Supreme Court No. 95184-5
Court of Appeals No. 74892-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

State of Washington Department of Social & Health Services, and Jane and John Does 1-100,

Petitioner-Appellant.

PETITION FOR REVIEW

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I. INTRODUCTION

The court of appeals' published opinion warrants review for three reasons. First, for duty the opinion relies on *HBH v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016), *review granted*, No. 94529-2 (Sept. 6, 2017). This Court has already decided that the duty *HBH* imposed on DSHS—a common law duty to protect foster children based on a special relationship under *Restatement (Second) of Torts* § 315(b)(1965)—presents an issue of substantial public importance that warrants review.

Second, the court of appeals does not merely follow the *HBH* duty; it expands it. The opinion's duty requires DSHS to protect children who were previously in foster care from harm that did not begin until after they were adopted, when DSHS no longer had any relationship with them, much less a special relationship supporting a § 315(b) duty. Because the opinion effectively creates expansive new causes of action for negligent foster care placement and negligent adoption placement, it warrants review.

Third, the opinion affirms summary judgment in Plaintiffs' favor on breach and causation, despite DSHS having raised issues of material fact on both. The opinion discards the testimony of DSHS's expert witness that DSHS met the standard of care and ignores the testimony of DSHS's fact witnesses. It also overlooks Plaintiffs' failure to offer any evidence that the adoption court would have denied their adoption in 2004 but for DSHS's

alleged breach (the failure to find the unsubstantiated 2001 referral alleging that the Langes' then 12-year-old son had sexually assaulted his younger cousin), when no abuse had occurred during the entire 14 month foster care period. Depriving DSHS of its right to have a jury decide disputed factual issues on breach and causation, and erroneously subjecting DSHS to an eight million dollar judgment, also warrants review.

II. IDENTITY OF PETITIONER AND DECISION

The Department of Social and Health Services (DSHS) petitions for review of the published decision of Division I of the Court of Appeals, *C.L. & S.L. v. Department of Social & Health Services*, No. 74892-1 slip op. (Aug. 21, 2017), *reconsideration denied* Oct. 4, 2017 (*see* Appendix [App.] A, B).

III. ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals err in deciding that DSHS owed a duty to foster children under *Restatement (Second) of Torts* § 315(b) based on a special protective relationship, where DSHS's relationship with foster children does not involve the level of control and custody that Washington precedent requires for a special protective relationship?

2. Did the court of appeals err in deciding that DSHS owed a common law duty to foster children under *Restatement (Second) of Torts* § 315(b), where the Legislature has waived the State's sovereign immunity in tort only "to the same extent as if it were a private person or corporation" (RCW 4.92.090) and there is no private sector analog to DSHS's conduct of operating the foster care system?

3. Assuming that a *Restatement (Second) of Torts* § 315(b) duty applies to the DSHS statutory responsibilities in connection with foster care:

a. Plaintiffs allege that DSHS breached a duty to protect them by failing to deny the Langes' foster license and failing to oppose the Langes' adoption petition. Did non-movant DSHS raise a material question of fact on breach, requiring denial of summary judgment, through its expert's testimony that licensing the Lange foster home and recommending adoption met the standard of care?

b. Plaintiffs allege that DSHS's breach lies in failing to consider the 2001 referral, and but for that breach the Lange foster home would not have been licensed. Did non-movant DSHS raise a material question of fact on cause-in-fact, requiring denial of summary judgment, through its expert's testimony that the unsubstantiated 2001 referral could not have been used to deny the Langes' foster license?

c. Plaintiffs allege that DSHS's breach lies in failing to consider the 2001 referral, and but for that breach the Langes' adoption petition would have been denied. Did non-movant DSHS raise a material question of fact on cause-in-fact, requiring denial of summary judgment, where Plaintiffs introduced no evidence that the adoption court would have denied the adoption based on the unsubstantiated 2001 referral when during their 14 months in the Langes' foster care Plaintiffs were "thriving" and there was no evidence of any abuse?

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. DSHS licenses foster homes according to requirements specified in a comprehensive statutory scheme

DSHS licenses foster homes pursuant to a comprehensive statutory scheme that scrutinizes the qualifications of prospective foster parents, their households, and their homes. RCW 74.13, 74.15; WAC 388-148. Over all, prospective foster parents must demonstrate "[t]he understanding, ability, physical health, emotional stability and personality suited to meet the

physical, mental, emotional, and social needs" of foster children. Former WAC 388-148-0035(1) (2002); WAC 388-148-1365.

With respect to background checks, in 2002 when the Langes applied to be licensed as foster parents, anyone over age 16 living in the prospective foster home was subject to a criminal history background check. Former WAC 388-06-0110(4) (2002), former WAC 388-148-0035(2) (2002). DSHS policy also directed that its internal records be checked to determine if anyone living in the prospective foster home, regardless of age, had been identified to DSHS as part of a report of child abuse or neglect. CP 273. The law limited DSHS's use of such reports, and "no unfounded report of child abuse or neglect [could] be used to deny" a foster license.[1] Former RCW 74.15.130(2)(a) (2002).

Then and now, if licensing requirements are met, DSHS must grant or renew a foster care license. RCW 74.15.100. By the Legislature's express intent, "[f]oster parents are responsible for the protection, care, supervision, and nurturing" of the foster child.[2] RCW 74.13.330.

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[1] This prohibition has been clarified and currently provides that "*no unfounded, inconclusive, or screened-out report* of child abuse or neglect may be used to deny" a foster license. RCW 74.15.130(2)(a) (emphasis added).

[2] The intent to vest parental authority in foster parents has only increased. With the Legislature's adoption of the "reasonable and prudent parent standard," foster parents may authorize foster children to participate in all "normal childhood activities" "without prior approval of the caseworker, department, or court." RCW 74.13.710(3).

2. The Langes met the foster care licensing requirements, thus DSHS licensed them as foster parents

The Langes were licensed as foster parents in December 2002. CP 581. During the licensing process, the Langes disclosed to DSHS that their middle son, Dillon, had been identified as a victim in a CPS referral in 1997. CP 439, 468-69. The Langes did not disclose that in August 2001, then 12-year-old Dillon had been identified by another child as a suspect in a CPS referral related to his five-year-old cousin. CP 437, 573-77.

Because the 2001 referral did not allege abuse or neglect by a child's caregiver, per DSHS policy it was sent to law enforcement for investigation. CP 573-77, 625. The Whatcom County Sheriff's Office investigated the allegation and found no probable cause to file criminal charges. CP 441. DSHS's licensing social worker was not aware of the August 2001 referral during the licensing process. CP 437.

3. During DSHS-monitored foster care with the Langes, Plaintiffs were not abused, they were "thriving"

DSHS placed Plaintiffs in the Langes' foster care in June 2003. CP 549. For the next fourteen months, during DSHS's oversight of their foster placement, Plaintiffs were "thriving" in the Langes' care. CP 601, 533-34. Plaintiffs do not allege that DSHS negligently failed to uncover abuse while they were in the Langes' foster care. Indeed, both Plaintiffs

testified at deposition that no abuse occurred in the Lange home before they were adopted in August 2004. CP 457-59, 463, 465.

Plaintiffs' guardian ad litem visited them in the Lange home and approved of their placement there, writing to the court: Plaintiffs "are well bonded with each of the family members, are very integrated with the family, and are truly thriving in their care." CP 601.

4. After the court approved Plaintiffs' adoption, DSHS had no further involvement with Plaintiffs until C.L. disclosed abuse in 2013

When the Langes petitioned to adopt Plaintiffs, DSHS provided the court with an adoption pre-placement report of "all relevant information relating to the fitness" of the prospective adoptive parents. RCW 26.33.190(2). The DSHS social worker who drafted the adoption pre-placement report did not find the 2001 referral against Dillon.[3] CP 316-18. A post-placement report was also filed. RCW 26.33.200; CP 590-93.

The Whatcom County Superior Court approved Plaintiffs' adoption by the Langes in August 2004, severing DSHS's legal relationship with Plaintiffs. CP 612-15. DSHS had no involvement with Plaintiffs for the next nine years, until C.L. disclosed in 2013 that "between 7 and 12 years of age, she was sexually abused by her two older brothers." CP 619-23.

[3] That individual, Helen Anderson, no longer a DSHS employee by Plaintffs' litigation, was Plaintiffs' principle fact witness on summary judgment. CP 287-92, 716-18.

B. Procedural Facts

Plaintiffs filed this action in December 2014, alleging that DSHS's negligence in placing them in the Lange foster home and facilitating their adoption caused their post-adoption injuries. CP 1-8.

1. On Plaintiffs' motion, the trial court granted summary judgment on duty, breach, and causation; at trial, the jury then awarded Plaintiffs eight million dollars

Plaintiffs moved for partial summary judgment on liability, claiming that DSHS had breached the standard of care by facilitating their adoption into the Lange family in 2004, arguing theories they called "negligent investigation," "negligent foster placement," and "negligent adoption placement." CP 286-301, 715-16. DSHS responded that Plaintiffs could not establish the only recognized cause of action relevant to their case—the statutory claim for negligent investigation of a referral of child abuse or neglect under RCW 26.44.050—because there had been no referrals of abuse or neglect related to Plaintiffs until 2013.[4] CP 414-30. DSHS also argued that it had raised material questions of fact on breach and causation through, *inter alia*, the declaration of its expert that licensing the Lange foster home and recommending adoption met the standard of care. CP 424-25, 466-71.

[4] DSHS separately sought summary judgment directly on this basis. CP 760-74. The trial court denied DSHS's motion, without explaining how DSHS could be liable for negligent investigation of a child abuse referral when there had been no referral. CP 1346-47; RP 105.

The trial court granted Plaintiffs' motion, finding duty, breach, and causation as a matter of law, without elaboration, and reserving damages for trial.[5] CP 754-56; RP 71. Just before trial, the court adopted Plaintiffs' proposed order stating that duty was based on the statutory negligent investigation cause of action under RCW 26.44.050. CP 1667-76. A jury returned an eight million dollar verdict for Plaintiffs. CP 2353-55.

2. The Court of Appeals affirmed, finding duty on the alternative grounds of a special protective relationship and no material questions of fact on breach or causation

DSHS appealed, arguing that no duty under RCW 26.44 existed where there had been no reports or evidence of abuse. The court of appeals' opinion found that a "special relationship duty [under *Restatement (Second) of Torts* § 315(b)] exists regardless of whether [DSHS] breached the duty imposed by RCW 26.44.050." App. A at 8. The opinion claimed that three decisions of this Court supported its application of a broad common law negligence duty owed by DSHS to protect children from future harm by third parties: *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003); *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991); and *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998). App. A at 6-7. It declared without analysis that "[t]he evidence in this case establishes

[5] The trial court also granted Plaintiffs' motion to strike all of DSHS's affirmative defenses. RP 71.

beyond dispute [DSHS's] protective relationship with the two plaintiffs[.]" App. A at 8. And it cited to *HBH* as additional authority for imposing a special protective relationship duty under § 315(b). App. A at 8.

The court of appeals also rejected DSHS's showing that it, the non-moving party, had raised genuine issues of material fact on breach of duty and causation. App. A at 9-13. On breach, the opinion reviewed testimony from Plaintiffs' fact witness, but did not acknowledge that the record contained contrary testimony from DSHS's witnesses. App. A at 9. It relied upon the declaration of Plaintiffs' expert that DSHS breached the standard of care, while rejecting the opposite opinion reached by DSHS's expert. App. A at 10-11. On causation, the opinion credited Plaintiffs' fact witness and expert, and dismissed DSHS's expert, who opined that the unsubstantiated 2001 referral could not have been used to deny the Langes' foster care license because DSHS was prohibited by statute from denying a license based on an unfounded report of child abuse or neglect. App. A at 11-13. The opinion called the statute "irrelevant" and found, contrary to the evidence, that DSHS social workers "would have had every right and reason to recommend denial of the Langes' application" based on the 2001 referral. App. A at 11-13.

Seeking reconsideration, DSHS pointed out that this Court's decisions in *M.W.*, *Babcock*, and *McKinney* involve statutory, not common

law, duties. Mot. for Recons. (No. 74892-1) (App. C) at 2-6. DSHS also pointed out that the opinion misapprehended DSHS's relationship with foster children, which is defined by statute and does not involve the control and custody over foster children required to create a special protective relationship. App. C at 7-9. DSHS additionally argued that *HBH* is contrary to Washington law. App. C at 9. Regarding breach and causation, DSHS pointed out that the opinion did not consider the evidence in the light most favorable to non-movant DSHS. App. C at 13-22.

Reconsideration was denied on Oct. 4, 2017. App. B.

V. REASONS WHY REVIEW SHOULD BE GRANTED

A. Review Is Warranted Because Holding That DSHS Owes Foster Children a Special Relationship Duty Under *Restatement (Second) of Torts* § 315(b) Raises an Issue with Broad Public Importance and Conflicts with Washington Law

1. This Court's grant of review in *HBH v. State* shows that applicability of the § 315(b) special relationship duty to DSHS presents a matter of substantial public importance

This Court has accepted the State's petition to review *HBH*, 197 Wn. App. 77. In *HBH*, Division II held that DSHS owes a special relationship duty to foster children under *Restatement (Second) of Torts* § 315(b). *Id.* Here, Division I likewise imposed a special relationship duty on DSHS, citing *HBH*. App. A at 8-9. This Court's decision to review *HBH* confirms that whether DSHS owes a special relationship duty to foster children

presents an issue of substantial public importance. RAP 13.4(b)(4). Division I's imposition of the duty here further underscores the importance of the issue.[6] This Court should accept review of the petition.

2. Finding that DSHS has a special protective relationship with foster children conflicts with the decisions of this Court and the Court of Appeals that define what constitutes a special protective relationship

a. A special protective relationship arises from the defendant's control over the individual and the environment the defendant is obliged to protect

"As a general rule, there is no duty to prevent a third party from intentionally harming another," but a duty to protect from such harm can arise where "a special relation exists between the [defendant] and the other which gives the other a right to protection." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (internal quotations omitted); *Restatement (Second) of Torts* § 315(b) (1965). The essential rationale for why this special relationship creates this duty to protect against intentional acts by third parties "is that the [individual] is placed under the control and protection of the [defendant], with resulting loss of control [by the individual] to protect himself or herself." *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 433, 378 P.3d 162 (2016) (internal quotations omitted). Based on assuming this control, "[t]he defendant may therefore be required to

[6] That importance is corroborated further by the volume of cases already pending against DSHS, seeking to apply or expand the broad *HBH* duty. *See* App. D.

guard his or her charge against harm from others." *Niece*, 131 Wn.2d at 443 (internal quotations omitted). "Washington courts have recognized this type of special relationship, and corresponding duty, between certain individuals and schools, common carriers, hotels, hospitals, business establishments, taverns, possessors of land, and custodial mental institutions." *Donohoe v. State*, 135 Wn. App. 824, 837, 142 P.3d 654 (2006).

Washington appellate decisions considering the § 315(b) special protective relationship have determined that whether a relationship is "special" and gives rise to a duty depends on the control and custody the defendant has over the individual and the individual's environment. *See N.L.*, 186 Wn.2d at 431 (school districts have "duty to protect the students *in their custody* from foreseeable dangers.") (emphasis added);[7] *Bell v. Nw. Sch. of Innovative Learning*, 198 Wn. App. 117, 391 P.3d 600 (2017) (holding that school *did not* owe duty of care to plaintiff-student after it transferred custody of student to third party).

Thus, where there is control and custody, a special protective relationship exists and triggers the corresponding duty to exercise

[7] In *N.L.*, this Court clarified that "where a duty arises and a breach of that duty occurs while a student *is in a school district's custody*, then whether the *scope of that duty extends* to incidents off campus will depend on whether such incidents were foreseeable to the school district." *Bell*, 198 Wn. App. at 123 (citing *N.L.*, 186 Wn.2d at 435) (emphasis added). *N.L.* thus confirms that control, via custody, is the determining factor for whether a special protective relationship and corresponding duty arise in the first place.

reasonable care to protect against intentional harm by third parties. *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 529, 307 P.3d 730 (2013) (church has duty if molestation "occurs during church activities, when the children are in the 'custody and care' of the church"). But absent control and custody, no special relationship—and no corresponding tort duty—exists. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 729-30, 985 P.2d 262, *as amended* (Sept. 8, 1999) (majority of this Court rejecting the notion that the church had a special protective relationship and duty to prevent harm "that occurred as a result of a private, nonchurch-related child care arrangement between members of a church congregation.") (Madsen, J., concurring/dissenting).

Two cases involving vulnerable adults in need of 24-hour care illustrate this distinction: *Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001), and *Donohoe*, 135 Wn. App. 824. In *Caulfield*, a special protective relationship existed where government agents were the sole monitor of the 24-hour care that Mr. Caulfield received, in the isolated setting of his private home, after he was moved there from a nursing facility.[8] *Caulfield*, 108 Wn. App. at 245-47, 256 (County case manager

[8] The *HBH* opinion mistakenly claims *Caulfield* "stands for the proposition than entrustment, not custody, is at the heart of a special protective relationship." *HBH*, 197 Wn. App. at 91. But in *Caulfield*, "entrustment" existed because the government agent took

"required to make assessment visits" and "responsible for establishing Caulfield's service plans, monitoring his care, and providing crisis management, including terminating in-home care if it was inadequate to meet his needs." *Id.* at 256.)

In *Donohoe*, by contrast, DSHS did not have a special protective relationship and duty to Mrs. Donohoe where "it did not employ, supervise, or otherwise oversee [her] care or treatment" at a private nursing home. *Donohoe*, 135 Wn. App. at 840. "[U]nlike the government-supervised, in-home-care management arrangement in *Caulfield*," DSHS was not responsible for Mrs. Donohoe's individual daily care. *Donohoe*, 135 Wn. App. at 842. Rather, DSHS was responsible only for determining her eligibility for services, and monitoring the general, regulatory-compliance status and licensing of the nursing home. *Id.*

b. DSHS does not exercise the direct control over foster children and foster homes required to create the special protective relationship described in Washington law and § 315(b)

The Legislature did not vest DSHS with the type of direct control

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on the role of the nursing home as the sole monitor of Mr. Caulfield's 24-hour care, and did so in the isolated setting of his private home. *Caulfield*, 108 Wn. App. at 245-47, 256. That degree of control and custody is what defines the *Caulfield* "entrustment" relationship. This Court uses the label "entrustment" in *Niece* in the same manner: stating the duty arises "where one party is entrusted with the well-being of another" but then immediately defining by illustration that "entrustment" means "responsible for every aspect of [the other's] well-being." *Niece*, 131 Wn.2d at 50 (internal quotations omitted).

over foster children required to create a special relationship that imposes the broad duty to protect from third parties. Rather, "it is the foster parent . . . who stands in the parental role, not DSHS."[9] *Sheikh v. Choe*, 156 Wn.2d 441, 455, 128 P.3d 574 (2006). "'Foster parents are responsible for the protection, care, supervision, and nurturing of the child in placement.'" *Id.* (quoting RCW 74.13.330). DSHS's relationship with foster children is more like DSHS's relationship with the nursing home patient in *Donohoe*—DSHS is "limited to coordinating the foster care services" and "monitoring the home" but "'it does not control the manner and means of operating the home.'" *Id.* at 455-56 (quoting *DeWater v. State*, 130 Wn.2d 128, 139, 921 P.2d 1059 (1996)). Thus, unlike *Caulfield* and like *Donohoe*, DSHS does not have a special protective relationship with foster children.

The facts in this case reveal how far the lower courts have strayed from § 315(b) principles. Here, Plaintiffs' harm did not begin until after they were adopted by the Langes, when DSHS no longer had any relationship with them whatsoever. While Plaintiffs were in foster care with the Langes, DSHS had no reason to suspect that Plaintiffs were suffering abuse, because as Plaintiffs themselves testified, they were not abused

[9] The Legislature's intent that foster parents are to stand in the parental role—an archetypal special protective relationship if ever there were one—is shown by RCW 4.24.590, which provides that "the liability of foster parents for the care and supervision of foster children shall be the same as the liability of biological and adoptive parents for the care and supervision of their children."

during the Langes' foster care. The duty imposed on DSHS bears no resemblance to the duty of a hospital or school or nursing home to protect persons in their custody.

Because holding DSHS owes foster children a special relationship duty conflicts with Washington law, this Court should accept review.

3. Finding that DSHS has a common law duty to protect foster children exceeds the scope of the Legislature's waiver of sovereign immunity because DSHS's operation of the foster care system has no private sector analog

The Legislature has exclusive authority to "direct by law, in what manner, and in what courts, suits may be brought against the state." Const. art. II, § 26. With respect to common law tort liability, the Legislature has subjected the state to suit through a waiver of sovereign immunity that directs the State "be liable" for "its tortious conduct" to "the same extent as if it were a private person or corporation." RCW 4.92.090. To assert a common law negligence claim against the State:

> [T]he plaintiff must show that the State's conduct would be actionable if it were done by a private person in a private setting. If the plaintiff would have no cause of action against a private person for the same conduct, then the plaintiff has no cause of action against the State.

16 David K. DeWolf, Keller W. Allen, *Washington Practice: Tort Law and Practice* § 15:3 (4th ed. 2017); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994) (conduct must be "analogous to the

chargeable misconduct and liability of a private person or corporation.").[10] Thus, sovereign immunity has been waived only for state conduct that has a corresponding private sector analog.

But the DSHS actions challenged by Plaintiffs have no private sector analog. No private sector entity collects and investigates reports of child abuse and neglect; intervenes in families and removes children from parents; or licenses individuals to serve as foster parents, so that removed children can be placed into a natural, nurturing family environment. Nor do DSHS's statutory responsibilities create a § 315(b) special relationship between DSHS and foster children, which would itself be a private sector analog. Thus, state sovereign immunity bars imposition of the § 315(b) duty on DSHS foster care operation in part precisely because the statutes do not create a special relationship between DSHS and foster children.

The prerogative to impose liability for the operation of the foster care system rests solely with the Legislature. As this Court has repeatedly acknowledged, the Legislature did so through the enactment of a limited, implied cause of action in RCW 26.44.050. Additional liability must be

[10] *See Edgar v. State*, 92 Wn.2d 217, 226, 595 P.2d 534 (1979) (finding it incumbent on person asserting claim against the State to show the conduct complained of would constitute an actionable tort if done by a private person in a private setting); *Morgan v. State*, 71 Wn.2d 826, 827, 430 P.2d 947(1967) (affirming judgment for the State based on RCW 4.92.090 because Morgan failed to cite case showing private individual would have tort liability for comparable conduct).

found in legislative enactments, not in the common law.[11]

B. Review Is Warranted Because in Affirming Summary Judgment on Breach and Causation, the Opinion's Analysis Conflicts with Controlling Precedent and Deprives DSHS of Its Right to Have a Jury Decide Genuine Issues of Material Fact

Plaintiffs' allegations regarding breach and causation were a moving target below, and the court of appeals' opinion likewise conflates and confuses the two issues. App. A at 9-13. What is clear is that DSHS was the non-moving party on summary judgment, where the court found no genuine issue of material fact with regard to breach or causation. That ruling and the court of appeals' analysis turns the summary judgment process on its head by viewing all the facts and reasonable inferences therefrom in the light most favorable to Plaintiffs. Given that the ruling purports to declare liability as a matter of law, this Court should accept review and reverse on those grounds, even if there is a legal duty.

1. Non-movant DSHS raised a genuine issue of fact on breach through its expert's declaration that licensing the Lange foster home and recommending Plaintiffs' adoption met the standard of care

The opinion opens its analysis of breach by reciting the testimony of Plaintiffs' fact witness, but ignoring contrary testimony by DSHS's fact

[11] The Legislature imposed this statutory duty to investigate on the agency that has since become DSHS less than ten years after enacting the waiver. Laws of 1969, ch. 35, § 5 (codified at RCW 26.44.050). If the Legislature had understood the waiver to subject DSHS to a common law duty to investigate abuse and neglect of foster children, there would have been no need for it to impose that duty through statute.

witnesses also found in the summary judgment record. App. A at 9; CP 436-38, 785-96. The opinion chooses to believe the declaration of Plaintiffs' expert that DSHS "breached the standard of care by recommending and facilitating the adoption" of Plaintiffs. App. A at 9-10. It summarily rejects the opposite conclusion reached by DSHS's expert. App. A at 10-11. This analysis defies black letter law requiring all evidence and all reasonable inferences to be taken in the light most favorable to nonmoving party DSHS. *Robb v. City of Seattle*, 176 Wn.2d 427, 432-33, 295 P.3d 212 (2013).

The rationale for rejecting DSHS's expert's declaration—that it is "conclusory"—also conflicts with this Court's precedent. The opinion declares "conclusory statements of fact will not suffice to defeat a motion for summary judgment." App. A at 10 (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988)). This misapprehends *Grimwood*, which holds that a conclusory statement of fact *by a fact witness* will not suffice to defeat a motion for summary judgment. *Grimwood*, 110 Wn.2d at 359-60. *Grimwood* is not the monolithic rule expressed below; it concerns conclusory statements of fact and opinion *in a plaintiff's affidavit* that were insufficient to create a genuine issue of fact.

Expert witnesses, and the expert opinion in this case, are different. As a general rule, "an affidavit containing expert opinion on an ultimate issue of fact [i]s sufficient to create a genuine issue of fact which would

preclude summary judgment." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (holding expert opinion that design of hatch cover created unreasonably dangerous condition was sufficient to create genuine issue of fact precluding summary judgment).

But even apart from this general rule, the opinion's rejection of DSHS's expert's declaration as "conclusory" is indefensible in this case. The court of appeals focuses exclusively on the declaration's concluding paragraph, which ignores that the declaration provided supporting rationale. App. A at 10 (quoting CP 471 ¶ 31). The declaration's preceding paragraphs demonstrate that DSHS's expert considered the significance of the 2001 referral in formulating her ultimate opinion that "licensing . . . placing . . . and recommending the adoption" was "reasonable and met the social work standard of care." CP 471.

The reasonable inference from the declaration is that DSHS's expert's ultimate opinion also includes the opinion that "even if the department employees had known about the referral, it would have been reasonable for them to recommend and facilitate the placement of the girls into the Lange home." App. A at 11. Thus, the record contains the very evidence that the court of appeals' opinion states DSHS needed to raise a genuine issue of material fact on breach. App. A at 11. DSHS has a right to have a jury address Plaintiffs' claim that there was a breach of duty.

2. Non-movant DSHS raised a material question on cause-in-fact through its expert's declaration that the unsubstantiated 2001 referral could not have been the basis for DSHS to deny the Langes' foster license

The opinion alternatively identifies DSHS's breach as failing to find and consider the 2001 referral. App. A at 9-10. Under this formulation, Plaintiffs have the burden to establish that this breach was the cause-in-fact of their harm, by showing that if DSHS had considered the 2001 referral it would have denied the Langes' foster license. Again, the lower court errs by considering the evidence and reasonable inferences therefrom in the light most favorable to moving-party Plaintiffs, and by failing to recognize the obvious genuine issue of fact concerning causation.

The opinion states that "[t]he evidence is unequivocal that knowledge of the 2001 referral would have caused [DSHS] to recommend against [foster care] placement and adoption." App. A at 13. This statement ignores the record and DSHS's contrary evidence. Two DSHS social workers testified that even if they had been aware of the 2001 referral, it would not necessarily have disqualified the Langes from being licensed as foster parents. CP 436-38, 785-96. And DSHS's expert testified that the 2001 referral "could not have been used to deny the Langes' foster care license" because "[l]icensing statutes (RCW 74.15.130) clearly state that an

unfounded . . . report of child abuse or neglect may not be used to deny a foster care license." CP 470.

The opinion rejects the licensing statute as "irrelevant" and adopts its own subjective weighing of disputed evidence, claiming that DSHS social workers "if aware of the allegations against Dillon, would have had every right and reason to recommend denial of the Langes' application." App. A at 12. This conjecture goes beyond making inferences in Plaintiffs' favor to making assumptions that DSHS social workers may—and should—ignore statutory strictures at will. Cause-in-fact should rightly go to a jury.

3. Non-movant DSHS also raised a material question on cause-in-fact because Plaintiffs introduced no evidence that the unsubstantiated 2001 referral would have caused the adoption court to deny the adoption

Because Plaintiffs' abuse did not begin until after they were adopted (CP 457-59, 463, 465), to prove cause-in-fact they must also show that but for DSHS's breach of failing to consider the 2001 referral, the adoption court would have denied their adoption. *Estate of Borden v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004) (cause-in-fact "does not exist if the connection between an act [breach] and the later injury is indirect or speculative."). The opinion wrongly puts the burden on DSHS to prove the court would have *approved* the adoption even if it knew of the 2001 referral:

> A reasonable jury could not speculate that the adoption petition would have been presented to and approved by the

> court in the face of what the department knew or should have known about Dillon.

App. A at 13. This is error. Furthermore, Plaintiffs failed to carry their burden, because they presented no evidence that the adoption court would have denied the adoption if it had known of the 2001 referral,

In addition, DSHS plainly raises a genuine issue of material fact. What the adoption court could have been told regarding the 2001 referral was that three years before the 2004 adoption hearing: a referral was made by another child that Dillon had sexually assaulted his younger cousin, both Dillon and the cousin denied it, and the law enforcement investigation found no probable cause. CP 441, 573-77. What the record shows the adoption court was told, by Plaintiffs' guardian ad litem, was that during the 14 months that Plaintiffs were in foster care with the Langes they were "thriving." CP 597-610. Nor had there been any abuse. CP 457-59, 463, 465. On these facts, to find that the adoption court would have denied the adoption based solely on the 2001 referral requires both taking the evidence in the light most favorable to Plaintiffs and impermissible speculation.

In summary, the court of appeals' opinion ignores the genuine issues of material fact in the record, and reaches its result only by viewing all the facts and the reasonable inferences therefrom in the light most favorable to Plaintiffs, the moving party. As a result, DSHS was deprived of the right to

have a jury decide disputed factual issues regarding breach and causation, and erroneously subjected to an eight million dollar judgment.[12]

VI. CONCLUSION

For the reasons explained above, discretionary review is warranted pursuant to RAP 13.4(b)(1)(3) and (4). DSHS respectfully asks this Court to grant review of the court of appeals' opinion.

RESPECTFULLY SUBMITTED this 3rd day of November, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Allyson Zipp
ALLISON CROFT, WSBA 30486
ALLYSON ZIPP, WSBA 38076
Assistant Attorneys General

[12] DSHS requests that if this Court remands the case for further proceedings, it also direct that DSHS's affirmative defenses be reinstated.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

C.L., a sexual abuse victim, and Simeon J. Osborn as litigation guardian for S.L., a minor child and sexual abuse victim, Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellant, and JANE and JOHN DOES 1-100, Defendants.	No. 74892-1-I DIVISION ONE PUBLISHED OPINION FILED: August 21, 2017

BECKER, J. — The Department of Social and Health Services placed two dependent children for adoption without discovering that a member of the adopting family was previously reported to the department for molesting a child. On summary judgment, the trial court established the department's liability for the years of sexual abuse the children experienced in the placement and dismissed the department's affirmative defenses as lacking evidentiary support. A jury awarded damages of $4 million for each child. We affirm.

FACTS

Sisters C.L. and S.L. were born in 1996 and 2000, respectively. As young children, they lived with their mother in Everett. Their father was incarcerated out of state. Child Protective Services received reports that the girls' mother was using drugs and was abusive and neglectful. The girls were removed from her care in 2002 and were found dependent.

C.L. and S.L. lived in various foster homes, including one placement with some friends of Benjamin and Carolyn Lange. The Langes decided to apply for a foster license specifically so that they could be a placement for the two girls. The Langes had three biological sons, born in 1987, 1989, and 1992. The application asked, "Have you, or anyone in your family, been sexually or physically abused? And, have you or anyone in your family been a perpetrator or had a restraining order or protective order filed?" The Langes disclosed that their middle son, Dillon, had been "sexually abused by an older girl (with a history of abuse)" during school hours when he was in kindergarten and first grade. They said Dillon had received counseling "and is ok now."

The Langes did not disclose that Dillon was also an alleged perpetrator of sexual abuse. The department had in its files a referral to Child Protective Services concerning an incident in 2001, when Dillon was 12. According to the intake report, Dillon's 12-year-old cousin walked into a room and saw Dillon put his penis into the rectum of a 5-year-old cousin. The incident was reported to law enforcement for investigation. The officers who investigated the accusation

against Dillon reported they were unable to establish probable cause because neither Dillon nor the younger boy admitted to sexual conduct.

The social worker responsible for reviewing the Langes' foster application did not discover the 2001 referral concerning Dillon. The State issued a license to the Langes in December 2002 and placed the girls in the Lange home in June 2003. Social workers who checked up on the girls documented positive observations about their assimilation into the Lange family. The girls reportedly appeared bonded with Benjamin, Carolyn, and the three boys.

In late 2003, the State terminated the rights of the girls' biological parents. The Langes expressed interest in adoption.

The department was required to complete a preplacement report making a recommendation as to the fitness of the prospective adopters based on their "home environment, family life, health, facilities, and resources." Former RCW 26.33.190(2) (1991). Social worker Helen Anderson completed a preplacement report on the Langes. The report mentions that Dillon was molested. It does not mention that Dillon allegedly molested his cousin because Anderson did not see the 2001 intake report when gathering information on the Langes, although she admitted in a deposition that she should have. Her preplacement report states that background checks on Carolyn, Benjamin, and their oldest son did not reveal any disqualifying information. Anderson recommended that the adoptions go forward.

The department was also required to complete a postplacement report before the adoption was finalized. RCW 26.33.200(1). The postplacement

reports referred to the preplacement reports and concluded that the Lange home was adequate. A court approved the adoptions on August 24, 2004.

Around this time, the two younger boys—Dillon and Colten Lange—began to subject the girls to sexual abuse. C.L. testified that Dillon began molesting her when she was 8 and he was around 14. She said Dillon would come into her room at night, undress her, and touch her breasts and vagina with his hands, penis, and mouth. She said that this occurred on a regular basis until she was 12, that Colten regularly abused her during the same timeframe, and that both boys at times put their penises in her mouth. S.L. testified to similar experiences with Dillon from when she was 6 or 7 until she was 11, and at least once with Colten. She said if she told Dillon to stop, he would cover her mouth or choke her, and would threaten to kill her if she told anyone.

C.L. testified that she told Carolyn about the sexual abuse in 2011. Carolyn "didn't believe" C.L. and told her that if anything had happened, she "just needed to forgive" her brothers.

In August 2013, C.L. told her friend and her friend's mother about the sexual abuse. They contacted Child Protective Services. C.L. did not go back to the Lange home. The State removed S.L. from the Lange home in November 2013. During the ensuing police investigation, Colten confessed to having sexual contact with the girls. Dillon confessed to some of the allegations.

This lawsuit was filed on December 31, 2014, alleging the department's negligence in screening the background of the Lange family before facilitating the placement and adoption of the girls by the Langes. The complaint particularly

alleged that the department facilitated the adoption despite having information that Dillon had been accused of having anal intercourse with his younger cousin. The department's answer denied liability and stated numerous affirmative defenses.

Trial was set for January 2016 with a discovery cutoff in November 2015. The plaintiffs sent out initial interrogatories and requests for production in January 2015. The department serially produced thousands of pages of documents, many of them duplicative. The parties engaged in numerous communications about discovery issues.

After a hearing on November 13, 2015, the court granted the plaintiffs' motion for partial summary judgment to establish the department's liability and to dismiss the department's affirmative defenses. A trial occurred in which the jury was instructed that negligence and causation had already been established. The jury returned a verdict awarding $4 million in damages to each child. This appeal followed.

A negligence action requires a showing of duty, breach, causation, and damages. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is proper only when there are no genuine issues of material fact. CR 56(c). After the moving party has established an absence of factual issues, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material fact. Petcu v. State, 121 Wn. App. 36, 54, 86 P.3d 1234, review

denied, 152 Wn.2d 1033 (2004); Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986).

DUTY

The existence of a legal duty is a question of law considered de novo on appeal. N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 175 Wn. App. 517, 524-26, 307 P.3d 730, review denied, 179 Wn.2d 1005 (2013).

The department contends there are no common law duties that apply to the department's functions related to the case management of foster children. In the department's view, the only actionable claim against the department by a child who is abused in a foster or adoptive placement is a claim for negligent investigation premised upon and limited to the confines of RCW 26.44.050. This statute, which requires the department to investigate child abuse, has been interpreted to imply a cause of action for negligent investigation of abuse. M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 595, 70 P.3d 954 (2003). The department argues that C.L. and S.L. cannot prevail under RCW 26.44.050 because they do not allege that the department negligently investigated a child abuse referral pertaining to them.

The department's attempt to confine the plaintiffs to a cause of action for negligent investigation of child abuse is unsupported. The M.W. court, while finding no duty was owed in the particular circumstances of that case, recognized an actionable duty that flows from the department to children and parents who are harmed when the department's negligence results in placing a child into an

abusive home. M.W., 149 Wn.2d at 597. In the Babcock case, our Supreme Court "implicitly approved" a claim of negligence against the department for failing to adequately investigate the backgrounds of prospective foster parents. Tyner v. Dep't of Soc. & Health Servs., 141 Wn.2d 68, 79, 1 P.3d 1148 (2000), discussing Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991). A number of statutes and regulations direct the department to protect children by doing a careful evaluation of a foster or adoptive home before recommending placement. See, e.g., RCW 26.33.010; RCW 74.15.010; WAC 388-148-1320, -1370. Statutory imperatives as well as strong public policy grounds support recognition of a cause of action in tort for prospective adoptive parents against adoption placement agencies that negligently fail to disclose pertinent information about the child. McKinney v. State, 134 Wn.2d 388, 397, 950 P.2d 461 (1998). The tort duty arises from the special relationship between adoption placement agencies and adopting parents McKinney, 134 Wn.2d at 397. Logically, a tort duty also arises from the special relationship between the department as a placement agency and dependent children, allowing such children to seek a tort remedy when they are damaged by the department's negligent failure to uncover pertinent information about their prospective adoptive home.

Under the common law, a duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the other which gives the other a right to protection. N.K., 175 Wn. App. at 525-26. The existence of a duty predicated on a protective relationship requires knowledge of the "general field of danger" within which the harm occurred. McLeod v. Grant

County Sch. Dist. No. 128, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). The evidence in this case establishes beyond dispute the department's protective relationship with the two plaintiffs and the department's knowledge that a home in which a sexual predator resides is dangerous to children.

After the department filed the appellant's brief in this matter, Division Two of this court recognized that the department owes to dependent children a duty of reasonable care to protect them against foreseeable tortious or criminal conduct in a foster family home. HBH v. State, 197 Wn. App. 77, 92, 387 P.3d 1093 (2016), petition for review filed, No. 94529-2 (Wash. May 22, 2017).

> Absent proper monitoring by the State, a foster child is wholly exposed to the will of the foster parents, whether that will is a blessing or a horror. In this setting, the State is the last watchman of the foster child's well-being. A more compelling illustration of the bases of a special relationship . . . is hard to imagine.

HBH, 197 Wn. App. at 92. HBH is consistent with the earlier cases cited above and other cases finding a duty of protection arising from a special relationship under RESTATEMENT (SECOND) OF TORTS § 315(b). The special relationship duty exists regardless of whether the department breached the duty imposed by RCW 26.44.050. HBH, 197 Wn. App. at 86 n.2.

HBH is cited in the brief of respondent. The department's reply brief does not attack the reasoning of HBH. Instead, the department claims that the plaintiffs sought to establish liability solely by pursuing their cause of action for negligent investigation under RCW 26.44.050. This is incorrect. The complaint pleaded common law and statutory duties. The plaintiffs' motion for summary judgment argued common law and statutory duties. We may affirm a summary

judgment order on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994). The record in this case solidly supports the court's decision to find the element of duty established as a matter of law.

BREACH

The department contends that issues of fact preclude summary judgment on breach.

Helen Anderson, the department employee who completed the adoption preplacement report, did not discover the 2001 referral on Dillon when reviewing the Langes as potential adopters. She candidly admitted in her deposition that she "should have seen it" because it was a Child Protective Services file that she should have received when she did the background check on the Langes. As far as Anderson knew, the referral was available in the department's computer system and she was "certainly competent on the computer systems," but "why I didn't get this, I don't know." She testified she "would not have placed" the girls with the Langes if she had seen the referral. Anderson was "surprised" to see that the Lange home had previously been approved for foster care in light of Dillon's alleged sexual misconduct as reported to the department. She regretted that she did not know about the referral when she met with the girls in the course of her review because "if the girls were abused, I think that was something that was foreseeable."

Expert witness Barbara Stone, who had worked for the department for more than 30 years, submitted a declaration that the department breached the

standard of care by recommending and facilitating the adoption of C.L. and S.L., notwithstanding the 2001 referral. "The standard of care for social workers during the foster placement process always includes a referral search for prior sexual abuse." Stone observed that "a simple computer search for any member of the Lange family would have revealed the sexual abuse history of Dillon Lange within less than ten minutes." In her opinion, the Langes should not have been licensed for foster care "without further exploration."

The department presented the declaration of expert witness Joan Rycraft that the actions of the department's social workers who licensed the Lange home for foster care, placed the girls there, and recommended adoption by the Langes, "were reasonable and met the social work standard of care."

In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate. See Larson v. Nelson, 118 Wn. App. 797, 810, 77 P.3d 671 (2003). But conclusory statements of fact will not suffice to defeat a motion for summary judgment. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). Rycraft's conclusory statement that the standard of care was met does not rebut Stone's testimony that the department breached the standard of care by failing to discover critical information in its own files. Anderson herself acknowledged the breach.

The parties debate whether Rycraft's declaration should be disregarded on the issue of breach to the extent that it contradicts her deposition testimony.

We need not address this controversy.[1] Stone and Anderson testified that to meet the standard of care, the department's workers should have known of the referral accusing Dillon of child molestation and in view of that information should not have recommended the adoption. To rebut this evidence, the department needed evidence that even if the department employees had known about the referral, it would have been reasonable for them to recommend and facilitate the placement of the girls into the Lange home. Rycraft's declaration does not make this statement and thus does not raise an issue of material fact as to breach.

Summary judgment will be affirmed only if, from all the evidence, reasonable persons could reach but one conclusion. Petcu, 121 Wn. App. at 55. We conclude that no reasonable juror, properly instructed on the department's duty, could hear the evidence in this record and find that the department met the standard of care.

CAUSATION

The department contends the issue of proximate cause should have gone to the jury. Cause in fact is established by showing that but for the defendant's actions, the claimant would not have been injured. Petcu, 121 Wn. App. at 56. It is ordinarily a question for the jury unless reasonable minds could reach but one conclusion. Petcu, 121 Wn. App. at 56.

Prima facie proof of causation is provided by Anderson's testimony that if she and her supervisor had seen the referral on Dillon, they "would not have

[1] Consequently, we do not decide the department's motion to strike additional authorities submitted by respondents after oral argument in this court.

placed them in there," and by Stone's opinion that but for the department's negligence, the two girls would not have experienced the years of sexual abuse in the Lange home.

Citing Rycraft's declaration, the department argues that an issue of fact as to causation is created by a licensing statute, which stated that an unfounded report of child abuse or neglect may not be used to deny a foster home license.[2] Rycraft opines that because the law enforcement investigation ended inconclusively, the 2001 referral about Dillon did not rise to the level of "a founded child abuse report." Accordingly, the department contends the referral could not have been used as a basis for denying the Langes' application for a foster care license.

The licensing statute is irrelevant. The allegation in the referral was that Dillon engaged in criminal conduct; it was not a report of child abuse by Benjamin or Carolyn. And the adoption was not an administrative proceeding in which the Langes were contesting the department's refusal to issue them a foster home license. The department social workers, if aware of the allegations against Dillon, would have had every right and reason to recommend denial of the Langes' application.

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[2] In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of a foster family home license, the department's decision shall be upheld if there is reasonable cause to believe that:

(a) The applicant or licensee lacks the character, suitability, or competence to care for children placed in out-of-home care, however, no unfounded report of child abuse or neglect may be used to deny employment or a license.

Former RCW 74.15.130(2)(a) (2004).

But for the department's evaluation of the Langes as capable of providing a safe home, the girls would not have been injured. The evidence is unequivocal that knowledge of the 2001 referral would have caused the department to recommend against placement and adoption. A reasonable jury could not speculate that the adoption petition would have been presented to and approved by the court in the face of what the department knew or should have known about Dillon.

Because the record shows no genuine issues of material fact as to duty, breach, or causation, the court correctly granted partial summary judgment establishing liability.

AFFIRMATIVE DEFENSES

The department's answer stated affirmative defenses including (1) failure to state a claim; (2) for the purpose of RCW 4.22.070(1), any damages were caused by the fault of nonparties including the girls' biological mother and Carolyn, Benjamin, Colten, and Dillon Lange; (3) damages caused by the intentional conduct of other persons or entities must be segregated from damages allegedly caused by the department; (4) the plaintiffs may have failed to mitigate their damages; (5) the department's actions manifested a reasonable exercise of judgment and discretion and are not actionable; (6) claim preclusion; (7) court decisions were an intervening, superseding cause; (8) immunity for certain matters asserted; and (9) the State's potential entitlement to an offset from any award to the plaintiffs.

The trial court dismissed the department's affirmative defenses for failure to set forth specific facts showing a genuine issue of fact and alternatively as a sanction for alleged discovery violations.

Striking all of the State's affirmative defenses was a severe sanction for a discovery violation. In imposing a severe sanction, a trial court is obliged to make findings that lesser sanctions would not have been adequate, that the discovery violation was willful, and that the violation substantially prejudiced the other party. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). The trial court must "explain its reasons on the record" and cannot rely on the record to speak for itself. Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 349, 254 P.3d 797 (2011). The order needs to be supportable at the time it takes effect, not in hindsight. Blair, 171 Wn.2d at 350. Thus, the findings on the Burnet factors must be made "in the order itself or in some contemporaneous recorded finding." Teter v. Deck, 174 Wn.2d 207, 217, 274 P.3d 336 (2012).

We are not convinced the trial court complied with these requirements. During the hearing on November 13, the court did not specifically address the Burnet factors. Findings supporting the decision were not entered until January 8, 2016, when the trial was about to begin.

We nonetheless affirm the order dismissing the affirmative defenses. The record supports the alternative ground that the department's response to the motion to strike the defenses on summary judgment did not show the existence of a genuine issue of material fact as required by CR 56(e).

A party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 21-22, 851 P.2d 689 (citing Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)), review denied, 122 Wn.2d 1010 (1993). The moving party must identify those portions of the record that demonstrate the absence of a genuine issue of material fact. Guile, 70 Wn. App. at 22. The burden then shifts to the party with the burden of proof at trial. Young, 112 Wn.2d at 225. As the defendant, the department bears the burden of proving affirmative defenses. E.g., Brougham v. Swarva, 34 Wn. App. 68, 75, 661 P.2d 138 (1983). As the nonmoving party, the department could not rely on the allegations made in its pleadings but was obligated to set forth specific facts showing that there was a genuine issue for trial on the affirmative defense. See Young, 112 Wn.2d at 225-26.

Plaintiffs' motion argued that the department's lack of evidence was shown by its evasive responses to interrogatories. One interrogatory requested "the factual basis for each and every affirmative defense" alleged in the department's answer. The department's initial and supplemental responses to this interrogatory were prefaced by objections that it was "overly broad and unduly burdensome," it called "for the mental impressions and legal theories of defense counsel," it was "work product and not discoverable," and it was a "trap for Defendant because it can easily produce claims that the Defendant did not completely respond to the request." The objection was followed by: "ANSWER: Without waiving the above objections, see generally, Answer." Related

interrogatories and requests for production were given similar treatment. Throughout the discovery period, the department's position on its affirmative defenses remained opaque, supported primarily by string cites to identification numbers of "documents previously produced."

Plaintiffs' motion, filed on October 16, 2015, claimed they were entitled to dismissal of the affirmative defenses "unless Defendant produces evidence sufficient to establish a prima facie case for each affirmative defense alleged by the Defendant in its answer."

On October 29, 2015, the department provided several pages of supplemental discovery responses. These responses did no more than repeat the department's answer to the complaint:

- the biological mother of the girls as well as their adopting parents were at fault for failing to protect the girls and for concealing information;
- Dillon and Colten were negligent and had committed intentional torts;
- damages should be segregated to each intentional tortfeasor;
- the girls "may have failed to mitigate their damages by declining therapy and services";
- prior court orders and the abusive acts of the Lange brothers operated as superseding, intervening causes of harm, relieving the department of liability;
- the department "may be entitled" to an offset for funds the girls received from state programs such as foster care, adding "This response may be supplemented";

- an interrogatory about the defense of contributory or comparative fault "calls for attorney work product," but without waiving that objection, "Defendant may either supplement this answer or waive this affirmative defense at trial";
- an interrogatory asking whether the department believed nonparties were at fault or liable was objectionable as calling for attorney work product, but without waiving the objection, the Langes and the biological mother of the girls "are wholly responsible for the injuries that Plaintiffs claim. This answer may be supplemented as discovery continues."

On November 2, 2015, the department filed a response to the plaintiffs' motion for summary judgment, claiming that the facts stated in the supplemental discovery responses on October 29, 2015, provided prima facie grounds for denial of the motion to dismiss the affirmative defenses.

The department's response brief of November 2, 2015, did not address the prima facie showing necessary to establish any particular affirmative defense. Nor did it associate any particular document with any particular affirmative defense. The brief rested on the mere allegations of the department's answer to the complaint accompanied by numerical references to thousands of otherwise undifferentiated documents. The department, as the nonmoving party, did not meet its burden under CR 56(e) to show the court a genuine issue of material fact that would justify sending the affirmative defenses to the jury for decision.

EVIDENTIARY RULINGS

The department assigns error to three evidentiary rulings made at trial. We will not alter a trial court's decision to admit or exclude evidence unless "a substantial right of the party is affected." ER 103(a).

The trial court excluded a statement that the older girl gave to police the same day she initially reported the sexual abuse. The department claims there are inconsistencies between the statement and her trial testimony. The department was permitted to explore the alleged inconsistencies at trial through cross-examination. The department fails to show how the exclusion of the statement, if error, affected a substantial right.

The department contends the court should have excluded, as hearsay, a detective's testimony about his report of a recent interview with Dillon, who at the time of the interview had not been convicted. Some of Dillon's remarks during the interview could be interpreted as admissions of guilt. The department initially raised a hearsay objection. But after an extensive colloquy, counsel for the department said, "I think the Court can allow the admissions to come in" without those portions that were irrelevant and unduly prejudicial. In view of this colloquy, we conclude the hearsay objection was not preserved.

The department claims the court conveyed a personal opinion to the jury during closing argument by allowing plaintiffs' counsel to refer to testimony offered by the younger girl's guardian ad litem, while prohibiting the department from discussing the same testimony. The rulings do not convey a personal opinion and in any event were not prejudicial.

Affirmed.

Becker, J.

WE CONCUR:

Mann, J.

APPENDIX B

FILED
10/4/2017
Court of Appeals
Division I
State of Washington

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

C.L., a sexual abuse victim, and Simeon J. Osborn as litigation guardian for S.L., a minor child and sexual abuse victim, Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellant, and JANE and JOHN DOES 1-100, Defendants.	No. 74892-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Department of Social and Health Services, has filed a motion for reconsideration of the opinion filed on August 21, 2017. Respondents, C.L. and S.L., have not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Becker, J.
Judge

APPENDIX C

NO. 74892-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellant.

MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Appellant, Department of Social and Health Services, moves for reconsideration of the Court's decision because it misapprehends material facts and Washington law in finding the Department to be liable as a matter of law. RAP 12.4. On duty, the decision's finding that the Department owed Plaintiffs a common law special relationship duty misapprehends Washington law in three significant ways: the Supreme Court precedents on which the decision relies involve statutory, not common law, duties; the Department's relationship with dependent children is defined by statute and incompatible with a common law special relationship; and the scope of the State's waiver of sovereign immunity in tort does not extend to the Department's relationship with dependent children, which has no private sector analog. As for breach and causation, on both issues the decision misapprehends key facts and overlooks that the Department, not Plaintiffs, is the nonmoving party. By considering the evidence and inferences in the light most favorable to Plaintiffs, the decision finds breach and causation established as a matter of law. The Department respectfully requests that the Court reconsider its decision, correct these misapprehensions of fact and law, and remand for entry of summary judgment on duty in the Department's favor, or in the alternative, for a new trial.

II. ARGUMENT IN SUPPORT OF RECONSIDERATION

A. Reconsideration is needed because the decision misapprehends Washington law in finding that the Department owes a common law protective special relationship duty to Plaintiffs

This Court should reconsider its decision finding that the Department owes Plaintiffs a common law negligence duty. To reach that finding, the decision misapprehends Washington law in three significant ways. First, the decision misapprehends the Supreme Court precedents on which it relies—they involve statutory, not common law, duties. Second, the decision misapprehends the nature of the Department's relationship with dependent children—it is defined by statute and incompatible with a common law special relationship. Third, the decision ignores that the scope of the State's waiver of sovereign immunity in tort does not extend to the Department's relationship with dependent children, which has no private sector analog. Because any one of these reasons, standing alone, invalidates the decision's finding that the Department owes a common law special relationship duty to Plaintiffs, this Court should reconsider its decision.

1. The decision misapprehends the Supreme Court precedents on which it relies—*M.W.*, *Babcock*, and *McKinney* involve statutory, not common law, duties

The decision presents three Supreme Court precedents as ostensibly recognizing common law negligence duties owed by the Department: *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 70 P.3d 954

(2003); *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991); and *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998). *C.L. & S.L. v. Dep't of Soc. & Health Servs.*, slip op. at 6-7, 748924-1-I (Wash. Ct. App. Aug. 21, 2017) (slip op.) (attached as Appendix A). However, all three decisions actually involve statutory, not common law, duties. Thus, they provide no support for finding that the Department owes a common law special relationship duty to Plaintiffs.

With respect to the *M.W.* holding, the decision omits language indicating the statutory basis of the recognized duty. The decision states the *M.W.* court:

> recognized an actionable duty that flows from the department to children and parents who are harmed when the department's negligence results in placing a child into an abusive home.

Slip op. at 6-7 (citing *M.W.*, 149 Wn.2d at 597). But *M.W.* actually:

> recognized **that this statute creates** an actionable duty that flows from [the department] to both children and parents who are harmed by [the department's] negligence that results in . . . placing a child into an abusive home[.]

M.W., 149 Wn.2d at 597 (emphasis added). The referenced statute is RCW 26.44.010, the legislative purpose of RCW 26.44, which the *M.W.* court was examining to determine whether it "may infer a cause of action from a statutory duty" under the analysis required by *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). *M.W.*, 149 Wn.2d at 596.

M.W. considered whether the "statutory concerns" expressed in RCW 26.44.010 supported "a broader duty to protect children from harm" than the already-recognized negligent investigation cause of action based on RCW 26.44.050. The *M.W.* court concluded that a "careful reading of the statute's statement of purpose gives no indication that when the legislature created the duty to investigate child abuse, it contemplated" a broader duty to protect children from "direct negligence" by department investigators, "such as dropping a child." *M.W.*, 149 Wn.2d at 598. Accordingly, "[b]ecause the cause of action of negligent investigation originates from the statute, it is necessarily limited to remedying the injuries the statute was meant to address." *Id.* The statutory basis of the actionable duty recognized by *M.W.* is clear.

With respect to *Babcock*, the decision misidentifies a claim of statutory negligent investigation as negligence. The decision states that in *Babcock* "our Supreme Court 'implicitly approved' a claim of negligence against the department for failing to adequately investigate the backgrounds of prospective foster parents."[1] Slip op. at 7 (quoting *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 79, 1 P.3d 1148 (2000), discussing *Babcock*, 116 Wn.2d 596). But the *Tyner* court's discussion of *Babcock*

[1] "The specific holding of *Babcock* dealt with immunity," not the scope of the statutory negligent investigation claim under RCW 26.44.050. *Tyner*, 141 Wn.2d at 79; *Ducote v. State*, 167 Wn.2d 697, 702, 222 P.3d 785 (2009).

actually said the *Babcock* court "implicitly approved a **negligent investigation** claim." *Tyner*, 141 Wn.2d at 79 (emphasis added). At no place in *Babcock* does the Supreme Court ever consider common law negligence. And given that *Tyner* considered whether a statutory negligent investigation claim under RCW 26.44.050 was available to parents as well as children (*Tyner*, 141 Wn.2d at 76-82), the statutory basis of the referenced claim is clear. *Tyner*, likewise, does not "implicitly approve" a common law negligence claim.

Finally, with respect to *McKinney*, the decision ignores the statutory basis for the duty of disclosure that *McKinney* found is owed to prospective adoptive parents. The decision cites *McKinney* for the proposition that a "tort duty **arises from** the special relationship between adoption placement agencies and adopting parents." Slip op. at 7 (citing *McKinney*, 134 Wn.2d at 397) (emphasis added). While *McKinney* did discuss a Pennsylvania case that found a duty "arises from" that relationship, the *McKinney* court did not adopt that position, saying only: "[t]he special relationship between adoption placement agencies and adopting parents **argues strongly** for recognition of a cause of action in tort." *McKinney*, 134 Wn.2d at 397 (emphasis added). But that common law path was not the path the *McKinney* court followed.

Indeed, *McKinney* left no ambiguity about the statutory basis of the duty to disclose certain information to the "prospective adoptive parents":

> We believe the **Legislature has established the duty** owed by adoption placement agencies in RCW 26.33.350 (medical/psychological history) and RCW 26.33.380 (social history). The negligent failure of an adoption placement agency to comply with the **statutory disclosure mandate to prospective adoptive parents** may result in liability. The **scope of the agency's duty** is appropriately **drawn in those disclosure statutes**.

McKinney, 134 Wn.2d at 396 (emphasis added). The absence of parallel statutes requiring the Department to disclose to prospective adoptive children "pertinent information about their prospective adoptive homes" defeats the decision's reasoning that "[l]ogically, a tort duty also arises" between the Department and dependent children. Slip op. at 7. The reasoning of *McKinney* simply provides no "logical" basis for such a duty.

In sum, because the tort duties recognized in *M.W.*, *Babcock*, and *McKinney* are clearly based in statute, these precedents provide no support for this Court's decision finding that the Department owed a common law tort duty to Plaintiffs. To find such a duty is to misapprehend each of the Supreme Court cases on which the decision relies.

2. The decision misapprehends the Department's relationship with dependent children: it is defined by statute and incompatible with a common law special relationship

As the decision accurately relates, "[u]nder the common law, a duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the other which gives the other a right to protection." Slip op. at 7 (citing *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 525-26, 307 P.3d 730, *review denied*, 179 Wn.2d 1005 (2013)); *Restatement (Second) of Torts* § 315(b) (1965). However, in finding that the Department had such a "protective relationship with the two plaintiffs" the decision misapprehends the nature of the Department's relationship with dependent children. Slip op. at 8.

The protective special relationship duty requires the defendant to have substantial control over the plaintiff's environment. As explained in *N.K.*, cited by the decision, the protective special relationship duty applies in circumstances where the harm "occurs in a time and place where the vulnerable victim is in the custody and care of the institutional defendant." *N.K.*, 175 Wn. App. at 529 (finding a protective special relationship duty owed by a church to a child molested while in a church-sponsored scout group). Cases have also recognized a § 315(b) special relationship duty

owed by schools to students, by common carriers to passengers, by innkeepers to guests, and by hospitals to patients. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 44, 929 P.2d 420 (1997).

State statutes do not vest the Department with the type of "custody and care" common to protective special relationships. The Legislature authorizes the Department "to place the child" in a "foster family home licensed pursuant to chapter 74.15 RCW." *See* RCW 13.34.130(1)(b)(ii). During that placement, the Department and its social workers "coordinate and integrate" services ordered by a juvenile court. RCW 13.34.025(1)(a). These statutes do "not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate" services for the child and family. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26-29, 84 P.3d 899 (2004). Moreover, once placed with licensed foster parents, the foster child is entrusted to the foster parents' daily care. RCW 74.13.330 provides that "[f]oster parents are responsible for the protection, care, supervision, and nurturing of the child in placement."

As a state agency, the Department "may exercise only those powers conferred by statute, and cannot authorize action in absence of statutory authority." *Northlake Marine Works, Inc. v. State, Dep't of Natural Res.*, 134 Wn. App. 272, 282, 138 P.3d 626, 631 (2006); *accord, Wash. State*

Human Rights Comm'n ex rel. Spangenberg v. Cheney Sch. Dist. No. 30, 97 Wn.2d 118, 127, 641 P.2d 163, 167 (1982). By statute, the Department's relationship with dependent children is more limited than what is necessary to find a protective special relationship duty.

This Court's decision also relies on *HBH v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016), *petition for review granted*, No. 94529-2 (Wash. Sept. 5, 2017). Like the decision, *HBH* erroneously finds that the Department owes a duty of protection to foster children arising from a § 315(b) special relationship. Like the decision, *HBH* fundamentally misapprehends the limited statutory nature of the Department's relationship with dependent children. And like the decision, *HBH* is contrary to Washington law. *See* Appendix B (State's Petition for Review in *HBH v. State*, No. 47438-7).

3. The decision overlooks the scope of the State's waiver of sovereign tort immunity: it does not extend to the Department's relationship with dependent children, which has no private sector analog

In 1961, the Legislature waived, in part, the State's sovereign immunity in tort, directing that the "state be liable for damages arising out of tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090. "Essentially, then, the official conduct giving rise to liability must be tortious, and it must be analogous, in some degree

at least, to the chargeable misconduct and liability of a private person or corporation." *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965).[2] Only the State removes children from their parents and places them into foster care—private persons and corporations do not engage in analogous conduct. Because there is no analogous private sector conduct, the State's waiver of sovereign immunity does not extend to common law liability for negligent administration of the child welfare system. RCW 4.92.090; *cf.* RCW 26.44.050 (creating statutory tort liability for negligent investigation of child abuse or neglect).

The decision imposes a common law special relationship duty on Department conduct that is not analogous to private conduct subject to tort liability under the common law. Reconsideration is needed because the decision's finding that the Department owed Plaintiffs a common law special relationship duty exceeds the scope of the State's waiver of sovereign immunity in tort.[3]

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[2] As Justice Chambers observed, "treating governments the same as private persons or corporations [is] problematic where statutes and ordinances imposed duties on governments not imposed upon private persons or corporations." *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn. 2d 871, 887, 288 P.3d 328 (2012) (Chambers, J. concurring) (citing *Evangelical* in evaluating a public duty doctrine question) "Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the state of Washington." *Id.* Nor do private persons operate child welfare systems.

[3] On appeal, Plaintiffs did not argue that they had established the Department's duty under the RCW 26.44.050 negligent investigation cause of action. *See* Br. of Respondents at 17-22. Consequently, were this Court to reconsider its decision and reverse

B. Reconsideration is needed because the decision misapprehends key facts in finding breach and causation as a matter of law

This Court should reconsider its decision finding breach and causation as a matter of law because it overlooks or misapprehends three key facts material to those determinations.

First, the decision overlooks that the evidence on summary judgment (and at trial) unequivocally established that neither C.L. nor S.L. suffered abuse during the time they resided in foster care with the Langes. The decision obscures this fact by stating that the sexual abuse started "around the time" of Plaintiffs' adoption. Slip op. at 4. However, C.L. and S.L. each consistently testified, at deposition and at trial, that their abuse in the Lange home did not begin until *after* the adoption.[4] CP 457-59, 463, 465; RP (Vol. 5) at 602, 681 (Vol. II) at 113. That the abuse began after Plaintiffs' adoption—and therefore after their dependency relationship with the Department had been severed—is material to analysis of the Department's liability.

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its imposition of a common law special relationship duty on the Department, this Court should direct the trial court to enter summary judgment on duty in the Department's favor.

[4] When Plaintiffs were adopted in August 2004, C.L. had not yet turned eight years old and S.L. had just turned four years old. (C.L. was born on 11/17/1996 and S.L. was born on 6/11/2000. CP 1087.) C.L. testified that her abuse occurred when she was "[l]ike 8 to 11." CP 458. S.L. testified that her abuse began when she was "[l]ike six or seven." CP 463.

Second, the decision misapprehends the legal effect of an adoption order on the Department's relationship with dependent children. The decision finds that the "evidence in this case establishes beyond dispute the department's protective relationship with the two plaintiffs[.]" Slip op. at 8. This statement fails to acknowledge that Plaintiffs' adoption severed the Department's legal relationship with them. Accordingly, the Department's "protective relationship" with Plaintiffs, to the extent it was recently recognized in *HBH v. State*, only existed while Plaintiffs remained dependent—prior to their adoption. *See HBH*, 197 Wn. App. at 91, *petition for review granted*, No. 94529-2 (Wash. Sept. 5, 2017). Once the adoption court entered the adoption order on August 24, 2004, the relationship between the Department and Plaintiffs was terminated and Plaintiffs became the Langes' lawful children. RCW 26.33.260(1). Thereafter, the Department no longer had any authority to intervene in Plaintiffs' lives unless and until it received a referral for abuse or neglect. RCW 26.44.050.

Third, the decision misapprehends the evidence regarding the 2001 referral by implying that the referral alone established the Department knew or should have known a sexual predator resided in the Lange home. The decision states the "evidence in this case establishes beyond dispute . . . the department's knowledge that a home in which a sexual predator resides is dangerous to children." Slip op. at 8. It is axiomatic that "a home in which

a sexual predator resides is dangerous." *Id.* But no evidence in this case, including the 2001 referral, established that the Department knew or should have known a sexual predator resided in the Lange home (prior to C.L.'s report in 2013 (CP 619-22)).

Allegations of sexual abuse, as were made in the 2001 referral, do not establish that an individual is a "sexual predator". Fundamental to our system of justice is the mandate that individuals are innocent until proven guilty. Mere allegations do not, and should not, permit the conclusion that an individual is a "sexual predator," particularly not a 12-year-old child. RCW 10.58.020. To the extent that the decision applies the label "sexual predator" to 12-year-old Dillon Lange, it misapprehends that law enforcement investigated the 2001 allegations and concluded there was insufficient evidence to find probable cause, much less charge or convict Dillon of a crime. CP 441, 446-49, 469.

Reconsideration is needed because the decision misapprehends these points of fact.

C. Reconsideration is needed because the decision, in finding breach as a matter of law, overlooks that the Department—not Plaintiffs—is the nonmoving party

On summary judgment, the court must consider all evidence submitted and all reasonable inferences from that evidence in the light most favorable to the nonmoving party. *Petcu v. State*, 121 Wn. App. 36, 55, 86

P.3d 1234 (2004); *N.K.*, 175 Wn. App at 522. The Department is the nonmoving party on the issue of breach: whether, in light of the 2001 referral, licensing the Lange foster home and recommending adoption of Plaintiffs by the Langes breached the standard of care. As the nonmoving party, the Department is entitled to have all evidence and all reasonable inferences from that evidence considered in the light most favorable to it.

But to the contrary, the decision ignores the testimony of the Department's social worker witnesses. And it dismisses the declaration of the Department's standard of care expert by focusing on a single statement in her six-page declaration and ignoring the rest. Reconsideration is needed because in finding of breach as a matter of law, the decision ignores the posture of the Department as the nonmoving party on summary judgment and takes the evidence in the light most favorable to Plaintiffs.

First, the decision relies on the testimony of Plaintiffs' social worker witness and utterly ignores contrary testimony offered by the Department's social worker witnesses. On behalf of Plaintiffs, Helen Anderson "testified she 'would not have placed' the girls with the Langes if she had seen the referral." Slip op. at 9. In rebuttal, the Department offered the testimony of the Lange's primary foster care licensor, Helen Zenon, and a second social worker assigned to the Lange family during foster care. Both testified that if they had been aware of the 2001 referral, that referral would not

necessarily have disqualified the Lange family from being licensed as foster parents (CP 438, 785-96), thus allowing placement of Plaintiffs with them. The social workers' testimony gives rise to competing inferences, and "[w]here different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact." *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 319–20, 111 P.3d 866, 871 (2005).

Second, the decision dismisses the testimony of the Department's standard of care expert, Dr. Joan Rycraft, as "conclusory" and therefore insufficient to defeat Plaintiffs' motion on breach. Slip op. at 10. In so doing, the decision focuses exclusively on the conclusion of Dr. Rycraft's six-page declaration: that "the actions of the department's social workers who licensed the Lange home for foster care, placed the girls there, and recommended adoption by the Langes 'were reasonable and met the social work standard of care.'" Slip op. at 10 (quoting CP 471 ¶ 31). But in rejecting Dr. Rycraft's conclusion as insufficient, the decision misapprehends the distinction between fact and expert witness evidence.

Conclusory statements of fact **by fact witnesses** will not suffice to defeat a motion for summary judgment. *See Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (finding plaintiff's affidavit containing only his own conclusory statements of fact and opinions insufficient to create a genuine issue of fact). By contrast, the

Supreme Court has "determined that an affidavit containing expert opinion on an ultimate issue of fact was sufficient to create a genuine issue of fact which would preclude summary judgment." *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346, 1350 (1979) (holding expert opinion that design of escape hatch cover created an unreasonably dangerous condition was sufficient to create a genuine issue of fact precluding summary judgment).

Moreover, the decision ignores the rest of Dr. Rycraft's six-page declaration. In the declaration's preceding paragraphs, Dr. Rycraft discussed both (1) Plaintiffs' allegations that if the 2001 referral had been known to the licensing or pre-adoption social workers, the Langes would not have been licensed or approved for adoption and (2) the significance and impact of the referral on licensing the Lange home. CP 466-71. This demonstrates that Dr. Rycraft considered those points in formulating her ultimate opinion that "licensing . . . placing . . . and recommending the adoption" was "reasonable and met the social work standard of care." CP 471. The reasonable inference is that her ultimate opinion also includes the opinion that "even if the department employees had known about the referral, it would have been reasonable for them to recommend and facilitate

the placement of the girls into the Lange home."[5] Slip op. at 11. This is the very evidence that the decision states the Department needed to raise a genuine issue of material fact on breach. *Id.*

Through the testimony of the Department's two social workers, Dr. Rycraft's expert declaration, and the reasonable inferences from both, taken in the light most favorable to the Department, the Department raised a genuine issue of fact on breach. Reconsideration is needed because the decision overlooks this evidence and misapprehends the summary judgment posture of the parties in concluding otherwise.

D. Reconsideration is needed because the decision, in finding cause-in-fact as a matter of law, overlooks that the Department—not Plaintiffs—is the nonmoving party

As with breach, the Department is the nonmoving party on causation, entitled to have all evidence and all reasonable inferences from

[5] This is a reasonable—and conservative—inference, as a recent legal-negligence decision illustrates. In *Clark County Fire District No. 5 v. Bullivant Houser Bailey P.C*, the court considered whether the Fire District's experts had established that the defendant-attorney's settlement evaluation was outside the range of reasonable settlement values from the perspective of a reasonable, careful and prudent Washington attorney. *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey P.C.*, 180 Wn. App. 689, 709, 324 P.3d 743 (2014).

None of the Fire District's three experts specifically stated that the amount of the attorney's evaluation was outside the range of reasonable alternatives under the facts of the case or that no reasonable attorney would have made the same settlement evaluation. *Id.* The experts merely opined that the attorney's evaluation was "erroneous in that he underestimated the value of the plaintiffs' claims" and that his "settlement evaluation breached an attorney's standard of care." *Id.* However, the court said, "it can be inferred that the experts believed that no reasonably prudent attorney would have agreed with [attorney's] evaluation based on their opinions that [he] breached the standard of care." *Id.* Accordingly, the court held that the Fire District had produced sufficient evidence to create a material question of fact on the issue. *Id.*

that evidence considered in the light most favorable to it. *Petcu*, 121 Wn. App. at 55. To establish cause-in-fact, Plaintiffs must show that but for the Department's alleged breach (licensing and recommending adoption) they would not have been injured. *Petcu*, 121 Wn. App. at 56. And because Plaintiffs were not injured until after they were adopted (CP 457-59, 463; 465), establishing cause-in-fact necessarily requires showing that, but for the alleged breach, the adoption order would have been denied. *Estate of Borden ex rel. v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004) (cause-in-fact "does not exist if the connection between an act and the later injury is indirect or speculative.")

Accordingly, to establish causation Plaintiffs must show both that (1) if the Department had known of the 2001 referral it would not have licensed the Lange foster home or recommended the adoption, and (2) absent that recommendation, the adoption court would have denied the adoption. Reconsideration is needed because, as with breach, the decision finds cause-in-fact as a matter of law only by taking the evidence and inferences in the light most favorable to Plaintiffs, not the Department.

First, on licensing and recommending the adoption, the decision ignores the Department's evidence in finding that "[t]he evidence is unequivocal that knowledge of the 2001 referral would have caused the department to recommend against [foster care] placement and adoption."

Slip op. at 13. As discussed above on breach, the Department offered testimony to the contrary. *See supra,* Section C, 14-17. Two social workers assigned to the Lange family testified that even if they had been aware of the 2001 referral, it would not necessarily have disqualified the Langes from being licensed as foster parents (CP 438, 785-96), thus allowing placement of Plaintiffs with them. And Dr. Rycraft testified that the 2001 referral "could not have been used to deny the Langes' foster care license," given that "Licensing statutes (RCW 74.15.130) clearly state than an unfounded. . . report of child abuse or neglect may not be used to deny a foster care license". CP 470.

Rather than considering this testimony in the light most favorable to the Department, the decision instead rejects the licensing statute as "irrelevant." Slip op. at 12. The decision opines that the statute's prohibition on considering unfounded reports of child abuse does not apply to allegations of criminal conduct, and that the statute's import is limited to contested foster care licenses. *Id.* But this statutory analysis is itself irrelevant to the task of determining whether the Department's evidence raises a genuine issue of fact on causation.

Similarly inappropriate is the decision's conclusion that, notwithstanding the statute, Department social workers "if aware of the allegations against Dillon, would have had every right and reason to

recommend denial of the Langes' application." Slip op. at 12. With this conjecture the decision not only makes inferences in Plaintiffs' favor, rather than in favor of the nonmoving party Department, it also appears to assume that Department social workers could ignore, at will, the strictures of RCW 74.15.130.[6]

Second, turning to whether the adoption court would have denied the adoption absent the Department's recommendation, the decision not only takes the evidence and inferences in Plaintiffs' favor, it reverses the burden of proof in Plantiffs' favor as well. The decision's single sentence on this aspect of causation incorrectly places the burden of proof on the Department to establish that the adoption court would have approved the adoption even if it knew of the 2001 referral:

> A reasonable jury could not speculate that the adoption petition would have been presented to and approved by the court in the face of what the department knew or should have known about Dillon.

Slip op. at 13. But Plaintiffs are the moving party on causation. Thus, on summary judgment it is their burden to establish that the adoption court

[6] The decision provides no analysis regarding the question of whether knowledge of the 2001 referral would have caused the Department to recommend against adoption. It recounts the testimony of Plaintiffs' witness Ms. Anderson that "if she and her supervisor had seen the referral on Dillon, they 'would not have placed [Plaintiffs] in there.'" Slip op. at 11-12. Ms. Anderson's testimony regarding what her supervisor would have done is speculative hearsay, and thus inadmissible. ER 802. Moreover, this testimony says nothing regarding Ms. Anderson's own, much less the Department's, recommendation regarding Plaintiffs' adoption.

would have denied the adoption if it knew about the referral. Plaintiffs presented no evidence that the adoption court would have done so.

Moreover, considering the evidence and inferences in the light most favorable to the Department, the Department raised a genuine issue of material fact as to whether the adoption court would have denied the adoption if the Department had recommended against it based on the 2001 referral. At most, what the adoption court could have been told regarding the 2001 referral was that three years before the adoption hearing a referral was made that Dillon had sexually abused his cousin, that both Dillon and the cousin denied it happened, and that no criminal charges were ever filed. And as the adoption court was told by the Plaintiffs' guardian ad litem, during the year Plaintiffs were in foster care with the Langes they were "thriving." CP 597-610. Nor had there been any abuse. CP 457-59; 463, 465. In light of these facts, finding that the adoption court would have denied the adoption based solely on the 2001 referral would require impermissible speculation and the evidence viewed in the light most favorable to Plaintiffs.

Reconsideration is needed because in finding cause-in-fact to be established as a matter of law, the decision considered the evidence and

inferences in the light most favorable to Plaintiffs, not the Department.[7]

III. CONCLUSION

On duty, the decision misapprehends Washington law in finding that the Department owes a common law protective special relationship duty. On breach and causation, the decision misapprehends three key facts and overlooks that the Department was the nonmoving party, entitled to have all evidence and reasonable inferences considered in its favor on these issues. The Department respectfully requests that, for the reasons explained above, this Court reconsider its decision, correct these misapprehensions of fact and law, and remand for entry of summary judgment on duty in the Department's favor, or in the alternative, for a new trial.

RESPECTFULLY SUBMITTED this 11th day of September, 2017.

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[7] Were this Court on reconsideration to agree that the Department has raised a genuine issue of material fact on breach and causation, and therefore to remand the case for re-trial, the Department requests that its affirmative defenses also be reinstated.

APPENDIX D

Supreme Court No. _____
Court of Appeals No. 74892-1

SUPREME COURT OF THE STATE OF WASHINGTON

C.L., a sexual abuse victim, and Simeon J. Osborn as litigation guardian for S.L., a minor child and sexual abuse victim, Respondents, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and JANE and JOHN DOES 1-100, Petitioner.	DECLARATION OF ALLYSON ZIPP REGARDING TABLE OF PENDING MATTERS ALLEGING *HBH* DUTY AGAINST STATE OF WASHINGTON AND/OR DEPARTMENT OF SOCIAL AND HEALTH SERVICES

I, Allyson Zipp, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

1. I am over the age of eighteen, am competent to testify, and have personal knowledge of the matters stated below.

2. I directed my paralegal Judy St. John to prepare a report collecting all cases currently pending against the State of Washington and/or the Department of Social and Health Services in which plaintiffs have raised claims alleging the common law *Restatement (Second) of Torts* § 315(b) duty imposed on DSHS in *HBH v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016), *review granted*, No. 94529-2 (Sept. 6, 2017).

3. Attached hereto, as Attachment 1, is that report, which lists in tabular format the case name, forum, cause number, and amount of damages requested by the plaintiffs in their tort claim to the State, if available.

RESPECTFULLY SUBMITTED this 3rd day of November, 2017.

s/ Allyson Zipp
Allyson Zipp
Assistant Attorney General

ATTACHMENT 1

Table of Pending Matters Alleging *HBH* Duty Against State of Washington and/or Department of Social and Health Services

Case Name	Forum	Cause number	Damage request per tort claim
A.H., *v.* *Dep't of Social & Health Services*	King County Superior Court	17-2-25863-6	$10,000,000
Josh Brothers, as GAL of M.M., *v.* *Dep't of Social and Health Services*	Pierce County Superior Court	16-2-09206-9	$8,250,000
C.L. and S.L., *v.* *Dep't of Social & Health Services*	Court of Appeals, Division I	74892-1	$8,000,000* Jury Verdict
D.H., T.H. E.W., R.W-1 & R.W.-2, *v.* *Dep't of Social & Health Services*	King County Superior Court	16-2-13645-1	$30,000,000
Barbara Davis as Personal Representative of the Estate of G.B., deceased, *v.* *Dep't of Social & Health Services, et al.*	U.S. District Court, Eastern District of Washington	2:17-cv-00062	$9,700,000
Talitha Ebrite as guardian ad litem of R.O. and S.O. *v.* *Dep't of Social & Health Services*	Snohomish County Superior Court	16-2-033057	$18,000,000
G.C. and R.P., *v.* *Centralia School District, et al.*	U.S. District Court, Western District of Washington	3:17-cv-05027	$2,000,000
G.V., *v.* *Kiwanis International, et al.*	Thurston County Superior Court	17-2-04542-34	$2,000,000
J.M. on behalf of his minor child E.M,. *v.* *Dep't of Social & Health Services*	Clark County Superior Court	16-2-02502-5	To Be Determined at Trial
K.B., *v.* *Kiwanis International, et al.*	Thurston County Superior Court	16-2-04662-34	$150.00
K.W.M., *v.* *State of Washington*	King County Superior Court	16-2-23754-1	$25,000,000

Case Name	Forum	Cause number	Damage request per tort claim
Lita D. Kiely, personal representative of Estate of Garrett Ambrose Peter Charlie, *v.* *Crystal Bailey & Lawrence Bailey, et al.*	Whatcom County Superior Court	15-2-00296-8	$2,500,000
M.D., an infant, by Barbara Coster, her litigation guardian ad litem, *v.* *Dep't of Social & Health Services*	Pierce County Superior Court	17-2-06953-7	$50,000,000
M.M.S. and Crystal Armstrong, *v.* *Dep't of Social & Health Services, et al.*	Court of Appeals, Division II	49287-3	$1,500,000
Jerry Peterson as guardian ad litem for T.P., *v.* *State of Washington*	Court of Appeals, Division II	48828-1	$7,500,000
James F. Pritchard and Pauline Pritchard as guardian ad litem of Dillon Nathaniel Pritchard, *v.* *Steven & Sandra Peery, et al.*	Walla Walla County Superior Court	09-2-00715-3	$1,000,000
R.N. J.W. and S.C., *v.* *Kiwanis International, et al.*	Thurston County Superior Court	15-2-00383-3	$6,000,000
R.R. as guardian ad litem for his minor daughter C.R., *v.* *State of Washington, et al.*	King County Superior Court	17-2-10630-5	$5,500,000
Jo-Hanna Read as guardian ad litem for A.R.B., *v.* *State of Washington*	King County Superior Court	17-2-13121-1	$10,000,000
Julie A. Seeman, et al., *v* *State of Washington*	Mason County Superior Court	17-2-00564-23	$15,000,000
Patrisha & Steven Sillavan on behalf of their minor children C.S., B.S., and L.S., *v.* *Dep't of Social & Health Services, et al.*	U.S. District Court, Western District of Washington	2:17-cv-01126	$15,000,000

Case Name	**Forum**	**Cause number**	**Damage request per tort claim**
T.P., *v.* *Dep't of Social & Health Services*	Clark County Superior Court	16-2-00205-0	$6,000,000
Jessica L. Wrigley, *v.* *Dep't of Social & Health Services, et al.*	Court of Appeals, Division II	49612-7	$6,000,000

DECLARATION OF FILING AND SERVICE

I declare that on November 3, 2017, I electronically filed the foregoing document in the Washington Court of Appeals, Division I and served a copy of the foregoing on:

Raymond J. Dearie, WSBA No. 28792
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Attorneys for Respondents C.L. and S.L., by electronic mail to the above address, on the above-stated date.

s/Jodi Elliott
JODI ELLIOTT, Legal Assistant

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

November 03, 2017 - 2:43 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74892-1
Appellate Court Case Title:	C.L. & Simeon J. Osborn as litigation guardian for S.L., Res. v. State of WA., DSHS, App.
Superior Court Case Number:	14-2-02833-1

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