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NO. 47438-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HBH; SAH; KEY, JDB, and KMH,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

Between 1998 and 2003, Scott and Drew Anne Hamrick served as foster parents to a number of children, including the five young women who are Plaintiffs here. At the time, the Hamricks received glowing reports as caregivers, and the children asked to be adopted by them, which later occurred. During this pre-adoption period, none of the children reported any abuse to any of the mandatory abuse reporters (social workers, teachers, therapists, and guardians ad litem) with whom they routinely interacted, and none of those mandatory reporters reported any concerns to the Department of Social and Health Services (DSHS). Later, between 2008 and 2010, DSHS received three reports of possible abuse by the Hamricks, and in 2011 DSHS removed Plaintiffs from the Hamrick home.

Plaintiffs sued DSHS, alleging that DSHS negligently failed to investigate and discover abuse. The claims were based on two distinct time periods: (1) the pre-adoption period (1998-2003); and (2) the later time when DSHS received reports of abuse (2008-2010). Both claims went to trial, but at the close of the evidence, the superior court dismissed the claim based on the earlier, pre-adoption time period, finding "there was nothing [in the evidence elicited] to show there was any abuse." RP 83 (3/5/15). Thus, nothing DSHS knew or could have reasonably known during the pre-adoption period supported a claimed breach of duty to investigate or take action. *Id.* The

remaining claim of negligence during the latter period went to a jury, which found for DSHS. CP 636-40.

The court of appeals reversed. But the claim it allowed was not based on this Court's extensive case law regarding statutorily implied claims for negligent investigation. For the first time, the court of appeals declared that DSHS is subject to a common law duty to investigate. It found a "special relationship" exists between social workers and foster children under the Restatement (Second) of Torts § 315(b) (1965) such that social workers owe a duty of care to foster children they interact with, and held that a foster child could claim a breach of this duty even if DSHS entirely complied with state law and agency policy. This subjects taxpayers to liability when foster children suffer harm even if the State had no reason to suspect abuse.

This Court should accept review to determine: (1) whether DSHS has a common law duty to protect children in foster care from harm caused by third parties when the State conduct is not analogous to the private conduct that is subject to liability at common law; (2) whether social workers have a "special relationship" with foster children under Restatement (Second) of Torts § 315(b) (1965) when they lack custody and supervision of the children and have no indication of a risk posed by a third party; and (3) whether a reasonable jury could have found a breach of duty based on the

evidence here, which showed nothing warranting investigation by DSHS during the pre-adoption period.

II. IDENTITY OF PETITIONER AND DECISION

The Petitioner is the State of Washington, Department of Social and Health Services. In *HBH v. State,* No. 47438-7, the Court of Appeals reversed a CR 50 dismissal and remanded a claim for trial (*HBH, et al. v. State,* No. 47438-7, slip op., Wash. Dec. 13, 2016, *see* App. A). The court revised the original decision after a motion for reconsideration. App. B (Order Denying Motion for Reconsideration and Amending Filed Opinion, *HBH, et al. v. State,* No. 47438-7, Wash. April 18, 2017).

III. ISSUES PRESENTED FOR REVIEW

1. Under the State's waiver of sovereign immunity, is DSHS subject to a common law duty to investigate and protect children in foster care from harm caused by third parties where the conduct of administering foster care is not analogous to the type of conduct of a private party subject to tort liability at common law?

2. Do DSHS social workers have a special relationship duty to foster children under Restatement (Second) of Torts § 315(b) (1965), when social workers lack custody and supervision of the children, where there is no historic basis for finding the duty, and where the elements needed to impose the special relationship duty do not exist?

3. Should dismissal of Plaintiffs' claim for pre-adoption negligence be affirmed because no reasonable jury could have found a breach of duty by DSHS where there was no evidence of potential harm from the foster parents and no unreasonable failure to act?

IV. STATEMENT OF THE CASE

Plaintiffs' alleged that DSHS negligently failed to protect them from abuse in the Hamrick home during two distinct time periods: the pre-adoption period, between 1998-2003, and a post-adoption period in 2008-2010 during which three CPS referrals occurred. The Complaint alleged that DSHS had breached a duty to conduct "reasonable investigations and taking appropriate action in response to reports and referrals expressing concern regarding Scott and/or Drew Ann Hamrick's" parenting. CP 6.

This matter went to trial, which lasted approximately six weeks. At the conclusion of evidence, the Court granted the State's CR 50 motion and dismissed claims based on the pre-adoption period. The negligent investigation claim based on the 2008 to 2010 period went to the jury, which returned a verdict in favor of DSHS.

In dismissing, the trial court noted that even viewing the facts in the light most favorable to Plaintiffs, in the pre-adoption period there had been no allegations or evidence of abuse to trigger a duty on DSHS to investigate, and, therefore the negligent investigation claim failed as a matter of law.

According to the trial court, "there were so many people involved that were handling this prior to the adoption, all of these other voices that were coming in saying, no, there was nothing to show there was any abuse." RP (3/5/15) at 83:2-12. As shown below, this was the only conclusion to reach based on the evidence.

A. Overview of the Evidence Considered under CR 50

In 1998, the first of the plaintiffs, KMH, was placed in the Hamrick foster home. According to her social worker, Amy Page, KMH expressed that she wanted to be adopted by the Hamricks, and throughout the dependency process never gave any impression or indication there was anything wrong, nor did the social worker see any evidence there was something wrong in the Hamrick home. RP (3/4/15) at 55:8-24. Page was also in touch with the child's therapist and GAL and there were no reports of concerns from either. RP (3/4/15) at 59:4-60:25. According to Page, KMH appeared to be happy. RP (3/4/15) at 61:15-18. KMH testified that she was never sexually abused in the Hamrick home. RP (2/23/15) at 289:9-290:9.

The social worker assigned to SAH and HBH at that time was Mary (Wooldridge) Meyer, who became the Twins' social worker in February 1999. RP (2/9/15) at 8:11-15; RP (3/2/15) at 114:8-9. Meyer testified that she would not provide the Juvenile Court with updates or submit an Individual Service and Safety Plan (ISSP) to the Court without conducting a contemporaneous

Health and Safety visit. She made her first report to the Court in March 1999. RP (3/2/15) at 114:10-14. The next month Meyer flew with the Twins up to Alaska to visit with prospective adoptive parents. RP (3/2/15) at 114:15-24.

Meyer filed more reports with the Court in June 1999, September 1999, and May 2000. RP (3/2/15) at 115:3-116:9; RP (3/2/15) at 104:18-105:5; 123:12-16; Ex. 114. On October 29, 1999, the Twins were placed in the Hamrick home. When Meyer visited the Twins in early November, they told her they did not want to leave and begged her to let them stay in the Hamrick home. RP (3/2/15) 118:6-8; RP (3/2/15) 118:6-119:8. Later, during a May 2000 visit, the Twins invited Meyer to a dance recital. RP (3/2/15) at 104:18-105:5; 123:12-16; Ex. 114. Plaintiffs claimed Meyer did not conduct health and safety visits after November 1999, and failed to learn of their abuse. RP (2/5/15) at 35:9-17. However, at trial HBH testified that the abuse did not begin until a year after she was adopted (RP (2/19/15) at 126:10-13), and SAH testified that she did not become aware that the inappropriate touching was sexual abuse until the disclosures occurred in 2011. RP (2/11/15) at 64:10-16.

In May and June of 2000, an Adoption Home Study was conducted by Social Worker Shannon Nelson. Ex. 115. Nelson also conducted interviews of the Twins, and the foster and biological children in the home. All reported they were doing well and looking forward to the adoption. RP (2/19/15) at

166:1-167:19; RP (2/23/15) at 181:15 – 182: 25. After the Home Study, Meyer visited the Twins again. Meyer testified that they were so happy to be adopted by the Hamricks they gave hugs, jumped up and down, etc. RP (3/2/15) 124:1-18. The home study was completed on June 21, 2000. Ex. 115. On October 6, 2000, KMH, HBH and SAH were adopted. Exhibit 121 is a drawing the Twins made for Meyer and presented to her on the day of their adoption. RP (3/2/15) at 124:23-125:19.

The Twins also had regular contact with Laura Bentle (Kellogg), their Court Appointed Special Advocate Guardian ad Litem (CASA GAL). RP (2/25/15) at 88:1-9. Bentle testified that she saw the Twins on average about once every six weeks over the course of their dependency. RP (2/15/15) at 85:22-87:21; 106:21-107:3; RP (2/25/15) at 106:6-18. In regards to the Hamrick home, Bentle reported that "in the five years this CASA GAL has been active in the girls' lives, I have never seen them so happy." RP (2/15/15) at 107:19-21; Ex.109; Ex. 112. In April 2000, the Twins wanted GAL Bentle to promise they could be adopted by the Hamricks. RP (2/25/15) at 138:5-139:19; Ex. 112. Bentle also recalls the subsequent visit where the Twins were very happy when told they would be adopted by the Hamricks. RP (2/25/15) at 138:5-139:19; Ex. 112. At no point did the Twins report to Bentle any allegations that they were being inappropriately touched or otherwise give any indication that something had or was about to go wrong in

the Hamrick home. RP (2/15/15) at 115:23-116:8. At their adoption, the Twins presented Bentle with drawings thanking her for the family and the adoption, as they had done for Meyer. RP (2/25/15) at 111:20-112:17; Exs. 217, 217A, 217B, and 217C.

The final two Plaintiffs, KEH and JBH, were placed in the Hamrick home in January, 2000. RP (3/3/15) at 48:4-16. They remained foster children until 2003. Their social workers, all of whom testified at trial, were Lisa Gilman, Amy Page, and Anna Tran. Each testified that they conducted regular health and safety visits, that the children appeared to be doing well and reported a desire to be in the Hamrick home. None had concerns about the Hamrick home. All three testified that they had routine contact with the assigned GAL, and KEH's therapist.[1] On March 8, 2000, during a Health and Safety Visit, KEH told Gilman that she and her sister wanted to stay with the Hamricks "forever" and she was adamant about that. Ex. 198 at 110. Tran testified this squared with her impression as well. RP (2/25/15) at 67:8-20.

During this period, KEH was in weekly counseling. RP (2/25/15) at 145:21-24. There were no reports of abuse made to Tran by counselors. In fact, based on Gilman's contact with KEH and her discussion with the therapist, Gilman believed that KEH was "so bonded with her foster parent"

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[1] See Gilman: RP (3/3/15) at 34:1-6, 37:8-38:22, RP (3/3/15) at 51:3-52:1; Page (who first met the Hamricks in 1998): RP (3/4/15) at 66:1-8, RP (3/4/15) at 62:6-63:13, RP (3/4/15) at 62:6-63:13, RP (3/4/15) at 67:3-20; Tran: RP (2/15/15) at 56:10-59:22.

that it was making visits with her biological mother difficult. RP (3/3/15) at 9:1-18. By the spring of 2000, KEH began to taper off from weekly therapy as she improved, RP (3/4/15) at 66:1-8, which was connected with being told that she would be adopted by the Hamricks. RP (2/25/15) at 74:20-75:6.

KEH and JBH were adopted on January 31, 2003. Once a child is adopted, DSHS plays no role in the children's life or otherwise maintains any contact with the child. RP (2/9/15) at 41:8-9.

B. The Court of Appeals Reversed by Finding a Special Relationship Common Law Duty and Evidence Supporting a Breach of that Duty

On appeal, the Plaintiffs abandoned any claim that DSHS conducted a negligent investigation under the cause of action implied from RCW 26.44.050. App. A, at 8 n.2; *see also M.W. v. Dep't of Soc. & Health Serv.*, 149 Wn.2d 589, 70 P.3d 954 (2003) (discussing RCW 26.44.050 cause of action). But rather than affirm the trial court's well-supported dismissal of Plaintiffs' claim, the court of appeals found that DSHS had a new, parallel, previously unidentified common law duty to conduct investigations to protect foster children, and that this new duty could be breached where there are no reports of abuse or neglect and the evidence shows the children are doing well. App. A. The court found this common law duty by concluding that there was a "special relationship" that imposed a duty to protect under Restatement (Second) of Torts § 315(b) (1965).

The court found the relationship between DSHS and foster children was like the relationship between innkeeper and guests, common carriers and passengers, and hospitals and patients. These relationships "are protective in nature, historically involving an affirmative duty to render aid" and "where one party is entrusted with the well being of another." App. A 8-9 (internal quotations and citations omitted). It then described this Court's opinion in *M.W.* as ambiguous in limiting DSHS's duty to investigate to situations involving reports or evidence of abuse or neglect. App. A. It held the DSHS-foster child relationship created a duty as in *Caulfield v. Kitsap County*, 108 Wn. App. 242, 250, 29 P.3d 738 (2001), involving a vulnerable adult in custodial care. App. A at 13.

After finding the new duty, the court found that a question of fact existed as to whether a social worker failed to properly conduct a health and safety check. This evidence, it ruled, could show a breach of duty because a jury might find that "SAH or one of the other girls would have disclosed the abuse and the State would have intervened." App. A 15-16. The opinion does not indicate what abuse could have been disclosed under this speculative chain of events.

The court of appeals modified its opinion upon reconsideration. It deleted its original, candid statement that "we reverse the trial court's CR 50 ruling and remand for trial on the claims of negligent investigation and

failure to take appropriate protective action during the period before adoption." The court substituted "we reverse the trial court's CR 50 ruling and remand for trial." App. B. at 2. It made no substantive changes to its analysis of a new duty to investigate and conclusion that there was some evidence that might support a breach.

V. THE PETITION FOR REVIEW SHOULD BE GRANTED

This case is the first time a Washington court has gone outside the extensive statutory and regulatory framework through which the Legislature created DSHS and defined its responsibilities to the state's foster children to impose a common law tort duty to investigate. The court of appeals found this duty where there is no private sector analog conduct, contrary to the state's waiver of sovereign immunity. It found the duty by misapplying the Restatement (Second) of Torts § 315(b), because a social worker's relationship with a foster child falls outside the special relation duty contemplated by the restatement and case law. Finally, it remanded based on evidence that a trial court, after six weeks of trial, properly found it could not reasonably support a jury finding of negligence. Thus, there are three separate reasons to reverse the court of appeals. These issues meet this Court's criteria for review under RAP 13.4(b). The newly declared duty conflicts with case law of this Court and the courts of appeal, and the case raises questions of significant public interest because the newly declared

duty affects all the state's foster families, social workers, and taxpayers.

A. The Court Should Address Whether the Common Law Cause of Action Based on DSHS Implementation of the Foster Care Statutes Is Contrary to the State's Waiver of Sovereign Immunity

In 1961, the Legislature waived sovereign immunity in part, directing that the "state be liable for damages arising out of tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090. Conduct giving rise to tort liability must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation.[2] But only the State removes children from their parents and places them into foster care; private persons and corporations do not engage in analogous conduct. In the absence of analogous private sector conduct, the waiver of sovereign immunity does not encompass common-law liability for negligent foster care administration. RCW 4.92.090. *Cf.* RCW 26.44.050 (creating statutory liability for negligent investigation of child abuse or neglect).

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[2] In evaluating a public duty doctrine question, Justice Chambers observed that "treating governments the same as private persons or corporations became problematic where statutes and ordinances imposed duties on governments not imposed upon private persons or corporations." *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn. 2d 871, 887-88, 288 P.3d 328 (2012) (Chambers, J. concurring), citing and quoting *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965) ("Essentially, then, the official conduct giving rise to liability must be tortious, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation."). In both the sovereign immunity context and public duty analysis, state liability in tort depends on conduct that is "analogous, in some degree at least," to private conduct also subject to tort liability. *Evangelical United Brethren*, 67 Wn.2d at 253.

The State's waiver of sovereign immunity did not create tort liability for implementing foster care statutes. RCW 4.92.090. For example, Washington courts made it clear there is no such thing as a common law claim for negligent investigation. *M.W. v. Dep't of Soc. & Health Serv.*, 149 Wn. 2d 589, 601, 70 P.3d 954 (2003). Moreover, the absence of a common law claim is demonstrated by this Court's determination that the Legislature by implication allowed a cause of action under RCW 26.44.050, the statute authorizing investigation of child abuse or neglect. *See e.g. Tyner v. Dep't of Soc. & Health Servs.* 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000) (determining that the Legislature implied a cause of action for negligent investigation under RCW 26.44.050). Had a common law duty to investigate or liability for special relationship existed, this Court would not have needed to find this implied cause of action.

Review should be granted in light of how the court of appeals ruling conflicts with the limits of the state's waiver of sovereign immunity and cases holding that Washington does not recognize a common law cause of action for negligent investigation.[3] The special relationship duty cannot be imposed on DSHS consistent with the limited waiver of sovereign immunity where it imposes liability on conduct not analogous to private conduct subject to tort

[3] *E.g., Dever v. Fowler*, 63 Wn. App. 35, 44-5, 816 P.2d 1237 (1991); *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999); *Blackwell v. Dep't of Soc. & Health Serv.*, 131 Wn. App. 372, 375, 127 P.3d 752 (2006).

liability under the common law.

B. The Court Should Address Whether the Court of Appeals Erred when it found that the Restatement (Second) of Torts §315(b) Imposes on DSHS a Common Law "Special Relationship Duty" to Investigate that exceeds the Implied Cause of Action Duty Previously Recognized

"As a general rule, there is no duty to prevent a third party from intentionally harming another unless a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (internal quotations omitted). Avoiding the general rule, the court of appeals concluded that DSHS had a special relationship duty under Restatement § 315(b). This conclusion conflicts with case law limiting the special relationship duty. Moreover, the duty goes far beyond the only cause of action implied by legislative intent. If not corrected, this new duty will alter the relationships between DSHS and foster parents and children.

1. The Court of Appeals decision conflicts with § 315(b) cases limiting application of the special relationship duty

Section 315(b) recognizes a duty to protect arises if "(b) a special relation exists between the [defendant] and the other which gives the other a right to protection." *Niece*, 131 Wn.2d at 43 (quoting Restatement (Second) of Torts § 315(b)). "Many special relationships give rise to a duty

to prevent harms caused by the intentional or criminal conduct of third parties. For example, a school has a duty to protect students in its custody from reasonably anticipated dangers." *Niece*, 131 Wn.2d at 44. The "rationale for such a duty" is to address relationships that are "protective in nature, historically involving an affirmative duty to render aid[.]" *Id.* at 44 (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)). Cases recognizing a special relationship duty involve individuals and schools, common carriers, hotels, hospitals, business establishments, taverns, possessors of land, and custodial mental institutions. *Niece*, 131 Wn. 2d at 44.

A special relationship duty requires substantial control over the plaintiff's environment and notice of foreseeable harm giving rise to entrustment to the defendant's care, and a demonstration of an historic obligation to provide protection from third parties. Even the primary case cited by the court of appeals recognized that the special duty relationship is "typically custodial, or at least supervisory" such as "between a doctor and patient, jailer and inmate, or teacher and student." *Caulfield*, 108 Wn. App. 255. No comment, note, or example in the Restatement finds liability absent these elements, or absent both control over the environment and knowledge of impending harm.

State statutes do not provide DSHS with this type of control, supervisorial responsibility, or historical obligation akin to the other special relationships. The Legislature authorizes DSHS "to place the child" in a "foster family home licensed pursuant to chapter 74.15 RCW" (*see* RCW 13.34.130(1)(b)(ii)). During that placement, DSHS and its social workers "coordinate and integrate" services ordered by a Juvenile Court. RCW 13.34.025. These statutes do "not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate" services for the child and family. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26-29, 84 P.3d 899 (2004). Moreover, once placed with licensed foster parents, the foster child is entrusted to the foster parents' daily care. RCW 74.13.330 provides that "Foster parents are responsible for the protection, care, supervision, and nurturing of the child in placement." *See also* WAC 388-73-014(5) (foster parents are responsible for the direct care and supervision of children placed in their care); WAC 388-73-312 (same).

Thus, the DSHS role is more limited than any prior case finding a special relationship duty. The reality of foster care and the details in the foster care statutes distinguish this case from *Caulfield*, where particular facts showed an entrustment of a vulnerable, dependent adult triggered the special relationship. In *Caulfield*, the plaintiff's only contacts other than his

caregiver, were the DSHS case manager and a county social worker, both of whom were aware of plaintiff's deteriorating condition. This "gave rise to a duty to protect Caulfield ... from the tortious acts of others..." *Caulfield*, 108 Wn. App. at 256. Social workers, however, lack supervisory power and custody of foster children and lack the responsibility to monitor care, give crisis management, and make assessment visits directed at such care as in *Caulfield.*

Moreover, *Caulfield* justified its §315(b) special relationship duty on past known behavior of a third-party that made the plaintiff "the foreseeable victim." *Caulfield*, 108 Wn. App. at 253. This factor is missing here. All the children were in regular contact with their social workers, therapists, guardians ad litem school officials, and their social workers maintained contact with those other professionals.[4] The social workers for all Plaintiffs maintained regular contact with the children, spoke individually with them, and all children reported uniformly a desire to be adopted by the Hamricks and that they were happy there.[5] These children cannot be called foreseeable victims simply because they were foster

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[4] RP (2/25/15) at 56:10-24; 58:10-24; 70:5 – 71:2; 76:2-16; 77:15 – 78:13; RP (3/2/15) at 75:12-17; 110:1-10; 119:9-16; 123:22-25; RP (3/3/15) at 35:25 – 40:16; 48:2 – 49:23; 52:22 – 53:1; RP (3/4/15) at 60:2-25; 62:21 – 63:13; 67:3-20.

[5] RP (3/2/15) at 71:7-17; 72:2-6; 78:2–79:3; 84:16-25; 89:17-25; 104:18-24; 118:12–119:8; 124:11-22; 125:13 – 126:2; RP (3/3/15) at 51:13-21; RP (3/4/15) at 59:4-22; 66:20-67:2.

children, particularly where the children confirmed that that the abuse had not occurred during this time period or they had no reason to interpret the foster parent's actions as suspicious.

For many of the same reasons, the relationship in *Niece* is distinguishable. It involved a developmentally disabled adult woman who sued a private group home after she was sexually assaulted by a home employee. This Court found a special relationship between Niece and the Home analogous to the relationship between a patient and a hospital, a situation that is markedly different than DSHS's statutory role.

This Court should accept review and address expansion of the special relationship duty in §315(b) to DSHS and a foster child. It conflicts with these cases and is not warranted by the Restatement.

2. The *Restatement* § 315 Duty Created by the Court of Appeals Conflicts with the Negligent Investigation Cause of Action Implied by Statute

The duty found by the court of appeals is also in conflict with Washington cases that have carefully developed a specific implied cause of action. For twenty-five years this Court has held that RCW 26.44.050 created an implied cause of action for negligent investigation. But Plaintiffs disclaimed that cause of action. App. A at 8 n.2. A negligent investigation claim depends on a report of abuse or neglect, or knowledge of circumstances requiring a report of abuse or neglect. In contrast, the duty

found by the court of appeals apparently does not depend on whether a DSHS social worker failed to act on evidence, a report, or information. This expands DSHS's duty beyond anything previously examined by this Court. It imposed a duty that will compel social workers to ferret out information from foster children about their foster family, and conflicts with this Court's holdings that the negligent investigation cause of action is limited to the purposes of RCW 26.44.050. *See M.W.*, 149 Wn.2d at 596.

In *M.W.*, this Court assessed whether to infer an expanded cause of action from DSHS's statutory duty to investigate child abuse.[6] The Court determined that the scope of the duty under RCW 26.44.050 was not broad enough to allow a claim for general negligence occurring within an investigation. The implied cause of action for negligent investigation was limited by the legislative purposes of that statute. *M.W.*, 149 Wn.2d at 587-98. Thus, the Court rejected a duty on DSHS to protect children "from all harm." *M.W.*, 149 Wn.2d at 598.

In *Braam v. State,* this Court again applied *Bennett v. Hardy* and affirmed a trial court's determination that RCW 74.14A.050(2), (3), RCW 74.13.250 and .280 (created for the "especial benefit of foster children")

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[6] Under *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258, 1260 (1990), the *M.W.* Court analyzed whether the plaintiff in *M.W.* was: (1) within the class of persons for whose benefit the statute was enacted; (2) whether the legislative intent supports a remedy; and (3) whether the underlying purpose of the statute is consistent with inferring a remedy.

do not imply a cause of action. 150 Wn.2d 689, 711-12, 81 P.3d 851, 863 (2003). There was "no legislative intent to create a private cause of action" and "that implying one is inconsistent with the broad power vested in DSHS to administer these statutes." *Id.* at 713. *See also Linville v. State*, 137 Wn. App. 201, 211-13, 151 P.3d 1073 (2007) (no implied intent in daycare insurance statutes to create a remedy against the State for child allegedly abused in licensed daycare facility).[7]

Thus, the recognized negligent investigation claim depends on investigating reports or evidence of abuse and neglect. The court of appeals imposes a far different duty for DSHS as "the last watchman of the foster child's wellbeing." App. A at 14, announcing a duty that requires social workers to probe for indications of abuse and neglect by foster parents even where no evidence exists. That duty to uncover future potential abuse goes beyond the implied cause of action, and cannot be justified by any implied legislative intent. The conflict between the implied cause of action and the court of appeals ruling warrants this Court's review.[8]

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[7] Similarly, in *Aba Sheikh v. State*, 156 Wn.2d 441, 457-58, 128 P.3d 574 (2006), this Court construed and limited the implied cause of action based on the statutory purposes to find no duty running to third-party harmed by a foster child.

[8] There is no question that the implied cause of action is robust. A breach may arise from actions in response to a report of abuse or neglect, or responses to evidence or indication of abuse or neglect such that a mandatory report would be obligated to report the matter under RCW 26.44.030 or potentially face liability for that failure. *Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 80, 247 P.3d 421, 426–27 (2011).

3. The broad claim recognized by the court of appeals imposes a questionable policy change to the foster care system warranting this Court's review

The duty declared by the court of appeals will predictably affect whether people will foster children, because it imposes a duty that incentivizes an adversarial relationship between DSHS and licensed foster parents. This is especially a problem because the scope of duty of care is not limited by the facts of this case. The common law special relationship duty could lead to claims that DSHS erred by failing to prevent a wide variety of harms, such as a dog bite.[9] It will inject further tort litigation and monetary remedies into areas previously addressed by foster home licensing and regulation. These effects are significant and statewide, warranting review under RAP 13.4(b).

Review is also warranted because the § 315(b) claim allowed by the court of appeals is so broad as to be unworkable. It would, apparently, attach when the child is assigned to a social worker's caseload. But, in footnote six, the court of appeals states that even adhering to DSHS policies may not be enough to satisfy the new duty. This means that DSHS and its social workers will have no ability to defend on the basis of meeting a standard of care. App. A (Slip Op. at 17). Proximate cause arguments will be ever more

[9] This issue recently arose in a case pending in Division II after *HBH* was decided.

tenuous because the newly declared duty is unmoored from negligently performing the investigatory function under RCW 26.44.050, and there is no requirement of reports or evidence of abuse. In short order, the extraordinary § 315(b) duty could be so uncertain that DSHS will face claims for failing to prevent any harm that occurs to any foster child.

C. The Court of Appeals Erred by Remanding When, After Six Weeks of Trial, Plaintiffs Failed to Introduce Evidence Sufficient to Show a Breach of Duty

Even if the Court could find a special relationship between social workers and foster children under § 315(b), the Court should take this case to clarify what degree of evidence is sufficient to take to the jury a claim of breach of that duty. The court of appeals found that the evidence was sufficient for a remand not because DSHS ignored a risk of harm, or ignored a report of abuse. Rather, the court of appeals relied on the assertion that one social worker may have failed "to conduct required health and safety checks—either at all or with sufficient regularity[.]" App. A at 14. And then, a jury might "find that but for the allegedly deficient health and safety checks, SAH or one of the other girls would have disclosed the abuse and the State would have intervened." This chain of logic reflects speculation unfounded by any substantial evidence, and the lack of evidence provides a further reason to reverse the court of appeals.

First, none of the "other girls" reported they were abused prior to their adoptions. In fact, of the Twins, HBH testified that the sexualized touching did not start until a year *after* her adoption. RP (2/19/15) at 126:10-13. SAH testified she was not aware there was sexualized touching until 2011 when her sisters disclosed. RP (2/11/15) at 64:10-16. At that point she realized the over-the-clothes touching she experienced as a child was sexualized. To conclude the later tragedies could have been prevented, a jury would have to conclude that during a more perfect health and safety visit, SAH would have said something that would have then unveiled future abuse, or otherwise have predicted the future harms.

Similarly, the premise that a jury could infer that a social worker needed to form better rapport calls for rank speculation. The social worker in question, Mary Meyer, traveled to Alaska with the Twins, was invited to a dance recital by the Twins, and on the day of their adoption was presented with a drawing by the children with the caption thanking her for the family. There is nothing except speculation to support the court of appeals' ruling that a jury could infer that if a social worker had done something different, then SAH or HBH (or another child) would have made a statement or disclosure to contradict essentially everything positive they had been saying about the Hamrick home.

Only through multiple levels of rank speculation could a jury conclude that DSHS breached a duty to prevent the subsequent harm. This is error. But the speculative nature of the claim also illustrates the problem with the special relationship duty as adopted by the court of appeals. With no evidence of abuse or neglect upon which to base an investigation, a claimed breach of duty will turn to speculation in order to claim liability.

VI. CONCLUSION

Review should be granted and the court of appeals reversed.

RESPECTFULLY SUBMITTED this 18th day of May 2017.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY_____

CERTIFICATE OF SERVICE

I certify that on the 18th day of May, 2017, I caused a true and correct copy of this Petition for Review to be served via hand delivery by Camille Berta on the following:

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 13, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HBH; SAH; and TREY HAMRICK, litigation guardian ad litem on behalf of KEH, JBH, and KMH, Appellants, v. STATE OF WASHINGTON, Respondent, And TOWN OF EATONVILLE, Defendant.	No. 47438-7-II PART PUBLISHED OPINION

BJORGEN, C.J. — KMH, HBH, SAH, KEH, and JBH[1] (collectively, the children) appeal the trial court's partial dismissal of some of their claims through a CR 50 motion for judgment as a matter of law, as well as an evidentiary ruling and the final judgment in favor of the Department of Social and Health Services (DSHS). Their claims were related to incidents of

[1] We use initials to protect the privacy of those who were children at the time of the events.

child abuse by their foster, and later adoptive, parents, Scott and Drew Anne Hamrick (the Hamricks).

The children contend that the trial court erred by (1) dismissing under CR 50 their claims regarding DSHS's failure to investigate during the period before they were adopted, (2) adopting a special verdict form that improperly asked the jury to apportion fault for both intentional torts and negligence, (3) excluding the testimony of two late-disclosed witnesses, and (4) speaking candidly about personal political leanings in court. They also assert that (5) cumulative error violated their rights to a fair trial.

In the published portion of this opinion, we hold that (1) DSHS has a duty of reasonable care to protect children it places in foster homes based on a special relationship and that the plaintiffs produced sufficient evidence to avoid dismissal under CR 50 for claims regarding DSHS's negligence during the period before the children were adopted. In the unpublished portion we hold that (2) the trial court erred by submitting an incorrect special verdict form to the jury, but the error was harmless for those claims; (3) the trial court erred in excluding the two witnesses, but this error also was harmless; (4) the trial court did not create any appearance of unfairness by speaking about political matters; and (5) there was no cumulative error. Accordingly, we reverse the trial court's CR 50 ruling and remand for trial on the claim of negligent failure to investigate and to appropriately protect foster children. We affirm the trial court's judgment as to the remaining claims.

FACTS

1. Pre-Adoption Period

In February 1998, DSHS placed KMH in foster care with the Hamricks. Social worker Amy Page was assigned to KMH's case and conducted health and safety checks. Page did not receive any information or make any observations suggesting that the Hamricks were abusing KMH or that the placement was otherwise harmful.

In October 1999, twins HBH and SAH were placed with the Hamricks as well. The twins had been in other foster homes for the preceding seven years, and had suffered abuse and neglect in those homes. DSHS social worker Mary Woolridge was assigned to the twins' cases. According to agency policies, Woolridge was supposed to conduct in-home health and safety checks every 90 days at which she was to talk with the girls about their experiences in the home. However, evidence presented at trial indicated that Woolridge may not have conducted these visits as required.

During this period, the Hamricks allegedly abused KMH, HBH, and SAH emotionally and physically, and abused SAH sexually. However, DSHS received no reports of any abuse, and individuals in contact with the children reported that they seemed happy.

In January 2000, DSHS placed KEH and JBH in the Hamricks' home. Social worker Lisa Gilman was assigned to their cases and conducted health and safety visits. Gilman did not receive any indication that abuse was occurring in the Hamrick home. Page later took over as their assigned social worker, and similarly believed KEH and JBH were happy and doing well in the home.

In June 2000, DSHS conducted a home study to determine whether the Hamricks would be suitable adoptive parents. The resulting report recommended that DSHS allow them to adopt all of the children.

2. Post-Adoption Period

In October 2000, the Hamricks adopted KMH, HBH, and SAH. In January 2003, they adopted KEH and JBH as well.

In April 2008, a school counselor reported suspected physical abuse of SAH. Child Protective Services (CPS) screened this report and decided not to investigate. In November 2009, CPS received a referral related to Scott Hamrick's alleged sexual contact with a juvenile neighbor girl. CPS apparently referred this incident to local law enforcement for criminal investigation but did not investigate the Hamrick household for abuse.

In March 2010, a neighbor reported possible abuse and neglect of KEH to CPS. CPS investigated this report, visiting the Hamrick household and interviewing the children and the Hamricks. Ultimately, CPS determined that the report was unfounded.

In 2011, the Pierce County Sheriff's Department began an investigation of allegations that the Hamricks had abused KMH, HBH, SAH, KEH, and JBH. This investigation led DSHS to remove the children from the Hamrick home. Scott Hamrick committed suicide during the investigation, and Drew Ann Hamrick was charged with crimes related to the abuse.

3. Claims and Trial

In October 2011, HBH and SAH sued DSHS, claiming that its negligence in failing to investigate or take other protective action allowed the Hamricks to abuse them during their

period as foster, and later adoptive, children in the Hamrick home. A guardian ad litem sued DSHS on similar grounds on behalf of KMH, KEH, and JBH, who were still juveniles at the time, and the two cases were consolidated. Following an initial mistrial, the case was tried beginning in February 2015.

Several days before trial began, the children disclosed two additional witnesses who would testify concerning matters related to the 2009 CPS referral. The State objected to their testimony. The trial court excluded the witnesses as a sanction for the children's late disclosure, believing that the testimony would not add anything significant to the case.

4. CR 50 Motion

Following the close of both parties' cases, the State moved under CR 50 for judgment as a matter of law that, inter alia, DSHS was not negligent during the pre-adoption period or in relation to the 2009 CPS referral. The trial court agreed with the State and granted the motion. As to the pre-adoption period, it ruled:

> there were so many people involved that were handling this prior to the adoption, all of these other voices that were coming in saying, no, there was nothing to show there was any abuse. I mean, absent — I mean, does it really matter whether Mary Woolridge was or was not doing her health and safety visits[?]. . . . Seems to me most of this case comes down to what did they know and when did they know it. . . . I can't really see there are any claims based on anything Mary Woolridge did or did not do.

Report of Proceedings (RP) (Mar. 5, 2015) at 83. As to the 2009 CPS referral, the court ruled that "the fact they didn't investigate it is not evidence of any kind of negligence on their part because they didn't have any duty or obligation to investigate it." RP (Mar. 5, 2015) at 82.

5. Special Verdict Form

The trial court provided the jury a special verdict form on which it was to document its verdicts as to negligence and the assignment of any resulting damages. The verdict form first

asked the jury to decide whether DSHS was negligent in its treatment of the 2008 and 2010 referrals and whether its negligence proximately caused harm to the children. It then asked whether certain other nonparties' negligence proximately caused harm to KMH, HBH, SAH, KEH, and JBH. In accordance with the trial court's CR 50 rulings, the verdict form included no questions concerning the pre-adoption period or the 2009 referral.

The verdict form included several questions regarding damages. It asked the jury to determine "each plaintiff's total amount of damages" as a dollar value. Clerk's Papers (CP) at 638. Next, it stated:

> Assume that 100% represents the total combined negligence or fault that proximately caused each plaintiff's damages. What percentage of this 100% is attributable to each individual or entity, if any, for whom you answered "yes" in answer to [the questions concerning DSHS's and certain nonparties' negligence]? For each plaintiff, the percentage of fault must equal 100 %.

CP at 638.

The verdict form next asked, "Were the intentional acts of the following individuals a proximate cause of any of the plaintiff[s'] damages?" CP at 638. Finally, the form asked:

> What percentage of each plaintiff's damages were caused by . . . all of the intentional conduct of [Scott and Drew Ann Hamrick], and what percentage of plaintiff[s'] damages were caused by all of the negligent conduct you identified in your answers to [the questions concerning negligence]? Your answer for each plaintiff must total 100 %.

CP at 639.

6. Outcome of Trial

The jury found that DSHS was not negligent in its treatment of either the 2008 or 2010 CPS referrals. As a result, it did not calculate or assign any damages to the children on the special verdict form.

The plaintiffs moved for a new trial, arguing that the trial court had erred in its CR 50 ruling, its exclusion of the two witnesses' testimony, and in providing the special verdict form. The trial court denied the motion. The children now appeal.

ANALYSIS

I. CR 50 MOTION REGARDING PRE-ADOPTION NEGLIGENCE

The children argue that the trial court erred by dismissing their claims of negligence by DSHS during the pre-adoption period. Underlying this request is the contention that DSHS owes a common law duty of reasonable care to protect children it places in foster homes. We agree. We further hold that the children here established genuine issues of fact as to both breach and causation and, therefore, that the trial court erred in granting the CR 50 motion and in declining to instruct the jury as to DSHS's negligence during the pre-adoption period.

1. Standard of Review

We review de novo a trial court's decision on a motion for judgment as a matter of law on a particular issue under CR 50. *Estate of Bordon ex rel. Anderson v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). Like the trial court, we must determine whether there is any legally sufficient evidentiary basis for a reasonable jury to have found for a party with respect to the issue. CR 50; *Bordon*, 122 Wn. App. at 240. We view all conflicting evidence in the light most favorable to the nonmoving party, here KMH, HBH, SAH, KEH, and JBH. *Bordon*, 122 Wn. App. at 240.

2. Duty to Protect

The children argue that DSHS owes a duty of reasonable care to investigate the health and safety of children it places in foster homes based on a special protective relationship between

the agency and those children.[2] We agree.

Liability in tort for negligence may lie only where the defendant owes the plaintiff a duty of care. *Caulfield v. Kitsap County*, 108 Wn. App. 242, 250, 29 P.3d 738 (2001). "As a general rule, there is no duty to prevent a third party from intentionally harming another unless 'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.'" *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)); *accord* RESTATEMENT (SECOND) OF TORTS § 315. Such a special relationship is characterized by either (1) a duty by one party to control the conduct of a third person or (2) a right by one party to the protection of the other. *Niece*, 131 Wn.2d at 43; *Caulfield*, 108 Wn. App. 253; RESTATEMENT (SECOND) OF TORTS § 315.

"Many special relationships give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." *Niece*, 131 Wn.2d at 44-45. Common examples include the relationships between schools and their students, innkeepers and their guests, common carriers and their passengers, and hospitals and their patients. *Niece*, 131 Wn.2d at 44; *Caulfield*, 108 Wn. App. at 255. These relationships are "'protective in nature, historically involving an

[2] The State argues that the trial court correctly dismissed the childrens' negligent investigation claims because DSHS did not breach the duty to investigate imposed by RCW 26.44.050. The duty to investigate under this statute arises "upon the receipt of a report concerning the possible occurrence of abuse or neglect [by] the law enforcement agency or the [DSHS]." RCW 26.44.050; *see also Albertson v. State*, 191 Wn. App. 284, 301, 361 P.3d 808 (2015). The children argued in the trial court that DSHS breached its duty under RCW 26.44.050. However, on appeal they expressly disclaim any argument based on RCW 26.44.050, contending instead that DSHS's duty to perform health and safety checks was based on a special relationship of entrustment. Therefore, we need only address the latter source of duty.

affirmative duty to render aid.'" *Caulfield*, 108 Wn. App. at 253 (quoting *Hutchins*, 116 Wn.2d at 228). Our Supreme Court held that the duty to protect another person from the intentional or criminal actions of third parties arises, "where one party is 'entrusted with the well being of another.'" *Niece*, 131 Wn.2d at 50 (quoting *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 440, 874 P. 2d 861 (1994). In finding such a duty, *Niece* also relied on the vulnerability of the person harmed. 131 Wn.2d at 50-51. Similarly, this court in *Caulfield*, 108 Wn. App. at 255, held that these special relationships arise where one party is entrusted with the care of another party rendered vulnerable by the nature of the arrangement.

In finding that a social worker has no duty to protect third persons from the tortious acts of children for whom it coordinates services, Division One of our court noted that social workers are not responsible for day-to-day supervision of such children. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 28, 84 P.3d 899 (2004). It explained that "[a]ny 'ongoing' relationship between the social worker and the child is to prevent future harm *to that child*, not to protect members of the community from harm." *Id.* (emphasis added). Our Supreme Court later quoted this language approvingly in *Sheikh v. Choe*, 156 Wn.2d 441, 450, 128 P.3d 574 (2006). However, no Washington court has yet addressed whether such an ongoing relationship between a social worker and a foster child constitutes a special relationship within the meaning of *Restatement (Second) of Torts*, section 315, giving rise to a duty to protect that child from the tortious acts of foster parents. We turn to the *Restatement* and to Washington case law pertaining to foster children to meet that issue.

In defining the contours of a protective special relationship, *Niece* relied on *Restatement (Second) of Torts* § 315, among other sources. 131 Wn.2d at 43. Section 315 states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

> • (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> • (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment c to this section explains that "[t]he relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314 A and 320." RESTATEMENT, *supra*, cmt. c. Section 314 A, in turn, lists a number of specific relations of this type, such as common carrier and passenger, none of which involve social worker and foster child. Section 320 deals with custodial relations. Significantly, comment b to *Restatement*, *supra*, section 314A specifies that

> [t]he relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. . . . The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

Thus, we must turn back to our case law to determine the extent to which the State had a duty to protect these plaintiffs.[3]

In *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), the court examined whether RCW 26.44.050 imposes a duty on DSHS to protect children from harm by DSHS workers while investigating potential abuse. *M.W.*, 149 Wn.2d at 597. After examining the statute and the case law interpreting it, the court held that liability under this statute arises only for children

> who are harmed because DSHS has gathered incomplete or biased information that results in a harmful placement decision, such as removing a child from a

[3] We note that *Restatement (Third) of Torts*, section 40, replaced section 314 A of the *Restatement (Second) of Torts*. However, no party cites to the *Restatement (Third)*, and none argue that the *Restatement (Third)* changed the principles of *Restatement (Second)*, section 315, in a way that affects this appeal.

> nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home.

Id. at 602. As noted above, the plaintiffs in this appeal make no claim of liability under RCW 26.44.050. Therefore, the holding in *M.W.* does not govern the resolution of this appeal.[4]

M.W. does contain language which, read in isolation, could suggest that all claims of negligence in monitoring the welfare of foster children are limited to this statutory liability. For example, after noting that our courts have not recognized a general tort claim for negligent investigation, the court stated, "The negligent investigation cause of action against DSHS is a narrow exception that is based on, and limited to, the statutory duty and concerns we discuss above." *Id.* at 601. However, the court's entire analysis in *M.W.* was restricted to determining whether liability lay in M.W.'s case under the statute. It examined the wording of the statute, its purpose, and case law interpreting it. Its gaze did not reach the larger question presented here: whether a special relationship is present from which a tort duty to exercise ordinary care would arise. This narrow focus on statutory liability cannot be the basis for a denial of any liability in tort, especially when the cornerstone of that liability, the special protective relationship, was not even discussed. In addition, any duty under the statute is triggered only if a report is received of possible abuse or neglect. To read *M.W.* to deny any liability outside the statute, then, is to restrict liability to situations where a report has been made. Such a narrowing of liability, and its consequent reduction of legal protection of foster children, cannot rest on a doubtful implication from ambiguous language. *M.W.* does not speak to the issue here before us.

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[4] The Supreme Court cited *M.W.* for its holding in *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005). *Roberson*, like *M.W.*, is restricted to an interpretation of liability under chapter 26.44 RCW. *Roberson*, 156 Wn.2d at 35, 48.

Another central decision in this area is *Braam, ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). The principal issue in *Braam* was whether foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. *Braam*, 150 Wn.2d at 700. In holding that foster children have this right, the court specified that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Braam*, 150 Wn.2d at 699 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). Thus, *Braam*'s due process analysis and holding does not bear on the issue presented here.

The most direct authority on a common law duty of care is *Caulfield* and *Niece*, both *supra*. In *Caulfield*, we examined whether a special relationship arose when a county contracted with a third party to provide in-home caregiving services to a physically disabled adult as part of a program designed to support disabled people living outside of group nursing facilities. 108 Wn. App. at 255-56. We held that this was a special relationship and that it gave rise to a duty on the part of the county "to protect . . . [such] vulnerable clients from the tortious acts of others, especially when a case manager knows or should know that serious neglect is occurring." *Id.* at 256. We reasoned that because county case workers were responsible under the program for planning and monitoring care, and for terminating the contracted caregiver if care was inadequate, they must use ordinary care to protect their clients from dangers imposed by the caregiver's tortious conduct. *Id.*

The State argues that a special relationship giving rise to tort liability must be custodial in

nature. However, it is clear from *Caulfield* that custody is not a crucial element of such a relationship. There, the contracted caregiver, not the county case worker, had a custodial relationship to the disabled client. 108 Wn. App. at 245-46. The case worker's relationship with the client extended only to planning, monitoring, and providing other support services. *Id.* at 256. The fact that the case worker was entrusted with ensuring the client's wellbeing proved crucial in our assessment of the relationship. *Id.* at 255. *Caulfield* stands for the proposition that entrustment, not custody, is at the heart of a special protective relationship for purposes of imposing a common law tort duty. *Niece*, on the other hand, did involve a custodial relationship between the group home operator and the resident. As noted, however, *Niece* did not base its finding of a special relationship on custody, but rather on the same ground as *Caulfield*, entrustment of a vulnerable individual. *Niece*, 131 Wn.2d at 50; *Caulfield*, 108 Wn. App. at 255. Thus, the decisions of both the Supreme Court and this court signal that custody is not a prerequisite to a protective special relationship.[5]

The relationship between DSHS and children it places in foster homes is quite similar to the one analyzed in *Caulfield*. Just as the county contracted with an in-home caregiver in *Caulfield*, DSHS contracts with licensed foster parents to take in the children. *See DeWater v. State*, 130 Wn.2d 128, 136, 921 P.2d 1059 (1996). Like the county case workers, DSHS social workers are responsible for monitoring the health and safety of the children. *See* former RCW 74.13.031 (1998). Like the county's disabled adult clients, the children are especially vulnerable to harms created by their caregivers. *Aponte v. Dep't of Soc. & Health Servs.*, 92 Wn. App. 604,

[5] Alternatively, if some degree of custody were required, it is present. In *Braam*'s discussion of a foster child's substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety, the Supreme Court characterized the State as "custodian and caretaker of foster children." 150 Wn.2d at 700. This custodial relation is not somehow effaced when the inquiry shifts from substantive due process to a special relationship.

622, 965 P.2d 626 (1998). The facts and policies at work in this appeal parallel those in *Caulfield*. As in *Caulfield*, they lead to the presence of a special relationship.

Perhaps more to the point, *Niece* found a special relationship "where one party is 'entrusted with the well being of another,'" and the entrusted party is vulnerable to a degree. 131 Wn.2d at 50 (quoting *Lauritzen*, 74 Wn. App. at 440). As noted, *Niece* did not rely on custody in finding this relationship. Absent proper monitoring by the State, a foster child is wholly exposed to the will of the foster parents, whether that will is a blessing or a horror. In this setting, the State is the last watchman of the foster child's well being. A more compelling illustration of the bases of a special relationship established in *Niece* is hard to imagine.

For these reasons, we hold that DSHS owed the children a duty like that recognized in *Caulfield* to take ordinary care to protect them from the tortious or criminal conduct of their foster parents. The trial court erred to the extent it ruled that no such duty exists.

3. Breach of Duty

DSHS policies require case workers to conduct health and safety checks for foster children. Evidence presented at trial showed that such visits were supposed to occur every 90 days during the first year children are in a new foster home. The evidence, however, indicated that Woolridge did not conduct such health and safety checks for SAH during the pre-adoption period.

DSHS's failure to conduct required health and safety checks—either at all or with sufficient regularity—constituted sufficient evidence of a breach of its duty of care to avoid dismissal under CR 50. Accordingly, the trial court erred to the extent it ruled that there was an

insufficient evidentiary basis for a reasonable jury to find that DSHS breached its duty to protect the children.[6]

4. Causation

The State argues that even if DSHS had a duty to perform health and safety checks, the children did not produce evidence from which the jury could find that a breach of that duty caused their injuries. We disagree.

To prove negligence, a plaintiff must establish that the negligent party's action or failure to act was the proximate cause of the plaintiff's harm. *Wuthrich v. King County*, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). Proximate cause consists of two elements: cause in fact and legal causation. *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). Cause in fact requires a determination that if the defendant did not breach the duty of care, the plaintiff's injuries would not have occurred. *See id.* Legal causation describes the policy-based determination that the defendant's breach of the duty of care was of sufficient causal proximity to support imposition of liability for the resulting injuries. *See id.*

To establish cause in fact, a negligence plaintiff must prove that but for the defendant's breach of duty, the plaintiff would not have been injured. *Id.* This is a factual question, but may be resolved as a matter of law where a reasonable jury could reach only one conclusion based on the evidence presented. *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 251, 139 P.3d 1131 (2006). Mere speculation or argumentative assertions of possible counterfactual events is insufficient to prove that but for the defendant's breach of duty the plaintiff would not have been injured. *Id.* at 252, 254.

[6] We do not suggest that compliance with DSHS policies is necessarily enough to ensure compliance with the duty to exercise ordinary care to protect foster children.

The children claim that if DSHS had properly conducted health and safety checks, they would have given the social worker some indication of abuse. SAH testified at trial that

> *if I felt safe* and knew—and the woman was always there, *if I felt safe*, I believe I would have said something. I was a very outspoken young girl.

RP (Feb. 11, 2015) at 32 (emphasis added). The record also shows that SAH wanted someone to give her the opportunity to tell what was happening to her and that she asked to talk privately with a therapist. The jury reasonably could have found based on this evidence that had the social worker properly performed health and safety checks, SAH or the other girls would likely have felt safe enough with the social worker to disclose the abuse or that the checks would have otherwise uncovered or given DSHS reason to suspect abuse during the pre-adoption period.

In addition, records of SAH's and HBH's visits with a therapist showed that the girls were "sexually acting out together and using language which you wouldn't expect a child to use." RP (Feb. 9, 2015) at 48. The children's standard of care expert testified if Woolridge had been aware of this behavior, it would have been reason to increase the health and safety checks by DSHS. The jury could reasonably have found based on this evidence that the social worker would likely have encountered similar behaviors had she properly performed health and safety checks and that such encounters would have triggered an investigation. Notably, the jury would have considered all of this evidence in light of the testimony of the children's standard of care expert that proper health and safety checks in general help built rapport, encourage honest communication, and provide an avenue for disclosure of abuse and for observation of various indicators of abuse.

This evidence supplies a sufficient basis for a reasonable jury to find that but for the allegedly deficient health and safety checks, SAH or one of the other girls would have disclosed the abuse and the State would have intervened. It also provides a sufficient basis for a finding of

legal causation. With this, there was a sufficient evidentiary basis for a reasonable jury to find that DSHS's breach of its duty to protect the children was a proximate cause of their injuries. Therefore, the trial court erred in entering judgment as a matter of law under CR 50 on the children's claims regarding the pre-adoption period.

CONCLUSION

We hold that DSHS has a duty to exercise ordinary care to protect foster children on the basis of its special relationship with such children. We hold also that the evidence, viewed in the light most favorable to KMH, HBH, SAH, KEH, and JBH, supplied a legally sufficient evidentiary basis for a reasonable jury to find by a preponderance that DSHS breached that duty during the pre-adoption period and proximately caused at least some of the children's damages. Consequently, we reverse the trial court's CR 50 ruling and remand for trial on the claims of negligent investigation and failure to take appropriate protective action during the period before adoption.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

II. SPECIAL VERDICT FORM

The children argue that the trial court erred by providing a special verdict form that asked the jury to segregate damages in an improper way. We agree, but hold that the error was harmless.

We review errors of law in jury instructions de novo. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). A trial court's instructions to the jury are legally sufficient if they properly inform the jury of the applicable law, are not misleading, and permit each party

to argue its theory of the case as to any matters the jury will decide. *Boyd v. Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 11, 349 P.3d 864 (2015). However, even where the trial court erred in instructing the jury, we reverse only if the error prejudiced a party below. *Hue*, 127 Wn.2d at 92.

Jury instruction 19 required the jury to determine what percentage of total negligence was attributable to the negligence of DSHS and what percentage was attributable to the negligence of the Hamricks, and stated that the total must equal 100 percent. Further, in calculating any damage award, the jury was instructed to segregate any damages caused by such negligence from damages caused solely by the Hamricks' *intentional* acts. Instruction 21 stated:

> In calculating any damage award, you must not include any damages that were caused by the intentional acts of Drew Anne Hamrick and/or Scott Hamrick and not proximately caused by negligence of State of Washington/DSHS, nonparty Trey Hamrick, and/or nonparty Kelly Hamrick. Any damages caused solely by the intentional acts of Drew Ann Hamrick and/or Scott Hamrick and not proximately caused by negligence of State of Washington/DSHS, Trey Hamrick and/or Kelly Hamrick must be segregated from and not made part of any damage award against State of Washington/DSHS.

CP at 632. The children agree that instructions 19 and 21 correctly state the law.

Questions 1 through 5 of the trial court's verdict form involved whether DSHS was negligent and question 6 involved whether the Hamricks were negligent. Question 7 then asked the jury to find the amount of each child's damages. Based on instruction 21, the jury was not allowed to include in this amount any damages caused solely by the Hamricks' intentional acts. Consistent with instruction 19, question 8 required the jury to determine what percentage of total negligence was attributable to the negligence of DSHS and what percentage was attributable to the negligence of the Hamricks, and stated that the total must equal 100 percent. Again, the Plaintiffs do not object to this series of instructions.

Next, question 9 asked the jury to determine whether the Hamricks' intentional acts were a proximate cause of *any* of the children's damages. Question 10 then asked the jury:

> What percentage of each plaintiff[s'] damages were caused by . . . all of the intentional conduct of [Scott and Drew Ann Hamrick], . . . and what percentage of plaintiff[s'] damages were caused by all of the negligent conduct you identified in your answers to Question No. 7? Your answer for each plaintiff must total 100%.

CP at 639. Question 10 also asked the jury to allocate percentages to either "[d]amages from intentional conduct" or "[d]amages from negligent conduct," with the total equaling 100 percent. CP at 640.

The children argue that including question 10 in the verdict form misled the jury as to the segregation of damages by indicating that it could allocate some of the negligence damages already segregated under instruction 21 to the Hamricks' intentional torts. We agree.

We read jury instructions as a whole when determining sufficiency. *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 379-80, 199 P.3d 499 (2009). We believe that here the instructions read as a whole were misleading. Instruction 21 correctly required the jury to segregate the damages caused by DSHS's negligence from the damages "caused *solely* by the [Hamricks'] intentional acts." CP at 632 (emphasis added). This instruction directed the jury response to question 7 of the verdict form, requiring the jury to exclude damages caused solely by the Hamricks' intentional acts in determining the amount of the children's damages. But question 10 then allowed for a second segregation of those *negligence-related* damages between damages "caused by all of the negligent conduct" and those "caused by . . . all of the [Hamricks'] intentional conduct." CP at 638-40.

The State argues that question 10 simply presented a step-by-step method of implementing instruction 21. Read in the context of instruction 21, however, question 10 created

a significant risk that the jury would segregate damages twice. We hold that the jury instructions and verdict form questions as a whole were misleading as to the segregation of damages.[7]

However, KMH, HBH, SAH, KEH, and JBH have shown no resulting prejudice. An erroneous jury instruction is prejudicial if it affects the outcome of the trial. *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 278, 135 P.3d 955 (2006). We will not presume prejudice if an instruction was misleading but did not misstate the law. *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015). Here, because the jury found that DSHS was not negligent, it assigned no damages at all. It could not have been misled by the damage assignment portion of the special verdict form because it did not reach that portion of the form. Any error in that unused portion of the form had no effect on the outcome of the case.

Accordingly, we hold that the trial court committed no reversible error regarding the claims that went to the jury in issuing the special verdict form. However, on remand the trial court's verdict form should be consistent with our analysis above.

III. EXCLUSION OF WITNESS TESTIMONY

The children argue that the trial court erred by excluding the testimony of two late-disclosed witnesses without performing the analysis required by *Jones v. City of Seattle*, 179 Wn.2d 322, 314 P.3d 380 (2013). We agree that the trial court erred but hold that the error was harmless.

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[7] Question 9 also is inconsistent with instruction 21. Instruction 21 requires segregation of damages caused *solely* by the Hamricks' intentional conduct and damages caused by DSHS's negligence. Question 9 asked the jury to determine whether the Hamricks' intentional acts were *a* proximate cause of any of the children's damages. Under instruction 21, the jury should have been asked whether the Hamricks' intentional acts were the *sole* proximate cause of any of the children's damages

We review a trial court's decision to exclude witness testimony for an abuse of discretion. *Id.* at 337. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Peralta v. State*, 191 Wn. App. 931, 951, 366 P.3d 45 (2015), *review granted in part*, 185 Wn.2d 1027 (2016). The erroneous exclusion of witnesses without performing the analysis required by *Jones* and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), has been held to be subject to harmless error analysis. *Jones*, 179 Wn.2d at 338. An error is harmless, and therefore not grounds for reversal, if it does not affect the outcome of the case. *Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004).

Under *Jones*, a trial court may not exclude late-disclosed witnesses as a sanction without first "explicitly consider[ing] whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial." *Id.* at 338; *see also Burnet*, 131 Wn.2d at 484. The trial court need not invoke *Jones* or *Burnet* specifically, but the record must show that the trial court evaluated the necessary elements before excluding the testimony. *Jones*, 179 Wn.2d at 344.

Here, the trial court did not conduct the evaluation required by *Jones* and *Burnet*. In ruling to exclude the testimony, the court reasoned as follows:

> [I]f you were intending on calling them as witnesses, they could have been disclosed at least a month ago; so I'm not going to allow them to testify at this time. I don't think that their testimony is going to add materially to anything. We already know the subject of the 2009 referral, and I would assume at some point we're going to have a caseworker that's going to be testifying about that referral and why they did or did not do anything. All right? So I don't think we need either [of the witnesses] to add anything to that; so at this point, I'm not going to allow [them], as lay witnesses, to testify.

RP (Feb. 5, 2015) at 26. This ruling did not address whether a lesser sanction would suffice, whether the late disclosure was willful or deliberate, or whether the late disclosure prejudiced the State in its trial preparation. Therefore, the trial court erred under *Jones*.

However, the children have made no showing—in fact, they do not even argue—that the exclusion prejudiced them. The record shows that the witnesses would have testified to matters related to a 2009 referral to CPS. The evidence presented at trial showed that that particular referral did not result in any mandate for DSHS to investigate. Consequently, the trial court dismissed all claims based on DSHS's inaction in light of that referral, and the children have not appealed that dismissal. Given the dismissal and the absence of a showing of prejudice from excluding the witnesses, we hold that the trial court's failure to follow *Jones* did not prejudice KMH, HBH, SAH, KEH, or JBH and constituted harmless error.

IV. COMMENTS REGARDING PERSONAL POLITICAL LEANINGS

The children argue that the trial court violated their rights to a trial presided over by a fair and impartial judge when it discussed matters of personal political preference. We disagree.

The children base their argument on the appearance of fairness doctrine. Under that doctrine, they must show actual or perceived bias to establish a violation of their right to a fair trial. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 154, 317 P.3d 1074, *review denied*, 181 Wn.2d 1008 (2014). The critical question is whether the proceedings would have appeared unfair to a reasonably prudent and disinterested person. *Id.* We review appearance of fairness claims de novo. *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010).

According to SAH's declaration in support of the children's motion for a new trial, the presiding judge discussed the lifelong trajectory of her political views and described political

disagreements with another judge. Yet the record shows no nexus between these comments and the parties or the issues to be decided in the case. It is unclear how commentary regarding political matters would have produced any actual or potential bias in a negligence case related to the abuse of foster children. No reasonably prudent, disinterested person would infer from these comments by the trial court that it was biased as to the issues before it.

The children also argued in the superior court that "it is clear that members of the jury likely over[]heard the Court's comments and was [*sic*] likely influenced by it in some unknown, but prejudicial, way." CP at 676. They speculated that jurors may have decided the case according to their own political biases rather than the evidence presented in the case and the instructions of the court as to the applicable law. However, the jury was properly instructed to find the facts of the case based only on the evidence presented, and we presume that the jurors followed those instructions. *Peralta*, 191 Wn. App. at 950.

Speculation as to jurors' motivations does not rebut this presumption and is no substitute for a showing of actual or potential bias. The children have not shown that the trial court's comments produced any actual or perceived bias on the part of any jurors.

V. CUMULATIVE ERROR

The children also argue that the cumulative effects of the preceding claimed errors in aggregate violated their right to a fair trial. We disagree.

The children cite no authority for applying the cumulative error doctrine in a civil case. In criminal cases our courts have held that cumulative error may warrant reversal even where the trial court's individual errors were harmless. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). This is the case "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair

trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial." *Cross*, 180 Wn.2d at 690.

Assuming that the doctrine applies in civil cases, the children have not shown cumulative error warranting reversal. The trial court erred in instructing the jury as to the segregation of damages and in excluding two witnesses as a sanction for the children's late disclosure of those witnesses. However, there is no clear cumulative impact from those errors. The children argue that "key rulings were decided on the fly without any serious consideration as to the controlling law and/or admitted evidence." Br. of Appellant at 33-34. This addresses a commonality of causation—and a highly abstracted one—but does not speak to the cumulative effects of those errors.[8]

The children have not shown that cumulative error denied them a fair trial.

CONCLUSION

We hold that DSHS has a duty to exercise ordinary care to protect foster children on the basis of its special relationship with such children. We hold also that the evidence, viewed in the light most favorable to the children, supplied a legally sufficient evidentiary basis for a reasonable jury to find by a preponderance that DSHS breached that duty during the pre-adoption period and proximately caused at least some of the children's damages. Consequently, we

[8] The children seem to argue that they suffered generalized prejudice because the trial court's CR 50 rulings forced them to give a closing argument that did not mirror their opening statement, harming their attorneys' credibility in the eyes of the jury. However, a change in legal argument is an ineluctable result of granting a CR 50 motion on some but not all claims. In addition, the jury was properly instructed to base its verdict only on the evidence presented and the instructions of the court. We presume that the jurors followed those instructions, *Peralta*, 191 Wn. App. at 950, and nothing in the record or briefing shows that they did not.

reverse the trial court's CR 50 ruling and remand for trial on the claims of negligent investigation and failure to take appropriate protective action during the period before adoption. However, we disagree with the children's other arguments and affirm the trial court's judgment as to the 2008 and 2010 CPS referrals.

Bjorgen, C.J.

BJORGEN, C.J.

We concur:

Johanson, J.

JOHANSON, J.

Maxa, J.

MAXA, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

April 18, 2017

HBH; SAH; and TREY HAMRICK, litigation guardian ad litem on behalf of KEH, JBH, and KMH, Appellants, v. STATE OF WASHINGTON, Respondent, And TOWN OF EATONVILLE, Defendant.	No. 47438-7-II ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING FILED OPINION

The Respondent filed a motion for reconsideration of the opinion filed on December 13, 2016. After review, it is hereby

ORDERED that Respondent's motion for reconsideration is denied; it is further

ORDERED that the filed opinion in this matter is amended as follows:

A. On page 16, line 24, after the sentence ending with "intervened," the following language is inserted:

> Whether or not there was evidence that Woolridge supervised the placement of children other than HBH and SAH, a jury could reasonably infer that intervention by Woolridge would have led to protection of the other children against subsequent abuse.

The next sentence is amended to read:

> This also provides a sufficient basis for a finding of legal causation.

B. On page 2, line 17, the following sentence is deleted:

> Accordingly, we reverse the trial court's CR 50 ruling and remand for trial on the claim of negligent failure to investigate and to appropriately protect foster children.

On page 2, line 17, the following language is inserted in its place:

> Accordingly, we reverse the trial court's CR 50 ruling and remand for trial.

C. On page 17, line 11, the following sentence is deleted:

> Consequently, we reverse the trial court's CR 50 ruling and remand for trial on the claims of negligent investigation and failure to take appropriate protective action during the period before adoption.

On page 17, line 11, the following language is inserted in its place:

> Consequently, we reverse the trial court's CR 50 ruling and remand for trial.

D. On page 24, line 19, the following sentence is deleted:

> Consequently, we reverse the trial court's CR 50 ruling and remand for trial on the claims of negligent investigation and failure to take appropriate protective action during the period before adoption.

On page 24, line 19, the following language is inserted in its place:

> Consequently, we reverse the trial court's CR 50 ruling and remand for trial.

IT IS SO ORDERED.

Bjorgen, C.J.

We concur:

Johanson, J.

Maxa, J.