FILED
SUPREME COURT
STATE OF WASHINGTON
2/8/2019 11:35 AM
BY SUSAN L. CARLSON
CLERK

No. 95184-5

SUPREME COURT
OF THE STATE OF WASHINGTON

C.L., a sexual abuse victim, and Simeon J. Osborn as litigation guardian for S.L., a minor child and sexual abuse victim,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and JANE and JOHN DOES, 1-100,

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS RE: *H.B.H. v. STATE*

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

DEARIE LAW GROUP, P.S.

By: Raymond J. Dearie
WSBA No. 28792

2025 First Avenue, Suite 1200
Seattle, WA 98121-3119
(206) 239-9920

Attorneys for Respondents

TABLE OF CONTENTS

A. Introduction. 1

B. Supplemental Argument. 3

1. *H.B.H.* held the State has a special relationship to children placed in foster care that requires the exercise of reasonable care for their protection, rejecting the arguments advanced in the State's petition for review in this case. 3

2. *H.B.H.* confirms the State's duty to use reasonable care before placing C.L. and S.L in a dangerous foster care setting. 5

3. *H.B.H.* supports the Court of Appeals' holding that the State's duty of care arises from its statutory obligations to use reasonable care when licensing foster homes and preparing adoption placement reports. 7

4. The State breached its duty in licensing the Langes as foster parents. CPS never made a determination that Colten Lange's sexual abuse of a relative was "unfounded." 9

C. Conclusion. 10

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Babcock v. State,
116 Wn.2d 596, 809 P.2d 143 (1991).. 6

Bernethy v. Walt Failor's, Inc.,
97 Wn.2d 929, 653 P.2d 280 (1982).. 8

C.J.C. v. Corp. of Catholic Bishop of Yakima,
138 Wn.2d 699, 985 P.2d 262 (1999)..7

C.L. v. Dep't of Soc. & Health Servs.,
200 Wn. App. 189, 402 P.3d 346 (2017) ....*passim*

H.B.H. v. State,
197 Wn. App. 77, 387 P.3d 1093 (2016),
aff'd, 192 Wn.2d 154, 429 P.3d 484 (2018) ....*passim*

Linville v. State,
137 Wn. App. 201, 151 P.3d 1073 (2007) 9

McKown v. Simon Prop. Grp., Inc.,
182 Wn.2d 752, 344 P.3d 661 (2015).. 6

N.L. v. Bethel School Dist.,
186 Wn.2d 422, 378 P.3d 162 (2016).. 6

STATUTES

RCW 5.40.050 9

RCW 26.33.010 8

RCW 26.33.190 2

RCW 26.44.050 3-4

RCW 74.15.010 .... 2, 8

RCW 74.15.030 9

RULES AND REGULATIONS

RAP 13.4 10

WAC 110-148-1370 2

WAC 388-15-005 10

WAC 388-148-1370 2

WAC 388-149-1320 8

WSR 18-14-078 2

OTHER AUTHORITIES

Restatement (2nd) Torts § 315 4-5

A. Introduction.

Respondents C.L. and S.L., through their litigation guardian Simeon Osborn, submit this supplemental brief to address this Court's recent decision in *H.B.H v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018). *H.B.H.* rejected the arguments the State raises in its petition for review and supports the Court of Appeals' decision that the "evidence in this case establishes beyond dispute the department's protective relationship with the two plaintiffs and the department's knowledge that a home in which a sexual predator resides is dangerous to children." *C.L. v. Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 198, ¶ 19, 402 P.3d 346 (2017).

H.B.H. disposes of the State's argument that it had no duty of care in placing these vulnerable dependent children into a dangerous foster family and then approving their adoption by that same family where they fell victim to sexual abuse. The Court of Appeals' holding in this case, recognizing the "department's protective relationship with the two plaintiffs and the department's knowledge that a home in which a sexual predator resides is dangerous to children," 200 Wn. App. at 198, ¶ 19, is entirely consistent with *H.B.H.'s* holding that the State has a protective special relationship with dependent children. 192 Wn.2d at 169-73, ¶¶ 26-30.

Moreover, the State's statutory duty "[t]o safeguard the health, safety, and well-being of children" when licensing foster homes, RCW 74.15.010(1), including the duty to assess "[t]he physical and mental health of all members of the household," WAC 388-148-1370,[1] supports the Court of Appeals' decision holding the State to a duty to investigate before placing the girls in an abusive foster home. 200 Wn. App. at 197, ¶ 18. The State's contention that it had a mandatory obligation to grant the Langes a foster home license while ignoring their son's prior referral to law enforcement for sex abuse is without merit. Moreover, this argument ignores that the State breached a duty that has nothing to with foster care licensing – the statutory duty to prepare an preplacement report that "include[s] a recommendation as to the fitness" of prospective adoptive parents, which "shall include an investigation of the home environment" and "family life" of the prospective adoptive parents. RCW 26.33.190(2). 200 Wn. App. at 197, ¶ 18.

The Court of Appeals correctly held that the State breached its duty of care based on undisputed evidence from its own caseworker that the State ignored its own documented referral of the Langes' son

---

[1] WAC 388-148-1370 was recodified as WAC 110-148-1370, effective July 1, 2018. WSR 18-14-078.

for sexually abusing a minor relative to law enforcement. Its decision in this case is entirely consistent with *H.B.H.*

B. Supplemental Argument.

1. *H.B.H.* held the State has a special relationship to children placed in foster care that requires the exercise of reasonable care for their protection, rejecting the arguments advanced in the State's petition for review in this case.

H.B.H. disposes of the State's arguments for further review in this case. This Court "affirm[ed] the Court of Appeals' holding that DSHS stands in a special relationship with foster children in its charge . . . . [that] supports recognition of a duty in tort to protect foster children from foreseeable harms at the hands of foster parents." *H.B.H.* 192 Wn. 2d at 178, ¶ 38; *see also H.B.H. v. State*, 197 Wn. App. 77, 92, ¶¶ 35-36, 387 P.3d 1093 (2016). The Court of Appeals decision in this case favorably cited Division Two's *H.B.H.* decision. *C.L.*, 200 Wn.. App. at 198, ¶ 20. By affirming Divison Two's decision, this Court's decision in *H.B.H.* rejects the arguments the State makes here.

First, this Court in *H.B.H.* "reject[ed] the State's argument that . . . . liability must be limited to the 'implied cause of action in RCW 26.44.050'" for negligent investigation of child abuse. 192 Wn.2d at 177, ¶ 37. That is the very argument raised by the State below, and correctly rejected by the Court of Appeals in this case.

C.L., 200 Wn. App. at 197, ¶ 18 ("The department's attempt to confine the plaintiffs to a cause of action for negligent investigation of child abuse is unsupported."); App. Br. 22 ("The only actionable claim that Washington appellate courts have recognized from child welfare statutes is a claim for negligent investigation premised upon and limited to the confines of RCW 26.44.050," which requires the State to investigate allegations of child abuse).

Second, this Court in *H.B.H.* also rejected the State's argument, first made in its petition for review in this case, that the State's duty of protection is temporally limited to when it has actual "control and custody" of dependent children, and terminates once the child is placed in foster care. (Petition 11-16) Because "the State, through DSHS, retains legal custody of the child throughout the duration of the dependency, and the State alone controls the placement of the child," *H.B.H.* 192 Wn.2d at 174, ¶ 33, "entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship." 192 Wn.2d at 173, ¶ 32.

Third, this Court in *H.B.H.* disposed of another argument first raised here by the State in its petition – that the State's "sovereign immunity bars imposition of the [*Restatement (2nd) Torts*] § 315(b)

duty on DSHS foster care operation" because "DSHS's operation of the foster care system has no private sector analog." (Petition 16-18) To the contrary, "[t]he State cannot shield itself from liability by simply asserting that its role in the foster care system has no direct counterpart in the private sector." *H.B.H.,* 192 Wn.2d at 180, ¶ 43.

2. *H.B.H.* confirms the State's duty to use reasonable care before placing C.L. and S.L in a dangerous foster care setting.

H.B.H. establishes that the State "stands in a special relationship with foster children in its charge" and has a corresponding "duty in tort to protect foster children from foreseeable harms at the hands of foster parents," based upon *Restatement* § 315(b). 192 Wn.2d at 178, ¶ 38. This Court in *H.B.H.* thus ratified the Court of Appeals' holding in this case that by exercising its power to obtain an adjudication of C.L. and S.L. as dependent children and place them in foster care, the State had a common law "duty to protect [them] from sexual assault by a third party" based upon "a special relationship . . . that gives [them] a right to protection." *C.L.,* 200 Wn. App. at 197, ¶ 19.

The State attempts to limit *H.B.H.* to its facts, arguing that it can no longer face liability for foreseeable harm if the harm occurs after a dependency ends. This argument is meritless, as it ignores

this Court's holding that its "special relationship supports recognition of a duty in tort to protect foster children from *foreseeable* harms at the hands of foster parents." *H.B.H.,* 192 Wn.2d at 178, ¶ 38 (emphasis added). This Court in *H.B.H.* thus recognized that foreseeability of harm defines the scope of a defendant's duty of care. 192 Wn.2d at 176, ¶ 36; *see McKown v. Simon Prop. Grp., Inc.,* 182 Wn.2d 752, 764, ¶¶ 14-15, 344 P.3d 661 (2015). The State cannot credibly argue that sexual abuse is not a foreseeable result of placing a dependent child in a foster home with an accused sexual predator – a risk that lies at the heart of its duty to perform a reasonable investigation. *See Babcock v. State,* 116 Wn.2d 596, 622, 809 P.2d 143 (1991).

The State's contention that it no longer owed a duty to C.L. and S.L. when they were sexually assaulted by Dillon and Colten Lange ignores that its duty arose – and was breached – when the girls were under the State's protective custody when the State made its placement decision and when it recommended the girls' adoption into the Langes' abusive home. Whether they were sexually abused before or after the termination of the dependencies is as irrelevant as the fortuity that the plaintiff was raped by another student off, rather than on, campus in *N.L. v. Bethel School Dist.*, 186 Wn.2d 422, 435,

378 P.3d 162 (2016) ("the mere fact the injury occurs off campus is not by itself determinative" when the harm itself is foreseeable).[2] *Accord C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (church owed duty to prevent foreseeable abuse by deacon, regardless whether abuse occurred on church grounds or during church activities).

3. *H.B.H.* supports the Court of Appeals' holding that the State's duty of care arises from its statutory obligations to use reasonable care when licensing foster homes and preparing adoption placement reports.

The Court of Appeals here correctly relied upon numerous statutory directives, enacted for the benefit of foster children and prospective adoptees, in rejecting the State's argument that it owed no duty to C.L. and S.L. "A number of statutes and regulations direct the department to protect children by doing a careful evaluation of a foster or adoptive home before recommending placement." 200 Wn.

---

[2] The State's factual contention concerning the timing of the abuse is, in any event, not supported by the record. Relying on C.L's November 17, 1996 birthdate (CP 1110) and the August 24, 2004 adoption (CP 612), the State argues that C.L. suffered no injury until *after* she was adopted by the Langes. C.L. testified that she was "like" or "about" eight years old when first assaulted by Colten Lange, but that it was "tough to remember" because she has "tr[ied] to forget" the sexual abuse she suffered. (CP 457, II RP 113-14) Any fact issue as to when C.L. first was assaulted is immaterial, because the State approved her placement with and adoption by the Langes while she was in the State's protective care as a dependent child.

App. at 197, ¶ 18 (citing RCW 26.33.010; RCW 74.15.010; WAC 388-149-1320, - 1370). Each of these provisions imposes upon the State a duty to investigate the fitness of a prospective foster or adoptive family prior to placement. (Answer to Petition 5, 10-11)

The Court of Appeals correctly held that these "[s]tatutory imperatives as well as strong public policy grounds support recognition of a cause of action" based on the "special relationship between the department as a placement agency and dependent children, allowing such children to seek a tort remedy when they are damaged by the department's negligent failure to uncover pertinent information about their prospective adoptive home." 200 Wn. App. at 197, ¶ 18. This Court in *H.B.H.* cited some of these same statutes in holding that the State's protective relationship with dependent children gives rise to a duty that is enforceable in tort. 192 Wn.2d at 166-67, ¶ 22 ("In addition to its initial duty to investigate foster homes for licensing purposes, DSHS has a continuing duty to investigate allegations of abuse and to monitor the dependent child in the foster home," citing RCW 74.15.010).

A duty may arise either from common law principles, from a statute, from a regulation, or, as in this case, from all three. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982);

Linville v. State, 137 Wn. App. 201, 208, ¶ 16, 151 P.3d 1073 (2007); RCW 5.40.050. The Court of Appeals' decision is entirely consistent with *H.B.H.* and presents no grounds for review.

4. The State breached its duty in licensing the Langes as foster parents. CPS never made a determination that Colten Lange's sexual abuse of a relative was "unfounded."

H.B.H. has no bearing on the Court of Appeals' holding that the State breached its duty to perform a reasonable investigation *before* licensing the Langes as foster parents, *before* approving the girls' foster placement, and *before* recommending their adoption into the Langes' abusive home. (CP 318-19, 549, 581) The State breached its duty of care when it placed C.L. and S.L. in a foster home where they became foreseeable victims of sexual abuse and, again, when it approved their adoption into that family. *C.L.,* 200 Wn. App. at 199-200, ¶ 24 ("a simple computer search for any member of the Lange family would have revealed the sexual abuse history of Dillon Lange within less than ten minutes"). The Court of Appeals properly dismissed as "irrelevant" the State's argument that RCW 74.15.030 compelled it to license the Langes as foster parents. 200 Wn. App. at 202, ¶ 32.

As the Court of Appeals held, "the adoption was not an administrative proceeding in which the Langes were contesting the department's refusal to issue them a foster home license." 200 Wn.

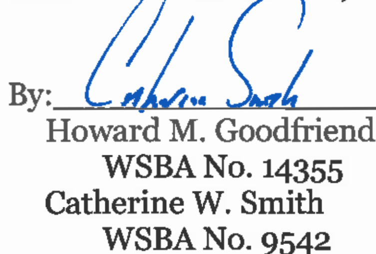
App. at 202, ¶ 32. The State's reiteration of this argument as a ground for review also ignores its negligent failure to find in its own files the CPS referral to law enforcement for Colten Lange's sexual abuse of a cousin before recommending the girls' adoption, and its caseworker's admission that she would not have placed the girls in the Lange home for adoption had she seen the referral. (CP 317-19) In any event, as discussed in the Answer, CPS never made a finding that the accusation was "unfounded" within the meaning of WAC 388-15-005. (Answer 4) CPS in fact did not perform *any* investigation concerning the referral; it instead referred the accusation directly to the Whatcom County Sheriff. (CP 573-75, 732)

C. Conclusion.

The Court of Appeals' decision is wholly consistent with *H.B.H.* and presents no issue of substantial public interest. RAP 13.4(b). This Court should deny the petition.

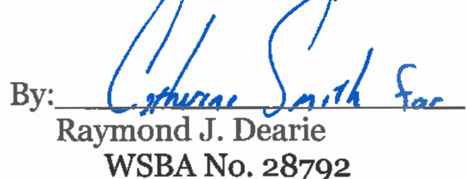
Dated this 8th day of February, 2019.

SMITH GOODFRIEND, P.S.



By:________________________
Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

DEARIE LAW GROUP, P.S.



By:________________________
Raymond J. Dearie
WSBA No. 28792

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 8, 2019, I arranged for service of the foregoing Supplemental Brief of Respondents Re: *H.B.H. v. STATE*, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Raymond J. Dearie Dearie Law Group, P.S. 2025 First Avenue, Suite 1200 Seattle, WA 98121-2510 rdearie@dearielawgroup.com aglassman@dearielawgroup.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Allison M. Croft Attorney General's Office 800 Fifth Ave Ste 2000 Seattle, WA 98104-3188 AllisonC@ATG.WA.GOV TOROlyEF@atg.wa.gov jodie@atg.wa.gov shaunnac@atg.wa.gov cathyw@atg.wa.gov	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Allyson Zipp Attorney General's Office 7141 Cleanwater Lane SW Olympia WA 98504-0126 allysonz@atg.wa.gov	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 8th day of February, 2019

Sarah N. Eaton

SMITH GOODFRIEND, PS

February 08, 2019 - 11:35 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95184-5
Appellate Court Case Title:	C.L. and Simeon J. Osborn as litigation guardian for S.L. v. State of Washington
Superior Court Case Number:	14-2-02833-1

The following documents have been uploaded:

- 951845_Briefs_20190208113326SC923197_2972.pdf
  This File Contains:
  Briefs - Respondents Supplemental
  The Original File Name was 2019 02 08 Supp Brief of Respondents Re HBH v State.pdf

A copy of the uploaded files will be sent to:

- AllisonC@ATG.WA.GOV
- SHAUNNAC@ATG.WA.GOV
- aglassman@dearielawgroup.com
- allysonz@atg.wa.gov
- atgmitortacef@atg.wa.gov
- cathyw@atg.wa.gov
- howard@washingtonappeals.com
- jodie@atg.wa.gov
- rdearie@dearielawgroup.com
- tori@washingtonappeals.com
- torolyef@atg.wa.gov

Comments:

Sender Name: Sarah Eaton - Email: sarah@washingtonappeals.com
Filing on Behalf of: Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20190208113326SC923197