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COURT OF APPEALS
DIVISION II

NO. 36723-8-II

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

A.O. and S.O.,

Appellants,

v.

STATE OF WASHINGTON; PUGET SOUND SOCIAL SERVICES,
d/b/a THE DECHUTES CHILDREN'S CENTER; RON HANNA;
PATSY BLACKSTOCK,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

The plaintiff, A.O., who is currently thirty years old, along with his mother, S.O., commenced this lawsuit against the State on February 16, 2006, for injuries from two alleged assaults that occurred in a private group home when he was eleven years old. CP 97. A.O. admits that he has known since 1995 that his numerous emotional and psychological problems were caused by what happened to him at the Deschutes Children's Center (DCC).

The commencement of the lawsuit nearly a decade after achieving adulthood was not due to the revelation of unknown injuries; rather, commencement was due to a revelation of an entirely different nature. As explained by A.O.:

I have never forgotten the abuse I suffered at Deschutes. It messed me up, and my life has never been the same. I have known that I had multiple psychological disorders that have developed over time. However, I did not know that I could bring a lawsuit for the harms that I suffered at Deschutes. It wasn't until I heard about the OK Boys Ranch in 2005, that I made the connection that it would be possible to bring a lawsuit.

CP 74-75.

Discovering the possibility of a lawsuit for money damages is not the connection contemplated by the Legislature in enacting a special tolling provision for child sex abuse. *See* RCW 4.16.340. The trial court

correctly ruled that the plaintiffs' claims were barred by the statute of limitations. CP 84-85.

The trial court also correctly ruled that plaintiffs had not proven causation under any of their various theories. RP 28. The plaintiffs argued that Patsy Blackstock, a DCC employee, created a "sexual atmosphere" at DCC, but never submitted any evidence beyond speculation that this "atmosphere" is what caused two juveniles to assault A.O. or that removing Ms. Blackstock from the facility would have stopped those other juveniles from assaulting A.O.

The trial court granted summary judgment on the statute of limitations and on plaintiffs' failure to establish causation. RP 27-28. Although the trial court did not reach the question of duty, it was briefed and argued below, and is presented by both parties on appeal. This court can affirm summary judgment on any basis that is supported by the record. *Champagne v. Thurston County*, 134 Wn. App. 515, 520, 141 P.3d 72 (2006).

II. PLAINTIFFS' CONCESSIONS DURING ORAL ARGUMENT

The plaintiffs' brief omits any reference to the numerous concessions that were made during oral argument on summary judgment, including the abandonment of several theories against the state.

Significantly, the plaintiffs expressly disavowed any theory of negligent licensing even though licensing of DCC is the only connection the state has to this case. RP 14-15. In spite of all the problems the plaintiffs' claim existed at DCC, counsel for plaintiffs admitted that they were not claiming that the state should have revoked DCC's license.

THE COURT: Have you got someone who says that the license should not have been -- should have been revoked?

MR. BEAUREGARD: That's not the theory of our case, Your Honor. The theory of our case is with respect to the placement and the non-removal of Ms. Blackstock.

THE COURT: Okay. Let's talk about placement for a second. The State didn't place the child there.

RP 15.

Upon being confronted with the facts regarding placement of A.O., counsel for plaintiffs finally conceded that placement at DCC was voluntary by the mother and that A.O. was never a dependent of the state. RP 16-18. Counsel also acknowledged that the state had no authority to remove A.O. from DCC. RP 17-18.

Having expressly denied a placement theory against the state, plaintiffs' counsel changed course and claimed they were pursuing a "take charge" theory of liability. As stated by plaintiffs' counsel:

THE COURT: Did she [A.O.'s mother] have the authority to take the kid at any time?

MR. BEAUREGARD: She did, Your Honor, because her parental rights were not terminated.

THE COURT: She didn't have to place that the child anywhere. The State may have suggested it to her.

MR. BEAUREGARD: She didn't, and we're not arguing that --

THE COURT: Well, how can you say that the State did the placement?

MR. BEAUREGARD: Because the State made --

THE COURT: They couldn't move the child without her consent, right?

MR. BEAUREGARD: Certainly, that's correct. She could remove the child at any time. There is no dispute about that. The issue is not who placed him in the facility. The question is, once the State of Washington assumes responsibility for, takes charge of, takes the child into their custody to care for him, that they have a responsibility --

THE COURT: This is not a state agency that was caring for the child.

MR. BEAUREGARD: No, it's not, Your Honor.

THE COURT: It's a state-licensed --

MR. BEAUREGARD: It's a state-licensed facility.

THE COURT: That's like making the State responsible for your practice of law because you are licensed by the state of Washington to practice law.

RP 17-18.

The plaintiffs did not raise their "take charge" theory on appeal and have therefore abandoned it. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). Furthermore, the Supreme Court recently rejected the argument that the "take charge" theory of state liability for DOC parolees applied to the families receiving social welfare services under Title 74 RCW. *Aba Sheikh v. Choe*, 156 Wn.2d 441 at 448-54, 128 P.3d 574 (2006).

The plaintiffs' argument for duty on appeal assumes that the issuance of a license to a private facility implicitly creates a tort duty owed by the state to persons injured at the facility. The plaintiffs' brief is then overwhelmingly dedicated to arguing facts that would be relevant to breach of that duty, but they fail to address the cases that have rejected the existence of a duty based on issuance of a license. *Aba Sheikh*, 156 Wn.2d at 448-54; *Taylor v. Stevens County*, 111 Wn.2d 159, 172, 759 P.2d 447 (1988) (issuance of a license does not implicitly create a duty to those who may be injured by the licensee).

The plaintiffs also argue to import the cause of action for negligent investigation of child abuse under RCW 26.44 into the context of licensing and the delivery of social welfare services under Title 74. However, placement of a child or failure to remove a child from an abusive parent is required under that theory. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003). Plaintiffs counsel represented to the trial court that they were not pursuing a placement issue (RP 17) and are thereby barred from pursuing that claim on appeal. As stated by this court in *Holder*:

A party abandons an issue by failing to pursue it on appeal by (1) failing to brief the issue or (2) implicitly abandoning the issue at oral argument.

Holder, 136 Wn. App. at 107.

Plaintiffs have abandoned their take charge theory by failing to raise it on appeal and have also abandoned any theory dependent on placement of A.O. based on statements during oral argument. *Holder*, 136 Wn. App. at 107. However, the merits of plaintiffs' duty arguments are addressed below, along with the basis to affirm the ruling of the trial court on the issues of causation and statute of limitations.

III. STATEMENT OF ISSUES

1. Should the dismissal of the plaintiffs' claims against the state be upheld on the basis that issuing a license to a private entity does not create a tort duty running from the state to those who may be injured by the negligence of the licensee, or by the misconduct of other patrons of a private facility.

2. Does Washington law require the court to reject plaintiffs' negligent investigation theory when the state did not control the placement or removal of A.O. from a private group home?

3. Did the trial court correctly rule that the plaintiffs failed to prove that the state was a proximate cause of A.O. being assaulted by two juveniles in a private group home?

4. When the plaintiff testified that he knew by 1995 that his emotional and psychological issues were caused by the abuse at DCC in

1989, did the trial court correctly rule that his claims became time barred no later than September 26, 1998, the plaintiff's 21st birthday?

IV. STATEMENT OF FACTS

A. **The Early Childhood Of A.O. Was Beset With Numerous Psychological Impairments, Including Sexual Aggressiveness**

A.O. was born on September 26, 1977. CP 137. At age two he was diagnosed with Reye's Syndrome (swelling of the brain). CP 138. At age six he was diagnosed with Tourette's syndrome and ADHD. CP 138-41. A.O. was in special education from first grade forward. CP 143-44.

In 1984, when A.O. was seven, his parents divorced. CP 147. The following year his parents briefly reunited and lived in California for about nine months. CP 147. During this time, A.O. was sexually abused by an unknown person. CP 144. While living in California, when A.O. was eight years old, he was caught by his mother sexually abusing his younger sister. CP 207. *See also* CP 185-86. (reference to other sexual interactions between A.O. and his younger sister). A.O. was also suspected of sexually abusing his cousin Tanya around the same time. CP 266. When A.O. was 10 years old he told his mother he had sexual interactions with a teenage neighbor girl. CP 144-45. His mother did not report any of A.O.'s sexual interactions to anybody. CP 145-46.

During these formative years, before A.O. went to DCC, he had significant anger management problems which are attributed to physical abuse inflicted on A.O. by his father. CP 139-40, 148-49, 152-53, 181. As a result, A.O. was suspended from elementary school many times due to assaultiveness. CP 213-15. He was expelled from school in the fourth grade at age 9. CP 150.

B. There Is No Evidence That A.O. Was Ever Found To Be A Dependent Child Nor Was He Ever In The Custody Of DSHS

Due to his anger problems, sexual abuse of others, mental health problems, and his expulsion from fourth grade, A.O.'s mother placed A.O. in a private group home called Ruth Dykeman in 1987. CP 214. She admits that there was no court hearing or dependency proceeding regarding A.O., and no termination of her parental rights prior to her placement of A.O. into any group home, including DCC. CP 151, 154-58, 173-74, 182, 187.

DSHS can obtain legal custody over a child only through the dependency process with the order of a court determining the status of a child. *See* RCW 13.34 and 26.44. There are no documents showing that A.O. was ever a dependent child or in the custody of DSHS. There is no evidence that A.O.'s placement DCC was anything other than a voluntary placement by A.O.'s mother. *See* CP 214.

Moreover, plaintiffs' counsel admitted to the trial court that placement of A.O. was voluntary by his mother and that the state would have had no authority to remove him from any placement without the mother's consent.¹ RP 16-18.

C. A.O.'s Alleged Abuse At DCC

A.O. lived at DCC from approximately April 1988 until August 1989. CP 54-55. DCC was a facility that accepted boys, such as A.O., who had behavioral issues including physical and sexual aggressiveness. CP 51. A.O. claims he had anal sex one time at DCC with his roommate. CP 222-27. A.O. also claims he gave oral sex one time to another boy at DCC sometime after the anal sex incident. CP 228-30, 241. A.O. cannot recall the date of either incident.

A.O. admits that he never reported the alleged oral sex incident to anyone, but says he reported the anal sex incident to his mother and, allegedly, to an employee of DCC, Ms. Blackstock. CP 231-32. His mother thought A.O. was lying when he told her he had been "raped". CP 162-172. However, she later came to believe him (albeit now giving a different description of events than A.O. now gives) and claims she told

¹ A.O. eventually claimed to have a vague memory of being given a ride to DCC on one occasion in a DSHS car. However, it is clear that it was A.O.'s mother who dropped him off and picked him up from DCC every week. CP 159-61. To the extent that legal custody of A.O. is significant to plaintiffs' case, it is plaintiffs' burden to establish that legal status with admissible evidence. CR 56(e). No such evidence has been produced.

DCC employees Ms. Blackstock and Ron Hanna about A.O.'s alleged rape. CP 162-172. A.O.'s mother testified A.O. still frequently lies to her and others to get what he wants, including when he is seeking money. CP 183-84. Apparently, A.O. has never told his mother or anyone else until now about the alleged oral sex incident. CP 162-172. There is no evidence that anyone ever reported A.O.'s alleged anal or oral sex to the state.

The only incident A.O. observed involving Ms. Blackstock that he regarded as sexually inappropriate was one time she allegedly held pieces of a carrot between her legs and told a group of boys to get the carrot. CP 235-40. This incident occurred on June 7, 1988. CP 4.² Other than this one incident with the carrot, A.O. testified that he could not recall any other incidents where staff persons at DCC engaged in activities that he regarded as sexually inappropriate. CP 240. A.O. testified that he never observed any other residents at DCC sexually interacting, although he did once walk in on two boys who were naked. CP 233-34.

Ms. Blackstock self-reported the carrot incident and described that her conduct effectively de-escalated the acting out behavior of a number of boys, although the methodology was questionable. CP 4-7. Ms.

² During his deposition, A.O. could not recall whether he had been assaulted before or after the carrot incident, but his lack of memory on this point was rescued by a declaration in which he became sure that the carrot incident happened first. CP 56-57. *Marshall v. ACNS, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989).

Blackstock was placed on probation by DCC and subsequently fired for how she handled the incident. CP 45.

Mary Klaila was a counselor at DCC for less than a year in 1988. CP 51. She claims to have seen the “megaphone incident” with Ms. Blackstock and thought it was overly sexual and inappropriate. CP 52. She does not identify which boys were involved in this incident nor does she claim that they are the same boys who plaintiff identifies as his assailants.

Ms. Klaila admits to complaining to her co-workers “for hours” about how inappropriate she thought Ms. Blackstock was behaving. CP 52. Ms. Klaila now professes great concern about the sexual atmosphere at DCC. CP 52. However, it is undisputed that she never reported any concerns that the children at DCC were in danger (until after she left employment of DCC and after the incidents involving A.O.) even though she was a mandatory reporter. *See* RCW 26.44.030(1).

In his deposition on March 29, 2007, A.O. testified unequivocally that he did not remember who else was present at the carrot incident. CP 240. Recognizing the need to place his perpetrators at the scene of the carrot incident, A.O. contradicted his deposition testimony with a declaration dated June 22, 2007, in which he now claims remembering that his perpetrators were at the carrot incident. CP 75.

D. A.O. Admits That He Knew By 1995 That His Injuries Were Causally Connected To Incidents At DCC

A.O. has been diagnosed with paranoid schizophrenia, bi-polar disorder, Tourette's syndrome, ADHD, and Obsessive Compulsive Disorder. CP 209-210. He has carried all of those diagnoses since 1995 or before. CP 219-21. He also has abused alcohol and drugs, including methamphetamine, since age 16 or 17 (i.e., 1993 or 1994). CP 194-95, 196-203, 204-06. He has seen mental health providers fairly regularly from age five to the present. CP 177, 211-12.

A.O. claims the alleged abuse at DCC caused the following injuries or conditions for which he brings this lawsuit: paranoid schizophrenia, bi-polar disorder, suicidal thoughts, and drug/alcohol addictions. CP 243-54, 261-65, 267. He admits that long ago (by 1995, if not earlier) he made the connection that all of these conditions were caused by his experiences at DCC. CP 256-60, 261-264, 267.

Despite making these connections by no later than 1995 when he was 18 years old, plaintiff did not file this lawsuit until more than 10 years later. CP 92. The reason why he decided to sue in late 2005 was because someone had told him about a lawsuit brought against a group home called OK Boys Ranch and suggested that he should file a lawsuit, too. CP 74-75. A.O. denies that he has discovered any new or different injuries or

conditions since 1995 that he now connects to the alleged sexual abuse at DCC. CP 256-260.

V. LAW AND ARGUMENT

A. Issuance Of A License To Operate A Private Child Care Facility Does Not Create Public Tort Liability For Negligence Or Other Misconduct Subsequently Committed By The Licensee Or By Patrons Of A Private Facility

1. The Licensing And Regulatory Authority Of The State Has No Private Analog And Therefore Is Not A Function For Which Sovereign Immunity Has Been Waived.

Under the State Constitution, the legislature is responsible for setting the boundaries of public tort liability. Wash. Const. Art. 2, § 26. In waiving sovereign immunity, the Legislature expressly imposed a limit on the scope of the waiver. RCW 4.92.090 provides:

Tortious conduct of state—Liability for damages. The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

The express limitation is found in the phrase “. . . to the same extent as if it were a private person or corporation.”

Where the state function at issue has no private analog, an action for damages is barred by sovereign immunity unless the applicable statutes contain an intent to create a private cause of action. *See Linville v. State*, 137 Wn. App. 201 at 208, 151 P.3d 1073 (2007); *see also*, Tardif and

McKenna, *Washington State's 45-year Experiment in Government Liability*, Seattle L.Rev., Vol. 29, P.1 (2005). As stated by this court in *Linville*:

Only where the legislature has expressly waived sovereign immunity by statute can there be the possibility of an actionable duty owed by the State.

Linville, 137 Wn. App. at 208.

The only connection of the state to the events at DCC is through its governmental licensing and regulatory capacity. Licensing and its attendant regulatory authority have no private analog. Accordingly, claims about what the state should or should not have done with its licensing authority are within the area of governmental conduct for which sovereign immunity has not been waived. *See Linville*, 137 Wn. App. at 208 (no common law duty to protect children from abuse at private day care); *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006) (licensing and regulatory authority over nursing homes does not create a duty to protect vulnerable residents); *Stenger v. State*, 104 Wn. App. 393, 16 P.3d 655 (2001) (regulatory authority does not create tort duty).

Therefore, unless the statutes governing the licensing and regulation of private child care facilities reveal a legislative intent to create a private cause of action against the state, the plaintiffs' claims are barred by sovereign immunity.

2. The Statutes Governing The licensing Of Child Care Facilities Do Not Contain An Intent To Allow A Private Right Of Action Against The State.

The licensing and regulatory functions of government are analyzed under the public duty doctrine to determine whether an actionable duty is owed to an individual. *Baerlein v. State*, 92 Wn.2d 229, 231, 595 P.2d 930 (1979). As explained by the Supreme Court, the public duty doctrine is based on the policy that:

Legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.

Taylor v. Stevens County, 111 Wn.2d at 170. Regulatory statutes in particular are appropriately analyzed under the public duty doctrine. As stated in *Baerlein*:

The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties owed to a particular individual which can be the basis for a tort claim. *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). The rule is almost universally accepted regardless of the exact nature of the statute relied upon by the plaintiff.

Baerlein, 92 Wn.2d at 231; *in accord*, *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988).

In this case, the statutes at issue are in the Title 74 RCW and involve delivery of social welfare services, including the licensing and

regulation of private child care centers. RCW 74.13 and 74.15. As demonstrated below, legislation promoting the delivery and availability of child care services are enactments for the public welfare and do not contain an intent to create a public liability for injuries occurring in private facilities.

a. RCW 74.13 And 74.15 Do Not Reveal A Legislative Intent To Create An Action for Damages Against The State For Injuries To Children In Private Child Care Facilities.

The legislative intent exception to the public duty doctrine only applies when the legislature has clearly expressed that an enactment is intended to protect a particular and circumscribed class of persons. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998). As stated by the court in *Ravenscroft*:

In order for the legislative intent exception to apply, the regulation establishing a duty must intend to identify and protect a particular and circumscribed class of persons, and this intent must be clearly expressed within the provision – it will not be implied.

Ravenscroft, 136 Wn.2d at 930. The court ascertains legislative intent by looking to the relevant statute's declaration of purpose. *Dorsch v. City of Tacoma*, 92 Wn. App. 131, 134, 960 P.2d 489 (1998).

If the legislation is intended to protect a particular and circumscribed class, then the court must consider whether creating an

action for damages would be consistent with the underlying purpose of the legislation. *Linville v. State*, 137 Wn. App. at 211. The statutes involved in this case do not meet either element of this analysis.

RCW 74.13 and 74.15 govern the delivery of child welfare services, including the licensing of child care facilities. The purpose of this legislation is to promote the welfare of children, families, and the community at large by ensuring that a sufficient number of facilities are available to the community and that they meet statewide minimum standards of care. RCW 74.13.010 and 74.15.010. In specific reference to the purpose of licensing, RCW 74.15.010(5) provides:

(5) To license agencies as defined in RCW 74.15.020 and to assure the users of such agencies, their parents, the community at large and the agencies themselves that adequate minimum standards are maintained by all agencies caring for children, expectant mothers and developmentally disabled persons.

RCW 74.15.010(5) (emphasis added).

Statutory language phrased in broad terms such as protecting the “community at large” does not identify a particular circumscribed class. The broad phrasing in RCW 74.15.010(5) is similar to phrases such as protecting the “people of the state” or promoting the “welfare of the people.” Phrasing of this type has consistently been found as not falling within the legislative intent exception. *See Burnett v. Tacoma City Light*,

124 Wn. App. 550, 562-63, 104 P.3d 677 (2004). For example, in *Taylor*, regulations in the State Building Code that were “To promote the health, safety, and welfare, of the *occupants or users of buildings...*” did not evince a legislative intent to create an action against the government. *Taylor*, 111 Wn.2d at 164-66 (italics in original).³

In *Aba Sheikh*, the Supreme Court specifically considered whether RCW 74.15 contained a legislative intent to create an action for damages against the State and in doing so focused on the purpose of licensing as set forth by RCW 74.15.010(5). As stated by the court:

Aba Sheikh points to nothing in the WAC or authorizing legislation that would suggest the treatment provisions are intended to prevent tortious acts by dependent children from harming the community at large. Second, Aba Sheikh’s only contention that the legislature intended to create a remedy is his renewed citation to the “community at large” reference in RCW 74.15.010(5) (one of DSHS’s purposes is to license foster homes to ensure there are minimum standards in child care). Licensing foster homes has no relation to offering additional services (i.e., mental health and chemical dependency treatment) to dependent children. Finally, as discussed in detail above, the purpose of the child welfare statutes and regulations is to benefit the dependent children, not to make DSHS a component of the criminal justice system.

Aba Sheikh, 156 Wn.2d at 458.

³ In the note on construction for RCW 74.13 *Child Welfare Services*, the Legislature expressly provided that they did not intend to create a private right of action for any individual against the state. RCW 74.13.030, *Construction-2006 c. 266*.

The ruling by the court in *Aba Sheikh* to reject public liability arising from the licensing and regulatory functions of DSHS is consistent with the earlier decision in *Taylor v. Stevens County*, in which the Supreme Court held that issuance of a license does not create an implicit duty running to those who may be injured by misconduct of the licensee. *Taylor*, 111 Wn.2d at 159-171. In *Taylor*, the court held that it would be poor public policy to shift the risk of liability away from the licensee and onto government regulators. *Taylor*, 111 Wn.2d at 171.

In addition to *Aba Sheikh*, several cases have found that legislation promoting the delivery of social services does not fall within the legislative intent exception to the public duty doctrine. *Linville v. State*, 137 Wn. App. 201; *Donohoe*, 135 Wn. App. at 844-48; *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20 at 25-26, 84 P.3d 899 (2004). In *Terrell C.*, the court considered whether the state owed a duty of protection to the plaintiff under several statutory schemes relating to social welfare services, including ch. 26.44 RCW and Title 74; *Terrell C.*, 120 Wn. App. at 26. As stated in *Terrell C.*,

Statutes governing a social worker's interaction with children and their families, especially dependent children, were enacted to further the goals of preventing child abuse while preserving the family unit. The authority and obligations imposed on the state social workers arise predominately from chapter 13.34 RCW (Juvenile Court), chapter 26.44 (abuse of Children), and from Title 74 RCW

(Public Assistance). These statutes do not support a claim that protecting children from abuse includes a duty to reasonably foreseeable victims of those children.

Terrell C., 120 Wn. App. at 25-26. (footnote omitted).

In *Linville*, the parents of children who were abused at a day care brought an action against the state. The plaintiffs' argument was premised on the state's licensing and regulatory authority. In considering whether the mandate to make insurance available to day care operators under RCW 48.88.010 created an action against the state, the court held:

We fail to see how implying a monetary damages award to children injured by intentional sexual assaultive torts or crimes at daycare facilities is consistent with our Legislature's statutory purpose to improve the availability of general liability insurance for daycare providers. Absent express legislative intent to provide such coverage, we will not act judicially to imply such a remedy.

Linville, 137 Wn. App. at 213.

In *Donohoe*, the plaintiffs sued the state for wrongful death arising from a death at a nursing home. The plaintiffs claimed that the licensing and regulatory authority of the state created a duty to protect the residents of the nursing home and that negligent investigation of complaints led to failure to enforce safe standards. *Donohoe*, 135 Wn. App. at 823-24. In rejecting the argument that the authority to regulate the nursing home industry created a duty to protect individual residents, the court held:

Thus, DSHS's statutory duty under Chapter 18.51 RCW is essentially limited to licensing and overseeing nursing homes for compliance with applicable standards. Chapter 18.51 RCW. Although the Legislature has given DSHS progressively more severe sanction tools for attempting to obtain nursing home compliance with these standards, the Legislature has not thereby created a cause of action for nursing home residents when DSHS does not obtain compliance.

. . . That the Legislature has empowered DSHS to protect the public by assuming control of, or even closing down, nursing homes chronically unwilling or unable to comply with these standards does not create an actionable special duty owing personally to Mrs. Donohoe. And even assuming, for summary judgment purposes, that Pacific Care was not in compliance with certain nursing home regulations, the Estate fails to state an actionable claim on which liability can be predicated under the facts here.

. . . We agree with the trial court:

The plaintiff fails to convince [us] that the legislature intended the nursing home regulatory scheme to be for the benefit of the plaintiff individually rather than the public as a whole. Such intent is not clearly expressed and it cannot be implied. *See Ravenscroft v. [Wash.] Water Power Co.*, 136 Wash.2d 911, 930, 969 P.2d 75 (1998). *See also Baerlein v. State*, 92 Wash.2d 229, 232, 595 P.2d 930 (1979) and *Johnson v. State*, 77 Wash. App. 934, 938, 894 P.2d 1366 [review denied, 127 Wash.2d 1020, [904 P.2d 299]](1995).

Donohoe, 135 Wn. App. at 847-48.

The plaintiffs cite no statutory language that falls within the legislative intent exception. Their only reference to health and safety language in RCW 74.15.010(1) is similar to the language rejected by the Supreme Court in *Taylor*. *Taylor*, 111 Wn.2d at 164. Nor do plaintiffs

address the fact that the Supreme Court in *Aba Sheikh* held that the purpose of licensing child care facilities under RCW 74.15 does not support finding a legislative intent to imply an action for damages against the state. *Aba Sheikh*, 156 Wn.2d at 458.

This court should find that RCW 74.15 does not come within the legislative intent exception for the licensing and regulation of private group homes and that implying a cause of action against the state would be inconsistent with the purpose of the legislation. *Aba Sheikh*, 156 Wn.2d at 458; *Linville*, 187 Wn. App. at 213.

b. The Failure To Enforce And The Special Relationship Exception Of The Public Duty Doctrine Do Not Apply To This Case

Washington courts have found a legislative intent to create an action for damages against the government where officials have actual knowledge of a statutory violation and have a mandate to take specific corrective action. *Donohoe*, 135 Wn. App. 848-49. The exception does not apply when the officials have discretion on how to correct the violation. *Donohoe*, 135 Wn. App. at 849.

DSHS has broad authority to correct licensing violations, including the suspension or modification of a license. RCW 74.15.130. The department can also assess monthly penalties to encourage compliance. RCW 74.15.130. There is no language in RCW 74.15 or 74.13 that

mandates a specific response by DSHS to any particular violation. Accordingly, the failure to enforce exception does not apply. *Donohoe*, 135 Wn. App. at 849.

There are two types of public liability that are known as the special relationship exceptions. These exceptions originate in the common law rather than by statute. The first type of special relationship exception applies when the state is in direct contact with the plaintiff and provides an express assurance of protection. *Cummins v. Lewis County*, 156 Wn.2d 844, 854, 133 P.3d 458 (2006). There is no evidence to support this exception and plaintiffs do not assert it.

The other type of special relationship recognized by Washington cases is where the state has a “definite, established and continuing relationship with a third party.” *Aba Sheikh*, 156 Wn. App. at 449. This exception is also known as the “take charge” theory of liability. *Aba Sheikh*, 156 Wn. App. at 449. As noted above, plaintiffs have abandoned this theory by failing to raise it on appeal. *Holder*, 135 Wn. App. at 107. Moreover, in *Sheikh*, the Supreme Court held that the take charge theory does not apply to the recipients of child welfare services. *Aba Sheikh*, 156 Wn. App. at 450-55; *in accord*, *Terrell C.*, 120 Wn. App. at 28.

B. A Cause Of Action Against The State Under Chapter 26.44 RCW Does Not Apply To Assaults Occurring In A Private Group Home When The State Did Not Control Placement Of The Child

The plaintiffs' argument to extend the cause of action for negligent investigation to incidents at private group homes is contrary to limits set by Washington courts. *M.W.*, 149 Wn.2d at 591. The plaintiffs' argument for a duty under RCW 26.44.050 is flawed in two respects. First, the cause of action does not apply to child abuse investigations outside the parent-child relationship with an allegation that a particular child is in danger; and second, the cause of action does not apply where the state has not made a placement decision. *M.W.*, 149 Wn.2d at 591; *Terrell C.*, 120 Wn. App. at 26.

Washington courts have refused to extend the cause of action for negligent investigations under RCW 26.44 to non-parental relationships such as private day cares and state licensed foster homes. As stated in *Terrell C.*:

The legislative purpose behind the statutes [ch. 26.44 RCW and Title 74] is to protect client children from abuse while preserving the family integrity. The statutory purpose of the duty to investigate allegations of child abuse is to protect children and families from both abuse and from needless separation. In *Pettis v. State*, 98 Wn. App. 553, 560 (1995), an action against DSHS for negligent investigation of claimed physical child abuse by an accused child care worker, this court held that extending a duty to

nonparental relationships was inconsistent with legislative intent.

Terrell C., 120 Wn. App. at 26 (emphasis added).

The second problem with plaintiffs' argument under RCW 26.44 is that the cause of action for negligent investigation under that section is limited to situations in which the state has controlled the placement of the child. *Roberson v. Perez*, 156 Wn.2d 33, 45, 123 P.3d 844 (2005); *M.W.*, 149 Wn.2d at 591.

As stated in *M.W.*:

Although the statute [RCW 26.55.050] supports a claim for negligent investigation in limited situations, such a claim is available only when DSHS conducts a biased or faulty investigation that leads to a harmful placement decision, such as placing the child in an abusive home, removing the child from a nonabusive home, or failing to remove a child from an abusive home.

M.W., 149 Wn.2d at 591.

The term "home" means the home in which the parent and child are residing. The reason for this specific and limited definition of "home" is because the underlying cause of action for negligent investigation is tied to the statutory purpose of protecting the parent-child relationship and avoiding the needless separation of parent and child. *See M.W.*, 149 Wn.2d at 597-99, *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68 at 79, 1 P.3d 1148 (2000). Therefore, an action under RCW 26.44 does not

apply to nonparental relationships or to situations beyond the parent-child home such as the group home in this case.

In *Roberson*, the Supreme Court held that voluntary out of home placements made by the parents of a child do not come within the cause of action under 26.44.050. *Roberson v. Perez*, 156 Wn.2d at 46-47. Similar to *M.W.*, the court emphasized that the cause of action for negligent investigation under RCW 26.44 is based on purpose of that legislation to protect the bond of family integrity and the safety of the child. *Roberson*, 156 Wn.2d at 45. Accordingly, the cause of action for negligent investigation under RCW 26.44 does not apply when an investigation does not implicate the parent-child relationship. *M.W.*, 149 Wn.2d at 600-601; *Roberson*, 156 Wn.2d at 45. *See also* RCW 26.44.010; *Tyner*, 141 Wn.2d 68, 79-81 (duty to investigate is owed equally to the parent and the child).

In this case it is undisputed that the state did not control A.O.'s placement into or out of DCC. RP 15-18. The mother of A.O. acknowledged that there had never been a dependency proceeding regarding A.O. and that placement into DCC was voluntary by A.O.'s mother. RP 16-17. In terms of failing to remove A.O. from DCC, plaintiffs' counsel conceded that removal of A.O. could not have been done by the state and was under the control of A.O.'s mother. RP 16-17.

Plaintiffs' counsel then expressly disavowed that they were making any claim for placement or removal of A.O. RP 18.

Therefore, under *Roberson* and *M.W.*, the plaintiffs' argument to apply the action for negligent investigation under RCW 26.44 to this case must be denied on the grounds that the state did not control the placement of A.O.

In this case, the self-report by Ms. Blackstock regarding the carrot incident is what plaintiffs seize upon as the triggering report of child abuse. The report came to DSHS as a potential licensing issue, not a report of child abuse or as a report that A.O. or any other particular child was in danger. CP 4.

Even if the report is considered as a report of child abuse creating a duty to A.O., it was not a report that implicated a parental or family relationship. CP 4-7. The cause of action for negligent investigation under ch. 26.44 does not extend to "nonparental relationships" and therefore plaintiffs' arguments premised on that statute are misplaced in this case. *M.W.*, 149 Wn.2d at 591; *Terrell C.*, 120 Wn. App. at 26.

C. Foreseeability Of An Injury Does Not Create A Duty Of Protection Or Rescue.

Plaintiffs' assertion that foreseeability of an injury creates a duty is a gross misstatement of the law. The concept of foreseeability limits the

scope of an existing duty, but it does not independently create a duty.

Halleran v. Nu West, Inc., 123 Wn. App. 701, 717, 98 P.3d 52 (2004). As stated in *Halleran*:

However, we note that Halleran's contentions that the harm suffered by the investors was reasonably foreseeable and that the Securities Division had a duty to prevent the harm conflate the concepts of duty and foreseeability. Foreseeability limits the scope of a duty, but it does not independently create a duty.

Halleran, 123 Wn. App. at 717; *in accord*, *Garibay v. State*, 131 Wn. App. 454, 462, 128 P.3d 617, 621 (2005), review denied, 158 Wn.2d 1017 (2006).

In *Terrell C.*, the court specifically held that the duties of social workers do not create a duty of protection even though a child victim is foreseeable. As stated by the court:

The authority and obligations imposed on the state social workers arise predominately from chapter 13.34 RCW (juvenile court), chapter 26.44 RCW (abuse of children) and from Title 74 RCW (public assistance). These statutes do not support a claim that protecting children from abuse includes a duty to reasonable foreseeable victims of those children.

Terrell C., 120 Wn. App. at 26.

The plaintiffs do not acknowledge the long line of cases holding that foreseeability limits an existing duty, but does not create duties. Plaintiffs' erroneous proclamation that anytime an injury is foreseeable the

state owes a duty to prevent the injury stems from their misreading of *Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007). The plaintiff in *Parilla* was injured when a passenger took control of a county bus and hit the plaintiff's vehicle. *Parilla*, 138 Wn. App. at 431. The issue was whether the county, as a common carrier, had a duty to a non-passenger when the affirmative acts of the bus driver contributed to the accident. *Parilla*, 138 Wn. App. at 433. The court held that the county would be liable to the foreseeable extent of the affirmative acts of the bus driver. *Parilla*, 138 Wn. App. at 438-40.

No affirmative acts by the state in this case caused the plaintiff to be assaulted and foreseeability of injury in a private group home does not create a duty on the part of the state. See *Terrell C.*, 120 Wn. App. at 26; *Halleran*, 123 Wn. App. at 717.

D. The Trial Court Correctly Ruled That Plaintiffs' Theory Of Causation Does Not Rise Above Mere Speculation And Conjecture.

Proximate cause consists of two elements: cause in fact and legal causation. *Estate of Bordon ex rel. Anderson v. Department of Corrections*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). Review denied, 154 Wn.2d 1003 (2005). To establish proximate cause there must be substantial evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances

where the injury would not have occurred but for the defendant's act or omission. WPI 1501 (5th Ed.).

Cause in fact or "but for" causation "does not exist if the connection between an act and the later injury is indirect and speculative." *Bordon*, 122 Wn. App. at 240. Legal causation is based on considerations of "logic, common sense, justice, policy and precedent. *Braegelman v. Snohomish County*, 53 Wn. App. 381, 384, 766 P.2d 1137 (1989). How far liability should extend from an act or omission is a consideration for legal causation. *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

In this case, plaintiffs overlook the fact that DCC was a home for boys, like A.O., who had serious behavioral and sexual issues. In spite of this underlying dynamic, the plaintiffs assert that Patsy Blackstock created a sexually charged environment. They then add to that assertion the assumption that the juveniles who had sex with A.O. would not have done so but for the conduct of Ms. Blackstock. There is no evidence or basis beyond sheer speculation that any conduct by Ms. Blackstock caused other juveniles to have sex with A.O. Accordingly, cause in fact has not been established in this case.

The causation theory in terms of alleged state responsibility is even more attenuated. The plaintiffs theorize that after learning about the carrot

incident the state should have done something to get DCC to fire Ms. Blackstock and that would have prevented A.O. from having sex with other juveniles. However, the licensing authority of the state does not include the right to compel a private employer to terminate an employee. The state can take action against the licensee, but in this case plaintiffs have expressly disavowed any theory that the state should have closed DCC. RP 15. The plaintiffs further admit that the state did not have the authority to remove A.O. from DCC. RP 16-18.

The plaintiffs' causation theory that the removal of Ms. Blackstock would have prevented A.O. from having sex with other juveniles is completely speculative. On one hand the plaintiffs argue that the sexual atmosphere at DCC was deep and persuasive affecting all of the children, but then as easy as flipping a light switch the removal of Ms. Blackstock eliminates the sexual atmosphere. The behavioral and sexual aggressiveness of A.O. and all the other children magically go away as soon as Ms. Blackstock is gone. The trial court correctly recognized the speculative nature of plaintiffs' theory and that A.O. may have had sex at DCC even if Ms. Blackstock had never been there.

The plaintiffs conflate issues of foreseeability with causation in an attempt to bolster their causation argument. As stated in *Rikstad*,

The better considered authorities do not regard foreseeability as the handmaiden of proximate cause. To connect them leads to too many false premises and confusing conclusions.

Rikstad v. Holmberg, 76 Wn.2d 265, 268, 456 P.2d 355 (1969).

In the section of plaintiffs' brief on causation, plaintiffs list a number of factors as being foreseeable and thereby causing A.O.'s injury (Pltfs. Br. pp. 20-30). These factors are itemized in bullet format with eight items (Pltfs. Br. pp 24-25). In addition to the factual problem for plaintiffs that only the first two of the eight items were ever reported to the state, the plaintiffs use of these issues to prove causation is legally flawed.

Rikstad, 76 Wn.2d at 268.

To withstand summary judgment, it is not enough to simply say that some event or series of events might have or could have caused an injury. *Miller v. Likins*, 109 Wn. App. 140, 146-47, 34 P.3d 835 (2001). Yet, at best, that is all the plaintiffs can show here: there might have been some connection between Ms. Blackstock's actions and the separate intentional misconduct of the boys, which might be connected to DSHS's alleged failure to urge a private employer to exercise its independent authority to control its employee. Furthermore, the state's position as a licensor is too attenuated to be the legal cause of misconduct in a private group home. *See Hartley*, 103 Wn.2d at 784.

The trial court correctly ruled that plaintiffs had not proven causation in its theory against the state.

E. The Plaintiff Cannot Create A Question Of Fact On The Running Of The Statute Of Limitations By Contradicting His Own Unequivocal Admission That He Knew The Abuse At DCC Was Causing His Emotional Issues, Nor Is The Statute Tolloed By Adding A New Label To The Constellation Of Plaintiff's Known Symptoms.

It cannot be disputed that plaintiffs' claims became barred by the statute of limitations ten years ago on his 21st birthday, unless he is able to take advantage of the additional tolling provided by the special statute of limitations for child sex abuse, RCW 4.16.340. *See* RCW 4.16.080(2). Under Washington law, the statute of limitations for child sex abuse is tolled until three years from when the plaintiff connects his injuries to the abuse. *Korst v. McMahon*, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006).

The Legislature's intent in creating a special discovery rule for childhood sexual abuse cases was based on recognition that:

[e]ven though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later", and thus, "the earlier discovery of less serious injuries should not affect the statute of limitations for [more serious] injuries discovered later.

Laws of 1991, ch. 212, § 1, as quoted in *Hollmann v. Corcoran*, 89 Wn. App. 323, 333, 949 P.2d 386 (1997) (emphasis added). In his deposition,

A.O. acknowledged that he had subjectively made the connection between all of the following conditions and the abuse at DCC:

- Suicidal behavior and ideation
- Drug and alcohol abuse/addiction
- Paranoia
- Homicidal thoughts
- Attention deficit disorder
- Fear

CP 256-64, 267.

A.O. also attributes his schizophrenia and his bi-polar disorder to the abuse at DCC, although neither of these are trauma induced conditions. A.O. does state that he has no condition or injuries that he attributes to DCC that he did not realize by 1995. CP 264, 267. Therefore, A.O.'s claims became time-barred on September 26, 1998, when he turned 21. RCW 4.16.190(1).⁴

Plaintiff's deposition on March 29, 2007, demonstrated that he had connected his multitude of serious emotional and psychological conditions to the events at DCC. The state moved for summary judgment on June 8, 2007, on the basis that the plaintiffs' action was barred by the statute of limitations as well as causation and duty deficiencies. CP 269. Recognizing that A.O.'s acknowledgement that he had connected his

⁴ The time limitation on commencing A.O.'s mother's claim began to run at the same time as the underlying claim of her child. See *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 729, 985 P.2d 262 (1999).

problems in life to the abuse at DCC as early as 1995, the plaintiffs obtained a psychological opinion from a professor of social work, Jon Conte, on June 15, 2007. Dr. Conte adds a new label (PTSD) to conditions already understood by A.O. to relate to DCC. CP 72.

The plaintiff and Dr. Conte focus on “memories” of the events at DCC and attribute the recurrence of those memories to PTSD and the death of one of A.O.’s friends from DCC. CP 74, 78. However, the plaintiffs’ PTSD theory is undermined by A.O.’s admission that “I have never forgotten the abuse I suffered at DCC. It messed me up and my life has never been the same.” CP 74. Similarly, A.O. stated “memories have haunted me ever since it [the assaults] occurred. CP 57. Significantly, neither A.O. nor Dr. Conte even attempt to claim that any of the memories after the death of A.O.’s friend are new or different than his previous memories which have never been forgotten.

The plaintiffs’ reliance on *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (2007) is misplaced. In *Miller*, the plaintiff began having new memories as an adult of abuse that he had suffered as a child. *Miller*, 137 Wn. App. at 765. Although the plaintiff was aware of many symptoms, he had not connected them to the abuse until beginning therapy as an adult. *Id.* at 767. Unlike the plaintiff in *Miller*, neither A.O. nor Dr.

Conte identify a single new memory of abuse nor an emotional trauma that A.O. had not already connected to DCC.

Although the clinical label for a condition such as PTSD may not have been known to A.O., the lack of knowledge of a diagnostic label does not toll the statute of limitations. Adding a new label to a constellation of known symptoms does not meet the intent of the legislature for tolling the statute of limitations for child sex abuse, nor is it tolled for the discovery of effects that are less serious or are sub-sets of greater injuries that plaintiff has previously connected to the abuse, such as suicidal ideation, fear, and paranoia. *See Hollmann*, 89 Wn. App. at 333.

In this case A.O. was fully aware of his many problems and attributed them to the abuse at DCC. CP 256-64. The trial court correctly found this case was barred by the statute of limitations.

VI. CONCLUSION

The licensing and regulatory authority of the state is a uniquely governmental function that has no private analog and therefore is not a function for which sovereign immunity has been waived. RCW 4.92.090. The legislation at issue in this case governs the licensing of private group homes and is part of a legislative scheme promoting the general welfare of the people of Washington supporting the availability of child welfare services. Such legislation should not subject the state to tort liability, nor

is there any language in the legislation revealing an intent to create an action for damages against the state for injuries arising in private group homes. *See Taylor*, 111 Wn. 2d at 170; *Aba Sheikh*, 156 Wn.2d at 458.

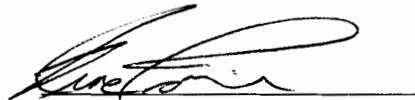
The trial court also correctly ruled that it would be sheer speculation to assume that Ms. Blackstock's presence or absence from DCC was a proximate cause of A.O. being assaulted. The state's role as a licensor is even further removed from the chain of causation.

The tolling provision in RCW 4.16.340 for child sexual assault does not apply when, as in this case, the plaintiff was aware of all of his symptoms and had long ago connected them to an incident of sexual assault. The liberal standard of the statute was not meant to be abused as plaintiffs' attempt to do by merely attaching a new label to a constellation of issues that have been well known, particularly when the new label wasn't discovered until after the lawsuit was filed. The trial court correctly found this case to be barred by the statute of limitations.

For all of the reasons given above, the decision of Judge Chushcoff should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of December,
2007.

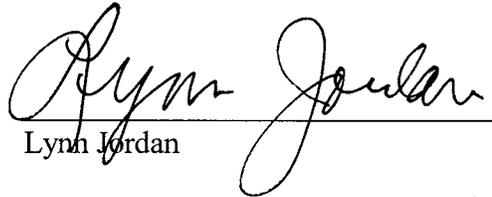
ROBERT M. MCKENNA
Attorney General

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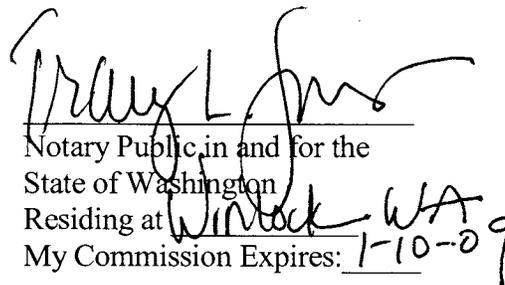
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SUBSCRIBED AND SWORN TO Before me this 28 day of
December, 2007.


Notary Public in and for the
State of Washington
Residing at Winlock WA
My Commission Expires: 1-10-09

