power but not the function of the prosecutor's office to render the children temporarily fatherless, which resulted in severe emotional distress.

15. RCW 4.24.28 AND 4.24.595 ARE NOT APPLICABLE OR RETROACTIVE.

RCW 26.44.280 limits liability of government entities and officers as provided in RCW 4.24.595, which limits liability for emergent placement investigations to circumstances where there is gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065. This does not apply here because there

was no emergent placement and there was no dependency case.

The final report for Senate Bill 6555, which created RCW 26.44.280 favorably cites *Tyner* as creating and allowing an implied cause of action. The government liability section discusses the government's liability during a short window of time the report and the shelter care hearing. *Id.* Petty conduct did not occur during that limited time period. Further, the language of this statue suggests that this only applies in dependency cases.

But, even if this statue were to apply, it is not retroactive. Generally statutes are presumed to operate prospectively, unless there is some legislative indication to the contrary. *Agency Budget Corp. v. Washington Ins. Guar. Ass'n*, 93 Wn.2d 416,424, 610 P.2d 361 (1980). This statute does not fit the retroactivity exception. See *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645, (1981). RCW 4.24.280 was not enacted to protect the government from liability. It was enacted to effect the legislature's intent to protect children by keeping caseworkers from having to choose between protecting potentially abused children and protecting themselves from a law suit. Given that none of the actions complained of arose from conduct related to that situation, it would not further the statute's purpose to apply it retroactively.

16. EMOTIONAL DISTRESS

Appellants concede that the claim of Outrage was abandoned against the State prior to summary judgment. Appellants misread CP 1433.

The County argues that Conor and Cormac cannot maintain a claim of Outrage because they were not present during the action. But, in cases where the plaintiff is required to be present, the actual outrageous conduct was aimed at someone else. *Schurk v. Christensen*, 80 Wn.2d 652,656-57, 497 P.2d 937 (1972)(a mother could not maintain a tort of outrage action as a result of the molestation of her daughter, because she did not observe the injuries occurring to her daughter); *Lund v. Caple*, 100 Wn.2d 739, 742, 675 P.2d 226 (1984)(Aff'd the dismissal of the plaintiff's tort of outrage complaint based on a sexual relationship between his wife and the pastor of the church because plaintiff must be present when conduct is directed at a third person). Logic would normally dictate that in order for someone to inflict emotional distress on a child, that child would have to be present. But, that is not the case when the emotional distress inflicted is a separation from the child's parent or when the child is clearly in a mentally distressed situation and the law enforcement does nothing.

Considering the position occupied by the defendant, Conor's and Cormac's susceptibility to emotional distress, and the defendants'

awareness that there is a high probability that his conduct would cause severe emotional distress there is enough evidence to meet the threshold determination that outrageous conduct took place. See *Phillips v Hardwick*, 29 Wn. App. 382, 388, 628 P.2d 506 (1981). This occurred on at least four occasions.

First, Deputy Kingrey intentionally separated the children from their father knowing that children are peculiarly susceptible to emotional distress when separated from their parents. Second, Deputy Farrell saw locks on the outside of the children's room and other signs of abuse and did nothing. He knew the children were enduring abuse, but recklessly chose to leave them in that situation. He was in a position of power and in a position to end their suffering, but chose to consciously disregard their wellbeing. Third, Deputy Paulson had knowledge that Conor was suffering such severe emotional trauma that he was throwing up. Fourth, Petty witnessed Patricia emotionally abusing Conor. Instead of using her power to end his suffering, she chose to ignore it and allow Conor to stay in Patricia's care in exchange for fabricated evidence against Fearghal to create a new charge. Petty threatened Patricia that she would put the children in foster care if Patricia did not cooperate, but what she was really

saying is that she would agree not to report the abuse if Patricia went along with her plan. She traded Conor's wellbeing for a win.

B. CONCLUSION

This case is akin to a train wreck. Deputy Kingrey started the train; Dixson failed to put the brakes on; Paulson, Young, and Farrell fueled the fire; Petty steered the train off course until it crashed. The evidence presented shows a jury could find that each defendant's breach of their duty to conduct an investigation was the factual and legal cause of Conor and Cormac's harmful placement. Therefore, this court should reverse the trial court's orders granting summary on all claims and remand the case for trial.

DATED this 4th day of September, 2015.

Respectfully Submitted,

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APPENDIX

Figure 1 *continued*

- Secure the instrument of abuse or other corroborative evidence that the child identifies at the scene.
- Photograph the scene and, when appropriate, include any injuries to the child. Rephotograph injuries as needed to capture any changes in appearance.

Followup Investigation

- Be supportive and optimistic to the child and the family.
- Arrange for a medical examination and transportation to the hospital. Collect items for a change of clothes if needed.
- Make use of appropriate investigative techniques.
- Be sure the child and family have been linked to support services or therapy.
- Be sure the family know how to reach a detective to disclose further information.

During the Court Phase

- Visit the court with the child to familiarize him or her with the courtroom setting and atmosphere before the first hearing. This role may be assumed by the prosecutor or, in some jurisdictions, by victim/witness services.
- Prepare courtroom exhibits (pictures, displays, sketches) to support the child's testimony.
- File all evidence in accordance with State and court policy.
- Unless they are suspects, update the family about the status and progress of the investigation and stay in touch with them throughout the court process. Depending on the case, officers should be cautious about the type and amount of information provided to the family, since they may share the information with others.
- Provide court results and case closure information to the child and the family.
- Follow up with the probation department for preparation of the presentence report and victim impact statement(s).

A-2

Figure 1

Considerations for Child Abuse Investigations

When You Receive the Referral

- Identify personal or professional biases with child abuse cases. Develop the ability to desensitize yourself to those issues and maintain an objective stance
- Know department guidelines and State statutes.
- Know what resources are available in the community (therapy, victim compensation, etc.) and provide this information to the child's family
- Introduce yourself, your role, and the focus and objective of the investigation
- Assure that the best treatment will be provided for the protection of the child.
- Interview the child alone, focusing on corroborative evidence.
- Don't rule out the possibility of child abuse with a domestic dispute complaint; talk with the children at the scene.

Getting Information for the Preliminary Report

- Inquire about the history of the abusive situation. Dates are important to set the timeline for when abuse may have occurred.
- Cover the elements of crime necessary for the report. Inquire about the instrument of abuse or other items on the scene
- Don't discount children's statements about who is abusing them, where and how the abuse is occurring, or what types of acts occurred.
- Save opinions for the end of the report, and provide supportive facts. Highlight the atmosphere of disclosure and the mood and demeanor of participants in the complaint.

Preserving the Crime Scene

- Treat the scene as a crime scene (even if abuse has occurred in the past) and not as the site of a social problem

A-1

DECLARATION OF SERVICE

I hereby declare that on September 4, 2015, I served the foregoing APPELLANT'S BRIEF IN REPLY on:

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By the following indicated method or methods:

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

I further certify that I personally served a copy of Appellant's Brief in Reply to the Clerk of the Court for Court of Appeals Division Two

DATED this 4th day of ~~August~~ September, 2015

Erin C. Sperger, WSBA No. 45931