NO. 46347-4-II

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

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

Appellants,

v.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, CHILDRENS PROTECTIVE SERVICES,

Respondent.

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-2-04895-4

BRIEF OF RESPONDENT CLARK COUNTY, WASHINGTON

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

TAYLOR R. HALLVIK, WSBA #44963
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
Civil Division
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2478

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

A. INTRODUCTION

Plaintiffs appeal the trial court's entry of summary judgment in favor of all Defendants, each of which played a factually and legally distinct role in a tragic family dispute involving allegations of child abuse at the hands of Fearghal McCarthy. Defendant Clark County's involvement in this dispute was limited to four law enforcement contacts involving the McCarthy family between June of 2005 and January of 2006. While Plaintiffs' have advanced numerous claims arising from these contacts, they cannot satisfy the elements of these claims, as a matter of law, and wholly disregard Clark County's entitlement to RCW 10.99.070 good faith immunity and common law qualified immunity.

With regard to Fearghal McCarthy's false arrest and imprisonment claims, the trial court correctly granted summary judgment because Judge Schreiber's finding of probable cause constitutes an absolute defense to these claims. Summary judgment should also be affirmed because these claims are barred by the applicable two-year statute of limitations.

Concerning Plaintiffs' RCW 26.44 negligent investigation claims, the trial court's award of summary judgment to Clark County should be affirmed because the undisputed facts show that Ms. McCarthy *pre-emptively, independently* and *constructively* removed the McCarthy

children from the home prior to *any* Clark County investigation. Additionally, there is no causal connection between Clark County's investigations and any "placement decision." Finally, Plaintiffs' negligent investigation claims are barred by the doctrine of qualified immunity.

Pursuant to RCW 10.99.070, Clark County is entitled to statutory good faith immunity for it's involvement in domestic violence investigations because its deputies were acting in good faith to enforce the court's no-contact orders regarding the McCarthys. Finally, Plaintiffs' IIED (outrage) claims against Clark County fail as a matter of law because reasonable minds could not differ or conclude that any Clark County conduct was extreme or outrageous. Pursuant to Washington law and the undisputed facts of this case, this Court should affirm the trial court's award of summary judgment in favor of Clark County.

B. RESPONSE TO ASSIGNMENT OF ERRORS

The County rejects the McCarthys' statements of the issues and presents the following in lieu thereof:

1. Whether Mr. McCarthy's false arrest and imprisonment claims are barred by the two-year statute of limitations when he was arrested and imprisoned on June 3-6, 200, and filed suit on August 1, 2008.

2. Whether Mr. McCarthy's false arrest and imprisonment claims are barred where a judge considered all material facts and found probable cause.

3. Whether RCW 10.99.070 statutory immunity bars Mr. McCarthy's negligent domestic violence investigation claims when the undisputed facts demonstrate that Clark County deputies had probable cause to arrest him and acted in good faith to enforce the court's no-contact orders.

4. Whether Clark County deputies are entitled to qualified immunity when the undisputed facts demonstrate that they acted pursuant to their statutory duty to investigate reported crime, followed procedure, and acted in an objectively reasonable manner.

5. Whether Plaintiffs' negligent investigation claims survive when Patricia McCarthy constructively removed her children from the home prior to any Clark County investigation.

6. Whether Judge Schreiber's finding of probable cause represents an intervening superseding cause precluding Plaintiffs' RCW 26.44 negligent investigation claims.

7. Whether there is any proximate causal connection between Clark County's child abuse investigation and any subsequent "harmful placement decision."

8. Whether Clark County is entitled to summary judgment on Plaintiffs' IIED claims where its deputy's conduct was not outrageous or extreme in character.

C. STATEMENT OF THE CASE

1. Deputy Kingrey responds to report that Fearghal McCarthy had struck his two-year old son in the head, knocking him to the ground.

On June 3, 2005, at approximately 12:51 p.m. Deputy Kingrey of the Clark County Sheriff's Office (CCSO) was dispatched to a report of an assault that occurred the night prior. (CP 1526- 1532). Deputy Kingrey responded to the citizen report of crime and investigated, consistent with CCSO policy. (CP 1508). Deputy Kingrey made contact with the

reporting party, Patricia McCarthy, by telephone at the Highland Drive St. Joseph Catholic Church, where she had gone to seek shelter with her children, Conor and Cormac, and her mother Regina Greer. (CP 1526-1532).

Patricia told Deputy Kingrey that her husband, Fearghal McCarthy (Fearghal), had been physically and emotionally abusive to her and her sons and that he told her he would physically harm her if she ever reported the abuse to the police. (CP 1529-1530). Patricia relayed incidents of pushing, shoving, poking, and Fearghal grabbing her by the neck. (CP 1530). Patricia reported that on the prior evening, June 2, 2005, her two-year old son, Cormac, was crying while seated at the kitchen table when Fearghal, who was working at his computer, told her to shut him up or he would. (CP 1530). Patricia stated that Cormac continued to cry, at which point, Fearghal came over and "whacked" Cormac across the head, told him to shut up and then "whacked" him across the head again. (CP 1530). Patricia added that Fearghal hit Cormac so hard that Cormac hit his head on the table and then fell off the stool he was sitting on and fell to the floor. (CP 1530). Fearghal then pointed at Patricia and stated, "If you don't take responsibility for keeping him under control, I'm going to do that again. You need to slap him and show him who's boss." (CP 1530).

When asked if there were any injuries, Patricia stated there were no visible marks. (CP 1530).

Kingrey then spoke with Patricia's mother Regina, who stated that Patricia's five-year old son, Conor, had told her that he had seen Fearghal abuse Patricia. (CP 1530). Regina also stated that Conor told her about the incident where Fearghal struck Cormac the night prior. (CP 1530). Regina added that she had personally witnessed verbal and mental abuse against the boys and relayed one incident where Fearghal broke a wooden spoon on the hands of the boys while disciplining them. (CP 1530).

After receiving this information, Deputy Kingrey contacted Fearghal at his residence, where he denied striking Cormac or physically assaulting Patricia. (CP 1531). When asked why Patricia would make up a story like that, Fearghal stated that she takes medication for anxiety and that he believes the medication is making her delusional. (CP 1531). When asked why Patricia had to take anxiety medication, Fearghal stated that she has anxiety attacks because her older sister committed suicide, which has affected Patricia. (CP 1531). Fearghal did admit to having been angry and yelling on occasion, but denied ever touching Patricia. (CP 1531). When asked why Conor, a five-year old boy, would make up a story about him striking Cormac, Fearghal again denied any physical

abuse of the family members. (CP 1531). Fearghal never mentioned that the home or Patricia were harmful or dangerous for the boys. (CP 1531).

After interviewing Fearghal, Deputy Kingrey determined that he had probable cause for Assault in the Fourth Degree – Domestic Violence and placed Fearghal McCarthy under arrest, where he was then transported and booked into the Clark County Jail. (CP 1526 -1532).

After Fearghal was booked into jail, Deputy Kingrey went to the McCarthy residence and made face-to-face contact with Patricia. (CP 1526 -1532). Patricia completed a Domestic Violence Victim Statement (aka: *Smith* affidavit). (CP 1629-1632; CP0192-0195)[1]. The victim statement, which was *handwritten* by Patricia herself, reiterated what she had told Deputy Kingrey regarding the assault of Cormac by Fearghal. (CP 1526-1532; 1629-1632; 0192-0195). Furthermore, Deputy Kingrey testified at deposition that "I'd already spoken to her [Patricia] and I didn't detect any unusual behavior when she talked to me" (CP 1540) and "[s]he didn't sound delusional to me..." (CP 1540). He also testified that "[h]e told me that she was using antidepressants. But an antidepressant was not

[1] A *Smith* affidavit is a sworn statement by a domestic violence victim obtained by police officers to be used as substantive evidence to prove the accused's guilt if the victim later recants. *See State v. Smith*, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982). As the Court there recognized, "In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness." *Id.* at 861.

a concern at the time, to me, as far as her demeanor when I talked to her." (CP 1544). This was the only contact Deputy Kingrey ever had with either Fearghal or Patricia. (CP 1545).

2. **Finding of Probable Cause by Judge Schreiber and Entry of No Contact Order.**

On June 5, 2005, Clark County District Court Judge Vernon Schreiber reviewed Deputy Kingrey's probable cause declaration. (CP 1667-1668). He found that "probable cause to arrest is established." (CP 1667-1668). On June 6, 2005, Fearghal was arraigned on one count of Assault Fourth Degree-Domestic Violence where Judge Schreiber entered a No Contact Order (NCO) prohibiting Fearghal from having contact with his son, Cormac, and Patricia. (CP 1670-1671).

3. **Patricia McCarthy Obtains Separate Order of Protection and Files for Dissolution.**

On July 28, 2005, Patricia obtained an order for protection that barred Fearghal from making any contact with Patricia or his two children. (CP 1329). On August 9, 2005, Patricia filed for dissolution under Clark County Cause 05-3-01349-1. (CP 1601-1606; 0196-0212). Patricia's dissolution filing included a declaration by Patricia where she reiterated all of the facts she provided to Kingrey on June 3, 2005, regarding the assault of Cormac. (CP 1561 -1665, 0210). On August 10, 2005, the July 28th

protection order was extended for another three weeks. (CP 1328). For the next year, there were numerous restraining and no-contact orders entered by the court during the dissolution and criminal proceedings. (CP1450 – 1470). These orders prevented Fearghal from having unrestricted contact with his children; the Clark County Sheriff's Office was not a party to these proceedings and Mr. McCarthy was free to advise the court of any facts he believed to be material to the court's issuance of such orders. *Id.*

4. **Second Contact with Clark County Sheriff's Office.**

On October 5, 2005, at approximately 7:48 p.m., Clark County Sheriff Deputy Todd Young took a report of a restraining order violation from Fearghal who stated that Patricia had called him three times in violation of the order. (CP 1675-1677). Fearghal complained that Patricia was yelling at him and his mother who was visiting from Ireland. (CP 1675-1677). When contacted by Deputy Young, Patricia admitted to making the phone calls but stated that she was fed up with the abuse from Fearghal and his attempts to control her. (CP 1677). Deputy Young confirmed the existence of the family court's temporary order (TMO), completed a report and referred it to the Prosecuting Attorney. (CP 1677).

5. **Third Contact With Clark County Sheriff's Office.**

On January 11, 2006, at approximately 7:00 p.m., Clark County Sheriff Deputy Douglas Paulson received a report from Fearghal that his wife had come to his house and had made threats in violation of the TMO. (CP 1679-1682). Fearghal requested that deputies check on his children who were in the custody of Patricia. (CP 1680). During the call, Deputy Paulson became aware that there were two court orders in this case. (CP 1680-1681). The first was the criminal No-Contact order and the second was the civil TMO. (CP 1680-1681). Deputy Paulson contacted Patricia who admitted that she had violated the TMO by going over to Fearghal's residence. (CP 1681). She stated that she became upset when she was told by her oldest son, Conor, that Fearghal had taken him to court and had him lie about Fearghal not hitting Cormac. (CP 1681). Deputy Paulson completed a report regarding the incident and referred the incident to the Prosecuting Attorney because there were two court orders in existence, including crossed out and handwritten language. (CP 1679 -1682). Because of the confusion he thought best to refer it. (CP 1679 -1682). Deputy Paulson did indicate in his report that he advised Sgt. Barnes of his decision to refer the case for disposition. (CP 1679 -1682).

6. **Fourth Contact with Clark County Sherriff's Office.**

On May 5, 2006, at approximately 3: 15 p.m., Fearghal came into the Clark County Sheriff's Office Central Precinct to report a forgery committed by Patricia. (CP 1684-1685). Fearghal told Deputy Richard Farrell that he and Patricia were in dissolution proceedings and that she had cashed one of his checks for $5000 without his authorization. (CP 1685). When contacted by Deputy Farrell, Patricia stated that the checks belong to a business that was started by her and that her name is on the business license. (CP 1685). Patricia added that Fearghal was very angry over the dissolution and that he has been bringing her into court quite often over different issues. (CP 1685). Deputy Farrell made the determination that this was a civil issue and should be taken up by the court handling the dissolution proceedings. (CP 1685). However, Deputy Farrell did forward his report to the Prosecuting Attorney for review. (CP 1685).

7. **Fearghal McCarthy Pleads to Disorderly Conduct and Court Enters Post-Conviction No Contact Order.**

On August 1, 2006, Fearghal appeared in Clark County Superior Court in front of the Honorable Judge Lewis and entered an *Alford/Newton* and *In Re Barr* plea to Disorderly Conduct. (CP 1687). In making this plea, Fearghal admitted on the record his understanding that

he was pleading to the Disorderly Conduct charge in order to avoid possible convictions for Assault IV Domestic Violence and Witness Tampering. (CP 308-309). Patricia attended the change of plea hearing and spoke emotionally on the record, confirming that Fearghal had indeed struck Cormac in the head on June 2, 2005. (CP 309-318; 1702-1732; 1715). This statement was recorded on video and Ms. McCarthy's statement is a part of the record. (CP 309-319). Upon accepting Mr. McCarthy's *In Re Barr* plea to the lesser offense of Disorderly Conduct, Judge Lewis found that there was a factual basis for the charge of Assault IV. In sentencing Mr. McCarthy, Judge Lewis issued a post-conviction No Contact order prohibiting Fearghal from having any contact with Cormac or Patricia McCarthy. (CP 324; 1699-1700).

8. **Procedural History Relating to Clark County Claims.**

Plaintiffs commenced this action on August 1, 2008. (CP 2178). On April 16, 2009, Defendants filed their Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint.[2]

Clark County moved for summary judgment on January 6, 2011. (CP 1101-1118). On April 1, 2011, the trial court partially granted Clark County's motion for summary judgment, dismissing Plaintiffs' false arrest

[2] Clark County has filed a supplemental designation of clerks papers designating its' April 16, 2009 Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint.

and imprisonment claims. (CP 1267-1272). Plaintiffs' subsequent motion for reconsideration was denied. (CP 1293-1295). On October 31, 2011, Clark County moved for summary judgment on the remainder of Plaintiffs' claims. (CP 2072-2074). On May 9, 2014, the trial court granted Clark County's motion on all remaining claims.

D. ARGUMENT

1. Standard of Review.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

2. **Summary Judgment on Fearghal McCarthy's false arrest and imprisonment claims should be affirmed because they are barred by the two-year statute of limitations.**

This Court may affirm a trial court's award of summary judgment on any basis adequately supported in the record, even if the trial court did not consider that argument or basis in making its decision. *Champaigne v. Thurston County,* 134 Wn. App. 515, 520, 141 P.3d 72 (2006); *LaMon v. Butler*, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989). In the present case, Clark County raised the applicable statute of limitations as an affirmative defense when it filed its Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint on April 16, 2009. Thereafter, Clark County successfully moved for summary judgment against Plaintiff Fearghal McCarthy's False Arrest and Imprisonment Claims on the basis that probable cause constituted a complete defense, rendering the statute of limitations defense a moot issue for the trial court. (CP 1267-1272). Pursuant to *Champaigne*, this Court may affirm the trial court's award of summary judgment on any grounds that are adequately supported by the record. In this case, the record demonstrates that Mr. McCarthy's false arrest and imprisonment claims were filed well beyond the applicable two-year statute of limitations.

In Washington, claims for false arrest and false imprisonment are subject to a two-year statute of limitations. RCW 4.16.100(1); *Heckart v.*

City of Yakima, 42 Wn. App. 38, 38-39 (1985) (per curiam). Claims for "[f]alse arrest and false imprisonment can be distinguished by the manner in which each cause of action arises." *Bender v. City of Seattle*, 99 Wn.2d 582, 590 (1983). Although a false imprisonment may occur independently from law enforcement activities, a false arrest cannot. *Id.* Either way, "[t]he gist of an action for false arrest or false imprisonment is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority." *Id.*

It is undisputed in this case that Fearghal McCarthy was arrested on June 3, 2005, and was released on or about June 6, 2005. (CP 0003 – CP0004). Accordingly, the action for false arrest or false imprisonment accrued no later June 6, 2005. *Heckart*, 42 Wn. App. at 39. The applicable two-year statute of limitations for these claims ran on June 6, 2007. The record on appeal demonstrates that Plaintiffs' Complaint was filed on August 1, 2008; more than a year after the statute of limitations had run. (CP 2178) As noted above, Clark County affirmatively alleged that one or more of Plaintiffs claims were barred by the applicable statute of limitations when it filed its Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint on April 16, 2009.

The Court should affirm the trial court's award of summary judgment with respect to Plaintiff Fearghal McCarthy's false arrest and

imprisonment claims on the basis that they were not filed within the applicable statute of limitations.

3. The trial court correctly granted summary judgment on Fearghal McCarthy's false arrest and imprisonment claims because probable cause is a complete defense.

Probable cause is a complete defense to claims of false arrest and false imprisonment. *See McDaniel v. City of Seattle*, 65 Wn. App. 360, 368 – 69, 828 P.2d 81 (1992), review denied, 120 Wn.2d 1020, 844 P.2d 1017 (1993). Probable cause exists where an officer has reasonable grounds to believe a suspect has committed or is committing a crime due to the surrounding circumstances. *State v. Gonzalez,* 46 Wn. App. 388, 395, 731 P.2d 1101 (1986). At the time of the arrest, the arresting officer need not have evidence to prove each element of the crime beyond a reasonable doubt. The officer is required only to have knowledge of facts sufficient to cause a reasonable person to believe that an offense had been committed. *State v. Knighten.* 109 Wn.2d 896, 903, 748 P.2d 1118 (1988). It is a reasonableness test, considering the time, place and circumstances and the officer's special expertise in identifying criminal behavior. *Gonzales*, 46 Wn. App at 388. Probability, not a prima facie showing of criminal activity, is the standard for probable cause. *State v. Patterson,* 83 Wn.2d 49, 55, 515 P.2d 496 (1973).

When the evidence conclusively establishes that an officer had probable cause to arrest, the court need not submit the issue to a jury and can make a finding as a matter of law. *Daniel v. State,* 36 Wn.App. 59, 62, 671 P.2d 802 (1983) ("unless the evidence conclusively and without contradiction establishes" that the arrest was lawful, the issue of probable cause must be submitted to a jury). Probable cause must be examined in light of the arresting officer's special experience, and the standard is whether a reasonable, prudent officer would believe in good faith that the law was violated. *State v. Cottrell,* 86 Wn.2d 130, 133, 542 P.2d 771 (1975); *Sennett v. Zimmerman,* 50 Wn.2d 649, 651, 314 P.2d 414 (1957).

In this case, the trial court correctly concluded Deputy Kingrey had probable cause to arrest Fearghal for Assault in the Fourth Degree. This conclusion was supported by *both* the undisputed facts relating to Mr. McCarthy's arrest, as well as a review of the facts by *two* separate judges.

In this case, the undisputed facts of June 2-3, 2005, conclusively support the finding of probable cause because a reasonable and prudent law enforcement officer encountering these facts would believe in good faith that the law was violated. First, Patricia McCarthy called 9-1-1 and then reported to Deputy Kingrey that Fearghal McCarthy had "whacked" their two-year old son, Cormac, across the head, which resulted in the child striking his head on a table and then falling to the floor. (CP 1530).

Secondly, Deputy Kingrey obtained corroborating information from Patricia's mother, Regina Greer, who stated that she spoke with the McCarthy's oldest son, Conor, who confirmed the fact that Fearghal had indeed struck Cormac across the head. *Id.* Finally, following the arrest, Patricia provided a sworn handwritten *Smith* Affidavit reiterating what she had already told Deputy Kingrey regarding the assault of Cormac on June 2, 2005. As noted above, the Court of Appeals has held in *State v. Smith* that such an affidavit is *more likely to be true* than testimony offered at trial because it is closer to the events in question. *Id.* at 861. This is especially true in a domestic violence case where victims often become reluctant to testify. Ultimately, these facts alone support a finding of probable cause to arrest.

On appeal, Plaintiffs contend that Fearghal's statements to Deputy Kingrey regarding Patricia's anxiety medication and delusions somehow preclude a finding of probable cause. This position is not supported by Washington law or the facts of this case and wrongly assumes that Deputy Kingrey was required to believe Fearghal McCarthy. As noted above, Washington law *does not* require that Deputy Kingrey discover, weigh or evaluate all of the potential evidence in the case. ***That is the responsibility of the court and the parties and fact-finder throughout the criminal case.*** *Patterson,* at 55. Rather, as the investigating law

enforcement officer making a probable cause determination, Deputy Kingrey need only have knowledge of facts sufficient to cause a reasonable person to believe that an offense had been committed. Patricia McCarthy's statements and Regina Greer's corroborating information provided Deputy Kingrey with more than sufficient information for a reasonable person to believe that Mr. McCarthy had committed the offense of Assault in the Fourth Degree.

On June 5, 2005, Clark County District Court Judge Vernon Schreiber reviewed Deputy Kingrey's probable cause declaration and found that "probable cause to arrest is established." (CP 234-35). In so doing, Judge Schreiber confirmed that Deputy Kingrey had reasonable grounds to believe that Fearghal McCarthy had committed a crime. As noted above, Fearghal McCarthy's alleged self-serving statements regarding Patricia McCarthy's anxiety medication and his unsupported opinion that she was delusional was not material to determination of probable cause because this information could not have rebutted the corroborated sworn statements documenting an assault of a two-year old. It is noteworthy that while Deputy Kingrey omitted Fearghal McCarthy's immaterial and unsupported statements from his probable cause declaration, he included these details in his official report which became a

part of the record in the criminal proceeding that ultimately culminated in Mr. McCarthy's plea to Disorderly Conduct. (CP 1526-1532).

In addition to the review by Judge Schreiber, Clark County Superior Court Judge Robert Lewis also reviewed the facts and expressly found a factual basis for the charge of Assault in the Fourth Degree when accepting Fearghal McCarthy's *Alford/Newton* and *In re Barr* plea. The Washington Supreme Court has held that "[a]n *Alford/Newton* plea allows a defendant to plead guilty in order to take advantage of a plea bargain even if he or she is unable or unwilling to admit guilt." *State v. Zhao,* 157 Wn.2d 188; 137 P.3d 835 (2006), citing *State v. Newton,* 87 Wn.2d 363, 372, 552 P.2d 682 (1976) and *North Carolina v. Alford*, 400 U.S. 25, 31 91 S. Ct. 160, 27 L.Ed. 2d 162 (1970). "The basic standard for determining the validity of an *Alford* plea is whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id.* If a defendant "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt, such a plea is valid." *In re Montoya,* 109 Wn.2d 270 280-81, 744 P.2d 340 (1987), citing *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

In our case, in order for Judge Lewis to accept Fearghal McCarthy's *Alford/Newton* plea, he was required to find strong evidence

of "actual guilt," a much higher standard than the probable cause standard of reasonable belief that a crime had been committed. Moreover, because Fearghal McCarthy was entering an *In re Barr* plea to the lesser charge of Disorderly Conduct, Judge Lewis was also required to find that there was a factual basis to support the original charge. In an *In re Barr* plea, a defendant "chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense." *In re Barr* 102 Wn.2d 265, 269-70, 684 P.2d 712 (1984). "For the trial court to make the proper evaluation, the plea bargain must be fully disclosed. The trial court must find a factual basis to support the original charge, and determine that defendant understands the relationship of his conduct to that charge. Defendant must be aware that the evidence available to the State on the original offense is sufficient to convince a jury of his guilt." *Id.* In the present case, it is undisputed that during the August 1, 2006, change of plea hearing, the judge found a factual basis for the original offenses of Assault in the Fourth Degree and Witness Tampering.

It is noteworthy that Judge Lewis made this finding in the context of a *plea*, after having an opportunity to hear any facts that Mr. McCarthy believed to be material to the case. Of course, Mr. McCarthy did not make any reference to the so-called material facts that he now contends should have defeated probable cause for his arrest because they would not

have made any difference in either judges' decision. Having not raised these so-called facts in any of the criminal proceedings, Mr. McCarthy cannot now credibly claim that Judge Schreiber or Judge Lewis lacked material information relating to probable cause or his plea bargain.

4. **The trial court correctly granted summary judgment on plaintiffs' negligence claims against deputies Young, Paulson and Ferrell because these contacts did not arise from reported child abuse and because RCW 10.99.070 affords immunity for enforcing court no-contact orders.**

In general a claim for negligent investigation does not exist in Washington unless the plaintiffs fall within a particular class of persons protected by statute. *See Roberson v. Perez,* 156 Wash.2d 33, 123 P.3d 844; *M.W.,* 149 Wn.2d at 591, 595, 70 P.3d 954. ("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"). In these cases, the Washington Supreme Court held that RCW 26.44 protects parents and children involved in reported instances of child abuse and implies a negligent investigation cause of action o*nly where there is a reported instance of child abuse or neglect. Id.*

In the present case, it is undisputed that Deputy Kingrey was investigating a reported instance of child abuse on June 3, 2005. This investigation and the shortcomings of Plaintiffs' claims are discussed in greater detail below. However, the undisputed facts demonstrate that

Deputies Young, Paulson and Ferrell were not investigating a reported instance of child abuse when they responded to Fearghal McCarthy's allegation that Patricia McCarthy had violated the no-contact order in various ways. Fearghal McCarthy's vague and passing references to his concern for the wellbeing of his children to Deputies Paulson and Young as they responded to the reported no-contact order violation does not constitute a reported instance of child abuse or trigger a duty under RCW 26.44. Even if such a duty could be triggered by such an passing reference, the undisputed facts demonstrate that Deputies Paulson and Young acted reasonably by including the information in their report and forwarding to the Prosecuting Attorney for review. Plaintiffs offer no authority for their contention that Deputies Paulson or Young were somehow required to arrest Patricia McCarthy for child abuse or neglect.

With regard to these deputies no-contact order violation investigations, RCW 10.99.070 provides law enforcement officers with immunity from liability when they respond to a domestic violence situation and effectuate an arrest based upon probable cause or enforce a court order in good faith. *See* RCW 10.99.070. Specifically, this statute provides:

> A peace officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in

> good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

Id.

The Washington Supreme Court has held that the question of whether good faith exists may be resolved as a matter of law when, as in this case, reasonable minds could reach but one conclusion and conclude that the officers acted in good faith. *See Roy v. City of Everett,* 118 Wn.2d 352, 366, 823 P.2d 1084 (1992).

As set forth above, Deputy Kingrey had probable cause to arrest Fearghal McCarthy on June 3, 2005, on the charge of Assault in the Fourth Degree – a *domestic violence* offense where Patricia McCarthy was a named victim. Accordingly, Deputy Kingrey is immune from liability for this domestic violence arrest pursuant to RCW 10.99.070, which provides immunity for arrests based on probable cause.

Similarly, the undisputed facts demonstrate that Deputies Young and Paulson are immune from civil liability because they were acting in good faith to enforce the court's no-contact orders when they responded to Fearghal McCarthy's complaints regarding Patricia McCarthy on October 5, 2005, and January 11, 2006. Because reasonable minds could not differ on this question, the question of good faith may be decided as a matter of law. Specifically, Deputies Young and Paulson acted in good faith by

responding to and investigating Mr. McCarthy's allegations, taking statements from all of the parties, preparing a report and forwarding to the Prosecuting Attorney for review.

Plaintiffs apparently attempt to deny Clark County immunity under RCW 10.99.070 by claiming that a jury could find that Deputies Young and Paulson acted unreasonably. This is not the standard for under RCW 10.99.070. Instead, the statute affords immunity from negligence claims if the facts demonstrate that the officer was acting in *good faith* when enforcing the court's order. Deputies Young and Paulson's actions far exceed this immunity standard because they followed their procedures, conducted an appropriate investigation of a complex and bitter family dispute, and referred the matter to the Prosecuting Attorney for review.

Finally, to the extent that Fearghal McCarthy's report to Deputy Ferrell that Patricia McCarthy had improperly cashed a check can be construed as a domestic violence matter, Deputy Ferrell is likewise entitled to immunity from liability under RCW 10.99.070. Like Deputies Young and Paulson, Deputy Ferrell acted in good faith when he determined that Mr. McCarthy's complaints were a civil matter best addressed in the context of his dissolution. Deputy Ferrell's good faith is further evidenced by the fact that, despite his conclusion that this related

to a civil matter, he nonetheless prepared a criminal report and referred it to the Prosecuting Attorney for review.

5. **The trial court correctly granted summary judgment on Plaintiffs' negligent investigation claims because Deputy Kingrey's investigation did not constitute or otherwise cause a "harmful placement decision."**

In order to maintain a negligence investigation claim under RCW 26.44, a plaintiff must be able to prove that the investigation resulted in a "harmful placement decision." *Roberson v. Perez,* 156 Wn.2d 33, 123 P.3d 844; *M.W.,* 149 Wn.2d at 591, 595, 70 P.3d 954. In *MW,* the Court held that "harmful placement decision" should be construed narrowly to include situations where the state removes "a child from a non-abusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *Id.* The *Roberson* Court has further held that the definition of "harmful placement decision" should not be expanded to include "constructive placement decisions," such as when a parent or guardian acts voluntarily and independently of the state to remove a child from the home pending a criminal investigation. *Id.*

In the present case, despite this authority and all evidence to the contrary, Plaintiffs appear to argue that Deputy Kingrey's investigation *caused* or *resulted* in a "harmful placement decision." However, despite these assertions, there is no evidence that Deputy Kingrey caused a child

to remain in an abusive home when he allowed the children to remain with Patricia McCarthy on June 3, 2005. Rather, the undisputed facts demonstrate that at the time of Fearghal McCarthy's arrest, the McCarthy children had been *pre-emptively and constructively* removed from the home and taken to St. Joseph's Church by Patricia McCarthy when she and the children sought shelter following the assault. Furthermore, it is undisputed that at the time of Fearghal McCarthy's arrest on June 3, 2005, the McCarthy children were not in any imminent danger *because* they were with their mother at St. Joseph's Church. (Plaintiffs Conor and Cormac Opening Brief, p. 31; Fearghal McCarthy's Opening Brief, p. 6)

a. The "substantial factor" test is improperly before the court and is inapplicable to Plaintiffs' claims.

The Washington Supreme Court has repeatedly articulated the causation standard to be applied in negligent investigation claims. Specifically, the Court held in *Tyner* that "there are two elements to proximate causation: cause in fact and legal causation. *Tyner* at 82 (citing *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998) "cause in fact refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendants actions [would the] plaintiff be injured.") In contrast, "legal causation is a much more fluid concept. It is grounded in

policy determinations as to how far the consequences of a defendant's acts should extend." *Id.*

For the first time on appeal, and contrary to the *Tyner* Court's negligent investigation causation analysis, Plaintiffs inappropriately advance a 'substantial factor' causation theory. This causation theory and line of argument was not raised by Plaintiffs before the trial court and is therefore not properly before this Court. The Washington Court of Appeals has held that new legal theories and arguments may not be raised for the first time on appeal and that such arguments should be disregarded. *See State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *Binschus v. Dep't of Corr.*, 345 P.3d 818, 831 n.37 (Wash. Ct. App. 2015). Specifically, the Washington Supreme Court held in *McFarland* that "[a]s a general rule, appellate courts will not consider issues raised for the first time on appeal."

In advancing the substantial factor test for the first time on appeal, Plaintiffs rely upon factually distinguishable discrimination cases for the proposition that Deputy Kingrey's investigation somehow "substantially" contributed to subsequent placement decisions and protective orders entered by the family court. (Plaintiffs Cormac and Conor's Opening Brief at 52-53, 61; Plaintiff Fearghal's Opening Brief at 45). Specifically, Plaintiffs cite *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302,

898 P.2d 284 (1995) and *Daugert v. Pappas,* 104 Wn.2d 254, 262, 704 P.2d 600 (1985). However, the Plaintiffs ignore that the Court of Appeals has expressly held in *Fabrique v. Choice Hotels Intern., Inc.,*144 Wash.App 675, 684(2008), that the substantial factor test is not appropriate for general negligence actions and is "intended to be used only in the narrow class of cases where the "but for" test of causation is inapplicable." *Id.* at 684. In particular, the *Fabrique* Court held that "[w]ashington Courts have applied the substantial factor test in only four types of cases – those involving: (1) discrimination or unfair employment practices (2) securities (3) toxic tort cases, including multi-supplier asbestos injury cases; and (4) medical malpractices cases where the malpractice reduces a patience chance of survival. *Id.* at 685.

Even if the "substantial factor" argument and authority were properly before the court on appeal, which they are not, it is inapplicable to our case because *Tyner* requires that the "but for" causation test and proximate cause analysis should control in negligent investigation claims. *See Tyner v. DSHS,* 141 Wn.2d 68, 86-88, 1 P.3d 1148 (2000); *Bishop v. Miche,* 137 Wn.2d 518, 973 P.2d 465 (1999); *Hertog ex rel. S.A.H. v. City of Seattle,* 138 Wn.2d 265, 979 P.2d 400 (1999). Moreover, this case is not among, or remotely akin to, the limited types of cases that Washington

Courts have traditionally applied the "substantial factor" test. *See Fabrique* at 685.

The trial Court correctly granted Clark County summary judgment on Plaintiffs negligence claims because, based upon the undisputed facts, reasonable minds could not differ or conclude that Deputy Kingrey's investigation constituted or caused a "harmful placement decision."

b. Patricia McCarthy *independently, pre-emptively* and *constructively* removed the McCarthy children from home on June 2, 2005.

The Washington Supreme Court has expressly refused to expand the definition of "placement decision" to include circumstances where a parent acting independently of the state pre-emptively takes action to remove children from the home. *See Roberson v. Perez,* 156 Wash.2d 33, 123 P.3d 844.

In *Roberson* the Court considered whether a parent's voluntary decision to send their children out of state to live with their grandmother pending a criminal child abuse investigation constituted a "placement decision" for purposes of maintaining a later negligent investigation claim against the state. In *Roberson* the parent removing the child from the home was the target of the investigation; however the rationale for the court's decision was not dependent upon which parent was under investigation or initiated the pre-emptive placement of the children.

Rather, the dispositive fact in *Roberson* was that the removal had occurred *prior to and independently of* the state investigation, precluding any determination of whether the investigation *resulted* in a harmful placement decision. Specifically, the *Roberson* Court held:

> "We conclude as a matter of law that the County's investigation did not result in a harmful placement decision and affirm the Court of Appeals' dismissal of the Simses claims." The Simses' testimony conclusively established that Daniel was sent from their home and from the state through their *voluntary* acts. ***Accordingly, no amount of evidence can be produced sufficient to meet the legal standard of a harmful placement decision.***
>
> *Id* at 47. (emphasis added)

Here, as in *Roberson,* the McCarthy children were removed from the home by their parent before any interaction with Clark County law enforcement personnel. Specifically, it is undisputed that following the assault of Cormac, Patricia McCarthy fled from the McCarthy home to St. Joseph's Church. Likewise, it is undisputed that Ms. McCarthy removed her children from the McCarthy home *prior* to calling 9-1-1 and *prior* to any investigation by Clark County. As in *Roberson,* this voluntary, pre-emptive and constructive removal of the McCarthy children from the home by a parent prevents the Plaintiffs from being able to demonstrate that such placement occurred as a *result* of Clark County's subsequent

investigation. Moreover, as noted above, Ms. McCarthy independently maintained the constructive removal of her children from Mr. McCarthy's home when she filed for dissolution on July 28, 2010, and obtained protective orders that were wholly separate from Clark County's investigation.

The Court should affirm the trial court's award of summary judgment to Clark County on the basis that Patricia McCarthy's pre-emptive and constructive removal of the children from the home on June 2, 2005, precludes a causal link between Clark County's investigation and a subsequent "placement decision."

c. Deputy Kingrey's arrest of Fearghal McCarthy on June 3, 2005, was not a "placement decision."

Even if Plaintiffs' claims are not barred by Patricia McCarthy's independent and pre-emptive "constructive placement," which they should be, there is no evidence that the McCarthy children were in any danger when Deputy Kingrey arrested Fearghal McCarthy on June 3, 2005. Specifically, as noted above, the McCarthy children had fled with their mother to St. Joseph's Catholic Church. Plaintiffs concede that on June 3, 2005, "Cormac was not in imminent danger" at that time and the undisputed facts demonstrate that during Deputy Kingrey's investigation, Mr. McCarthy did not raise any allegations of abuse or harm to his

children at the hands of Patricia McCarthy. (Plaintiffs Conor and Cormac Opening Brief, p. 31; Fearghal McCarthy's Opening Brief, p. 6). As detailed in Patricia McCarthy's 9-1-1 Call and *Smith* Affidavit, the only known danger posed to the McCarthy children at that time was that posed by Fearghal McCarthy. (CP 1629-1632; CP 192-195).

d. Judge Schreiber's No-Contact order was not a "placement decision."

Plaintiffs appear to contend that Deputy Kingrey's investigation resulted in a "placement decision" by Judge Schreiber when he found probable cause for Assault IV and entered a no-contact order. This decision does not constitute a "placement decision" because the Court did not make any decision intervening in the parental relationship.

Placement decisions occur when a court hears *evidence* for the purpose of making determinations on shelter care, dependency, or other state intervention in the parent-child relationship, pursuant to a vast statutory regulatory scheme. *(See, e.g., RCW 13.34.110); See also*, *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). These and other statutory schemes relating to the placement of children set forth a detailed process by which the state presents its investigation, the parties have an opportunity to respond and present evidence, and the court makes a considered "decision" in the interests of the child. Conversely, a judge

finding probable cause to arrest and entering a routine no-contact order to protect the parties does not constitute a "placement decision" because it does not decide any aspect of the parent-child relationship under Washington's law. As noted above, Washington appellate courts have rejected expanding the definition of "harmful placement decision" to include tenuous and abstract "constructive decisions," such as a parent's voluntary relinquishment of guardianship when facing criminal child abuse investigation. *See Roberson v. Perez,* 156 Wash.2d 33, 123 P.3d 844.

In the present case, the Court should reject any expansion of the term "placement decision" to include protective decisions that are ancillary to criminal charges and do not constitute interventions into the parent-child relationship under RCW 13.34 or equivalent authority. Such an interpretation would lead to a vast expansion of the negligent investigation claim that the Washington Supreme Court has previously limited to just those circumstances where there is an investigation and decision that removes "a child from a non-abusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *See Roberson v. Perez,* 156 Wn.2d 33, 123 P.3d 844; *M.W.*, 149 Wn.2d at 591, 595, 70 P.3d 954. In this case, Judge Schreiber's entry of a No-Contact order did not constitute such a decision and was merely secondary to the

finding of probable cause for arrest on a charge of Assault in the Fourth Degree.

Finally, even if the term "placement decision" could be read broadly to include the entry of a routine No-Contact order in a criminal assault case, which it cannot, there is no evidence that Judge Schreiber's order resulted in any "harm" to the McCarthy Children. Specifically, the record does not contain any evidence that the McCarthy children experienced any abuse or neglect in the period of time between the entry of the No-Contact order on June 3, 2005, and when Patricia filed for dissolution on July 28, 2005, and obtained one or more wholly separate and independent restraining orders that had no connection to Clark County's investigation or Judge Schreiber's order. (CP 1444, 1448, 1450). There is no indication that Mr. McCarthy or anyone else reported any concern for the McCarthy children or the parental fitness of Patricia McCarthy during this several week period of time prior to the entry of an independent no-contact order following initiation of divorce proceedings.

e. Judge Schreiber's no contact order breaks causal chain between Deputy Kingrey's investigation and subsequent "placement decisions."

The Washington Supreme Court has held that in negligent child abuse investigation claims, where the separation is caused by a court order constituting a "placement decision," a plaintiff must overcome the

superseding intervening cause of the court order by demonstrating that the court has been deprived of a ***material*** fact due to a faulty investigation. *Tyner v. DSHS*, 141 Wn.2d 68, 86-88, 1 P.3d 1148 (2000). A material fact is one that would have changed the outcome of the court's decision. *See Tyner v. DSHS*, 141 Wn.2d 68, 1 P3d 1148 (2000). The question of materiality goes to the issue of cause in fact and is only a question for the jury where reasonable minds could differ. *Estate of Jones v. State*, 107 Wn. App. 510, 517-18, 15 P.3d 180 (2000), *review denied*, 145 Wn.2d 1025 (2002).

In *Tyner*, the Court considered a case where a father, who was subject to no-contact orders through dependency proceedings, sued DSHS for negligent investigation under RCW 26.44.050 after it initiated proceedings based on sexual abuse allegations regarding his children. In that case, DSHS failed to inform the court *that a caseworker-investigator determined that the allegations were unfounded*; the caseworker also failed to interview others who would have provided *exculpatory information*. Under those egregious circumstances where *exculpatory* evidence was omitted, the Washington Supreme Court found that the withheld information was material to the court's decision and, thus, was the cause in fact of Tyner' separation from his children.

In contrast to the egregious omissions of clearly exculpatory evidence in *Tyner,* the Plaintiffs in this case must show that Fearghal's self-serving, and yet still non-exculpatory, claim that Patricia was taking anxiety medication and unfounded accusation that she was delusional was a *material* fact that would have impacted Judge Schreiber's decision. Put another way, Plaintiffs must show that the inclusion of this medication issue would have caused Judge Schreiber to reject or substantially discount an apparently credible witness' sworn and corroborated first-hand account of a man forcefully striking a two-year old child in the head. Plaintiffs cannot make this showing because no amount of medication history could overcome Patricia's sworn affidavit detailing a violent assault. These facts are not akin to those in *Tyner.* Reasonable minds could not differ and conclude that the omission of anti-anxiety medication and self-serving claims of an accuser's suspected delusions was exculpatory or somehow could have changed the outcome of Judge Schreiber's probable cause decision.

In order to attempt to invoke the facts of *Tyner* in the trial court and now appeal, Plaintiffs falsely and misleadingly attempt to twist Deputy Kingrey's deposition testimony to suggest that he omitted facts "for the sole *purpose* of separating him [Fearghal McCarthy] from Patricia and the children" with the *intention* of influencing the eventual placement

of the McCarthy children. (Plaintiffs Cormac and Conner's Opening Brief, pp. 7-8) This statement is not remotely supported by a fair reading of Deputy Kingrey's deposition testimony. Specifically, Deputy Kingrey testified as follows:

> Q. Why did you arrest Mr. McCarthy if Ms. McCarthy was already out of the house and there was no imminent threat to her?
>
> A. Based upon the information I have, ***I had genuine concern about the safety of Ms. McCarthy and the children***. And I thought that a no-contact order would be a good thing to have ***at the time***, and the only way to get that is to book – was to book Mr. McCarthy and have him see a judge, at which time a no-contact order would be issued.
>
> [...]
>
> Q. And the no-contact order and the arrest would become ***factors*** later on in determinations about when he would be allowed to see his children next?
>
> A. **Correct.**
>
> Q. And ***could*** ultimately lead to a – him not being allowed to see his children or her getting custody?
>
> A. ***Would depend on the judge.***
>
> Q. But it ***could*** also lead to him not having access to his kids.
>
> A. ***Yes. That's a possibility.***
>
> Q. You were ***aware*** of that at the time?
>
> A. **Yes.**

(CP 1542-1543, Emphasis Added)

In contrast to Plaintiffs' misleading characterization, Deputy Kingrey's testimony demonstrates that, like any reasonable officer, he was interested in protecting the safety of an alleged child victim and was aware of the potential consequences of his actions. Like the trial court, this Court should reject Plaintiffs false attempts to assign a nefarious motive to Deputy Kingrey's objectively reasonable actions and grant summary judgment on the basis that Judge Schreiber's probable cause determination would not have been altered by Fearghal McCarthy's self-serving and unfounded statements.

f. There is no causal connection between Deputy Kingrey's investigation and the post-conviction no-contact order entered by Judge Lewis.

On August 1, 2006, Mr. McCarthy appeared before Superior Court Judge Robert Lewis and entered an *Alford* plea to the charge of Disorderly Conduct relating to his conduct on June 2, 2005. At sentencing, Judge Lewis heard a victim statement from Patricia McCarthy wherein she confirmed the violent nature of Mr. McCarthy's assault of their two-year old child. Following this statement and based upon Mr. McCarthy's *plea* to the charge of Disorderly Conduct, Judge Lewis entered a post-conviction no contact order preventing Mr. McCarthy from contacting Patricia or Cormac. This No-Contact order was entered long after Mr. McCarthy's arrest and finding of probable cause by Judge Schreiber based

upon Deputy Kingrey's investigation. The undisputed facts demonstrate that Judge Lewis entered this order based upon Mr. McCarthy's plea and Patricia McCarthy's detailed and highly credible statement confirming the events of June 2, 2005. Additionally, as discussed in greater detail above, Judge Lewis accepted McCarthy's plea to a lesser offense of Disorderly Conduct only after making the finding that there was a factual basis for the charge of Assault in the Fourth Degree.

There is no evidence that Judge Lewis was deprived of any material fact by Deputy Kingrey or anyone else in making his findings when entering his order. Indeed, as discussed above, the record reflects that Mr. McCarthy did not raise any concerns or additional facts that he believed to be material to the case, including Patricia McCarthy's medication history or alleged delusions. Having failed to raise these supposedly material facts before being sentenced by Judge Lewis, Mr. McCarthy cannot now claim that these facts are *material* aspects of the proceedings that would have resulted in a different outcome had they been known. Mr. McCarthy did not raise these facts in the criminal proceeding because they were not material and would not have had any effect upon Judge Lewis' decision.

g. There is no causal connection between Deputy Kingrey's investigation and the subsequent protective orders entered by the family court.

To the extent Plaintiffs claim that Deputy Kingrey's investigation lead to later placement decisions made by the family court in the McCarthy dissolution, they must *again* prove a causal connection between the investigation and the subsequent family court decision. Pursuant to *Tyner*, Plaintiffs must demonstrate that Deputy Kingrey's investigation and the finding of probable cause by Judge Schreiber somehow deprived the subsequent family law court of a *material* fact. As noted above, a material fact is one that would have changed the outcome of the court's decision. *See Tyner.* Therefore, in order to overcome the superseding cause of the family court's subsequent orders, they must again demonstrate that Deputy Kingrey's June 3, 2005, omission of Fearghal's statements regarding Patricia's anxiety medication and alleged delusions changed the outcome of the later family court's decisions. As noted above, Plaintiffs face the impossible task of demonstrating that such an omission would have changed the outcome of Judge Schreiber's earlier decision in light of Patricia's sworn and corroborated statement detailing the assault. However, even if they were able to make that showing, it is impossible for them to demonstrate a causal connection and impact upon the family court proceedings because they occurred many months later,

after Mr. McCarthy had multiple opportunities to personally present *any* information he believed to be material to the family court.

Pursuant to *Tyner,* whether a court order is an intervening cause precluding a negligent investigation claim may be resolved as a matter of law where no reasonable minds could differ on the question. In the present case, no reasonable minds could differ and conclude that the omission of Fearghal's statements regarding Patricia's alleged use of anxiety medication in a *probable cause affidavit* somehow changed the outcome of a family law proceeding that occurred many months later, after Mr. McCarthy had an opportunity to present any additional information he believed to be relevant. The trial court correctly granted Defendants motion for summary judgment on plaintiffs' negligence claims because Plaintiffs cannot demonstrate a causal connection between Deputy Kingrey's investigation and later placement decisions made by the family court.

6. The trial court correctly granted summary judgment on plaintiffs' negligent investigation claims because deputies Kingrey, Young, Paulson and Ferrell are entitled to qualified immunity.

The Washington Court of Appeals has held that even though a cause of action for negligent investigation exists under RCW 26.44.050, law enforcement officers remain entitled to statutory and common law

qualified immunity. *Rodriquez v. Perez*, 99 Wn. App. 439, 449, 994 P.2d 874 (2000). Specifically, the *Rodriguez* Court held that in the context of RCW 26.44.050 investigations: "...[p]ermitting negligence actions against law enforcement officials does not leave them without statutory and common law qualified immunity." *Id.*

The purpose of qualified immunity is to protect government officials from the necessity of defending a suit, and that "insubstantial claims [should] be resolved as quickly as possible." *Estate of Lee*, 101 Wn. App. 158, 177, 2 P.3d 979 (2000) (*quoting, Orwick v. Fox,* 65 Wn. App. 71, 83-84, 828 P.2d 12 (1992)). Further, Plaintiffs do not dispute that entitlement to qualified immunity may be established as a matter of law. *Lee* at 177; *Dang v. Ehredt,* 95 Wn. App. 670, 680, 977 P.2d 29 (1999). The *Dang* Court held that: "The standard is one of objective legal reasonableness, that is, whether the officer acted reasonably under settled law under the circumstances, not whether another reasonable, or more reasonable interpretation of events can be constructed after the fact." *Dang*, 95 Wn. App. at 679. The Washington Supreme Court has held that, common law qualified immunity protects officer conduct where the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably. *Guffey v. State*, 103 Wn.2d 144, 152, 690 P.2d 1163 (1984).

In *Lee* the Court addressed qualified immunity in the context of an officer's duties to investigate domestic violence under the Domestic Violence Protection Act, RCW 10.99. During the attempt at arrest, the suspect pointed a rifle at police and the police shot and killed plaintiff. Plaintiff's estate sued for wrongful death. The court ruled that the police were entitled to qualified immunity because they had the statutory duty to arrest, effectuated the arrest consistent with City policy (which gave the officers the discretion to carry out the arrest as they saw fit), and overall acted reasonably due to the imminent threat posed to them by plaintiff pointing a rifle at one of them. The court concluded "[b]ecause they acted reasonably, they are immune under common law." *Lee* at 177.

In our case, like *Lee,* Deputy Kingrey was performing his statutory duty pursuant to policy and acted reasonably meeting each of the three prongs of the common law qualified immunity test. First, Deputy Kingrey had a statutory duty under RCW 26.44 to investigate child abuse allegations 26.44.050. Second, Kingrey complied with his statutory duty and CCSO policy requiring that he respond to the citizen report of crime, and investigate, which is consistent with the mandate in RCW 26.44. Third, as discussed in detail herein, he acted reasonably under the circumstances.

With regard to the reasonableness of Deputy Kingrey's actions, the record reflects that he: (1) Spoke with Patricia after she called 9-1-1, who conveyed the details of Fearghal's assault of their two-year old child; (2) Obtained a corroborative statement from Conor (via the child's grandmother, Regina) confirming the details of the assault; (3) Obtained information from Regina regarding Mr. McCarthy's history of abuse (that he had broken a spoon on the boys' hands and had verbally abused them); (4) Interviewed Fearghal and did not find to be credible; (5) Obtained a sworn statement from Patricia confirming the details of the assault and personally observed her mannerisms and behaviors to quell any concern about her being intoxicated, under the influence of medication or delusional. There is no dispute as to these facts, which demonstrate that Deputy Kingrey conducted his investigation in an objectively reasonable manner. As the court wrote in the *Dang* case, the fact that another reasonable interpretation or a more reasonable interpretation can be discovered after the fact is not the test or relevant inquiry for purposes of qualified immunity. Based upon the undisputed facts of this case, the trial court properly concluded that Deputy Kingrey was performing his statutory duty in the manner prescribed by statute and policy and was acting reasonably.

With regard to the October 5, 2011, actions of Deputy Young and the January 11, 2006, actions of Deputies Young and Paulson, the undisputed facts demonstrate that they was responding to an alleged violation of a no-contact order entered by the family court in connection with the McCarthy dissolution proceeding. Deputies Young and Paulson are entitled to qualified immunity because the undisputed facts demonstrate that they acted in an objectively reasonable manner in conducting an investigation, taking statements, and preparing reports that they forwarded to the Prosecuting Attorney for review.

Finally, the undisputed facts demonstrate that on May 6, 2006, Deputy Ferrell acted in an objectively reasonable manner pursuant to his duties as a law enforcement officer when he responded to Fearghal McCarthy's forgery claim. Specifically, after speaking with Mr. McCarthy, Deputy Ferrell determined that this was a civil issue arising from the McCarthy dissolution and that it should be taken up with the family court. However, despite making this determination, Deputy Ferrell also completed a criminal police report and forward to the Prosecuting Attorney for review.

In each of these instances, Deputies Young, Paulson and Ferrell had a duty to investigate reported crimes and acted in an objectively reasonable manner as they followed their procedures as they interviewed

necessary parties and prepared a formal report for review by the Prosecuting Attorney.

V. The trial court correctly granted summary judgment on Plaintiffs' IIED (outrage) claims because Clark County's conduct was not outrageous or extreme in character.

Washington appellate courts have held that in order "to recover for emotional distress inflicted by intentional or reckless conduct, Washington plaintiffs must plead and prove the elements of the tort of outrage." *Keates v. City of Vancouver*, 73 Wn. App.257, 263, 869 P.2d 88 (1994). A plaintiff may only sue for outrage if he or she was present when the conduct occurred. Additionally, and most significantly, the conduct must also be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Reid v. Pierce Co.*, 136 Wn. 2d 195, 203, 961 P. 2d 333 (1998).

The Washington Supreme Court has held in *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989), that the basic elements of the tort of outrage are: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Id* at 629, *citing Rice v. Janovich,* 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (Second) of Torts § 46 (1965). The conduct in question must be "so outrageous in character,

and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975); *Dicomes* at 630.

In *Dicomes* the Court rejected plaintiff's IIED (outrage) claim because the plaintiffs' wrongful discharge allegations, even if accepted as true, would not constitute outrageous conduct. In affirming summary judgment, the Court held that "mere insults and indignities, such as causing embarrassment or humiliation will not support imposition of liability on a claim of outrage." *Id.* at 630. The *Dicomes* Court further held that even if plaintiff's allegations rose to the level of malice, "no claim of outrage could be stated." *Id.* While the question of whether conduct is sufficiently outrageous is frequently a question for the jury, "it is the responsibility of the court to determine if reasonable minds could differ on whether the conduct was so extreme as to result in liability." *Dicomes*, at 630; *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979) (trial court must make an initial determination as to whether the conduct may reasonably be regarded as extreme and outrageous, thus warranting a factual determination by the jury). *Keates,* at 263-64. The Washington Court of Appeals has further held in *Phillips v. Hardwick*, 29 Wn. App. 382, 628 P.2d 506 (1981), that a court should

consider the following in determining whether conduct may be regarded as extreme and outrageous:

> (a) the position occupied by the defendant; (b) whether plaintiff was peculiarly susceptible to emotional distress, and if defendant knew this fact; (c) whether defendant's conduct may have been privileged under the circumstances; (d) the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and (e) the actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it.

Id. at 388.

In the present case, like *Dicomes*, Plaintiffs' allegations of negligence, bad faith, and malice do not support a claim for IIED (outrage). Plaintiffs have the burden of proving this claim and cannot rely upon mere allegations and conclusory supposition. In our case, as articulated by the *Dicomes* Court, "[a]t worst, plaintiffs allegations amount to a showing of bad faith. And even if they rose to the level of malice [...], no claim of outrage could be stated."

In applying the *Phillips v. Harwick* factors to our case, there is no evidence that any of the Plaintiffs were peculiarly susceptible to emotional distress or, even if they were, that any Clark County Sheriff Deputies were actually *aware* of this susceptibility. Specifically, there is no evidence in

the record that plaintiffs Conor, Cormac or Fearghal McCarthy suffered any distress beyond the stress, annoyance, inconvenience, or embarrassment which, unfortunately normally occurs during the investigation and arrest of child abuse and domestic violence suspects. Finally, disregarding Plaintiffs' speculation, there is no evidence that any Clark County Sheriffs Deputies were *aware* that there was a high probability that their investigations would cause severe emotional distress and that any one of them proceeded with such a motive or in conscious disregard of this fact. The Trial Court properly granted summary judgment in favor of Clark County with respect to Plaintiffs' IIED claims because reasonable minds could not conclude that the deputies' actions were extreme or outrageous under the circumstances.

E. CONCLUSION

The undisputed facts of this case demonstrate that Clark County Sheriff's Deputies acted in an objectively reasonable manner as they conducted their respective investigations and responded to extended marital strife in the McCarthy home. Even when all reasonable inferences are drawn in favor of Plaintiffs, a reasonable fact finder could not conclude that Clark County acted in a grossly negligent or objectively unreasonable manner or that there was any causal connection between its

investigations and a subsequent "harmful placement decision."

Accordingly, Clark County respectfully requests that the Court affirm the trial court's entry of summary judgment.

Respectfully submitted this 29th day of May, 2015.

RESPECTFULLY SUBMITTED:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

Taylor Hallvik, WSBA #44963
Deputy Prosecuting Attorney
Of Attorneys for Respondent Clark County

CERTIFICATE OF SERVICE

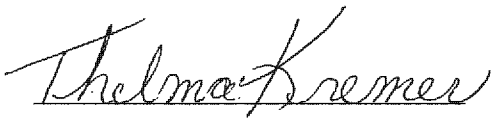
I, Thelma Kremer, hereby certify that on this 29th day of May, 2015, I served by email (per all parties' written consent) a copy of the foregoing *Brief of Respondent Clark County, Washington*, to Plaintiff, Pro Se, and all counsel of record as follows:

Mr. Fearghal McCarthy
fearghalmccarthy001@gmail.com

Erin Sperger
erin@legalwellspring.com

Daniel G. Lloyd
Dan.lloyd@cityofvancouver.us

Matthew Rice
matthew.rice@atg.wa.gov



CLARK COUNTY PROSECUTOR

May 29, 2015 - 3:28 PM

Transmittal Letter

Document Uploaded: 6-463474-Respondent's Brief.pdf

Case Name: Fearghal McCarthy v. Clark County, et. al.
Court of Appeals Case Number: 46347-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thelma W Kremer - Email: thelma.kremer@clark.wa.gov

A copy of this document has been emailed to the following addresses:

fearghalmccarthy001@gmail.com
erin@legalwellspring.com
dan.lloyd@cityofvancouver.us
matthew.rice@atg.wa.gov
taylor.hallvik@clark.wa.gov