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NO. 67475-7-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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THE ESTATE OF ZINA LINNIK, and MIKHAIL and VALENTINA  
LINNIK, a married couple, and STANISLAV M. LINNIK, and NINA  
LINNIK, and MIKHAIL LINNIK, as parent and guardian for PAVEL  
LINNIK, SVETLANA LINNIK, OKSANA LINNIK, VADIM LINNIK,  
SAMUEL LINNIK, his minor children,

Appellants

vs.

STATE OF WASHINGTON, by and through its various state agencies  
and subdivisions, including DEPARTMENT OF CORRECTIONS and  
CHILD PROTECTIVE SERVICES, and PIERCE COUNTY, a  
municipal corporation, and CITY OF TACOMA,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
NO. 10-2-13557-2 KNT

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**REPLY BRIEF OF APPELLANT RE: CITY OF TACOMA**

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## TABLE OF AUTHORITIES

### Cases

<u>Beal v. City of Seattle</u> , 134 Wn.2d 769, 954 P.2d 737 (1998) .....	15
<u>Brown v. MacPherson's, Inc.</u> , 86 Wn.2d 293, 545 P.2d 13 (1975) ....	5, 6, 7
<u>Chambers-Castanes v. King County</u> , 100 Wn.2d 275, 669 P.2d 451 (1983) .....	15
<u>Donaldson v. City of Seattle</u> , 65 Wn. App. 661, 831 P.2d 1098 (1992) .....	18, 19
<u>Folsom v. Burger King</u> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	5
<u>French v. Chase</u> , 48 Wn.2d 825, 297 P.2d 235 (1956).....	7, 8
<u>Ganno v. Lanoga Corp.</u> , 119 Wn. App. 310, 80 P.3d 183 (2003) .....	6, 8
<u>Gilliam v. Department of Soc. &amp; Health Servs.</u> , 89 Wn. App. 569, 950 P.2d 20 (1998).....	17
<u>Herskovits v. Group Health Cooperative</u> , 99 Wn.2d 609, 664 P.2d 474 (1983).....	12
<u>Jay v. Walla Walla College</u> , 53 Wn.2d 590, 335 P.2d 458 (1959).....	7
<u>Lesley v. Department of Soc. &amp; Health Servs.</u> , 83 Wash.App. 263, 921 P.2d 1066 (1996).....	17
<u>Lewis v. Whatcom County</u> , 136 Wn. App. 450, 149 P.3d 686 (2006) .....	14, 15, 17, 18, 20

<u>M.W. v.</u> , 149 Wn.2d 589 .....	17, 18, 19, 20
<u>Mohr v. Grantham</u> , 172 Wn.2d 844, 262 P.3d 290 (2011) (.....	12
<u>Osborne</u> , 157 Wn.2d 18, 134 P.2d 197 (2006) .....	15, 16
<u>Rodriguez v. Perez</u> , 99 Wn. App. 439, 994 P.2d 874 .....	14, 16, 20
<u>Robb v. Seattle</u> , 159 Wn. App. 133, 145, 133 P.2d 242 (2010).....	15
<u>Torres v. City of Chicago</u> , 352 Ill.App.3d 533, 816 N.E.2d 816 (2004)..	12
<u>Tyner v. DSHS</u> , 141 Wn.2d 68, 1 P.3d 1140 (2000) .....	17, 20
<u>Yonker v. State</u> , 85 Wn. App. 71, 930 P.2d 958 (1997) .....	20
Statutes	
RCW 4.24.550.....	21
RCW 4.92.090.....	6
RCW 9A.44.010.....	21
RCW 9.68A.001 .....	21
RCW 26.44.010 .....	18, 19
RCW 26.44.020(1).....	18
RCW 26.44.030.....	21
RCW 26.44.050 .....	passim
RCW 43.43.754.....	21
Other	
Restatement 2d Torts § 323, 324A.....	8, 12

## I. INTRODUCTION

On July 4, 2007 Terapon Adhahn abducted Zina Linnik from the alley behind her family's Tacoma home. Police officers quickly arrived on the scene and concluded they were dealing with a stranger abduction. Patrol Sergeant Barry Paris attempted to launch an Amber Alert, a voluntary program intended to help locate abducted children before they are harmed. While the City of Tacoma argues that the Amber Alert is an "investigative tool," evidence indicates that its primary purpose is not investigation, but rescue.

Amber Alert guidelines call for the Alert to be issued as soon as possible. Tacoma negligently delayed issuing an alert for nearly twelve hours. Tacoma argues that there should be no liability in this situation, either because police investigations are absolutely immune, or because Zina Linnik's estate and parents cannot demonstrate that a duty was owed to them under these circumstances.

To the contrary, where a defendant voluntarily undertakes a rescue, but does so negligently, a duty to the victim arises when the botched rescue attempt either increases the risk of harm to the victim or deprives the victim of help from other sources. Here, the repeated delay in the Amber Alert did both: because a missing child's safety diminishes with each passing hour, the repeated delays created an

increased risk of harm to Zina. Further, the officers' negligent decisions deprived Zina of the timely assistance of the public when it could have made a difference

## **II. REPLY STATEMENT OF FACTS**

The goal of an Amber Alert is the safe recovery of a missing child. Because research indicates that most abducted children are killed within the first three hours of abduction, Amber Alerts should be issued as quickly as possible.

### **A. An Amber Alert is not issued in a reasonable time despite knowledge of the consequences.**

Patrol Sargent Barry Paris testified that he requested an Amber Alert be issued roughly 30 minutes after Zina had been abducted. CP 2254, ln. 2-6. Paris understood the Alert criteria and the importance of issuing the Alert promptly because he had been involved in a prior Alert. CP 2254, ln. 10-13. Paris's "past experience was that all [he] had to do was call the LESA supervisor, provide the information, make sure that it falls within the criteria of an Amber Alert, and that it would be done." CP 2258, ln. 19-23.

Unfortunately, Sgt. Paris was incorrect about the process for initiating an Amber Alert, likely because there was no written policy in July 2007. CP 2286, ln. 6-8. Only Public Information Officer (PIO)

Mark Fulghum was authorized to issue an Alert.. CP 2196-2203. Nevertheless, Fulghum decided to defer to Detective Davidson, who had not been trained in Amber Alert procedures.. CP 2293, ln. 11-25.

At the time, police suspected the Linnik's neighbor Samantha Khann was the abductor, but did not know where Khann was, or whether he had even kidnapped Zina. Sgt. Paris explained in his deposition, "Regardless of whether or not the neighbor was a ... viable suspect ... at that point, it's my opinion that you issue the Amber Alert in order to try and intercept this child that may be with this person regardless of the situation." CP 2261. He further stated that even if police believe they know the identity of the abductor, "that wouldn't be a reason not to issue an Amber Alert." CP 2262, ln. 16-17. Regardless of whether the DOT's policy was to not put partial license plate information on interstate reader boards, information enabling the public to locate Zina's abductor would still have gone out.

After Khann was eliminated as a suspect and Davidson attempted to request an Alert, PIO Fulghum testified that he fell asleep after talking to Davidson. CP 2295-2296. At the time of Zina Linnik's abduction Tacoma had no written Amber Alert procedure in place and neither patrol officers nor detectives received any training on Amber Alerts. CP 2290, CP 2254, CP 2212. As a result no one awake

understood the level of urgency required, wasting over twelve hours before Tacoma police issued Zina's Amber Alert. The Amber Alert did not go out until after 10:00 a.m., more than twelve hours after Zina's abduction. CP 2221, ln. 4-8.

**B. The Trial Court erred when it struck Plaintiffs' briefing on RCW 26.44.050 and did not permit Plaintiffs to amend their complaint.**

Plaintiffs pled a negligence claim against all defendants in this case, but Plaintiffs did not specify that they were proceeding on a legal theory in which a duty arose under RCW 26.44.050. (Complaint at ¶6.5) CP 1-26. In ¶5.36, Plaintiffs alleged that Tacoma failed to timely issue an Amber Alert despite sufficient information and training. CP 1-26. In response to Tacoma's CR 12 Motion to Dismiss, filed before discovery was completed, Plaintiffs stated their claims against Tacoma were for negligence. CP 86-119. Before Plaintiffs had deposed Tacoma personnel or learned why the Amber Alert had not been issued in a timely fashion, Plaintiffs stated in response to an objected-to contention interrogatory that they were not alleging a breach of duty under RCW 26.44.050.

After conducting discovery and deposing Tacoma personnel, Plaintiffs learned that Tacoma likely breached their duty to Zina under RCW 26.44.050. In response to Tacoma's summary judgment motion

in which the City argued that it could not be held liable for its negligent investigation, thereby raising the issue in the first instance, Plaintiffs submitted responsive briefing describing Tacoma's duty under RCW 26.44.050. CP 86-119. Tacoma argued that the briefing should be stricken because the complaint did not specifically set out a claim under that statute, or alternatively, that a response to an objected-to, pre-discovery contention interrogatory precluded such a claim. Tacoma's motion was filed nearly six months before the dispositive motion cut off date, however. The Trial Court erroneously agreed, preventing Plaintiffs from making a legal argument entirely encompassed in their original pleadings.

### **III. ARGUMENT**

#### **A. The City of Tacoma is liable to Plaintiffs under the Rescue Doctrine.**

The Amber Alert program, as Tacoma agrees, is an explicitly voluntary program. However, duties arise even for voluntary undertakings. In particular, one who voluntarily undertakes rescue efforts is "required by Washington law to exercise reasonable care in his or her efforts." *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998) (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293,

299, 545 P.2d 13 (1975)). As set forth in *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 316, 80 P.3d 183 (2003):

Under the voluntary rescue doctrine, a duty to rescue arises when the rescuer knows a danger is present and takes steps to aid an individual in need. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965); *French v. Chase*, 48 Wn.2d 825, 829-30, 297 P.2d 235 (1956). A person may be liable for attempting a voluntary rescue and making the plaintiff's situation worse if that person (1) increases the danger; (2) misleads the plaintiff into believing the danger has been removed; or (3) deprives the plaintiff of possible help from others. *Folsom*, 135 Wn.2d at 676.

“When a defendant undertakes a rescue, a special relationship develops, giving rise to actionable negligence if a defendant breaches the duty of care by failing to act reasonably.” *Id.*

The leading case in Washington is *Brown v. MacPherson's*, 86 Wn.2d 293. *Brown* demonstrates that the voluntary rescue duty applies to public entities in Washington—as it should, given that under RCW 4.92.090, the state “shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person.” In *Brown*, the Washington Supreme Court held that the State of Washington could be liable where the State's agents gratuitously assumed a duty to act on the plaintiffs' behalf and then breached that duty to the plaintiffs' detriment. *Brown*, 86 Wn.2d at 294. In *Brown*, an avalanche expert notified an agent of the state that the plaintiffs'

cabins “were in a high-risk avalanche area.” *Id.* at 298. The state agent indicated that the state would convey his warning to the property owners in the high-risk area, including the plaintiffs—essentially, promising to rescue them. *Id.* Later, the state agent met with the real estate agent and developers of the area, but negligently conveyed to them that there was not significant avalanche risk. *Id.* The plaintiffs alleged that the state agent’s negligent act deprived them of the opportunity to be warned of the danger by the avalanche expert or by the developers, who might have relayed warnings had they themselves been told of the danger. *Id.*

The Washington Supreme Court held that although there was no statutory or other duty for the state agent to warn or rescue the plaintiffs, “One who undertakes, albeit gratuitously, to render aid or warn a person in danger is required by our law to exercise reasonable care in his efforts.” *Id.* at 299 (citing *Jay v. Walla Walla College*, 53 Wn.2d 590, 595, 335 P.2d 458 (1959); *French v. Chase*, 48 Wn.2d 825, 830, 297 P.2d 235 (1956)). The Court further held that if the state agent’s actions caused the developer or real estate agent “to refrain from action on [plaintiffs’] behalf he otherwise would have taken, the State is answerable for any damage cause by that misimpression.” *Id.* at 299-300. Thus, in *Brown*, the Washington Supreme Court adopted

the principle that state agents, as voluntary rescuers, may be liable for harm when their negligent rescue attempts deprive the victim of help that would otherwise have been offered by a third party.

**1. Tacoma voluntarily undertook a rescue effort.**

A rescue attempt requires that the would-be rescuer know a danger is present, know that a particular individual is in danger, and take steps to aid that individual. *Ganno*, 119 Wn. App. at 316 (citing Rest. (2d) Torts § 323, 324A; *French*, 48 Wn.2d 825). The rescue attempt must take place after the particular danger is known. *Id.* Issuance of an Amber Alert is a rescue attempt. An Amber Alert may only issue when a particular child has been subjected to the known danger of kidnapping. As stated in the training materials used by the Tacoma Police Department, and on the US Department of Justice's Amber Alert website, "The goal of an AMBER Alert is to instantly galvanize the entire community to assist in the search for and the safe recovery of the child." CP 2103. A reasonable jury could thus conclude that an Amber Alert is a rescue attempt.

Contrary to Tacoma's assertions, Plaintiffs have consistently alleged that Tacoma gratuitously undertook a rescue effort but conducted that effort negligently. The Amber Alert process was begun and negligently delayed twice. First, approximately 30 or 35 minutes

after Zina had been taken, Paris correctly concluded that the incident was likely a stranger kidnapping, that Zina's location was unknown, that she was likely in danger, that he had an adequate description of Zina, her abductor, her abductor's vehicle, and that an Amber Alert should be issued.. CP 2243-2277. In response to Paris's launch of the Alert, Fulghum halted the Amber Alert process, and instead decided that Davidson should decide when to issue the Alert. Davidson then negligently decided that the Alert should be delayed while police pursued the Linniks' neighbor Samnith Khann as a suspect—this despite the fact that Khann's license plate bore no resemblance to the plate information provided by the family, and despite the fact that police had no idea whether or not Khann was running with the girl. CP 2279-2376. Davidson continued to delay the Amber Alert even after Khann's van was located without Zina in it. CP 2279-2376.

Second, sometime around 3:30 or 4:00 a.m. on July 4, 2007, Det. Davidson belatedly decided that an Amber Alert should be issued. CP 2295-2296. He called Fulghum to request that he issue the Amber Alert. CP 2295-2296. Fulghum woke up, answered the phone, told Det. Davidson that he would issue the Amber Alert, then fell back asleep. CP 2296, CP 2321. The Amber Alert was not issued until after 10:00 a.m. on July 5. Viewed in the light most favorable to Plaintiffs,

both attempts to initiate the Amber Alert were rescue attempts, because both were done with the intent of aiding a known victim (Zina) subjected to a specific danger (kidnapping).

**2. The Amber Alert Process was conducted negligently.**

At the time of the Zina Linnik Amber Alert, proper processes for issuing an Amber Alert had been established, and Tacoma Police Department personnel, including Fulghum, had been trained in those processes. CP 2279-2376. The training stated that an Amber Alert should be issued within the first four hours of a kidnapping, and that it should be issued when a police concluded that a child under 18 years of age had been abducted, was likely in danger, and there was enough information to identify the child, abductor, and/or vehicle. CP 2152-2194. Tacoma's own Amber Alert procedures also adopted those four criteria. Here, despite the fact that Fulghum knew the criteria were met, and despite the fact that Fulghum knew that only Tacoma's PIOs had been trained in Amber Alert policy and procedure, he neither issued the Alert nor urged that Davidson do so—he simply deferred to Davidson's uninformed decision to delay the Alert. When Davidson finally decided to issue the Alert, Fulghum fell asleep and failed to issue it. From this evidence, a reasonable jury could conclude that

Tacoma Police Department personnel, including both Fulghum and Davidson, did not act reasonably.

There is also evidence from which a reasonable jury could find that Tacoma's Amber Alert procedures were themselves inadequate and unreasonable. The procedures in place when Zina was kidnapped required that all Amber Alerts be routed through the PIO. The Department also did not have any written processes for Amber Alerts or train all personnel on Amber Alert criteria and processes, meaning that the PIOs, who have no real decision-making authority, were the only people who had knowledge about when and why an Amber Alert should be issued. In 2007, Tacoma Police Detectives like Davidson were not trained on Amber Alerts. Nor were patrol officers, usually the first officers on the scene. Sgt. Paris had only learned about Amber Alerts through informal channels. Tacoma's Amber Alert process foreseeably created bottlenecks and poor decision-making by restricting Amber Alert knowledge and action to the PIO.

### **3. Tacoma's negligent actions increased the danger to Zina Linnik.**

A reasonable jury could conclude that Fulghum and Davidson's negligence either deprived Zina of other sources of help, increased the danger to Zina, or both. Fulghum's decision to delay the Amber Alert

in deference to Davidson deprived Zina of the timely Alert she would have received if Paris had been allowed to issue it at 10:15 p.m. When Fulghum fell back asleep and failed to issue the Amber Alert after Davidson finally requested it, he again deprived Zina of the help she would have received. Davidson's decision to delay the Alert for nearly six hours while pursuing Samnith Khann also deprived Zina of a timely Amber Alert. Either Alert would have brought Zina other sources of help from citizens—the entire purpose of an Amber Alert.

Fulghum had received training materials indicating that a child's chance of being killed increases sharply as time goes by. CP 2142-2150. In other cases involving the rescue doctrine, delay that reduces a chance of survival has been held to meet the "increased danger" prong. In *Torres v. City of Chicago*, 352 Ill.App.3d 533, 816 N.E.2d 816 (2004), the court concluded that police officers' 90-minute delay in sending for an ambulance met the "increased danger" prong. In a number of medical malpractice cases, delayed treatment or diagnoses has been held, under Restatement (Second) § 323, to meet the "increased danger" prong where the delay results in a reduced chance of survival. See, e.g. *Herskovits v. Group Health Cooperative*, 99 Wn.2d 609, 613, 664 P.2d 474 (1983) ("lost chance" doctrine based on Rest. (2d) Torts § 323); *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d

290 (2011) (“lost chance” doctrine affirmed and applies to cases where the harm is short of death).

Here, Zina’s family relied on Tacoma to use all methods at its disposal competently, including the Amber Alert, but Zina’s chance of survival was greatly reduced by the negligent delay in issuing the Amber Alert. Zina was kidnapped on July 4, a holiday during which people are commonly awake late and present outside for festivities. Police had a description of the abductor, his van, and a partial license plate number<sup>1</sup>. Had the Alert been issued upon Paris’s first request before 10:30 p.m., it would have greatly increased the chance that someone would have seen Adhahn’s van driving through the city streets or parked outside of his home while he raped Zina. The delay in issuing the Alert meant that Zina was deprived of numerous opportunities for citizen help, and significantly increased the likelihood of her remaining in her abductor’s captivity well past the time in which she was statistically likely to be killed.

On the Fourth of greater numbers of people are out on the street as opposed to other days. On the Fourth of July people return home late from fireworks shows, or local parties. So the number of citizen

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<sup>1</sup> Plaintiffs presented evidence that Tacoma Police in fact had the entire license plate number and could have included it in the Alert. CP 2099.

detectives would have increased markedly had Tacoma not halted Paris' launch of the Amber Alert. A jury could conclude that Zina was denied the assistance of a virtual army of citizens to assist in locating her.

As noted by Sgt. Paris, a reasonable officer would have put out an Alert regardless of whether they believed they knew the culprit, simply on the basis that police had no idea where that suspect was. Fulghum here instead chose to defer to an untrained detective's decision. He then chose go to bed using a sleep aid without waiting to see the outcome, negligently causing an avoidable twelve-hour delay in efforts to rescue Zina.

#### **4. Tacoma negligently investigated the abduction of Zina Linnik**

Police agencies and personnel may be sued for negligent investigation when they receive a child abuse referral of abuse or neglect. See *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006); *Rodriguez v. Perez*, 99 Wn. App. 439, 443, 994 P.2d 874, rev. denied 141 Wn.2d 1020 (2000). Surprisingly, Tacoma argues the opposite, that it may not be sued for negligent investigation. Tacoma is wrong.

Tacoma admits, in fact it insists, that an Amber Alert is an investigation. As Tacoma states in its brief, “the fact that the purpose of an AMBER Alert is to get the public’s assistance in one aspect of the police investigation does not somehow remove the Alert from the scope of that investigation.” (City of Tacoma’s Response Brief at 23). Here, Tacoma received a referral indicating that a stranger had abducted a twelve year old child. Kidnapping by a stranger clearly constitutes an allegation of abuse or neglect under RCW 26.44.050. Thus, Tacoma had a duty to non-negligently perform the child abuse investigation.

Police in Washington are routinely sued by crime victims whenever a particularized duty can be established under traditional liability principles. These suits are particularly common where police fail to come to the aid of a crime victim, and they have been allowed regardless of the fact that the police action is part of an investigation. See, e.g. *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 737 (1998) (wrongful death suit arising from negligent failure to respond to 911 call); *Robb v. Seattle*, 159 Wn. App. 133, 145, 133 P.3d 242 (2010)(negligent failure to apprehend dangerous individual); *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983) (negligence for failure to respond to crime scene). *Osborne v. Mason*

*County*, cited by Tacoma, stands for the principal that there is a cause of action against public entities for negligence whenever a plaintiff can demonstrate a duty runs to her. *Osborne*, 157 Wn.2d 18, 27-28, 134 P.2d 197 (2006).

Tacoma correctly notes that under *Rodriguez v. Perez*, a case involving negligent police investigation of child abuse, courts have generally found that no duty runs to the public at large. *Rodriguez*, 99 Wn. App. at 443. Tacoma fails to mention that the *Rodriguez* Court held that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action when that statute, in this case RCW 26.44.050, is violated and the injured party was one of the persons designed to be protected.. *Id.* at 444. In instances of alleged child abuse under RCW 26.44.050, the *Rodriguez* court held that the duty of law enforcement to non-negligently investigate was found to run to both children and parents. *Id.* at 446-447.

RCW 26.44.020(1) defines “abuse” broadly as “sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety.” Being kidnapped by a stranger is going to cause psychological injury at a minimum, and is extremely likely to cause physical injury.

The circumstance of being dragged into a van by a stranger is a circumstance that causes harm to the child, and most frequently occurs in circumstances that involves sexual violence. RCW 26.44.050 provides that “Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate.” In *Tyner v. DSHS*, 141 Wn.2d 68, 79, 1 P.3d 1140 (2000), the court held that RCW 26.44.050’s investigation requirement gave rise to a duty to investigate non-negligently. *See also Lesley v. Department of Soc. & Health Servs.*, 83 Wash.App. 263, 921 P.2d 1066 (1996); *Yonker v. State*, 85 Wn. App. 71, 930 P.2d 958 (1997); *Gilliam v. Department of Soc. & Health Servs.*, 89 Wn. App. 569, 950 P.2d 20 (1998).

The issue of whether a duty is owed to children who are allowed to remain with an abuser was directly presented to the Court of Appeals in *Lewis v. Whatcom County*, in which a child alleged that the county sheriff failed to non-negligently investigate allegations that she was being abused by an uncle with whom she did not reside. *Lewis*, 136 Wn. App. at 452. In *Lewis*, the County argued that under *M.W. v. Dept. of Social and Health Services*, the scope of the cause of action was limited to alleged abuse by parents or guardians and that the statutory duty extended only to harms arising from placement

decisions. *Id.* at 454, 458. The *Lewis* court rejected both arguments. Citing to RCW 26.44.010 the court held that statutory language and Washington case law provided that “children who may be abused or neglected” was the class specifically protected by the statute. *Id.* at 454-57. Pointing out that the placement issue framed by the County was not directly before the *M.W.* court, and citing the language of RCW 26.44.020(1), which defines “abuse” for purposes of the statute as abuse by “any person,” it held that “RCW 26.44.050 creates a duty to all children who may be abused or neglected, regardless of the relationship between the child and his or her alleged abuser.”. *Id.* at 452, 455, 458.

Under the broad statutory definition in RCW 26.44.020(1), Adhahn’s kidnapping of Zina Linnik was child abuse, and her family’s call to 911 made an allegation of child abuse, triggering the duty to investigate. Just as the *Lewis* court found that RCW 26.44.050 creates a duty for law enforcement to investigate allegations of abuse non-negligently regardless of the relationship between the abused and the abuser, Tacoma breached its duty when it allowed Zina to remain in the hands of a violent sexual predator.

*Donaldson v. City of Seattle* and *M.W. v. Dept. of Social and Health Services* are two “negligent investigation” cases cited by

Tacoma in which the suit was brought by an adult crime victim. *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992); *M.W. v.*, 149 Wn.2d 589. Neither case involved a child victim. Additionally, neither court held that there could never be any cause of action for activity associated with an investigation—only that on the facts of those cases, the plaintiffs had failed to demonstrate a particularized duty running to them.

In *M.W.*, a case regarding a DSHS investigation, the court addressed whether a public duty doctrine exception created an individualized duty running to the plaintiff. The question of whether the scope of the cause of action should be limited to children abused by a family member was not before the *M.W.* court. Although much of *M.W.*'s analysis does focus on RCW 26.44.010's purpose language, which discusses abuse specifically within the family, *M.W.* is clear that "The issue before us is whether these statutory concerns also support a broader duty to protect children from harm that is the result of direct negligence by DSHS investigators during the course of an investigation." *Id.* at 598. The court concluded that the legislative intent exception to the public duty doctrine did not apply, but went on to state that because "DSHS has an existing common law duty of care not to negligently harm children" in its custody, there might be a

common-law cause of action on the facts presented. *M.W.*, 149 Wn.2d at 600. Thus, the *M.W.* court, like the *Donaldson* court, did not view the supposed bar on “negligent investigation” claims as an absolute bar on suits brought by victims for activities that are part of an investigation, but only as a limitation that must be overcome by a showing of an individualized duty running to the plaintiff. As demonstrated by *Rodriguez*, such an individualized duty may be established by showing that a particular statute sought to protect a particular class of persons, and that one of those persons was harmed by violation of the statute. *Rodriguez*, 99 Wn. App. at 444. As demonstrated by *Lewis*, RCW 26.44.050 seeks to protect children from all forms of abuse regardless of the abuser, and so places a duty on law enforcement to investigate allegations of such non-negligently.

Public policy supports liability as well. The protection of children has expansively and consistently been a paramount concern to the legislature of the State of Washington, and this is reflected in the statutes it has passed. RCW 26.44.050 establishes that the State has a duty to investigate reports of child abuse. This statute has repeatedly been held to create a duty running in tort. *See, e.g. Tyner v. DSHS*, 141 Wn.2d 68, 79, 1 P.3d 1140 (2000); *Yonker v. DSHS*, 85 Wn. App. 71, 79-82, 930 P.2d 958 (1997) (duty runs to children who may be victims

of abuse, or who “may be abused”). The mandatory investigation and reporting requirements of RCW 26.44.030 and .050 have one overriding purpose—to protect children from abuse, either via the removal of the subject child from the situation of abuse, or by ensuring that the child abuser is prosecuted, or both. The Legislature has repeatedly and unmistakably articulated an intent to protect children in particular from sexual predators. *See, e.g.* RCW 9A.44.010, Intent 1994 c 271 “The Legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse;” RCW 9.68A.001 “The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance;” RCW 9.69.100(1)(b) (Making it a gross misdemeanor for any citizen to witness child sexual abuse and fail to report it); RCW 4.24.550, Findings--1997 c 113 “Child victims are especially vulnerable and unable to protect themselves;” *Id.*, Finding—Policy—1990 c 3 § 117 “...sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration or commitment;” RCW 43.43.754, Findings—1999 c. 329 “The legislature further finds that there is a high rate of recidivism among certain types of violent sex offenders.” Taken as part of this larger scheme, the clear legislative intent behind the processes set out in RCW 26.44 is to protect

foreseeable child victims of abusers by ensuring that allegations are investigated and referred for prosecution.

The question then becomes, on the facts of this case, did Tacoma owe a duty to Zina Linnik? Leaving Zina in the hands of an unknown abductor was a harmful placement under RCW 26.44.050. Similar to police in *Rodriguez* and *Lewis*, Tacoma had a duty to investigate allegations of this placement non-negligently. Tacoma's failure to timely issue the Alert was a breach of this duty.

**a. A RCW 26.44.050 claim against Tacoma is within the original scope of the complaint.**

Tacoma itself raised the issue of negligent investigation in its Summary Judgment motion, insisting that that the City is immune from negligent investigation claims. The plaintiffs should have been permitted to respond. No Washington court has ever held that a plaintiff suing a public entity must specify the precise public duty doctrine exception under which a duty arises. A negligence claim against Tacoma was adequately pled in Plaintiffs' Complaint. There was no need for Plaintiffs to specify that the precise source of Tacoma's duty was RCW 26.44.050.

Tacoma argues that it would have been prejudiced by the fact that Plaintiffs' briefing on RCW 26.44.050 was late-filed, but any

prejudice could have been easily alleviated by giving Tacoma time to respond to the argument during the six months remaining before the dispositive motion cut-off date. As noted above, the question of where a duty arises is primarily a legal question. Tacoma has always known this is a negligence claim, and Plaintiffs merely sought to clarify the legal basis of an existing claim premised on the same facts already in Tacoma's possession. Tacoma could have fully responded to this claim without undertaking any further discovery. It was error for the Trial Court to strike Plaintiffs' briefing.

#### **IV. CONCLUSION**

Plaintiffs set forth facts showing that the Amber Alert procedures in Tacoma were inadequate and that an Amber Alert had been requested by Sgt. Paris within approximately 30 minutes of the kidnapping. That decision was overridden by PIO Mark Fulghum, who had repeatedly been trained that Amber Alerts should be treated with extreme urgency and issued within four hours of a kidnapping, but delayed the Alert for hours while he deferred to that detective in charge of the investigation's judgment regarding the Alert. Later, when the Alert was finally requested, Fulghum fell asleep and failed to issue it. This is evidence from which a reasonable jury could conclude that the investigation was conducted negligently.

For the above reasons, Plaintiffs' negligence claims against the City of Tacoma for its failure to timely issue the Amber Alert should be remanded for trial.

DATED this 24<sup>th</sup> Day of May, 2012.

VAN SICLEN, STOCKS & FIRKINS



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## CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on May 24, 2012, she caused the foregoing *Reply Brief of Appellant re: City of Tacoma* to be served on the following parties of record and/or interested parties by regular US Mail and email transmission the same day:

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