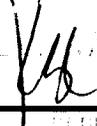


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COURT OF APPEALS

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NO. 33720-7

STATE OF WASHINGTON

BY 
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

RONALD JAY BIANCHI,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

Plaintiff Ronald J. Bianchi appeals a summary judgment order dismissing with prejudice his tort claims against Respondents Department of Social and Health Services (DSHS) and two of its social workers, Tyrone Fritz and Kevin Storm. Mr. Bianchi contends Respondents acted tortiously in connection with dependency and parental rights termination proceedings regarding a minor child he has never met.

II. COUNTERSTATEMENT OF ISSUES

Did the trial court err in finding there was no genuine issue of material fact where Mr. Bianchi stipulated to the dependent status of the concerned child, contested termination of his parental rights, and has exhausted his appeals in connection with his parental rights?

III. COUNTERSTATEMENT OF THE CASE

On June 30, 1998, Appellant Ronald Bianchi was sentenced to a 72-year term of confinement for multiple felonies. CP at 77-97. He was granted credit for the 257 days served since his arrest in October 1997. CP at 95. Meanwhile, Mr. Bianchi's biological daughter F.W.B. was born to Rachel Barnes in February 1998. CP at 156. Mr. Bianchi has never met F.W.B.¹ CP at 157.

¹ Below and on appeal, Mr. Bianchi frequently refers to a "step-son." This is a reference to J.B., Ms. Barnes' other biological child. There is no evidence in the record

Ms. Barnes voluntarily placed F.W.B. in foster care in early January 2002. CP at 99, 157. She renewed the voluntary placement agreement in May 2002. CP at 100. Respondent Tyrone Fritz was the assigned CPS caseworker. CP at 99-100.

On October 1, 2002, Mr. Bianchi, who was represented by counsel, stipulated to a finding of dependency with respect to F.W.B. CP at 102-107. Later, Ms. Barnes voluntarily relinquished her parental rights with respect to F.W.B. CP at 113-115. Respondent Kevin Storm filed a termination petition, which Mr. Bianchi resisted with the aid of counsel. CP at 120-126, 128.

The superior court held a fact finding hearing at which Mr. Bianchi, Mr. Fritz, and Mr. Storm testified. CP at 130-154. Mr. Bianchi himself examined Mr. Fritz and Mr. Storm, challenging them with his allegations of lack of notification by and correspondence with the social workers. CP at 137-140, 147-154. Mr. Storm testified under cross-examination about his correspondence with Mr. Bianchi and that he was concerned mainly with the best interests of F.W.B. CP at 137-139. Mr. Fritz testified under direct examination by both Mr. Bianchi and his counsel that he did not contact Mr. Bianchi or answer certain correspondence from Mr. Bianchi because the placement was voluntary in

that Mr. Bianchi ever had a legally-recognized parental relationship with J.B. Mr. Bianchi was not involved in the dependency and termination proceedings affecting J.B.

nature, Ms. Barnes did not want contact with Mr. Bianchi, Mr. Bianchi was not a viable placement alternative, and that such contact would not have been in the best interests of F.W.B. CP at 144-154.

On March 5, 2004, the superior court ordered termination of Mr. Bianchi's parental rights and issued consistent findings of fact and conclusions of law. CP at 156-158. On November 3, 2004, a commissioner of the Court of Appeals, Division II, affirmed the termination order. CP at 160-163. Mr. Bianchi pursued no further appellate relief and the case was mandated on December 16, 2004. CP at 165.

While his appeal of the termination order was pending, Mr. Bianchi filed suit in the Clark County Superior Court asserting multiple torts and constitutional violations against Mr. Fritz, Mr. Storm, and DSHS. CP at 13-28. On July 22, 2005, the trial court granted the defendants' Motion for Summary Judgment. CP at 7-8. Mr. Bianchi appealed, assigning error to the order granting summary judgment. CP at 207-208.²

IV. SUMMARY OF ARGUMENT

Mr. Bianchi stipulated to the dependency of F.W.B. He vigorously contested termination of parental rights to no avail. He appealed and lost

² On August 17, 2006, this Court granted Respondents' motion to supplement the record with the verbatim report of proceedings (VRP). Due to unforeseen technical problems, the court reporter has been unable to complete the VRP in time for purposes of this brief; accordingly, the VRP will be filed afterward for the Court's reference.

again. He had ample opportunity to contest the actions of the individually-named Respondents. He is precluded from trying to resurrect those issues in this tort suit. He cannot state a cognizable tort claim against Respondents. Accordingly, the trial court's order on summary judgment should be affirmed.

V. ARGUMENT

A. Standard Of Review

The standard of review for summary judgment is well-settled. "Summary judgment is proper when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Harvey v. County of Snohomish*, 157 Wn.2d 33, 38, 134 P.3d 216 (2006) (citing *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001)). "The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact." *Id.* "The appellate court engages in the same inquiry as the trial court when reviewing an order on summary judgment." *Id.* "In addition, all facts and reasonable inferences are considered in a light most favorable to the nonmoving party." *Id.* The court should grant summary judgment if reasonable persons could reach but one conclusion. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Finally, the court may affirm

the summary judgment ruling on any grounds supported by the record even if the trial court did not consider those grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

B. There Are Multiple Grounds For Affirming The Order On Summary Judgment In Favor Of Respondents

Mr. Bianchi challenges the summary judgment order to the extent it relied on collateral estoppel, res judicata, absolute immunity, and qualified immunity. The summary judgment order can be affirmed on those grounds and others articulated in trial court briefing and at the summary judgment hearing.³

1. Mr. Bianchi's Stipulation To The Dependent Status Of F.W.B. Constituted A Waiver Of Any Claims Based On Alleged Procedural Defects Leading Up To The Dependency Finding

Mr. Bianchi's primary claim against Mr. Fritz appears to be based on Mr. Fritz failing to contact him and answer correspondence from the time the children entered the custody of DSHS until Mr. Fritz turned the case over to Mr. Storm. However, Mr. Bianchi later stipulated that the child was indeed dependent and subject to the jurisdiction of the

³ In his statement of the case, Mr. Bianchi vaguely argues the trial court erred in not granting a continuance of the summary judgment hearing. Appellant's Brief at 2-3. But he did not assign error to the ruling in either his notice of appeal or the issue statement of his opening brief. Nor has he stated sufficiently any prejudicial effect of the court's refusal to allow him more time to respond to the State's motion for summary judgment. RAP 2.4(d). This Court should disregard Mr. Bianchi's fleeting and unreasoned contentions. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Satterlee v. Dep't of Soc. & Health Serv.*, 131 Wn. App. 97, 106 n.7, 125 P.3d 1003 (2006).

dependency court. CP at 102-107. His entry into that agreed order of dependency constituted a knowing waiver of any potential claims arising from the manner in which the dependency matter was handled, including his claim of irregularities against Mr. Fritz. *See Miles v. State, Child Prot. Serv. Dep't*, 102 Wn. App. 142, 153 n. 21, 6 P.3d 112 (2000) (reasoning doctrine of judicial estoppel barred relitigation of issues underlying agreed dependency order). In other words, Mr. Bianchi should not be allowed to sue Mr. Fritz in tort for his actions leading up to an order of dependency to which Mr. Bianchi agreed. *See id.*

2. Mr. Bianchi Is Collaterally Estopped From Challenging The Dependency And Termination Proceedings By Way Of This Tort Suit

In essence, Mr. Bianchi's lawsuit is a collateral attack on DSHS and its social workers for acting to protect the best interests of F.W.B. The actions of the department and its social workers were validated by the agreed order of dependency and the subsequent order of termination. *See Miles*, 102 Wn. App. at 153 (collateral estoppel bars subsequent tort suit arising from facts underlying agreed dependency order). Mr. Bianchi should not be allowed to do an end-run around the termination proceedings with a tort suit against DSHS and its social workers for their actions on behalf of F.W.B. *Id.*

3. The Termination Order Is Res Judicata As To Mr. Bianchi's Lack Of Parental Fitness

Mr. Bianchi alleges wrongful interference with his parental rights. His claim for recovery rests on the theory that he was a fit parent to begin with. The superior court's termination order put to rest any questions as to Mr. Bianchi's parental fitness in favor of DSHS and the social workers concerned with the case. CP at 156-158.

Res judicata applies when there is an identity of "(1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983) (citing *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 588 P.2d 725 (1978)). The primary subject matter between this suit and the prior suit are the same; the parental status of Mr. Bianchi. *See id.* Mr. Bianchi's cause of action is essentially no different than his arguments in the termination proceeding that his parental rights were wrongfully interfered with. *See id.* at 663-64. There is an identity of parties in that Mr. Fritz and Mr. Storm were social workers acting on behalf of DSHS. *See id.* at 664. And the parties are qualitatively the same for that same reason; the action against the social workers is essentially an action against DSHS. *See id.* at 664-65. This

concurrence of identities bars Mr. Bianchi's subsequent tort action under the doctrine of res judicata. *Id.* at 665.

4. Mr. Fritz And Mr. Storm Are Entitled To Absolute Immunity

Mr. Bianchi's constitutional claims below could be interpreted as impliedly grounded on 42 U.S.C. § 1983. Assuming for the sake of argument that they were, Mr. Fritz and Mr. Storm are entitled to absolute immunity.⁴

Mr. Bianchi's factual allegations touch upon the period of time from the pre-dependency investigation through the termination proceedings. However, for the acts of conducting an investigation pursuant to dependency and actual filing of a dependency petition, social workers enjoy absolute immunity from § 1983 claims. *Doe v. Lebbos*, 348 F.3d 820, 826 (9th Cir. 2003); *Miller v. Gammie*, 335 F.3d 889, 897, 898 (9th Cir. 2003).

"[T]he Supreme Court has recognized that when congress enacted §1983, it was aware of a well-established common-law tradition that extended absolute immunity to individuals performing functions necessary to the judicial process." *Id.* at 895-96 (citations omitted). At common law

⁴ Mr. Bianchi cannot assert a § 1983 claim against DSHS. It is well-settled that a state agency is not a "person" subject to suit under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989); *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986).

judges, prosecutors, trial witnesses and jurors were absolutely immune for their roles in the judicial process. *Id.* at 896. In describing the general scope and rationale for prosecutorial immunity, the Supreme Court reasoned that prosecutors are absolutely immune for the initiation and presentation of the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). The same type of immunity has been extended to social workers for investigation actions taken leading up to and the initiation of dependency proceedings because these decisions are integral to the judicial process. *Doe*, 348 F.3d at 826; *Miller*, 335 F.3d at 896-898; *Meyers v. Contra Costa County Department of Social Services*, 812 F. 2d 1154, 1157-58 (9th Cir. 1987).

The foregoing authorities are persuasive here. Mr. Bianchi's allegations against the individual respondents implicate the investigation leading to the initiation of the dependency action and the subsequent termination proceedings. For their actions in connection with these proceedings, Mr. Fritz and Mr. Storm have absolute immunity. *Doe*, 348 F.3d at 826; *Miller*, 335 F.3d at 896-898; *Meyers*, 812 F. 2d at 1157-58.⁵

⁵ Mr. Bianchi relies on *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991), and its progeny for arguing there is no absolute immunity in this case. But *Babcock* is legally distinguishable in that it held there was no state common law absolute immunity for social workers alleged to have conducted a negligent placement investigation, i.e., an investigation that resulted in a harmful placement decision. *See id.* at 606-10. Here, *Babcock* does not apply because Respondents have argued they have absolute immunity against Mr. Bianchi's obscure § 1983 claims, not state common law claims. In any event, Mr. Bianchi claims the Respondents were negligent in investigating his parental rights,,

5. Mr. Fritz And Mr. Storm Are Protected By Qualified Immunity

To the extent Mr. Bianchi's claims are grounded on 42 U.S.C. § 1983, Mr. Fritz and Mr. Storm are also entitled to qualified immunity.

The doctrine of qualified immunity shields government workers such as Mr. Fritz and Mr. Storm from civil liability for performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *see also Robinson v. City of Seattle*, 119 Wn.2d 34, 64-65, 830 P.2d 318 (1992). Accordingly, a plaintiff cannot maintain an action under 42 U.S.C. § 1983 unless he or she demonstrates that the law during the time of the alleged misconduct was so clearly established that any reasonable official would have known that the official's conduct was unconstitutional. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Determining whether there was a clearly established constitutional right requires the court to "survey the legal landscape" at the time of the alleged misconduct. *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996).

which is not a cognizable cause of action, and a tort theory falling outside of *Babcock*. *See section 7 infra* (discussing negligent investigation).

The Supreme Court reemphasized recently that the alleged constitutional violation must be based on the specific facts, not merely in the general sense. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). In other words, the particular asserted right applicable to the facts of the specific case must be so “clearly established” that the state official would be on notice that his or her actions would violate that right. *Brosseau*, 543 U.S. at 198-99. In *Brosseau*, the general Fourth Amendment right to be free from the use of excessive force was held to be insufficient to overcome a police officer’s qualified immunity after shooting a fleeing suspect in the back where others in the immediate area were at risk from that flight. *Id.* at 199-200. Applying *Brosseau* by analogy, Mr. Bianchi must show that at the time of the individual respondents’ actions, it was “clearly established” under the specific facts of this case that respondents were violating Mr. Bianchi’s constitutional rights. *See id.* at 599-600. Respondents have thus far failed to locate a single authority in either State or Federal jurisdictions during the concerned time frame (January 2002 to May 2004) that hold that an incarcerated noncustodial parent has a clearly established constitutional right to notice of the custodial parent’s voluntary foster care placement of the affected child. Similarly, there is no authority holding that the incarcerated parent has a clearly established constitutional right to

correspondence from the social workers responsible for protecting the best interests of the child.

To the contrary, a non-custodial parent cannot craft a federal due process right solely out of his biological link with the concerned child. *See generally Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). The key consideration is whether there is a genuine and meaningful parent child relationship worthy of due process protection. *Id.* at 260-61. In other words, there is a “clear distinction between a mere biological relationship and an actual relationship of parental responsibility.” *Id.* at 259-260. In this case, it is a verity that Mr. Bianchi had no meaningful parental relationship with F.W.B., especially in that he had never met the child. *See CP* at 157. In light of that background, Mr. Bianchi cannot stake a claim to a clearly established constitutional right to notice from and correspondence with the social workers.

Moreover, assuming solely for the sake of argument that the individually-named respondents violated a state law or regulation in their conduct toward the plaintiff, the violation of such a law or regulation alone neither creates a cause of action under § 1983, nor deprives a defendant of qualified immunity to such a claim. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); *Doe v. Connecticut Dep't of Child & Youth Services*, 911 F.2d 868, 869 (2nd Cir.

1990). “Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation--of federal or state law-- unless that statute or regulation provides the basis for the cause of action sued upon.” *Davis*, 468 U.S. at 194 n.12. State statutes do not create a federal constitutional interest unless the statute places specific substantive limits on an official’s discretion *and* the statute guarantees a specific substantive outcome. *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983); *Tony L. By and Through Simpson v. Childers*, 71 F.3d 1182, 1185 (6th Cir. 1995).

Illustratively, the Sixth Circuit held Kentucky’s child welfare statutes did not create a federally-recognized constitutional right “because no particular substantive outcome is mandated.” *Tony*, 71 F.3d at 1186. In other words, the affected individuals had expectations of “receiving a certain process,” but the end result was not guaranteed. *Id.*

Under facts more analogous to this case, the Ninth Circuit held a parent who did not have legal custody of the affected children could not establish a federally-recognized procedural due process violation when there was a seven-day delay in judicial review of the foster placement of the children. *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998). In *Campbell*, a state social worker took emergency custody of three children living in squalid conditions with their father, who did not have legal

custody. *Id.* at 928. In apparent violation of state law, the social worker was tardy in filing a petition for temporary custody. *Id.* The Ninth Circuit held qualified immunity protected the social worker because the apparent violation of state law did not infringe on a clearly established federal constitutional right. *Id.* at 929-30.

Respondents can find no authority that holds that the acts complained of here, essentially the individual respondents' refusal to surrender to the plaintiff's demands for unfettered access to and communications with F.W.B., give rise to a cause of action under 42 U.S.C. § 1983. Both social workers had broad discretion to safeguard the affected child's right to basic nurturing, physical and mental health, and safety. RCW 13.34.020. And there was no mandated substantive outcome. *See Tony*, 71 F.3d at 1185-86.

With respect to Mr. Fritz, there is no statutory requirement that the plaintiff be notified of Ms. Barnes' voluntary foster placement of F.W.B. *Cf.* RCW 13.34.060(2) (notification requirements apply only where children are taken into custody pursuant to court order or protective custody by law enforcement). Moreover, even if Mr. Fritz failed to follow state statutory or regulatory procedures, Mr. Bianchi has not shown that alleged lack of communications regarding the foster care of F.W.B. deprived him of any clearly established federal constitutional or statutory

rights. Consequently, assuming without conceding a statutory violation, qualified immunity shields Mr. Fritz from Mr. Bianchi's obscure § 1983 claims.

With regard to Mr. Storm, Mr. Bianchi has not alleged any acts approaching violations of state or federal statutes or regulations. The acts complained of fit within Mr. Storm's broad statutory mandate to protect the welfare of the children. *See* RCW 13.34.020. Assuming but without conceding that a statutory violation occurred, Mr. Bianchi has not shown that Mr. Storm's discretionary decision to limit Mr. Bianchi's contact with F.W.B. during the dependency and termination process deprived him of any clearly established federal or statutory rights. Accordingly, even if Mr. Bianchi stated a prima facie §1983 claim, qualified immunity protects Mr. Storm.

In any event, even if the individually-named respondents had communicated more frequently with Mr. Bianchi, and had they allowed him greater contact with F.W.B., the applicable statutes did not mandate a particular substantive outcome. *See Tony*, 71 F.3d at 1185-86. The substantive outcome Mr. Bianchi sought was a continuation of his parental rights. The termination order rendered that desired outcome illusory. CP at 156-158. In light of the foregoing, the trial court was correct in dismissing Mr. Bianchi's claims in summary judgment.

6. No Actionable Tort Duty Arises From RCW 13.34.060(2)

Mr. Bianchi's claim also fails because he has not shown there is a duty actionable in tort arising from RCW 13.34.060(2). The statute requires DSHS to make reasonable efforts to notify parents when a child is taken into custody pursuant to court order, RCW 26.44.050, or RCW 26.44.056. Under RCW 26.44.050, a law enforcement officer may take a child into protective custody without a court order if there is cause to believe the child is abused or neglected. But here, the termination court found the placement was voluntary. CP at 157. And RCW 26.44.056 does not apply as it concerns detention by hospital administrators and physicians.

Further, the statute does not expressly require notification to an incarcerated non-custodial parent when children are voluntarily placed into foster care by the custodial parent. RCW 13.34.060(2).⁶ Later, Mr.

⁶ RCW 13.34.060(2) reads:

Whenever a child is taken into custody by child protective services pursuant to a court order issued under RCW 13.34.050 or when child protective services is notified that a child has been taken into custody pursuant to RCW 26.44.050 or 26.44.056, child protective services shall make reasonable efforts to inform the parents, guardian, or legal custodian of the fact that the child has been taken into custody, the reasons why the child was taken into custody, and their legal rights under this title as soon as possible and in no event shall notice be provided more than twenty-four hours after the child has been taken into custody or twenty-four hours after child protective services has been notified that the child has been taken into custody. The notice of

Bianchi and Ms. Barnes stipulated to facts necessary to support dependency. CP at 102-107. Accordingly, the State Defendants did not owe Mr. Bianchi a duty to notify him of the foster care placement of F.W.B., and any claims based on such a contention were properly dismissed.

Even if there was a violation of a statutory notice requirement, Mr. Bianchi has not shown violation of a duty actionable in tort. In general, a statute does not give rise to a duty actionable in tort unless such a remedy is inferable from the statutory language. *Melville v. State*, 115 Wn.2d 34, 37, 793 P.2d 952 (1990); *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). *Bennett* set forth a three-part test that must be satisfied before a statute gives rise to a duty actionable in tort. *Bennett*, 113 Wn.2d at 920-21. Under the *Bennett* test, Mr. Bianchi must show (a) he falls within the particular class of individuals for whose special benefit the statute enacted, (b) the legislature intended either an express or implied remedy in tort, and (c) whether the implied tort remedy is consistent with the underlying purpose of the statute. *Id.* Mr. Bianchi does not address

custody and rights may be given by any means reasonably certain of notifying the parents including, but not limited to, written, telephone, or in person oral notification. If the initial notification is provided by a means other than writing, child protective services shall make reasonable efforts to also provide written notification.

any of the three *Bennett* factors; therefore, he has failed to establish a tort duty on appeal. *Sheik v. Choe*, 156 Wn.2d 441, 457, 128 P.3d 574 (2006).

If the *Bennett* factors are considered for the sake of argument, Mr. Bianchi, an incarcerated non-custodial parent with no prospects of effective parenting, who had never met F.W.B., did not fall within the class of individuals RCW 13.34 was intended to protect. *Bennett*, 113 Wn.2d at 920-21. Further, a tort remedy is not stated expressly or impliedly in the notice statute at issue here. RCW 13.34.060; *Bennett*, 113 Wn.2d at 921. Rather, a parent who asserts he or she has not had proper notification of his or her child's custody can seek redress through juvenile court proceedings. *See generally* RCW 13.34. And, most importantly, the remedy of monetary damages conflicts with the purpose of the statute, which is to promote family unity and the best interests of the child, with the interests of child paramount. RCW 13.34.020; *Bennett*, 113 Wn.2d at 921.

Moreover, Mr. Bianchi participated actively in an extensive judicial process from dependency to termination. CP at 102-107, 130-154, 156-158, 160-163. He had ample opportunity to notify the juvenile court of his complaints about lack of notice. CP at 137-140, 147-154. Nevertheless the court found it appropriate to ultimately terminate Mr. Bianchi's parental rights. CP at 156-158. Given the unassailable

correctness of the superior court's placement decision, Mr. Bianchi cannot rely on lack of notice as a basis for his tort claim. Accordingly, this Court should affirm dismissal of Mr. Bianchi's claim based on lack of notice because RCW 13.34 does not give rise to a duty actionable in tort.

7. Mr. Bianchi Cannot State A Claim Of Negligent Investigation

Mr. Bianchi makes some fleeting references to negligent investigation, asserting essentially that the social workers negligently investigated his parental rights. But there is no generally recognized negligent investigation cause of action as described by Mr. Bianchi. *See, e.g., M.W. v. Dep't of Social & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003); *Petcu v. State*, 121 Wn. App. 36, 58, 86 P.3d 1234 (2004). Courts have recognized a narrow cause of action for negligent investigation arising from the state's statutory duty to investigate allegations of child abuse. RCW 26.44.050; *M.W.*, 149 Wn.2d at 595; *Petcu*, 121 Wn. App. at 58. In the child abuse context, a negligent investigation cause of action "arises when the state conducts an incomplete or biased investigation that results in a harmful placement decision, such as wrongfully removing a child from a non-abusive home, placing a child into an abusive home, or allowing a child to remain in an

abusive home.” *Petcu*, 121 Wn. App. at 59 (citing *M.W.*, 149 Wn.2d at 597-98).

Under the foregoing authorities, the plaintiff claiming negligent investigation of a child dependency and parental rights termination matter must show that the State’s placement decision was “harmful.” *M.W.*, 149 Wn.2d at 597-98; *Petcu*, 121 Wn. App. at 59. But here, Mr. Bianchi cannot establish any harmful placement decision. To the contrary, he signed an agreed dependency order. CP at 102-107. And his claim is based on the theory that the social workers negligently investigated his parental rights; an assertion that does not give rise to a recognized claim of negligent investigation. *See id.*

Moreover, the termination court’s properly decided and subsequently affirmed termination order acted as a superseding intervening cause of the plaintiff’s separation from his children, thus cutting off any alleged liability of the State and its employees in the way the dependency and child termination matters were handled. *See Tyner v. State Dep’t of Social & Health Servs.*, 141 Wn.2d 68, 88, 1 P.3d 1148 (2000). There is no evidence the termination court lacked material information that would have altered the result. *See id.* In short, Mr. Bianchi contested termination and lost. CP at 156-158, 160-163. The superior court’s dependency and termination orders are res judicata as to

the validity of the children's placement. Because neither a factual nor a legal basis exists for Mr. Bianchi's negligent investigation claim, the trial court properly granted summary judgment.

8. Mr. Bianchi Cannot State A Claim For Alienation Of Affections

Mr. Bianchi makes reference to a claim for alienation of affections, without any reasoned argument in support of that theory. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Satterlee v. State Dep't of Soc. & Health Serv.*, 131 Wn. App. 97, 106 n.7, 125 P.3d 1003 (2006). In any event, a plaintiff alleging the tort of alienation of affections of a minor child must prove the following elements: (1) the plaintiff had an existing family relationship with the affected child; (2) a third person (the defendant) wrongfully interfered with plaintiff's relationship with the affected child; (3) the third person intended that such wrongful interference resulted in a loss of affection or family association; (4) there is a causal connection between the third person's wrongful conduct and the loss of affection; and (5) that the third person's conduct resulted in damages. *Waller v. State*, 64 Wn. App. 318, 338, 824 P.2d 1225 (1992); *Strode v. Gleason*, 9 Wn. App. 13, 14-15, 510 P.2d 250 (1973).

Mr. Bianchi cannot meet the first element because he never had a “family” relationship with F.W.B. He never met that child. CP at 157. The termination court concluded he had no meaningful parental relationship with the child and that he was not a fit parent. CP at 156-158. And those findings were affirmed on appeal. CP at 160-163. If Mr. Bianchi cannot establish the facts to support one element of a prima facie tort claim, the claim necessary fails on summary judgment. *See, e.g., Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998) (if plaintiff cannot establish “duty” element of negligence claim, the claim will not lie).

Even if the court were to conclude Mr. Bianchi met a minimal evidentiary threshold for the first element of alienation of affections, his claim fails under the other elements. He presented no evidence sufficient to create a genuine issue of material fact as to whether any of the State Defendants “wrongfully interfered” with plaintiff’s relationship with F.W.B. To the contrary, the uncontroverted record, viewed in a light most favorable to the plaintiff, shows respondents Fritz and Storm were seeking to protect the welfare of F.W.B., CP at 137-139, 144-154, “the paramount concern” underlying the purpose of the controlling statute. RCW 13.34.020.

Regarding the third element, there is no evidence that either

respondent Fritz or Storm “intended” wrongful loss of affection or family association. Rather, the record shows they were focused on serving the needs of F.W.B. for a safe and nurturing environment. CP at 137-139, 144-154. Further, the state actors were motivated by the best interests of the child pursuant to their statutory mandate to serve the best interests of the child where that interest conflicts with family reunification. RCW 13.34.020. Viewing the record in a light most favorable to Mr. Bianchi, there was no evidence the state actors’ actions were egregious or undertaken in bad faith. *See Adoption of B.T.*, 150 Wn.2d 409, 421, 78 P.3d 634 (2003) (declining to award attorneys fees where it appeared DSHS’ actions were “misguided” but were also motivated by what the agency believed were the affected child’s best interests). Given the correctness of the termination order with respect to F.W.B., Mr. Bianchi cannot show the individual respondents acted in bad faith or wrongfully interfered with his parental rights. *See Miles v. State*, 102 Wn. App. 142, 156, 6 P.3d 112 (2000).

With respect to the fourth element, causation is cut off by a number of events, including Mr. Bianchi’s lengthy incarceration, the agreed dependency order, and the subsequent termination order.

Consequently, even when the record is viewed in a light most favorable to Mr. Bianchi, he could not establish a prima facie claim of alienation of affections.

9. Mr. Bianchi Has Abandoned His Other Causes Of Action Asserted Below

In his complaint below, Mr. Bianchi asserted numerous other theories of liability, such as disparate treatment, and violation of the Consumer Protection Act. As Mr. Bianchi has not raised any of these causes of action as issues on appeal, they are abandoned. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n. 4, 974 P.2d 836 (1999); RAP 10.3(a)(5).

VI. CONCLUSION

Mr. Bianchi had no cognizable tort or constitutional claim. Accordingly, the Respondents respectfully ask the Court to affirm the order on summary judgment dismissing Mr. Bianchi's claims with prejudice.

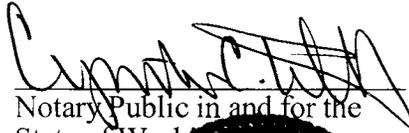
DATED this 22nd day of August, 2006.

ROB MCKENNA
Attorney General



MICHAEL E. JOHNSTON,
WSBA #28797
Assistant Attorney General

SUBSCRIBED AND SWORN TO Before me this 22nd day of August, 2006.



Notary Public in and for the
State of Washington
Residing at _____
My Commission Expires _____

