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NO. 68744-1-I

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

KATHIE COSTANICH,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS), SANDRA DURON and JOHN DOE DURON, CAROL SCHMIDT and JOHN DOE SCHMIDT, BEVERLY PAYNE and JOHN DOE PAYNE, JAMES BULZOMI and JANE DOE BULZOMI, ROBERT STUTZ and JANE DOE STUTZ, INGRID McKenny and JOHN DOE McKenny,

Respondent.

BRIEF OF APPELLANT

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INTRODUCTION

For over 20 years, Kathie and Ken Costanich provided unsurpassed foster-care for some of the neediest and most difficult children in the system. They were so successful with brain injured, abused, addicted, and medically fragile children, that DSHS regularly placed more children in their care when they were already at legal capacity. This Court, the Ninth Circuit, and DSHS have recognized that the Costanich home was an invaluable resource.

Over eleven years ago, DSHS began investigating child-abuse allegations made by one of the foster-children in Costanich's care. The child was known for storytelling, and investigations into claims like his were routine. But DSHS's investigation was so wanton that the Ninth Circuit concluded that DSHS made material misrepresentations and may have deliberately fabricated evidence.

DSHS falsely called Costanich an abuser, they took her license, and they took her kids – they cavalierly destroyed her family. Yet the trial court concluded that Costanich is remediless, dismissing on summary judgment her negligent-investigation and outrage claims. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erroneously dismissed Costanich's negligent-investigation claim on summary judgment.[1] CP 1626-43.

2. The trial court erroneously dismissed Costanich's outrage claim on summary judgment. CP 1087-91.

3. The trial court erroneously awarded DSHS $200 in costs. CP 1651.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court erroneously dismiss Costanich's negligent-investigation claim on summary judgment, where the court: (a) agreed that there are fact questions as to whether DSHS's investigation was harmful; but (b) ruled, as a matter of law, that DSHS did not make a harmful placement decision, although its negligent and outrageous conduct plainly coerced Costanich to give up her daughters temporarily, fearing that she would otherwise lose them forever?

2. Did the trial court erroneously dismiss Costanich's outrage claim on summary judgment, where the Ninth Circuit has already

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[1] The trial court entered many findings and conclusions, which are "superfluous and need not be considered," given this Court's *de novo* review. ***Shoulberg v. Public Utility Dist. No. 1 of Jefferson County***, 169 Wn. App. 173, 177 n.1, 280 P.3d 491 (2012). Thus, Costanich does not assign error to these findings.

determined that DSHS made material misrepresentations and may have intentionally fabricated evidence during its investigation, which, at a minimum, raises fact questions as to whether DSHS's conduct was outrageous?

3. Should this Court reverse the statutory-cost award, if Costanich prevails on either or both summary-judgment arguments?

STATEMENT OF THE CASE

A. Since 1983, Costanich provided unsurpassed care for some of the neediest and most difficult foster children in the system.

Kathy and Ken Costanich ("Costanich") had been foster parents since 1983, "for some of the neediest and most difficult foster children in the system." ***Costanich v. Dep't of Soc. & Health Servs.***, 138 Wn. App. 547, 551, 156 P.3d 232 (2007) *rev'sd in part on other grounds*, ***Costanich v. DSHS,*** 164 Wn.2d 925, 927, 194 P.3d 988 (2008).[2] In July 2001, Costanich was raising six children, three male foster children, K (age 15), J (age 12), and P (age 10); one male under a dependency guardianship, F (age 17); and two sisters also under dependency guardianships, E (age 8),

[2] Our Supreme Court reviewed only the trial court's attorney-fee award.

and B (age 4).[3] "All of these children had been victims of abuse or neglect, and many had severe behavioral, developmental, and medical problems. ***Costanich***, 138 Wn. App. at 552. Costanich specialized in violent, sexually aggressive children, and medically fragile infants. 138 Wn. App. at 552. She provided "unsurpassed" care. *Id.*

DSHS described the Costanich home as a "unique and valuable resource . . . unsurpassed by any foster home in the state." ***Costanich***, 138 Wn. App. at 552. Costanich was a DSHS trainer and the president of Foster Parents of Washington State ("FPAWS"). *Id.* She has received the Foster Parent of the Year Award. CP 1511. She was so successful at bringing together the unique mix of sexually aggressive boys and medically fragile infants that DSHS placed more medically fragile infants in her care even when she had reached her legal limit. CP 1512.

In summer 2001, DSHS's investigator, Sandra Duron, began investigating fourteen-year-old K's statements to his therapist, Richard Crabbe, alleging that Costanich abused some of the

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[3] A "Dependency guardian" is "appointed by the court . . . for the limited purpose of assisting the court in the supervision of the dependency," where a legal "Guardian . . . has the legal right to custody of the child pursuant to such appointment." RCW 13.34.030(5) & (8).

children in her care. 138 Wn. App. at 552; CP 110. K had been with Costanich for almost two years. CP 1514. Before coming to Costanich, K had been in 20 different homes, none for more than nine months. *Id.* K was a Sexually Aggressive Youth ("SAY"), and was "very angry." *Id.* But K was adjusting well in Costanich's care, and was making friends at school. *Id.*

Ten-year old P had recently arrived. CP 1514. Before arriving, P had acted out sexually and was being evaluated to determine whether he was a SAY. *Id.* P arrived anxious, worried, and scared. *Id.* But P responded well to special one-on-one attention from Costanich, and was soon laughing, joking, and hugging her. *Id.*

Twelve-year old J had been with Costanich a little more than four years. CP 109, 1513. J was a SAY, who had been sexually abused by his family. CP 1513. He was brain damaged, developmentally delayed, and "very angry." *Id.* But J had been able to settle down in the Costanich home, grew to love his big-brother role, and was particularly protective of E and B. *Id.*

Seventeen-year-old F had been with Costanich for six years. CP 1513. He too was thriving in her care. CP 1510. Although F knew that his parents had abandoned him, he still hoped they

would return. CP 1513. He had been in "the system" long enough to understand that they had not revoked their parental rights, so could still come back for him. *Id.*

Nine-year-old E had been with Costanich since the police removed her from her drug and alcohol addicted mother when she was just 6-months old. CP 674-75, 819, 1512. E's mother abandoned her. CP 1512. E is brain damaged and suffers from fetal-alcohol syndrome. *Id.* When she first arrived, she was unable to sit up and her head was flat from lying unattended in her crib for days. CP 1512-13.

E's four-year-old sister B had been with Costanich since she was just 4 days old. CP 819, 1513. The girls' birth mother asked DSHS to place B with Costanich. CP 1513. Both girls were doing very well in Costanich's care. CP 1460, 1464, 1467.

E and B are both members of the Kalispel Indian Tribe, as is their birth-mother. CP 679. With the Tribe's (and the mother's) permission, the Costanichs became E's dependency guardians in January 1996, and became B's dependency guardians in July 1998. CP 675. The guardianship order required Costanich to (1) provide the mother with visitation; (2) consult the Tribe and the mother on cultural and religious issues; and (3) maintain contact

with the Tribe. *Id.* Costanich wanted to adopt the girls, but the Tribe would not allow it. CP 819; ***Costanich v. DSHS***, 627 F.3d 1101, 1106 (9th Cir. 2010).

B. Investigations are common and Costanich thought nothing of it at first – she was wrong.

DSHS was more than familiar with this type of investigation. CP 1515. Such investigations were common given the children's significant emotional and behavioral issues. *Id.* In fact, K, whose accusations formed the basis of the investigation, was known for his "storytelling." CP 1514.

Costanich did not think anything of it at first. CP 1515. She encouraged DSHS investigators Sandra Duron and Ingrid McKinney to thoroughly investigate. *Id.* She was used to people coming in and out – case managers, lawyers, Court Appointed Special Advocates ("CASAs"), biological parents and other foster parents and children were always welcome in the home. CP 1511, 1514.

Duron informed E and B's social worker, Shelia Hunter, that Costanich was under investigation. CP 447, 1562. Hunter went to Costanich's home and saw nothing that concerned her. CP 1539. Hunter's supervisor, Edie Nelson, also found nothing concerning

the girls' safety. CP 291, 1565. She noted that Costanich kept the girls connected to their culture; voluntarily participated in foster-parent events, indicating she had nothing to hide; and always cooperated with DSHS. CP 1565-67. Home visits had never raised any concern. CP 1567. Thus, Hunter and Nelson concluded that E and B should remain with Costanich. CP 290-93, 1562, 1565.[4]

Nelson's supervisor, Faye Bates, believed that the girls should be removed, so transferred the matter out of Nelson's unit in November 2001. CP 292-93. Hunter was instructed not to speak to the replacement social worker, Jackie Timentwa-Wilson, or anyone else involved in the investigation. CP 295, 1487. This was contrary to DSHS procedure requiring social workers to communicate to bring a replacement social worker up to speed. *Id.* From "day one" Timentwa-Wilson's objective was to remove E and B. CP 917.

[4] Hunter and Nelson recommended a "corrective action plan," which would require Costanich to stop using derogatory language. CP 1562, 1567.

C. DSHS began removing Costanich's children without even speaking to their doctors, therapists, aids, social workers or others.

During its five-month investigation, DSHS removed P and J without notice. CP 1516. Costanich knew something was wrong, but did not know how far DSHS would go. *Id.* Duron refused to answer any questions or to tell Costanich what she had done wrong. CP 1516. Costanich was devastated, frantic, and afraid. *Id.* She had no idea whether DSHS would come and take the rest of her children. *Id.*

In November 2001, DSHS offered Costanich a deal, proposing that she could keep B and E if she agreed to accept the abuse finding DSHS was about to make, waiving her right to an administrative appeal. CP 1519. Costanich was shocked – she knew that a foster-parent who DSHS found to be abusive could not continue fostering children. *Id.* Costanich refused. *Id.*

In December, DSHS informed Costanich that DSHS found that physical-abuse allegations were "inconclusive," but that Costanich's use of profanity constituted emotional abuse. CP 117-19, 1516, 1518.[5] Costanich openly acknowledged that she swore,

[5] This Court already held that Costanich's profanity was not directed at the children and was not abusive. ***Costanich***, 138 Wn. App. at 561-63.

but never at the children. CP 1517. Costanich swore around the children to take the "power" out of profanity. CP 1517. This was effective with a "houseful of angry, sexually abused little boys, who when they first came into the house swore like little sailors." *Id.*

Everyone, including DSHS, knew Costanich swore, as she did not change her behavior – or her vocabulary – when social workers or guardians were present. CP 467, 1454, 1458, 1466, 1517. DSHS never explained why Costanich's profanity was suddenly problematic.

DSHS never interviewed the children's doctors or therapists. CP 1517-18. The three aids and a foster-parent Duron interviewed told DSHS that Duron wanted Costanich to be guilty, refused to believe any statement to the contrary, and deliberately "twisted their words." CP 260-61, 264-65, 1452-53, 1517-18. The children's doctors, therapists, aids, GALs and CASAs wrote to DSHS, stating that the children were not abused, but were thriving in the Costanich home and should remain there. CP 250-66, 1418-21, 1452-58, 1516-17.

Although the investigation was based on K's false allegations, his therapist opined that removing K from the Costanich home would harm his emotional and mental health and cause a

"significant escalation of behavior problems." CP 255. K even fought removal with his own attorney. CP 1514.

J's doctors simply could not understand removing J from the Costanich home, and feared that it was due to DSHS "'politics.'" CP 251. E and B's doctor opined that taking the girls away from Costanich would "cause emotional post-traumatic stress disorder, and lead to irreparable, life-long emotional harm." CP 258. DSHS ignored these and other letters. CP 1518.

D. After filing a motion to terminate Costanich's guardianship and to remove E and B, DSHS convinced the Tribe to take jurisdiction.

After much begging, DSHS agreed to internally review Duron's findings. CP 1520. But DSHS refused to have the children evaluated or to interview any of their doctors or therapists. *Id.*

DSHS initially urged the Tribe to take jurisdiction and remove E and B. CP 674, 1400, 1521. The Tribe refused. CP 1400, 1423, 1521. In the interim, Costanich requested an administrative hearing. CP 138. Days later, DSHS filed a motion to remove E and B and to terminate Costanich's guardianship, upset that the Tribe was "dragging [its] feet." CP 658, 1400, 1521, 1629.

Although the Tribe had refused jurisdiction, upon receiving DSHS's report, it assumed jurisdiction in April 2002, the same day

as DSHS's removal and termination hearing. CP 683-86, 1521. DSHS agreed to the Tribe's jurisdiction. CP 684. Per the Tribe's request, DSHS (through Timentwa-Wilson) continued to exercise "courtesy supervision" of the girls, conducting in-home visits and reporting to the Tribe. CP 659, 1618.

Costanich also agreed to the Tribe's jurisdiction. CP 684. Costanich would have done anything the Tribe told her to do to keep her girls. CP 1525. She also saw no point in contesting the Kalispel Tribe's jurisdiction over Kalispel Indian children. CP 1522. Seeing no "choice in the matter," she "just agreed and prayed." *Id.*

In June 2002, Costanich signed an "Agreed" Order, requiring the girls to live on the reservation with tribal elders for one month. CP 679-82. The order refers to the girls' removal to the reservation as a "vacation" to soften the transition. CP 1524. The Tribe had never before ordered Costanich or the girls to "vacation" on the reservation. CP 1524-25. Although they had visited the reservation before, they had always camped with Costanich, attended the Pow Wow, and returned home as a "family unit." CP 1523. This was not a vacation in any typical sense of the word. CP 1524-25.

E. Costanich did not voluntarily send her daughters away.

None of this was "voluntary." CP 1521-22. Costanich did not choose to give her girls away, sending them to live with compete strangers while they begged her not to leave. CP 1525. She would not choose to do something she knew would irreparably harm her daughters. CP 1521-22. DSHS had convinced the Tribe that Costanich was abusing tribal children. CP 1522. Costanich saw no way to win a fight against the Tribe. *Id.*

E was then 9 and B was 5. CP 1523. For the prior six months, the girls had watched their brothers disappear from Costanich's home one-by-one. *Id.* Their disabilities made this particularly difficult to handle. *Id.* Costanich worried that they would think that they had done something wrong or were no longer wanted. *Id.*

The girls had never before been separated from Costanich. CP 819-20. The Tribe allowed Costanich to transport the girls to the reservation. CP 1524. The Tribe physically removed the screaming and crying girls from the Costanich's arms, as they begged Costanich not to leave. CP 1525. The Tribe ordered Costanich off the reservation "NOW." *Id.*

The Tribe relented somewhat, awarding Costanich three daytime visits and allowing Costanich to camp on the reservation for three days, albeit without seeing the girls. CP 1524. The girls were placed with complete strangers. CP 1525.

A few weeks later, Costanich agreed to care for the girls over the weekend while their caretaker was sick. *Id.* When returning to the reservation, five-year-old B began shaking, crying and vomiting. CP 1526. She begged Costanich not to leave her again. *Id.* Costanich again had to leave her daughters feeling hurt and betrayed. *Id.*

Costanich feared the girls would be "lost to [her] forever." *Id.* She could not stop it, but saw the doctors' fears coming true – removal was irreparably harming her children. *Id.*

F. The Tribe ultimately gave Costanich a guardianship of E and B (again).

The Tribe could not place the girls by summer's end, so placed them back with Costanich. CP 1526. But the Costanichs were no longer guardians, but "foster parents." *Id.* Yet around the same time (August 16, 2002), DSHS revoked Costanich's foster-care license. CP 631. Costanich constantly worried that the Tribe would again take the girls. CP 1526.

The girls returned changed and full of distrust. CP 1526-27. B began wetting the bed and clinging to Costanich, afraid of being "'left behind, when mommy and daddy leave again.'" CP 1527. Tribal members had told E that the Costanichs were horrible, abusive people, and she believed that Costanich had given her away. CP 1527. She still does not trust them. *Id.* Costanich, whose reputation with the Tribe had been quite good, was left feeling humiliated and ashamed. CP 1524.

DSHS again supervised the family. CP 1527. Timentwa-Wilson was hostile and continued to advocate for the girls' removal. *Id.* It was a "long nightmare" as everyone involved believed Duron's abuse finding. *Id.*

In 2005, the Tribe told Costanich that moving closer to the reservation was the only way to keep her daughters. CP 1527-28. The family packed up and left jobs, friends and family to move across the State. CP 1527. The Tribe then finally made Costanich the girls' legal guardian (again). *Id.*

G. But it was too late to save Costanich's family.

But the damage was already done. CP 1528. E lost all trust in Costanich. *Id.* She has never forgiven Costanich and has never

been the same. CP 1528-29. B was so scarred that she would not let Costanich out of her sight. CP 1528.

In Costanich's view, DSHS "cavalierly destroyed" her family. CP 1528-29. Costanich has virtually no information about P and J. CP 1529. K is in and out of prison and homeless. *Id.* F, the only child who was allowed to remain with Costanich throughout the entire ordeal, graduated from college, owns a home, and enlisted in the Air Force. *Id.* He keeps in regular contact with Costanich and her biological children. *Id.*

PROCEDURAL HISTORY

A. This Court previously held that DSHS erroneously revoked Costanich foster-care license, reinstating the ALJ decision that Costanich's children were not abused, but were "thriving."

As mentioned above, DSHS's investigation was woefully inadequate. 138 Wn. App. 564; CP 1515-17; ***Costanich v. Dep't of Soc. & Health Servs.***, 627 F.3d 1101, 1110-14 (9th Cir. 2010). Costanich appealed the abuse finding and license revocation in an administrative hearing. ***Costanich***, 138 Wn. App. at 553. The ALJ overturned DSHS's decisions on both, finding that the children had not been emotionally abused, but were "thriving" in the Costanich home. *Id.*

DSHS appealed the ALJ decision to the DSHS Board of Appeals. *Id.* The review judge reversed the ALJ's decision, finding substantial evidence that Costanich threatened and swore at her foster children. *Id.* The review judge ruled that this constituted emotional abuse justifying the license revocation. *Id.*

Costanich sought judicial review, and the superior court reversed the review judge's final administrative decision, reinstating the ALJ's decision. *Id.* The court awarded Costanich attorney fees under the Equal Access to Justice Act, RCW 4.84.350. *Id.* DSHS appealed that decision to the Court of Appeals, Division I. *Id.*

The primary issue before this Court in the first appeal was the level of deference the review judge owed the ALJ. *Id.* at 554. This Court correctly held that the review judge was justified in substituting his factual findings for the ALJ's actual findings only if those findings were not supported by substantial evidence or if the ALJ failed to make an essential factual finding. *Id.* at 556. This Court ultimately upheld the ALJ's decision, holding:

> The review judge not only ignored the ALJ's credibility determinations, he also chose to base his decision on the very evidence the ALJ rejected as lacking credibility: the testimony of the CPS investigator and K.'s hearsay statements to his therapist. The review judge substituted his own view of the evidence for the ALJ's findings, which are supported by substantial evidence. This is clearly error

> under the deferential standard that applies to appeals from the ALJ's decision about abuse allegations.

Id. at 558-59. The Court also held that the review judge exceeded his authority. *Id.* at 559.

This Court went on to uphold the ALJ's decision that Costanich's profanity did not constitute emotional abuse or violate any foster-care-licensing regulation. *Id.* at 561-63. The Court also affirmed the trial court's attorney-fee award, and awarded Costanich appellate fees. *Id.* at 563-64. This Court summarized its multi-faceted ruling as follows (*id.* at 564):

> [A]lthough DSHS was justified initially in its concerns about Costanich's use of profanity, the evidence before the ALJ shows that DSHS was not substantially justified in revoking her license once it became aware of the problems in Duron's investigation. . . . We set aside the DSHS review judge's decision and reinstate the ALJ's decision. We affirm the superior court's decision to award Costanich attorney fees and award attorney fees on appeal on the same grounds.

B. The Ninth Circuit previously held that DSHS's investigative report contained misrepresentations and may contain intentional fabrications.

Costanich subsequently brought a Fourteenth Amendment Due Process Claim in King County Superior Court contending that Duron fabricated evidence in her report and declaration. CP 1. DSHS removed the matter to the District Court for the Western District of Washington. ***Costanich***, 627 F.3d at 111-13. The

District Court granted DSHS's motion for summary judgment on all federal claims and declined to exercise supplemental jurisdiction over the state court claims, including intentional and negligent infliction of emotional distress, negligent investigation, malicious prosecution and abuse of process. 627 F.3d at 1106-07 fn. 9; CP 46. Both parties timely appealed. ***Costanich***, 627 F.3d at 1106-07.

On appeal, Costanich argued that Duron and other DSHS officials violated her Fourteenth Amendment due process rights, depriving her of liberty and property interests in her foster care license and dependency guardianship of E and B. The Ninth Circuit affirmed the lower court decision that Duron enjoyed qualified immunity and that all other DSHS officials enjoyed absolute immunity as to the license revocation, and enjoyed qualified immunity as to the remaining claims. *Id.* at 1108. The Court held, however, that "deliberately fabricating evidence in civil child abuse proceedings violates the Due Process Clause of the Fourteenth Amendment when a liberty or property interest is at stake, and that genuine issues of material fact exist on the question of deliberate fabrication." *Id.* (footnote omitted).

On Duron's deliberate fabrication, the Ninth Circuit held:

- Although Duron indicated that she had interviewed 34 people, she later admitted that she made only brief contact with 18 of the 34 people listed.
- Attempting to lend credibility to her report, Duron suggested that she interviewed three of the children's therapists and received a report from a fourth. But Duron later testified at the ALJ hearing that she did not actually speak to any "medical professionals."
- Duron's report indicated that she interviewed K, the child upon whose statements the investigation was based, and described his statements to Dr. Crabbe, the therapist whose referral sparked Duron's investigation. But at the ALJ hearing, Duron admitted that during the alleged interview with K, she simple held a copy of Dr. Crabbe's referral and K said everything in the referral was true. Duron never showed the referral to K. She conceded that K did not say much and that she had summarized what he was saying.
- Duron admitted that she never actually interviewed Dr. Crabbe, despite the fact that Dr. Crabbe made the initial referral, and despite his December 18, 2001 letter stating his strong recommendation that K remain in the Costanich home where he had made very positive adjustments.
- Other witnesses testified that Duron's report contained statements they had never made. Duron specifically attributed extremely inflammatory and derogatory statements that Costanich supposedly made to two witnesses who denied that Costanich made the statements and who denied even speaking to Duron about the particular incidences.
- A number of witnesses specifically disputed Duron's reports supposedly memorializing the information she received during her investigation.
- Duron used quotation marks around witness statements that were never actually made, which plainly could support a trier's conclusion that Duron deliberately fabricated evidence.

Costanich, 627 F.3d at 11 at 1111-13.

The Ninth Circuit held that "[t]he errors in Duron's report are not questions of tone or characterization but actual misrepresentations," raising genuine issues of material fact as to whether her statements violated Costanich's due process rights. *Id.* at 1113-14. But the Ninth Circuit affirmed summary judgment that DSHS was immune as a matter of law, holding that the due process right to be free from the deliberate fabrication of evidence during a civil investigation was not clearly established when DSHS negligently investigated Costanich. *Id.* at 1116.

In sum, this Court previously upheld the ALJ decision that Costanich's profanity was not emotionally abusive and that the children were thriving in her care. 138 Wn. App. at 564. The Ninth Circuit previously held that Duron made "actual misrepresentations," and may have "deliberately fabricated evidence," during her investigation. 627 F.3d at 1113-14.

Following these two appeals, Costanich pursued, in State court, her negligent-investigation and outrage claims, among other torts. CP 13-66. These claims, and the negligent-investigation claim in particular, accused Duron and DSHS of knowingly fabricating evidence against Costanich to support the incorrect and

unfounded determination that Costanich emotionally abused the children in her care. CP 1, 1308.

Granting in part DSHS's motion for summary judgment, the court dismissed Costanich's claim for outrage, malicious prosecution, and abuse of process. CP 1089. The Court denied DSHS's motion to dismiss Costanich's negligent-investigation claim. *Id.* The Court ruled that there are genuine issues of material fact as to whether Costanich has standing to sue as a *de facto* parent or guardian. CP 1089-90.

C. The trial court did not resolve whether DSHS's investigation was in fact negligent, but dismissed the case, ruling as a matter of law that DSHS did not make a harmful placement decision.

On the eve of trial, the court, on its own motion, revisited DSHS's motion to dismiss Costanich's negligent-investigation claim. 4/10/12 RP 2-3, 8. As discussed fully below, there are two elements to an actionable negligent-investigation claim: (1) whether DSHS's investigation falls below the standard of care; and (2) whether DSHS made a harmful placement, such as removing a child from a nonabusive home, or placing a child in an abusive home. ***Roberson v. Perez***, 156 Wn.2d 33, 45-46, 123 P.3d 844 (2005). The trial court did not resolve the first element, nor could it

have in light of the Ninth Circuit's holding that Duron's report contained material misrepresentations and may contain outright lies. CP 1626-44; ***Costanich***, 627 F.3d at 1111-14. The trial court dismissed Costanich's claim, ruling as a matter of law that Costanich voluntarily removed E and B from her home, such that DSHS did not make a harmful placement decision. 4/10/12 RP 5-76; CP 1626-44.

ARGUMENT

A. Standard of Review.

This Court reviews "summary judgment order[s] de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." ***King v. Rice***, 146 Wn. App. 662, 668, 191 P.3d 946 (2008). Summary judgment is proper only where there is no "genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Shields v. Enter. Leasing Co.***, 139 Wn. App. 664, 670, 161 P.3d 1068 (2007); CR 56. The evidence must be such that "reasonable minds could reach but one conclusion." ***Shields***, 139 Wn. App. at 670.

B. There are fact question as to whether DSHS's negligent investigation resulted in a harmful placement.

For summary judgment purposes, the trial court assumed that DSHS conducted a "biased or faulty investigation," and provided its tainted results to the Tribe. CP 1631-32. But the court nonetheless held that DSHS could not be liable for its negligent investigation, finding that DSHS made no placement decision under ***Roberson***, *supra*. CP 1637-42. The principal underpinning of that erroneous decision is that, as a matter of law, Costanich "voluntarily" sent her daughters to live with compete strangers. CP 1637-38.

But Costanich had no choice – she could not beat the Tribe in a fight over Indian children, so agreed to the Tribe's demands and prayed. CP 1522. There is at least a material factual dispute as to whether Costanich acted voluntarily. This Court should reverse.

1. Washington recognizes a cause of action for negligent investigation where DSHS's sub-par investigation results in a harmful placement decision.

In February 2000, this Court recognized for the first time that Washington tort law permits recovery where law enforcement negligently investigate child-abuse allegations. *See* ***Rodriguez v.***

Perez, 99 Wn. App. 439, 451-52, 994 P.2d 874, *rev. denied,* 141 Wn.2d 1020 (2000). There, Honnah Sims learned that police reports identified her as "among those accused of abusing children," in what came to be known as the "'Wenatchee sex ring.'" ***Roberson***, 156 Wn.2d at 36. Fearing that she would be arrested, Sims and her husband sent their son to live with his grandparents, relinquishing guardianship in April 1995. 156 Wn.2d at 36. Sims was arrested in May and acquitted in July. *Id.* The child returned in November. *Id.*

Sims and other acquitted parents brought numerous claims against the City of Wenatchee and Benton County, including negligent-investigation claims. *Id.* at 37. The trial court dismissed the negligent-investigation and negligent-supervision claims under CR 12(b)(6), and the jury found for the defense on all remaining claims. *Id.* Sims appealed. *Id.* This Court reversed the negligent-investigation dismissal, and remanded for trial, holding for the first time that "both the children who are suspected of being abused and their parents comprise a protected class under RCW 26.44 and may bring action for negligent investigation." *Id.* at 37-38.

The Supreme Court denied review in September 2000. ***Rodriguez v. Perez***, 141 Wn.2d 1020, 10 P.3d 1073 (2000). Just

months before denying review, the Supreme Court issued an opinion in ***Tyner v. Dep't of Soc. & Health Servs.***, 141 Wn.2d 68, 1 P.3d 1148 (2000) (discussed in detail below). In ***Tyner***, the Court recognized an "implied cause of action against DSHS for negligent investigation of child abuse allegations under chapter 26.44 RCW." ***Roberson***, 156 Wn.2d at 44. There, the father ("Tyner") was separated from his children for several months while DSHS investigated child-abuse allegations and ultimately petitioned for dependency. ***Tyner***, 141 Wn.2d at 71-75. After the trial court dismissed the dependency petition, the father sued for negligent investigation under RCW 26.44.050. 141 Wn.2d at 75-77. The Court held that the statute extends a cause of action to parents wrongfully accused of child abuse. *Id.* at 82.

On remand, the trial court ordered a change of venue to Spokane County. ***Roberson***, 156 Wn.2d at 38. The jury found that Wenatchee had negligently investigated Sims, awarding her $2 million and awarding her husband $1 million. *Id.* Benton County appealed, arguing for the first time that RCW 26.44 did not extend a negligent-investigation claim to the Sims. *Id.*

Before Benton County's appeal was finalized, the Supreme Court clarified the scope of the cause of action established in

Tyner. ***M.W. v. Dep't of Soc. & Health Servs.***, 149 Wn.2d 589, 70 P.3d 954 (2003). In ***M.W.***, plaintiffs brought a negligent-investigation action on behalf of a minor, claiming that she suffered post-traumatic stress disorder after untrained DSHS workers performed a vaginal examination while investigating child-abuse allegations. ***M.W.***, 149 Wn.2d at 592. Rejecting that claim, the Court held that negligent investigation claims are cognizable "only when DSHS conducts a biased or faulty investigation that leads to a harmful placement decision, such as placing the child in an abusive home, removing the child from a nonabusive home, or failing to remove a child from an abusive home." *Id.* at 591.

Based in part on this new authority, Benton County argued that Sims could not maintain a negligent-investigation claim: (1) where DSHS never investigated her; and (2) where she avoided a harmful placement by voluntarily sending her son to live with family. ***Roberson***, 156 Wn.2d at 38-39. Citing ***M.W.***, Division Three agreed, declining to follow, as the law of the case, this Court's prior opinion, reversing the jury verdict, and dismissing the case. 156 Wn.2d at 38-39. The Supreme Court accepted review.

The Supreme Court affirmed, holding (1) that the appellate court property exercised its RAP 2.5 discretion to reach new issues;

(2) that the appellate court properly refused to follow this Court's prior opinion in light of intervening controlling precedent; and (3) that as a matter of law, Sims "voluntar[ily]" sent her son away, such that the County did not make a harmful placement decision. *Id.* at 40, 44, 47. ***Roberson***'s principal holding, which also distinguishes it from this matter, is that Sims "voluntarily relinquished guardianship" of her son. *Id.* at 46. The ***Roberson*** Court did not determine whether Sims was investigated, holding that under the two-part ***M.W.*** test, a negligent-investigation claim is actionable only if it leads to a harmful placement decision. *Id.* Since Sims "voluntarily" relinquished custody and guardianship, Sims, not DSHS, made the "harmful placement decision." *Id.*

The Court articulated three "problem[s]" preventing Sims from proceeding on her "constructive placement" theory:

- Any harm the investigation caused was "purely speculative in nature," where the Court could not "readily" determine what placement decision, if any, DSHS would have made after completing an investigation;
- Plaintiffs could control the measure of their damages, which reflect the disruption in the family home, so are proportionate to the length of the child's removal; and
- Plaintiffs would be encouraged to frustrate investigations.

Id. at 46-47.[6]

[6] As discussed in detail below, none of these "problems" arise here.

2. This matter is comparable to *Tyner*, in which DSHS failed to provide the juvenile court all information relevant to a placement decision.

This matter is much more like ***Tyner*** than ***Roberson***. After Debra Tyner became suspicious that her husband ("Tyner") was sexually abusing their children, CPS case worker Bill Mix submitted a declaration supporting the mother's petition for protection, stating that the mother had reported "suspicious symptoms" seen in child sex-abuse cases. ***Tyner***, 141 Wn.2d at 73. Pending completion of his investigation, Mix opined that Tyner should move out of the family home and that the children should have no contact with him. 141 Wn.2d at 73. The King County Superior Court entered a temporary protection order prohibiting Tyner's contact with his children. *Id.* Upon Mix's shelter-care motion, the trial court subsequently entered an order placing the children with the mother, prohibiting all contact between Tyner and his children, ordering Tyner to undergo a sexual-deviancy examination, and ordering the children to undergo sexual-assault evaluations. *Id.* at 74.

Neither Mix, nor the case worker he transferred the matter to after completing the investigation, ever contacted any collateral sources Tyner recommended, including his four grown children, the children's daycare provider, teachers, neighbors, or a local nurse

who regularly drove the kids to school. *Id.* at 73-74. In February 1993, Mix concluded that the abuse allegations were "unfounded," as opposed to "founded" or "inconclusive." *Id.* at 74. "Unfounded" means that "there is reasonable cause for the social worker to believe that the allegations on the CPS referral are untrue" and that there is sufficient evidence that no abuse occurred. *Id.* CPS never provided this report to Tyner, the mother, or their attorneys. *Id.*

After additional hearings, the trial court ultimately dismissed the State's dependency petition in June 1993, finding that the parties were cooperating with court-ordered services and had agreed to a course of future conduct. *Id.* at 75. The court, however, refused to include in the dismissal order language indicating that the State had not substantiated its abuse allegations. *Id.* The parties' divorce was subsequently finalized. *Id.* After further litigation on the parenting plan, the court awarded the parties joint custody, lifting all of the restrictions on Tyner's contact with his children. *Id.* at 75-76.

Tyner subsequently sued the State for negligent investigation. *Id.* at 76. The jury found for Tyner, awarding damages. *Id.* The appellate court reversed, holding that the State owed Tyner a duty and was not immune, but that the court's no-

contact orders cut off legal causation between the State's negligence and Tyner's separation from his children. *Id.*

The Supreme Court agreed with the appellate court, holding that a trial court order will act as a superseding, intervening cause precluding State liability for negligent investigation only if the State presents all material information to the trial court. *Id.* at 88. As the appellate court stated:

> The pivotal consideration is not the involvement of the court per se, but whether the State has placed before the court all the information material to the decision the court must make. Concealment of information or negligent failure to discover material information may subject the State to liability even after adversarial proceedings have begun.

Tyner v. Dep't of Soc. & Health Servs., 92 Wn. App. 504, 518, 963 P.2d 215 (1998), *rev'd on other grounds*, ***Tyner***, 141 Wn.2d 68 (2000).

But the Supreme Court disagreed with the appellate court's holding that "legal causation [was] lacking as a matter of law because in its view all material information was presented to the court." ***Tyner***, 141 Wn.2d at 86. The Court first held that whether information DSHS withheld is "material" is a jury question unless reasonable minds could reach only one conclusion. 141 Wn.2d at 86 (citing ***Hartley v. State***, 103 Wn.2d 768, 778, 698 P.2d 77

(1985)). The Court then held that DSHS should have, but failed to provide the court two pieces of information the jury could have found material: (1) caseworker Mix's determination that the allegations against Tyner were "unfounded"; and (2) information from collateral sources Tyner provided, whom DSHS failed to contact. ***Tyner***, 141 Wn.2d at 87-88.

Here, the trial court found that reasonable minds could differ as to whether DSHS provided the juvenile court and the Tribe all relevant information, and "assume[d]" that DSHS had failed to do so. CP 1636. DSHS sent the Tribe Duron's report, Cartwright's evaluation, and recent school reports. CP 1504. It failed to give the Tribe statements from the children's doctors, therapists, CASAs, GALs, and aids, all of whom opined that the children should remain with Costanich. CP 250-66, 1418-21, 1452-58, 1516-17. DSHS failed to tell the Tribe that E and B's social workers found that Costanich was not abusive, and fought to keep the girls with her. CP 290-93, 1539, 1562, 1565-67. Even worse, DSHS failed to tell the Tribe that E and B's psychologist opined that removing the girls would "cause emotional post-traumatic stress disorder, and lead to irreparable, life-long emotional harm." CP 258. It is difficult to fathom how a "reasonable mind[]" could

conclude that DSHS gave the juvenile court all material information. CP 1636.

And DSHS did more than fail to provide information material to the placement decision. The one-sided account DSHS gave the Tribe was full of misrepresentations and possible fabrications. ***Tyner*** extends liability where DSHS omits material information – it must also extend liability where DSHS omits material information *and* misrepresents or fabricates the little information it discloses. ***Tyner***, 141 Wn.2d at 87-88.

The agreed order transferring jurisdiction to the Tribe should not cut off DSHS's liability. DSHS wants to wash its hands of the mess it created because the tribal court, not DSHS, ultimately removed E and B. This argument would not save DSHS in juvenile court, and should not save it here. Again, the "pivotal question" is whether DSHS gave all material information to "the court" – it should not matter which court. ***Tyner***, 92 Wn. App. at 518.

Nor can it reasonably be said that the agreed order was voluntary. The trial court erroneously concluded that there was no placement decision at all, where Costanich signed an "agreed" order removing E and B. CP 1637-38. To reach this erroneous conclusion, the trial court ruled as a matter of law that Costanich

voluntarily gave her daughters to the Tribe. *Id.* The court was unwilling to "look behind" the removal order, concluding that since it was an "Agreed" order, Costanich must have acted voluntarily. *Id.* Neither logic nor authority supports that conclusion.

Costanich faced a horrific Sophie's Choice – fight the Tribe for tribal children and risk losing E and B entirely, or try cooperating with the Tribe, and hope for the best. CP 1521-22. Having repeatedly and unsuccessfully attempted to work with DSHS, Costanich decided she had a better chance to keep her girls if she worked with the Tribe. *Id.* She saw no choice in the matter. *Id.* She could not win a fight over tribal children against the Tribe. Her only chance was to do whatever the Tribe wanted and to pray. *Id.*

There was nothing "voluntary" about Costanich's heartwrenching decision. CP 1636-38. A mother does not voluntarily send her children to live with strangers, especially developmentally disabled children who could not possibly understand what was happening to them. A jury, not the juvenile court, should decide whether Costanich acted voluntarily.

And the removal was a "placement" even though the agreed order calls it a "vacation." CP 680, 1638. Again, Costanich would have signed anything if she thought it would help her daughters

stay with her. CP 1525. This was not a vacation, it was a nightmare.

3. This matter is nothing like *Roberson*, in which the parents voluntarily sent their teenaged son to stay with his grandparents.

On the eve of trial, the superior court *sua sponte* revisited DSHS's argument that ***Roberson*** required summary-judgment dismissal. 10/04/12 RP 8-10. Despite obvious factual distinctions between this matter and ***Roberson***, the trial court ruled that ***Tyner*** is inapplicable and that ***Roberson*** required dismissal as a matter of law under. CP 1636, 1639-42. This matter is nothing like ***Roberson***. This Court should reverse.

In ***Roberson***, the Court did not determine whether DSHS investigated Sims, and the opinions do not discuss any investigation. *Id.* at 46. Sims sent her son away upon learning that she was amongst the "accused." *Id.* Here, however, DSHS plainly investigated Costanich, completed its investigation, and concluded that she emotionally abused her children. And here, it is entirely possible to "readily determine" what placement decision DSHS would have made, where DSHS filed a petition to terminate Costanich's guardianship and to remove E and B from the home,

after unsuccessfully trying to convince the Tribe to remove E and B. *Compare* ***Roberson***, 156 Wn.2d at 46-47 *with* CP 674, 1400, 1521.

In short, DSHS initiated legal action to remove E and B from a nonabusive home. At DSHS's urging and with its agreement, the Tribe took jurisdiction, removing E and B. This is a harmful placement decision under ***M.W.*** and ***Roberson***.

And Costanich could not control her damages – the duration of E and B's removal. ***Roberson***, 156 Wn.2d at 46-47. Costanich had no choice but to let the Tribe take her daughters. CP 1521-22. She was willing to do whatever the Tribe demanded, so that she would not lose her daughters permanently. CP 1525. Turning young children over to complete strangers, while they kicked, screamed and begged her not to leave, is not remotely comparable to sending a teenage child to stay with his grandparents. *Compare id. with* ***Roberson***, 156 Wn.2d at 46-47.

Nor did Costanich frustrate the litigation. ***Roberson***, 156 Wn.2d at 47. When Costanich agreed to tribal jurisdiction, DSHS had already been encouraging the Tribe to take jurisdiction for months. CP 674, 1400, 1521. And DSHS agreed to tribal jurisdiction. CP 686. Costanich did not "frustrate" anything – she

gave DSHS exactly what it wanted (but only because she had no choice).

In sum, DSHS's shoddy investigation was negligent at best, and intentionally destructive at worst. With no real choice, Costanich gave her daughters to the Tribe, fearing she could otherwise lose them forever. DSHS should not escape liability without at least facing a jury.

C. At a minimum, there are material fact disputes on Costanich's outrage claim, prohibiting summary judgment.

Where the Ninth Circuit held that Duron's report includes material misrepresentations and may include intentional fabrications, whether Duron's conduct was so outrageous as to permit tort recovery must also be a question of material fact. Duron's misrepresentations alone raise a question of fact. But even assuming *arguendo* that misrepresenting evidence is insufficient, fact questions remain as to whether Duron intentionally fabricated evidence.

It is outrageous and utterly intolerable for a government employee to lie under oath and to fabricate grossly inflammatory evidence during a civil investigation. Our justice system cannot tolerate such atrocious misbehavior. DSHS's assertion that its

allegedly outrageous conduct "probably goes on every single day in juvenile court" is itself extreme, outrageous, and alarming. 11/4/11 RP 73. This Court should reverse the summary judgment order dismissing Costanich's outrage claims and remand for trial. CP 1089.

To prove intentional infliction of emotional distress or "outrage," a plaintiff must show: (1) "extreme and outrageous conduct"; (2) that is intentionally or recklessly inflicted; and (3) "resulting severe emotional distress." ***Corey v. Pierce County***, 154 Wn. App. 752, 763, 225 P.3d 367, *rev. denied* 170 Wn.2d 1016 (2010). The conduct must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" ***Corey***, 154 Wn. App. at 763 (quoting ***Grimsby v. Samson***, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). The trial court first determines whether "reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." ***Corey***, 154 Wn. App. at 763. The question then goes to the jury. *Id.*

In ***Corey***, for example, Barbara Corey presented evidence that Gerry Horn, her superior in the Pierce County Prosecuting Attorney's Office, accused her of criminal conduct despite knowing

that an internal investigation revealed little. *Id.* at 764. This false accusation was "particularly loathsome" to Corey, a longtime public servant. *Id.* (distinguishing ***Dicomes v. State***, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989), holding that "mere insults and indignities" are not actionable). Thus, this Court held that the trial court properly let Corey's outrage claim go to the jury. ***Corey***, 154 Wn. App. at 764.

Here too, it is "particularly loathsome" to Costanich to be accused of abusing the children in her care. *Id.* Costanich is a "longtime" foster-parent. *Id.* For over 20 years, she has provided "unsurpassed" care "for some of the neediest and most difficult foster children in the system." ***Costanich***, 138 Wn. App. at 551-52. And DSHS did not just insult Costanich, calling her an abuser, it used false abuse allegations to remove her children and take her foster-care license. At a minimum, reasonable minds could differ on whether DSHS's false allegations and shoddy investigation were sufficiently extreme to constitute the tort of outrage. ***Corey***, 154 Wn. App. at 763. This matter plainly should have gone to a jury. *Id.*

Before the trial court, DSHS argued that summary judgment was proper under ***Waller v. State***, 64 Wn. App. 318, 824 P.2d

1225, *rev. denied* 199 Wn.2d 1014 (1992). CP 404-05. ***Waller*** is easily distinguishable. There, Richard Waller brought an outrage claim against DSHS, based on DSHS's conduct during its child-abuse investigation of Waller. ***Waller***, 64 Wn. App. at 325. Waller's ex-wife, Frances, accused him of abusing their two children after she was held in contempt and jailed for denying Waller's visitation. *Id.* at 320-21. During the DSHS investigation, a police detective, several therapists, and at least one pediatrician, reported to DSHS that Waller had physically and sexually abused the children. *Id.* at 322. The expert who evaluated Waller opined that he did not fit the profile of an abuser and that if the children had been sexually abused, it was by someone else. *Id.* at 323.

Waller and his parents tried to convince DSHS that Frances was coercing the children to report false abuse allegations. *Id.* They accused her of psychologically abusing the kids and provided collateral contacts who would confirm their claims. *Id.* DSHS all but ignored the Wallers' claim that Frances, not Waller, was abusing the kids. *Id.*

The trial court eventually granted Waller permanent custody of his children, finding that the abuse allegations against Waller were unfounded. *Id.* at 325. The court found that Frances had

coached and intimidated the children into falsely accusing Waller, and awarded her supervised visitation for two hours per month. *Id.*

Accepting that DSHS may have "been grossly negligent in choosing to believe Frances' allegations and in choosing not to thoroughly investigate [Waller's] claims," this Court held that DSHS's conduct was not outrageous, where "the caseworkers were supported in part by the expert opinions of therapists." *Id.* at 337. In other words, the Court refused to second-guess DSHS's election to rely on unbiased experts, even though they presented only one side of the story. *Id.*

Here, however, not one doctor, therapist, CASA, aid, friend, or neighbor supported Duron's false assertion that Costanich was abusing her children. Rather, everyone Duron interviewed – and even those she failed to contact – tried to convince her that the children were thriving and should remain in the Costanich home:

- E and B's psychiatrist, opined that removing E and B would separate them from their "strong mother-daughter relationship" with Costanich, causing "irreparable, life-long emotional harm." CP 258.
- J's doctors opined that DSHS did not follow "best practices" in the investigation and was not acting in J's best interest. CP 250. They agreed that DSHS should not have removed J from the Costanich home, and questioned whether the decision to do so was based on "politics." CP 251.

- K's doctor and his case manager opined that K should remain in the Costanich home and that moving him would damage his emotional and mental health. CP 255, 257.
- Costanich's aid Tori McLaughlin stated that when Duron interviewed her, she felt "badger[ed]." CP 261. Duron "was not looking for the truth but only what she wanted to believe." *Id.* Duron continuously put words in McLaughlin's mouth and falsified her statements. *Id.*
- When Costanich's aid, Sara McLaughlin, told Duron that she thought Costanich was a great foster parent and that the children should remain with her, Duron became rude. CP 265. Duron "twist[ed] things around" and put words in S. McLaughlin's mouth. *Id.* Duron assumed Costanich was an abuser, and only wanted information to confirm her assumption. *Id.*

In sum, "[a]ll of those professionals who had direct contact with the children determined that they were thriving in the Costanich home environment." ***Costanich***, 138 Wn. App. at 561 (quoting ALJ decision).

DSHS's reliance on ***Waller*** is obviously misplaced. CP 404-05. DSHS claims that Duron's investigation was not outrageous because she relied on statements from the children in Costanich's care, her colleagues, and a clinical psychologist. *Id.* This defense is itself outrageous.

K, whose statements ignited DSHS's investigation, was known for his "storytelling." CP 1514. Indeed it is quite common for children like those in Costanich's home to make false reports against their foster parents and guardians. CP 1533. DSHS was

very familiar with false reports, and Costanich herself had previously been investigated 26 times. CP 492. In short, it is outrageous for DSHS to hide behind children it knew to be prone to fabrication.

DSHS omits that it ignored E and B's social workers, who concluded that Costanich was not abusive and advocated for the girls to remain in her care. CP 290-93, 1562, 1565. In any event, Duron's reliance on other DSHS employees, who were relying solely on what Duron told them, cannot possibly absolve DSHS.

The only expert DSHS purportedly relied on was Psychologist Beverly Cartwright, whom DSHS asked to evaluate "the impact of Ms. Costanich's aggressive behavior and verbal abuse." CP 492. Cartwright relied exclusively on information provided by DSHS, and by Duron and Payne in particular. *Id.* In other words, DSHS told Cartwright that Costanich was abusive and supplied her with one-sided information supporting that false conclusion. *Id.*

Even so, Cartwright's evaluation does not draw any conclusions about Costanich's children, but speaks only in generalities. She states, for example, that pejoratives "can" be damaging. CP 493. She says that subjecting a child to racial

comments "can be an [*sic*] humiliating experience." *Id.* She concludes that continued exposure to verbal abuse "can have cumulative effects." CP 494.

Neither Cartwright, nor any other expert DSHS called in the administrative hearing "could say with any degree of certainty that [Costanich's language posed] a risk of harm." ***Costanich***, 138 Wn. App. at 561 (quoting ALJ decision). Rather, DSHS's experts "spoke in terms of possibility not in terms of likelihood." *Id.*

Moreover, Costanich presented evidence that DSHS often attacks strong, vocal foster-parents like Costanich. CP 1177-79, 1182. Expert Darlene Flowers testified that DSHS has a history of making adverse findings, cutting funds, revoking licenses, and taking other retaliatory measures when foster parents advocate for services DSHS does not want to provide or are otherwise "too demanding." CP 1177-78, 1180-81. This disturbing pattern has been particularly prolific against FPAWS Presidents, such as Costanich. CP 1180-81.

Five foster-parents (other than Costanich) have served as FPAWS Presidents. CP 1181. Like Costanich, four of the five were considered "professional" or "therapeutic" foster-parents, with extraordinary training and skill. *Id.* DSHS demoted or revoked the

license of three of these four foster-parents during or shortly after their FPAWS presidency. *Id.* The other two served very briefly and refused to publically advocate for foster families, fearing that DSHS would take the children they were in the process of adopting. *Id.*

Expert Flowers opined that DSHS's negligent investigation resulted from the "vendetta" of a few DSHS employees acting out against Costanich's political powers and actions. CP 1182. DSHS did not follow investigative procedures, even making up evidence to wrongly accuse Costanich of abuse and to take the children in her care. *Id.* Foster parents "live in fear of such careless or intentional findings." *Id.*

In sum, any Washington citizen should be outraged to learn than that government employees misrepresented and may have outright lied to support a false abuse claim against a foster-parent of 30 years who provided unsurpassed care to the most difficult children in the system. Summary judgment was plainly inappropriate. This Court should reverse.

D. The trial court erroneously awarded DSHS statutory costs.

The trial court awarded DSHS statutory costs under RCW 4.84.080. CP 1645-47; 1651. DSHS requested statutory costs

"pursuant to the dismissal of [Costanich's] case." CP 1645. Thus, if this Court reverses one of both of the erroneous summary-judgment orders, it should also reverse this cost award.

CONCLUSION

The children placed in Costanich's unsurpassed care were all thriving. But DSHS took Costanich's kids, took her license, and labeled her an abuser, based on an investigation full of material misrepresentations and likely intentional fabrications. Thus, it cannot be, as a matter of law, that Costanich has no remedy. This Court should reverse.

RESPECTFULLY SUBMITTED this 14th day of November, 2012.

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CERTIFICATE OF SERVICE BY MAIL

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RCW 4.84.350
Judicial review of agency action — Award of fees and expenses.

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars. Subsection (1) of this section shall not apply unless all parties challenging the agency action are qualified parties. If two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars. The court, in its discretion, may reduce the amount to be awarded pursuant to subsection (1) of this section, or deny any award, to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy.

[1995 c 403 § 903.]

RCW 13.34.030
Definitions.

For purposes of this chapter:

(1) "Abandoned" means when the child's parent, guardian, or other custodian has expressed, either by statement or conduct, an intent to forego, for an extended period, parental rights or responsibilities despite an ability to exercise such rights and responsibilities. If the court finds that the petitioner has exercised due diligence in attempting to locate the parent, no contact between the child and the child's parent, guardian, or other custodian for a period of three months creates a rebuttable presumption of abandonment, even if there is no expressed intent to abandon.

(2) "Child," "juvenile," and "youth" means:

(a) Any individual under the age of eighteen years; or

(b) Any individual age eighteen to twenty-one years who is eligible to receive and who elects to receive the extended foster care services authorized under RCW 74.13.031. A youth who remains dependent and who receives extended foster care services under RCW 74.13.031 shall not be considered a "child" under any other statute or for any other purpose.

(3) "Current placement episode" means the period of time that begins with the most recent date that the child was removed from the home of the parent, guardian, or legal custodian for purposes of placement in out-of-home care and continues until: (a) The child returns home; (b) an adoption decree, a permanent custody order, or guardianship order is entered; or (c) the dependency is dismissed, whichever occurs first.

(4) "Department" means the department of social and health services.

(5) "Dependency guardian" means the person, nonprofit corporation, or Indian tribe appointed by the court pursuant to this chapter for the limited purpose of assisting the court in the supervision of the dependency.

(6) "Dependent child" means any child who:

(a) Has been abandoned;

(b) Is abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child;

(c) Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development; or

(d) Is receiving extended foster care services, as authorized by RCW 74.13.031.

(7) "Developmental disability" means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual.

(8) "Extended foster care services" means residential and other support services the department is authorized to provide under RCW 74.13.031.

(9) "Guardian" means the person or agency that: (a) Has been appointed as the guardian of a child in a legal proceeding, including a guardian appointed pursuant to chapter 13.36 RCW; and (b) has the legal right to custody of the child pursuant to such appointment. The term "guardian" does not include a "dependency guardian" appointed pursuant to a proceeding under this chapter.

(10) "Guardian ad litem" means a person, appointed by the court to represent the best interests of a child in a proceeding under this chapter, or in any matter which may be consolidated with a proceeding under this chapter. A "court-appointed special advocate" appointed by the court to be the guardian ad litem for the child, or to perform substantially the same duties and functions as a guardian ad litem, shall be deemed to be guardian ad litem for all purposes and uses of this chapter.

(11) "Guardian ad litem program" means a court-authorized volunteer program, which is or may be established by the superior court of the county in which such proceeding is filed, to manage all aspects of volunteer guardian ad litem representation for children alleged or found to be dependent. Such management shall include but is not limited to: Recruitment, screening, training, supervision, assignment, and discharge of volunteers.

(12) "Housing assistance" means appropriate referrals by the department or other supervising agencies to federal, state, local, or private agencies or organizations, assistance with forms, applications, or financial subsidies or other monetary assistance for housing. For purposes of this chapter, "housing assistance" is not a remedial service or time-limited family reunification service as described in RCW 13.34.025(2).

(13) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the federally established poverty level; or

(d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

(14) "Out-of-home care" means placement in a foster family home or group care facility licensed pursuant to chapter 74.15 RCW or placement in a home, other than that of the child's parent, guardian, or legal custodian, not required to be licensed pursuant to chapter 74.15 RCW.

(15) "Preventive services" means preservation services, as defined in chapter 74.14C RCW, and other reasonably available services, including housing assistance, capable of preventing the need for out-of-home placement while protecting the child.

(16) "Shelter care" means temporary physical care in a facility licensed pursuant to RCW 74.15.030 or in a home not required to be licensed pursuant to RCW 74.15.030.

(17) "Sibling" means a child's birth brother, birth sister, adoptive brother, adoptive sister, half-brother, or half-sister, or as defined by the law or custom of the Indian child's tribe for an Indian child as defined in RCW 13.38.040.

(18) "Social study" means a written evaluation of matters relevant to the disposition of the case and shall contain the following information:

(a) A statement of the specific harm or harms to the child that intervention is designed to alleviate;

(b) A description of the specific services and activities, for both the parents and child, that are needed in order to prevent serious harm to the child; the reasons why such services and activities are likely to be useful; the availability of any proposed services; and the agency's overall plan for ensuring that the services will be delivered. The description shall identify the services chosen and approved by the parent;

(c) If removal is recommended, a full description of the reasons why the child cannot be protected adequately in the home, including a description of any previous efforts to work with the parents and the child in the home; the in-home treatment programs that have been considered and rejected; the preventive services, including housing assistance, that have been offered or provided and have failed to prevent the need for out-of-home placement, unless the health, safety, and welfare of the child cannot be protected adequately in the home; and the parents' attitude toward placement of the child;

(d) A statement of the likely harms the child will suffer as a result of removal;

(e) A description of the steps that will be taken to minimize the harm to the child that may result if separation occurs including an assessment of the child's relationship and emotional bond with any siblings, and the agency's plan to provide ongoing contact between the child and the child's siblings if appropriate; and

(f) Behavior that will be expected before determination that supervision of the family or placement is no longer necessary.

(19) "Supervising agency" means an agency licensed by the state under RCW 74.15.090, or licensed by a federally recognized Indian tribe located in this state under RCW 74.15.190, that has entered into a performance-based contract with the department to provide case management for the delivery and documentation of child welfare services as defined in RCW 74.13.020.

[2011 1st sp.s. c 36 § 13. Prior: 2011 c 330 § 3; 2011 c 309 § 22; prior: 2010 1st sp.s. c 8 § 13; 2010 c 272 § 10; 2010 c 94 § 6; prior: 2009 c 520 § 21; 2009 c 397 § 1; 2003 c 227 § 2; 2002 c 52 § 3; 2000 c 122 § 1; 1999 c 267 § 6; 1998 c 130 § 1; 1997 c 386 § 7; 1995 c 311 § 23; 1994 c 288 § 1; 1993 c 241 § 1; 1988 c 176 § 901; 1987 c 524 § 3; 1983 c 311 § 2; 1982 c 129 § 4; 1979 c 155 § 37; 1977 ex.s. c 291 § 31.]

RCW 26.44.050

Abuse or neglect of child — Duty of law enforcement agency or department of social and health services — Taking child into custody without court order, when.

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

[1999 c 176 § 33. Prior: 1987 c 450 § 7; 1987 c 206 § 5; 1984 c 97 § 5; 1981 c 164 § 3; 1977 ex.s. c 291 § 51; 1977 ex.s. c 80 § 28; 1975 1st ex.s. c 217 § 5; 1971 ex.s. c 302 § 15; 1969 ex.s. c 35 § 5; 1965 c 13 § 5.]

42 U.S.C. §1983
Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.]