No. 94529-2

SUPREME COURT
OF THE STATE OF WASHINGTON

HBH; SAH; and TREY HAMRICK,
litigation guardian ad litem on behalf of
KEH, JBH, and KMH,

Respondents,

v.

STATE OF WASHINGTON,

Petitioner,

and

TOWN OF EATONVILLE,

Defendants.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The Court of Appeals applied well-established Washington common law principles to determine that the trial court erred in granting the State's CR 50 motion dismissing the action of KMH, HBH, SAH, KEH, and JBH ("the children") against the State for its negligent investigation and placement of the children with foster parents Scott and Drew Anne Hamrick. Those foster parents viciously abused the children physically, sexually, and psychologically before ultimately adopting them, a step that allowed the Hamricks to further abuse the children.

In seeking to constrict the duty of its Department of Social and Health Services ("DSHS") and/or Child Protective Services ("CPS"),[1] the State misrepresents its precise preadoption *placement* duty owed to the children. The Court of Appeals correctly understood the actual duty the State owed to the children in reversing the trial court's dismissal of the children's action.

The State fails to demonstrate that the criteria of RAP 13.4(b) apply to the Court of Appeals decision. This Court should deny review.

B. STATEMENT OF THE CASE

[1] CPS is a part of DSHS.

The Court of Appeals correctly set forth the facts and procedure in this case. Op. at 3-7. It is troubling that the State takes issue with the Court of Appeals' discussion of the facts, particularly those pertaining to the preadoption period, 1998-2008. Pet. at 4-9. In doing so, it supplies a truly "sanitized" version of the facts that is favorable to it, as the moving party, turning the proper CR 50 standard entirely on its head.[2]

When the facts are taken in a light favorable *to the children*, the record amply supports the view that abuse was vicious, pervasive, and on-going during the pre-adoption period. SAH and HBH recall being abused by both Scott Hamrick, sexually, and by Drew Anne Hamrick, physically and emotionally, immediately upon being placed in the Hamrick home. RP (2/11/15):18-51, (2/19/15):104-19. *See also,* CP 267-71, 290-94, 317-20, 330-32, 362-64. SAH described abuse including sexual touching and groping by Scott and physical and emotional abuse by Drew Anne. *Id.* HBH described physical abuse by Drew Anne including slamming her head

[2] This Court reviews a trial court's CR 50 decision *de novo*. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003), but a CR 50 motion is properly granted only when "viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Id.* at 531 (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the premise is true." *Id.* This Court must look to the evidence adduced at trial in the plaintiff's case in reviewing the trial court's CR 50 decision. *Davis*, 149 Wn.2d at 531 n.4; *Butson v. Dep't of Labor & Indus.*, 189 Wn. App. 288, 297, 354 P.3d 924 (2015).

up against the wall. *Id.* Drew Anne imposed assorted forms of physical abuse on the children as "punishment" and/or "discipline." *Id.*

Omitted from the State's glowing reports about the Hamricks' pre-2008 treatment of the children is the fact that the negligent conduct of its caseworkers made it extremely difficult for the State to even discern the existence of abusive conduct.

The assigned caseworker for SAH and HBH was Mary Wooldridge. According to DSHS policy, Wooldridge was required to conduct regular "health and safety" visits that required a visit away from the home in a safe setting, such as a school, at least every ninety (90) days. Ex. 2. The applicable DSHS policy required that a caseworker ask the foster child "Whether they feel safe or have concerns about their home setting" and "How they are disciplined." *Id.* If the policy is followed, the caseworker must log the visits in a "Service Episode Record." *Id.*

There were *no* documented health and safety visits between the time that SAH or HBH were placed in the Hamrick home in October 1999 until they were adopted in October 2000; Wooldridge did not log any visits in the Service Episode Record for the children over that period.[3] SAH

[3] The trial court missed the critical significance of Wooldridge's failure to conduct such visits: "I mean it really doesn't matter whether Mary Wooldridge was or was not doing her health and safety visits..." RP (3/5/15):83. The trial court apparently did not pay careful attention to the children's expert, Barbara Stone, on this point. She testified, for example, as to KMH, KEH, and JBH:

specifically testified that these visits never occurred. RP (2/11/15):21-22, 31-32. Wooldridge *admitted* that the Service Episode Records do not reflect that she conducted the required health and safety visits. RP (2/9/11):11-13. DSHS staff and the children's GAL testified that other interactions with the children did not adequately substitute for such visits. RP (2/19/15):154-56, RP (2/25/15):132-35. The absence of such visits was a critical facet of Barbara Stone's expert testimony; she testified to a systemic breakdown. RP (2/9/15):63-64.

As noted *supra,* SAH and HBH testified to the Hamricks' abuse. During the pre-adoption period they acted out sexually, something that should have troubled caseworkers and that would have been uncovered had home and health visits occurred, as required by DSHS policy. RP (2/9/15):49-53.

> Q. If – with regard to either Staci or Haeli or Kayci, if home visits back in 2000 had revealed abuse on the part of the Hamrick foster parents, what would – what would have happened? Would the children have been left in the home?
>
> A. No. If there was abuse, they would have been removed.
>
> Q. Just the children that are being abused or all of the children?
>
> A. No. If there was sexual abuse, all the children would be removed. That is practice that if you have one child who has been sexually abused, you don't leave any of the other children to be possible victims.

RP (2/9/15):68.

Moreover, a contemporaneous counseling record from a scheduled therapy session from December 21, 1999 documented that SAH wanted to speak with an adult alone at that time. RP (2/9/15):9-10. During these counseling sessions, Scott and/or Drew Anne would typically sit right outside the counselor's door or be in the same room. CP 269, 291; RP (2/11/15):31. SAH explained that "I wanted someone to give me an opportunity to tell what was happening to me during the first year that I was placed in the Hamrick home." CP 268. HBH indicated that if asked, as required by DSHS policy, she too would have disclosed being abused, including being hit with a belt and spatula as a form of discipline. CP 291; RP (2/19/15):108. If the State's health and safety visit policy had been followed, both girls would have been spared over a decade of abuse.

CPS was also negligent when the Hamricks' abuse of the children was reported to it. For example, on April 8, 2008, SAH disclosed to a school counselor, Mary Ann Baker, that Drew Anne had assaulted her: "Staci has a bruise on inside of her left knee – the size is bigger than a golf ball." CP 270; RP (2/11/15):39-44. Baker documented SAH's report and sent a formal abuse and neglect report to CPS. *Id.* The referral to CPS stated that there were several other children in the home, but CPS failed to investigate. *Id.* The intake worker elected to "screen out" the referral rather than have it addressed and investigated by a trained investigator, as required by law.

Id.[4] As illustrated by Baker's report, if CPS had investigated, SAH and/or the other Hamrick children would have disclosed the ongoing abuse within the home. Instead, CPS failed to conduct any investigation whatsoever.[5]

C. ARGUMENT

(1) The State Seeks to Restore Sovereign Immunity for Its Failure to Protect Children Subject to Its Care

The State contends in its petition at 12-14 that it owes no duty to the children because there is "no analogous private sector conduct" that

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[4] DSHS has a statutory duty to investigate such an allegation; RCW 74.13.031 identifies the following among the Department's duties to dependent children:

> (3) The department shall investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation, or that presents an imminent risk of serious harm, and on the basis of the findings of such investigation, offer child welfare services in relation to the problem to such parents, legal custodians, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court, or another community agency. An investigation is not required for nonaccidental injuries which are clearly not the result of a lack of care or supervision by the child's parents, legal custodians, or persons serving in loco parentis. If the investigation reveals that a crime against a child may have been committed, the department shall notify the appropriate law enforcement agency.

[5] According to Pierce County Detective Deborah Heishman, the children experienced a wide array of abusive conduct at the Hamricks' hands: (1) pervasive sexual abuse by their adoptive father, Scott Hamrick, (2) being denied food for days at a time, (3) being regularly beaten with metal spatulas, hot curling irons and other kitchen products, (4) being locked in a room for days without anything but a blanket to sleep on the floor and a bucket in which to urinate, (5) being starved to the point of unhealthy body mass, (6) disparaging and degrading comments about their bodies and abilities, (7) being forced to sleep in the woods outside of the home, (8) unusual forms of corporal punishment such as being forced to move rocks and bales of hay from one side of the yard to the other for no real reason besides punishment, (9) slashes in the face with scissors to the point of permanent scarring, (10) repeated threats of being returned to foster care, and other assorted forms of egregious abuse. RP (2/5/15):19-52.

compels it to perform its child protective duties through CPS in a non-negligent fashion. This bizarre restriction on its duty to foster children like those present here should be rejected as nothing more than the State's back door effort to obtain tort immunity despite RCW 4.92.090.

In discussing the duty owed by the State to the children, Division II applied well-established principles of Washington common law. Op. at 7-14. That court properly recognized that the State had a "Duty to Protect." *Id.* at 7. The State, however, fundamentally *misrepresents* Washington law. It asserts that for "the first time a Washington court has gone outside the extensive statutory and regulatory framework through which the Legislature created DSHS/CPS and defined its responsibilities to the state's foster children to impose a common law tort duty to investigate." Pet. at 11. It seemingly contends that it can *never* have a common law duty to children under its care, *ever*. That is simply untrue. This Court has recognized that in addition to statutory duties to abused children, the State has common law duties to children in its care as well.

First, as the State well knows, CPS has a *statutory* duty to investigate claims of child abuse. RCW 26.44.060. When that statutory duty has been breached, *numerous* cases have held the State liable either to the abused child when further abuse occurs or the parents when their right to their

relationship with the child has been legally invaded.[6] For the State to argue that common law duties on its part to properly protect children under its care by making appropriate investigation of the home in which it places an abused child is a great "expansion" of the State's duty is baseless; rather, it is inherent in its ongoing duty to children who have been found to be dependent.

The State also continues to misrepresent this Court's holding in *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003), claiming that the *M.W.* court eliminated anything but statutorily-prescribed State duties to children generally, or to children in the State's care specifically. Pet. at 13. The State's obstinate effort to confine any duty it owes with regard to abuse investigations to its statutory duty under RCW 26.44.050 is undercut by the *M.W.* court's actual opinion. *Nothing* in *M.W.* evidenced this Court's intent to eliminate common law claims *per se* against DSHS for its negligent conduct as to foster children. In the bizarre facts of

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[6] *E.g.*, *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991) (DSHS caseworkers were not entitled to immunity where they made negligent placement decision entrusting girls to the care of a relative who raped them); *Lesley for Lesley v. Dep't of Soc. & Health Servs.*, 83 Wn. App. 263, 921 P.2d 1066 (1996), *review denied*, 131 Wn.2d 1026 (1997) (recognizing cause of action for negligent investigation of child abuse allegations arising out of RCW 26.44.050); *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 930 P.2d 958, *review denied*, 132 Wn.2d 1010 (1997) (same); *Lewis v. Whatcom Cty.*, 136 Wn. App. 450, 149 P.3d 686 (2006) (county sheriff's department owed child a duty to reasonably investigate allegations of sexual abuse by uncle). *See also*, *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (duty to conduct non-negligent investigation of child abuse allegations extends to parents).

that case, CPS staff conducted an "examination" of a foster child who had allegedly been sexually abused by the child's foster parents. CPS re-traumatized the child as well as the foster parent present for the "examination." While the Court affirmed dismissal of the negligent statutory investigation claim, the *only* claim before the Court on appeal, *id.* at 593, this Court was quick to note that DSHS continued to have a "common law duty of care not to negligently harm children." *Id.* at 600-01. In sum, *common law* claims are available to child victims of abuse against the State, apart from RCW 26.44.050.[7]

This Court has long held that there is a common law duty to protect children under an entity's care from abusive treatment. In *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999), this Court held that the Catholic Church owed a duty of reasonable care to children to prevent their foreseeable harm. In that case, a church deacon sexually abused children. The Court predicated this duty of care on the special relationship between the Church and the children of the congregation. *Id.* at 721-24. *See also, M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 252 P.3d 914, *review denied*, 173 Wn.2d 1006

[7] In the absence of an express intent by the Legislature to abrogate any common law duties, the State's common law duties are concurrent with any statutory duties it has to protect the children from harm. RCW 4.04.010; *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008). The State has not pointed to such an express legislative intent.

(2011) (church had protective duty to female child parishioner to prevent abuse by man a priest allowed to come into contact with the child); *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730, *review denied*, 179 Wn.2d 1005 (2013) (church had protective relationship with Boy Scout who was entrusted to care and custody of church-sponsored troop). Thus, for the State to claim that there are no common law counterparts to its liability in this case is simply *false.*

In order to make this argument, the State must also misrepresent the actual nature of its duty to the children and foster children generally. It seeks to truncate its responsibility to one of "investigation" alone. But the duty owed by the State to the children here was not simply to "investigate," but rather to properly protect them, as vulnerable minors under the State's protection, by placing them in an appropriate care setting. Certainly in doing so, the State had an obligation to ensure that such a setting was *safe.* The children's position is well-recognized in Washington law and not "novel."

Critically, the State is obtuse to the reasons why it had authority over the children at all. *The State terminated the children's parents' rights.* It could only do so where the children's physical or mental health was so seriously jeopardized by parental deficiencies that could not be corrected

that they became "dependent," and the children became the State's responsibility. RCW 13.34.030(5). The State has a broad *parens patriae* responsibility to intervene and protect a child under such extreme circumstances. RCW 13.34.020; *In re Dependence of Schermer,* 161 Wn.2d 927, 941-42, 169 P.3d 452 (2007). As this Court noted "the State has an interest in protecting the physical, mental, and emotional health of children" and it is "well established that when a child's physical or mental health is seriously jeopardized by parental deficiencies," the State has the right and the duty to intervene on behalf of the child. *Id.* at 941.

This broad, ongoing duty to dependent children who arrive in foster care was confirmed in detail in this Court's landmark decision in *Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003).[8] In that case, this Court held that foster children have substantive due process rights the State is bound to respect. "Washington's foster care system is charged with the sad duty of

[8] The State cites *Sheikh v. State*, 156 Wn.2d 441, 128 P.3d 574 (2006) only in a footnote. Pet. at 20 n.7. That case does not detract from the children's argument that the State has a special protective relationship as to foster children. There, the question was whether the State had a *Restatement* § 319 "take charge" duty over foster children who then assaulted the plaintiff. This Court found that foster care did not result in sufficient control over the day-to-day actions of foster children to create an actionable duty to third persons. This Court cited with approval the observation in *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 29, 84 P.3d 899, *review denied*, 152 Wn.2d 1018 (2014): "Any on-going relationship between the social worker and the child is *to prevent future harm to that child, not to protect members of community from harm.*" *Id.* at 450. (emphasis added). That statement properly distinguishes between the State's duty to the children here, to protect them from harm, and the State's "take charge" duty to third persons.

caring for children whose families are unable to do." *Id.* at 694.[9] Central to that substantive due process right is a foster child's right to protection from unreasonable risk of harm and a right to reasonable safety while under the State's care and supervision. *Id.* at 699.

The State's placement duty as to foster children is not a "new" common law duty to investigate. It is a well-recognized common law duty to properly protect vulnerable children under the State's care by placing

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[9] RCW 74.13.010 states:

> The purpose of this chapter is to safeguard, *protect*, and contribute to the welfare of the children of the state, through a comprehensive and coordinated program of child welfare services provided by both the department and supervising agencies providing for: Social services and facilities for children who require guidance, care, control, *protection*, treatment, or rehabilitation; setting of standards for social services and facilities for children; cooperation with public and voluntary agencies, organizations, and citizen groups in the development and coordination of programs and activities in behalf of children; and promotion of community conditions and resources that help parents to discharge their responsibilities for the care, development, and well-being of their children.

(emphasis added). *See also*, RCW 74.13.031(6) (DSHS ongoing duty to monitor placement to ensure child safety consistent with RCW 74.13.010). RCW 74.13.330 notes the duty of protection owed by foster parents, chosen by the State, to the children under their care:

> Foster parents are responsible for the *protection*, care, supervision, and nurturing of the child in placement. As an integral part of the foster care team, foster parents shall, if appropriate and they desire to: Participate in the development of the service plan for the child and the child's family; assist in family visitation, including monitoring; model effective parenting behavior for the natural family; and be available to help with the child's transition back to the natural family.

(emphasis added).

them only in a decent, safe setting. Division II correctly articulated that duty here. Review is not merited. RAP 13.4(b).

(2) In Its *Parens Patriae* Capacity and Under Applicable Statutes, the State Had a Special Relationship with the Children and a Duty to Them under § 315 of the *Restatement (Second) of Torts*

As the necessary predicate for the specific common law duty to the children in this case, Division II determined that there was a special relationship between the State and the children for purposes of the *Restatement (Second) of Torts* § 315. Op. at 12-14.[10] Contrary to the State's argument that it has no special relationship with foster children, pet. at 14-22, Washington law is unambiguously to the contrary and supports the Court of Appeals' analysis.

The State argues that no special relationship existed between CPS and the children because 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 case, and a demonstration of an historic obligation to provide protection from third parties." Pet. at 15.

[10] § 315(b) states in particular that an actor has a duty to another as to harm where "a special relation exists between the actor and the other which gives to the other a right to protection." Moreover, § 314A of the *Restatement* specifically notes that a special relationship is present as to one "who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." *See also*, § 320 (duty of person having custody to control the conduct of another). A dependent child falls well within these provisions of the *Restatement*, as Division II recognized. Op. at 9-10.

It cites *no authority* for this contention. Nor can it. Unlike a circumstance under the statutory duty to investigate possible child abuse, the State here unambiguously has statutory/common law control over *dependent* children, like the children here, for whom the State has a clearly established legal protective obligation.

The State's position is belied by special relationship cases that are not confined to physical custodial situations, but extend to situations where one actor has a special obligation to protect another from foreseeable harm. There is little question that a special relationship exists in the custodial setting that requires protection of a plaintiff from harm occasioned by third persons. *E.g.*, *McLeod v. Grant Cty. Sch. Dist. No. 128,* 42 Wn.2d 316, 255 P.2d 360 (1953) (school child under the care and custody of school district); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (nursing home resident). A special relationship may also require protection of the plaintiff from the custodian or himself/herself. *E.g.*, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (inmate's special relationship with jailer requires jailer to ensure inmate's "health, welfare, and safety" so that city was liable for inmate's suicide).

It is not the existence of actual physical control, however, that dictates whether a special relationship is present, as the State contends. This Court squarely rejected the analogous argument that the location of the

victim's injury controlled in *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016) (special relationship existed as to student–district even though student was raped far away from campus by another student who was a registered sex offender). This Court has also rejected the notion that a § 315(a) special relationship is confined to situations of physical control over the defendant in cases like *Volk v. DeMeerLeer*, 187 Wn.2d 241, 386 P.3d 254 (2016) (recognizing that a professional takes charge over an outpatient who harms others). This Court has also determined that a special relationship duty exists even when there is no "custodial" relationship at all. *E.g.*, *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (business has special relationship with customers invited to premises). *See also*, *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (city has *Restatement* § 281 duty to protect harassment victim who made complaint from her harasser).

The scope of any special protective relationship duty is determined by the foreseeability of the harm. As the Court of Appeals noted in *N.K.*, the existence of a duty based on take charge liability requires only that the harm be in the *general field of danger*. 175 Wn. App. at 526 (citing *McLeod*, 42 Wn.2d at 321). Foreseeability limits the scope of duty. *Id.* at 530. Foreseeability is a question of fact for a jury. *Id. See also*, *Niece*, 131 Wn.2d at 50. The children were within the general field of danger when the

State placed them with abusive foster parents who then abused them physically, sexually, and psychologically.

Washington courts have expressly recognized that public caregivers owe a duty to persons placed under a government's responsibility. In *Caulfield v. Kitsap Cty.*, 108 Wn. App. 242, 29 P.3d 738 (2001), Caulfield was a vulnerable adult who "suffered from Multiple Sclerosis and needed 24 hours care." *Id.* at 245. Caulfield was placed with a caregiver and the placement was monitored by DSHS, and later Kitsap County, caseworkers. The caseworkers failed to monitor the placement and "never performed a reassessment of Caulfield or had any contact with Caulfield." *Id.* at 247. Caulfield's condition deteriorated and went undetected, resulting in his severe injuries. Based on the caseworkers' failure to conduct visits and ensure Caulfield's safety by a licensed care provider, Caulfield prevailed at trial. On appeal, DSHS and the County tried to argue that it owed Caulfield no duty under the existing law. Division II determined that the nature of the relationship, and Caulfield's vulnerability and reliance upon the social worker for safety, mandated that DSHS and the County owed Caulfield a duty of care. It is no different here.

The Ninth Circuit in *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833 (9th Cir. 2010) similarly held that foster children sexually abused by the friend of their foster parents stated claims against DSHS because the

children had a substantive due process right to be free from harm inflicted by a foster parent.[11] Such a federal constitutional right is clearly established. *Id.* at 846-47.

These facts document and support the existence of a special relationship here between the children, who were dependent and under the State's protection, and the State. The Court of Appeals did not err in determining that a special relationship was present. Review is not merited. RAP 13.4(b).

(3) The Children Adduced Substantial Evidence at Trial of the State's Breach of Its Duty to Them

The State also contends that there is "no evidence" of a breach of duty. Pet. at 22-24. This is but a resurfacing of its argument on reconsideration in the Court of Appeals rejected by that Court.[12] It is essentially a *factual* argument that meets none of the RAP 13.4(b) criteria. In any event, it is well-recognized that breach of duty is a fact question for the jury. *Hertog, ex rel. SAH v. City of Seattle*, 138 Wn.2d 265, 275, 979

[11] "Once the state assumes wardship of a child, the state owes the child; as part of that person's protected liberty interest, reasonable safety and minimally adequate care..." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992).

[12] The State's central contention in section B of its Court of Appeals motion for reconsideration was that because Wooldridge was assigned only to SAH and HBH, her failure to properly conduct required health and safety checks as to those children would not have resulted in the disclosure of sexual abuse of the other children, KMH, KEH, or JBH. Division II rejected the State's position in denying reconsideration.

P.2d 400 (1999). The trial court erred in taking that issue from the jury by its CR 50 decision, as Division II correctly recognized.

Contrary to the State's contention, pet. at 22-24, there is ample evidence to support the jury's verdict on its breach of duty as to all of the children.

First, the Court's opinion at 16-17 clearly documents the evidence supporting the jury's verdict as to SAH and HBH. Wooldridge's failure to conduct the requisite health and safety checks as to those two children proximately resulted in the failure to uncover their physical, emotional, and sexual abuse during the pre-adoption period. The State's position assumes that Wooldridge was faultless as to the health and safety checks for SAH and HBH, but that, of course, is unsupported here. Op. at 16-17. As Division II discerned, had Wooldridge properly performed her responsibilities, the Hamricks' abuse of SAH/HBH would have been discovered.

Second, it is *inconceivable* that had Wooldridge discovered SAH and HBH were being abused by the Hamricks that all the children would not have been removed from that abusive home. To keep children in a home where abuse was rampant is utterly illogical, defying the central role of Child *Protective* Services. In *Lewis*, *supra*, Division I found the County liable when its sheriff's department failed to investigate the plaintiff's

sexual abuse of another child by that uncle and learned of the plaintiff's possible abuse. That discovery should have prompted the sheriff's department to investigate. RCW 26.44.050. The logic of the *Lewis* court is no less compelling here.

The record here also supports the logic that all of the children would have been removed from the home upon the revelation of abuse of SAH and HBH. The children adduced evidence to that effect from Barbara Stone, a 33-year DSHS veteran who served as a frontline caseworker and ultimately as its director of the Division of Licensed Resources. RP (2/9/15):5-20.

> Q. (By Mr. Beauregard) If you would just take a moment to look at Plaintiffs' 41 and see if that helps refresh your recollection.
>
> A. I do remember this, yes.
>
> Q. Can you share with the jury what your understanding is of the date of that visit and what's being documented.
>
> A. The date is that it occurred on June 21st, and it was documented on June 23rd.
>
> THE COURT: Of what year?
>
> THE WITNESS: Of 2000.
>
> Q. (By Mr. Beauregard) And in that particular visit, does anything stand out to you as concerning as a social worker?
>
> A. Yes. The worker's in the home, and it said the worker was speaking with Drew Ann Hamrick and – let me get to that part – Kenya has decided she wants to be – go to

counseling, but she wants to be naked for her counseling sessions.

Q. Is that a concerning documentation to you?

A. Yes.

Q. And can you tell the jury why that is and what should have occurred.

A. Well, that's not a – a normal statement by a young child. It's certainly a concerning statement when you think you're talking about children who have been victims of maltreatment; and again, you want to find out what's going on, what's the etiology; but in the meantime, set some safety in this home if this girl is going to start doing this, very concerning.

Q. Is that something that should have been investigated further?

A. Yes.

Q. How so, please.

A. Well, the worker should be interviewing this child and if she gets no disclosure, even maybe going as far as a forensic interview for this child, certainly doing a medical evaluation, making sure that we don't have any medical issues that are happening and making contact with the school, with any other people who may be having contact with the child to see if there's other concerns.

Q. If those steps were taken, is this the sort of thing that could rise to the level of a mandatory report?

A. Absolutely.

Q. Did you see any documentation – and what's a mandatory report for the benefit of the jury?

> A. Well, the child abuse statute states that certain people, certainly anybody who's doing social work, any person who is employed by DSHS, police officers, counselors, doctors, nurses, helping people, basically, are required – if they have reason to believe that a child is being abused or neglected, or has been abused or neglected, must make a report to child protection or law enforcement.

RP (2/9/15):65-67. Expert testimony on breach, like other conflicting evidence, must be treated in a light most favorable to the children in a CR 50 decision. *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009). In addition to the testimony of HB and SAH referenced *supra,* Stone's testimony, as an eminently qualified expert, established the requisite causal connection as to KMH, KEH, and JBH, as the Court of Appeals properly concluded in denying the State's motion for reconsideration on similar grounds.

The Court of Appeals correctly determined that there was evidence of the State's breach of its duty to the children. This completely *factual* argument is hardly one meriting review by this Court. RAP 13.4(b).

D. CONCLUSION

The Court of Appeals faithfully applied this Court's well-developed common law principles on a special relationship and the attendant duty under §§ 314A, 315, and 320 of the *Restatement (Second) of Torts.* The children, who were repeatedly abused sexually, physically, and psychologically by their foster parents before their adoption due to the

State's negligence, are entitled to their day in court. This Court should deny the State's petition for review.

DATED this 22d day of June, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 94529-2 to the following parties:

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Original e-filed with:
Washington Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 22, 2017 at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

June 22, 2017 - 11:53 AM

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