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No. 36723-8-II

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

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A.O. and S.O.,

Appellants,

vs.

PUGET SOUND SOCIAL SERVICES and THE STATE OF WASHINGTON,

Appellees,

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**APPELLANTS' REPLY BRIEF**

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FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 29 PM 1:37  
STATE OF WASHINGTON  
BY                       
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## I. REPLY ARGUMENTS

- A. **The arguments being offered by DSHS in relation to the purported distinction between “placing” a child at a child care facility versus removing a license of a child care facility are pure semantics and are without legal significance as to the issue of duty.**

DSHS erroneously argues that A.O. was not owed a duty because DSHS purportedly could not control whether A.O. was placed in danger at Deschutes. In so arguing, DSHS ignores the fact that DSHS investigators are required, empowered, and able to take remedial and protective action in relation to child care facilities that place children at risk:

Upon the receipt of a report concerning the **possible** occurrence of abuse or neglect, the...department of social and health services must investigate **and provide the protective services section with a report in accordance with chapter 74.13 RCW [the child care facility licensing statutory scheme], and where necessary refer such report to the court.**

RCW 26.44.050 (emphasis added); *Tyner v. State Department of Social & Health Services, Child Protective Services*, 141 Wash. 2d 68, 1 P. 3d 1148 (2000) (actionable tort cause of action against DSHS in relation to duties owed under chapter 26.44 RCW for investigating abuse and neglect); *see also M.W. v. Department of Social and Health Services*, 149 Wash. 2d 589, 598, 70 P.3d 954 (2003) (duty owed by DSHS to both parents and children).<sup>1</sup> And the investigatory duty set forth under chapter 26.44 RCW is *not* owed, as is repeatedly suggested by DSHS, to the general public. *Id.* Instead, the duty of care is owed to only the

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<sup>1</sup> In relation to the investigatory duty owed under RCW 26.44.050, when called upon to “define the scope of the duty of the Washington State Department of Social Services (DSHS) while investigating child abuse allegations” the Washington State Supreme Court recently explained that the “cause of action inferred from a statutory **duty is limited by the harm the statute is meant to address.**” *M.W. v. Department of Social and Health Services*, 149 Wash. 2d 589, 592/602, 70 P.3d 954 (2003) (emphasis added). In other words, according to *M.W.*, the investigatory duty

particular children and parents that “may” be injured as a result of an act of negligence in the course of carrying out investigatory duties: “DSHS overlooks the fact that the services required by RCW 26.44 are for children and adult dependents *who may be abused or neglected*, and their families, not all children and their parents.” *Yonker v. State Department of Social and Health Services*, 85 Wash. App. 71, 79, 930 P.2d 958 (1997) (emphasis in original). DSHS itself asserts on pages 28-29 of the opposition that the “*concept of foreseeability limits the scope of an existing duty...*” DSHS owed A.O. an actionable duty of care in relation to the foreseeable harms that occurred at Deschutes, and this claim is not precluded by the public duty doctrine. *Id.*

In that regard, with respect to carrying out the duty recognized under RCW Chapter 26.44 *et seq.* and *M.W.* and protect A.O. in relation to his placement at Deschutes, Jane Ramon explained what specific actions that the investigators could have taken, but did not, in relation to protecting the residents at Deschutes:

*...Upon learning of the facts and circumstances as described by Ms. Blackstock, the State of Washington, to include specifically Licensor Steve C. Ennet, should have aggressively seen to it that Patsy Blackstock was removed from the premises. Referrals should have been frozen while temporary management positions were filled. Additional experienced staff should have been brought in during the change, and DSHS should have directed a permanent executive director and management process. **If this could not be accomplished then all child residents should have been removed.***<sup>2</sup>

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owed under RCW 26.44.050 is to prevent the foreseeable “harm” to children (including death obviously) by virtue of neglectful childcare. *Id.*

<sup>2</sup> CP 20-39

Put another way, if Ms. Blackstock was not removed, the Deschutes' authority to care for children, including A.O., should have been revoked in accordance with RCW 26.44.050.<sup>3</sup> By taking away the license, all the children would effectively be removed. *Id.* The arguments being offered by DSHS are pure semantics as between "removing" and/or "placing" children versus revoking Deschutes' authority to care for children. Based upon the controlling authority with respect to the duty issue set forth in *M.W.* and RCW 26.44 *et seq.*, and given the facts of the case including Ms. Ramon's expert opinion that Deschutes should not have been permitted to care for children, the dismissal on the part of the trial court based upon a purported lack of duty was reversible error.

**B. According to the controlling delineations of Legislative intent, and in contrast to controlling precedent, DSHS owes a duty to the children in licensed child care facilities.**

DSHS claims that the licensing statutory scheme, chapters 74.13 RCW and 74.15 RCW, was not intended by the Legislature to provide protection to the children and parents that trust DSHS licensed child care facilities to care for their children. In relation to these arguments pertaining to the existence and scope of the duty owed to children and their parents for negligent acts in licensing child care facilities, based upon the controlling legal principles, rules of statutory interpretation, and common sense, DSHS is incorrect as to Legislative intent of the laws pertaining to the licensing of child care facilities, and, consequently, provides for another reason that the public duty doctrine does not apply.

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<sup>3</sup> *Id.*

DSHS relies up cases such as *Donohue v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006) which held that there is no actionable tort claim against the State even when a *nursing home* is negligently licensed.<sup>4</sup> In so holding in relation to the existence, or nonexistence, of a claim under the public duty doctrine, the *Donohue* Court accurately noted that the “legislative intent exception applies ‘when the terms of a legislative enactment evidence and intent to identify a particular and circumscribed class of persons.’” *Id.* at 844, citing, *Bailey v., Town of Forks*, 108 Wn. 2d 262, 268, 737 P.2d 1257 (1987). Then, the *Donohue* Court analyzed the Legislative intent of the *nursing home* statutory scheme codified under RCW 18.51.005 (Legislative intent of nursing home licensing statutes) and determined that DSHS’s statutes limited the licensing obligations in the *nursing home* context as being somewhat passive and regulatory, to “**promote** safe and adequate care and treatment of individuals therein” and went on to recognize that the Legislature evidently intended that, in the nursing home context, DSHS’s role was limited “to **promote**, but not guarantee, safe care and treatment for residents.” *Id.* at 846 (emphasis added).<sup>5</sup>

By contrast, in relation to children placed in child care facilities, the Legislature specifically dictated that DSHS’s role is more active and controlling,

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<sup>4</sup> DSHS cites to and relies upon *Terrell C. v. DSHS*, 120 Wn. App. 20, 84 P.3d 899 (2004) wherein the plaintiffs submitted a declaration of a psychologist as the foundation to establish a legal duty in the form of a special relationship to the neighbors of children that were known to have sexually aggressive tendencies. By and through the psychologist’s declaration, the plaintiffs argued that DSHS has a special relationship “alleging they had a **duty to warn** her about the neighbor boys’ sexual aggressiveness” but made *no* allegations that the actual DSHS investigation was conducted negligently or that a child care facility was negligently licensed. *Id.* at 901 (emphasis added).

<sup>5</sup> The other cases relied upon by DSHS are also distinguishable. Specifically, in *Linville v. State*, 137 Wash. App. 201, 151 P.3d 1073 (2007), the Court determined that there was no duty in relation to, in essence, a governmental policy decision related to the availability of insurance. In

to “**safeguard** the health, safety, and well-being of children” and noted that the statutory scheme specifically applies to children that are “receiving care away from their own homes.” RCW 74.15.010 (Legislative intent of child care licensing statutes).<sup>6</sup> The Legislature’s choice to use the word “**safeguard**” as applies to children and child care facilities (versus simply “promote” as applies to *nursing homes*) evidences a clear intent to create an active and actionable duty on the part of DSHS to actionably protect children placed in licensed child care facilities. *Id.* Based upon this important difference in phraseology, to “**safeguard**” versus just “promote”, *Donohue* is distinguishable, and DSHS is not shielded from liability by the public duty doctrine. *Id.*

It should additionally be noted that in the context of the interrelated and tortuously actionable duty on the part of DSHS to conduct appropriate abuse and neglect investigations set forth under chapter 26.44 RCW, the appellate courts have already determined that usage of the term “**safeguard**” in relation to children, their parents, and child caretakers gives rise to an actionable tortuous duty of care and Legislatively intended exception to the public duty doctrine. RCW 26.44.010 (“to **safeguard** the general welfare of such children”) (emphasis added); *Yonker, supra* (noting intent to “prevent further abuses, and to **safeguard**” provides for actionable duty); *Tyner, supra* (holding that Legislative intent of chapter 26.44 RCW (“to **safeguard**”) is to create actionable duty of

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*Burnett v. Tacoma City Light*, 124 Wn. App. 550, 562-3, 104 P.3d 677 (2004), the Court held that there was no duty in relation to flood warnings on the part of the City of Tacoma.

<sup>6</sup> In relation to establishment of the “number” of child care facilities, the Legislature used the “to promote” terminology which is a separate and more policy based function. *See* RCW 74.15.010(4).

care). Beyond that, RCW 26.44.050 expressly references “chapter 74.13 RCW” in relation to the duties owed during abuse and neglect investigations, and the Legislative declaration of purpose set forth under RCW 74.13.010 also notes that the purpose of the licensing statutes is to “**safeguard**, protect, and contribute to the welfare of children...” Moreover, RCW 74.13.010 specifically explains that the interrelated child care laws cannot be read in isolation or with artificial distinction in that the purpose of the assorted child care laws is to provide a “comprehensive and coordinated program of public child welfare services.” *Id.*

DSHS cites selectively to *subparagraph 5* of RCW 74.15.010 which references the “community at large” with respect to differing obligations than are delineated under *subparagraph 1* of the same statute which specifically identifies a circumscribed class, “children, expectant mothers and developmentally disabled persons receiving care away from their homes”, which is to be safeguarded.<sup>7</sup> In *Yonker*, in relation to the establishment of a duty under RCW 26.44.050 the same arguments as apply under RCW 74.15.010 were already raised and rejected as to basically the same protected class of individuals. The Legislative intent language as between chapters 26.44, 74.13, and 74.15 is virtually identical calling for the protection of “children, parents, and adult dependents (developmentally disabled)”, and in *Yonker*, DSHS argued unsuccessfully that “nothing in the Legislature’s intent to benefit a particular and circumscribed class of persons” in relation to the aforementioned grouping. 85 Wash. App. at 80. Moreover, the *Yonker* Court noted that DSHS was incorrectly arguing that “the State’s duty to

investigate arises only when it has a report of actual abuse” versus the “*possible occurrence of abuse.*” *Id.* Under chapters 26.44, 74.13, and 74.15 RCW, a duty is owed to children, parents, and developmentally disabled individuals in State licensed facilities. *Id.* And *Yonker* is not distinguishable as a matter of logic and statutory interpretation.

According to Washington law and rules of statutory interpretation, if a statute is unclear or ambiguous, courts apply rules of statutory construction to determine the legislature’s intent and purpose. *Herrington v. Hawthorne*, 111 Wn. App. 824, 837, 47 P.3d 567 (2002). In light of any argued ambiguity as to the consistency of purpose as between the assorted statutes at issue, “the proper approach is to ‘harmonize statutes’ pertaining to the subject matter and maintain the integrity of the statutes within the overall statutory scheme.” *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386, 119 P.3d 840 (2005).

...The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose... This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question... If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and it is appropriate to resort to principles of statutory construction to assist in interpretation... Strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided...

*Id.* at 846-47; *see e.g. Gilbert v. Sacred Heart Medical Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995) (harmonizing conflicting statutes of limitation in favor of preserving claim related to minor). Based upon the fact that it has already been

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<sup>7</sup> Subparagraph 5 sets forth the regulatory aspect whereas subparagraph 1 sets forth the actual actionable duties to the specific class.

determined that the “safeguard” phraseology in relation to the interrelated statutory scheme set forth under chapter 26.44 RCW pertaining to abuse and neglect investigations provides for an actionable duty (and recognized exception to the public duty doctrine) there is no room for legitimate debate – DSHS owes the children and parents that patronize licensed child care facilities a Legislatively recognized duty of reasonable care to ensure that those facilities are indeed safe.

*Id.*

**C. DSHS’s arguments in relation to causation are without merit and the corresponding questions are for the jury.**

In relation to causation, DSHS offers arguments pertaining to the facts of the case which are for the jury to decide based upon expert testimony and the first hand account of the assorted witnesses. *See J.N. v. Bellingham School District*, 74 Wn. App. 49, 871 P.2d 1106 (1994) (error to reverse on causation when expert testimony is submitted on that issue). And according to expert Jane Ramon, the sexual assaults against A.O. and other residents at Deschutes were foreseeable to Licensor Ennet. *Id.* As was set forth in the moving brief, the trial court erred in taking away A.O.’s right to have a jury decided whether Deschutes and the State could have been prevented him from being raped by being placed into a sexually charged atmosphere which was created and sanctioned by Ms. Blackstock. On this issue, the trial court should be reversed.

**D. The trial court erred in relation to the childhood sex abuse tolling of the statute of limitations.**

DSHS offers little or no substantive legal argument in relation to the statute of limitations. As was set forth in the moving brief and in accordance with *Korst v. McMahon*, 136 Wn. App. 202, 148 P.3d 1081 (2006), *Cloud v. Summers*,

98 Wn. App. 724, 991 P.2d 1169 (1999), *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (2007), *Hollmann v. Cororan*, 89 Wash. App. 323, 949 P.2d 386 (1997), and *Green v. A.P.C.*, 136 Wn. 2d 87, 960 P.2d 912 (1998), the trial court should be reversed.

## II. CONCLUSION

For the reasons set forth herein, the trial court should be reversed as to the dismissal of DSHS and PSSS, and this matter should be remanded for a trial on the merits of the case.

RESPECTFULLY SUBMITTED this 28 day of February, 2008

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A.O. and S.O.,  
  
Plaintiffs,  
  
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PUGET SOUND SOCIAL SERVICES d/b/a  
THE DECHUTES CHILDREN CENTER;  
RON HANNA; PATSY BLACKSTOCK; and,  
THE STATE OF WASHINGTON,  
  
Defendant.

NO. 36723-8 II  
**AFFIDAVIT OF SERVICE**

THE UNDERSIGNED, pursuant to CR 5(b), affirms that on the 28<sup>th</sup> day of February, 2008, she sent by ABC Legal Messenger a copy of the Appellants' Reply Brief to the following at their respective addresses set forth below:

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