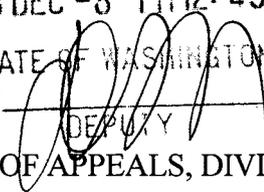


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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

Thomas L. Raglin and Cecelia M. Raglin, Appellants,

v.

State of Washington, Respondent.

APPELLANTS' OPENING BRIEF

DUANE C. CRANDALL
Crandall, O'Neill, McReary &
Imboden, P.S.
Attorneys for Appellants

1447 Third Ave., Ste. A
PO Box 336
Longview, Washington 98632
Telephone: (360) 425-4470
WSB #10751

TABLE OF CONTENTS

	Page
I. <u>INTRODUCTION</u>	1
II. <u>ASSIGNMENTS OF ERROR</u>	
No. 1.....	1
No. 2.....	1
III. <u>ISSUES</u>	
No. 1.....	1
No. 2.....	1
No. 3.....	1
No. 4.....	1
IV. <u>STATEMENT OF THE CASE</u>	2
A. Overview.....	2
B. Information known to DSHS when the child was placed in the Raglin home.....	3
C. When an adoption takes place, the parents must sign a DSHS 13-041(X) disclosure form.....	11
D. What went wrong.....	12
E. DSHS was in a position to predict the child's problems.....	15
F. DSHS did not monitor the child.....	16
G. After ignoring the Raglins and child, DSHS rushed the adoption.....	17
V. <u>ARGUMENT</u>	20
A. DSHS had a duty to provide all of the information to the Raglins they possessed or could possess.....	20
B. Issue preclusion mandated summary judgment for appellants.....	20
C. The release signed by the Raglins was unenforceable.....	23

D.	"Agreement" void for public policy.....	26
E.	Unconscionability.....	30
F.	Unilateral mistake.....	31
G.	Pre-existing duty rule.....	32
H.	Failure of consideration.....	33
VI.	<u>CONCLUSION</u>	34

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc.</i> , 22 Wn.App.781, 784, 591 P.2d 1220 (1979).....	25, 32
<i>Appleway Leasing, supra</i>	32
<i>Ashe v. Swenson</i> , 397 U.S. 436, 90 S. Ct., 1189, 1195, 25 L. Ed. 2d 469 (1970).....	20
<i>Ashe</i> , 90 S. Ct. at 1194.....	21
<i>Basin Paving v. Port of Moses Lake</i> , 48 Wn.App. 180 (1987).....	25
<i>Basin Paving, Inc. v. Port of Moses Lk.</i> , 48 Wn.App. 180, 185, 737 P.2d 1312 (1987).....	32
<i>Basin Paving, supra</i>	32
<i>Basin</i> , at 184 & 184-85.....	25, 26
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 663 (1990).....	24
<i>Boyce v. West</i> , 71 Wn.App. 657, 662 (1993).....	24
<i>Cf. Barry v. Lewis</i> , 259 A.D. 496, 20 N.Y.S.2d 88, 90 (1940).....	25
<i>Chauvlier v. Booth Creek</i> , 19 Wn.App. 334, 344 (2001).....	30
<i>Eelbode v. Chec Medical Centers, Inc.</i> , 97 Wn.App. 462, 471 (1999).....	28
<i>Failors Pharmacy v. DSHS</i> , 125 Wn.2d 488, 499 (1994).....	33
<i>Gill v. Waggoner</i> , 65 Wn.App. 272, 276 (1992).....	31
<i>Gill court</i> , at 279.....	32

	<u>Page</u>
<u>Cases</u>	
<i>Hansen v. Kelly-Hansen</i> , 87 Wn.App. 320, 329 (1997).....	21
<i>Harris v. Morgensen</i> , 31 Wn.2d 228, 240 (1948).....	32
<i>Hederman v. George</i> , 35 Wn.2d 357, 361 (1949).....	33
<i>Hilltop Terrace Assn. v. Island Co.</i> , 126 Wn.2d 22, 31 (1995).....	21
<i>Jeffery v. Weintraub</i> , 32 Wn.App. 536 (1982).....	31
<i>McKinney v. State</i> , 134 Wn.2d 388 (1998).....	2, 20
<i>Malland v. Dept. of Retirement Systems</i> , 103 Wn.2d 484, 489 (1985).....	21
<i>Metropolitan Life Ins. Co. v. Ritz</i> , 70 Wn.2d 317,321, 422 P.2d 780 (1967).....	25
<i>Multicare Med. Ctr. V. Holm</i> , 114 Wn.2d 572, 584-85 (1990).....	32
<i>Nationwide v. Watson</i> , 120 Wn.2d 178, 187 (1992).....	26
<i>Nelson v. McGoldvick</i> , 127 Wn.2d 124 (1995).....	31
<i>Nelson</i> , at 131 quoting <i>Schroeder v. Fageol Motors, Inc.</i> , 86 Wn.2d 256, 260 (1975).....	31
<i>Nelson</i> , at 131.....	31
<i>Pierce County v. State</i> , 185 P.3d 594, 624 (2008).....	33
<i>Puget Sound Nat'l Bank v. Selivanoff</i> , 9 Wn.App. 676, 681, 514 P.2d 175 (1973).....	25

<u>Case</u>	<u>Page</u>
<i>Ross v. Harding</i> , 64 Wn.2d 231, 236 (1964).....	24
<i>Scott v. Pac. West Mt. Resort</i> , 119 Wn.2d 484, 492 (1992).....	26
<i>Shoemaker v. Bremerton</i> , 109 Wn.2d 504, 507 (1987).....	21
<i>Simonson v. Fendell</i> , 101 Wn.2d 88, 91, 675 P.2d 1218 (1984) (citing Restatement (Second) of Contracts sec. 151 (1981)).....	32
<i>Snap-On Tools Corp. v. Roberts</i> , 35 Wn.App. 32, 35, 665 P.2d 417 (1983) (citing, <i>inter alia</i> , <i>Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc.</i> , 22 Wn.App. 781, 784, 591 P.2d 1220 (1979)).....	25
<i>State v. McNally</i> , 125 Wn.App. 854, 867-68 (2005).....	24
<i>Vodopest v. MacGregor</i> , 128 Wn.2d 840, 848 (1996).....	26
<i>Vodopest v. McGregor</i> , 128 Wn.2d 840, 858 (1996).....	28
<i>Vodopest</i> at 855.....	30
<i>Vodopest</i> , at 859-60.....	30
<i>Vodopest</i>	28, 30
<i>Wagenblast v. Odessa School Dist.</i> , 110 Wn.2d 845 (1988).....	24
<i>Wagenblast v. Odessa School Dist.</i> , 110 Wn.2d 845, 855 (1988).....	26
<i>Wagenblast</i> , at 855.....	29
<i>Wagenblast</i> , at 856.....	30
<i>Wagenblast</i> , at 858.....	28

	<u>Page</u>
<u>Case</u>	
<i>Wagenblast</i>	28
<u>Statutes</u>	
RCW 26.33.090 (4).....	16
RCW 26.33.380.....	12, 20
<u>Other</u>	
WAC 388-27-0315.....	22
WAC 388-27-0315(1).....	8
CFR 1356.40(b)(1).....	22

I. INTRODUCTION

Appellants moved for summary judgment on the issue of wrongful placement of a child (later adopted) in Appellants' home.

Respondent's cross motioned for summary judgment claiming Appellants had signed a binding release of liability for the wrongful adoption.

The Court denied Appellants' motion, granted Respondent's motion, and denied Appellants' motion for reconsideration. This appeal followed.

II. ASSIGNMENTS OF ERROR

1. The Court erred in denying Appellants' summary judgment motion as to wrongful placement.
2. The Court erred in granting Respondent's cross motion.

III. ISSUES

1. Whether DSHS had a duty to disclose to the prospective parents all of the information about the child and mother/family DSHS possessed or could possess.
2. Whether DSHS provided all of the information it possessed or could possess to Appellants prior to adoption.
3. Whether issue preclusion established that Respondent failed to disclose the required information.
4. Whether Appellants knowingly waived any right to sue for wrongful

placement.

IV. STATEMENT OF THE CASE

A. Overview

This is a wrongful placement/wrongful adoption case. Washington recognizes adoptive parents have a cause of action for negligent failure to meet statutory disclosure requirements. *McKinney v. State*, 134 Wn.2d 388 (1998). Appellants contend that respondent State of Washington, through DSHS and its subdivisions, placed Josiah, fka Kody, in the Raglin family home and later processed the Raglin adoption of Josiah without providing the Raglins critical information known to Respondent. Had the Raglins known what Defendant knew, no placement nor adoption would have occurred. As the child has grown he has exhibited increasingly anti-social behavior that has escalated into criminal behavior.

Over the years, the Raglins repeatedly sought information from DSHS regarding the prenatal care of Josiah and his mother's and families' medical histories, all of which was refused. Eventually the Raglins sought post-adoption support for the youth; DSHS rejected their application. An Administrative Law Judge entered an Agreed Order finding post-adoption support was available because of lack of disclosure, but left the monthly amount subject to negotiation. DSHS claims that part of the agreement to enter into the Agreed Order was that the Raglins would give up their right

to sue for wrongful placement. The Raglins disagreed and in fact never have received post-adoption support.

B. Information known to DSHS when the child was placed in the Raglin home.

Josiah was placed in the Raglin family home on May 28, 1993. He was one year old. The Raglins had never been foster parents before. Tom and Cece Raglin had been married seven years and had two fine sons, ages 6 and 4 at the time of the placement. Tom was employed with good health insurance; Cece was also employed.

Mrs. Raglin's brother had a brief encounter with a young woman named Carrie Phillips which resulted in her pregnancy. She was 21 when Josiah was born. She had already borne two children which she relinquished as she did Josiah. On July 8, 1992, there was reported neglect from Dr. Burton. (CP17, pp. 55-56) PS filed a complaint for neglect on September 7, 1992. (CP 17, pp. 58-59) On December 25, 1992, it was reported that Josiah had cuts, bruises, a fractured skull, a broken arm, a fever, and had not been given his medications for an ear infection. (CP 17, pp. 52-53)

Josiah had his own file with DSHS. The caseworker notes are filled with violence, neglect, criminal law intervention and illness. For example, Carrie's mother spent 4 years in Western State Hospital, had two

suicide attempts, and developed epilepsy. Carrie's father has been in jail twice for child molestation. (CP 117, p. 67)

The mother, Carrie, had her own extensive record with the Department of Children and Family Services (DCFS), a subdivision of DSHS. During the placement and eventual adoption of Josiah, Carrie had an open file because of her pregnancy with yet another child, Brandon. The DCFS file indicates drug and alcohol use during the pregnancy with Josiah.

The above reflects dates prior to the placement of Josiah into the Raglin home. None of this information was ever conveyed to the Raglins until many years after the adoption.(CP 18, p. 439, item 49) The child was placed in the Raglin home because the Raglins thought they would probably adopt him. They ultimately did so on May 16, 1997. (CP 18, p. 435, item 17) At adoption, the Raglins signed a waiver of post adoption support.

The first indication from a professional source that all was not well with Josiah came on May 10, 1997 (the last day of pre-kindergarten) from the school teacher, Debra Zandi. (CP 18, p. 435, item 16) She told the Raglins that Josiah was not ready for kindergarten and needed further testing. She suggested approaching the Kelso School District about services available. Mrs. Raglin requested of Lori Whittaker, a DSHS case

worker, all the medical and legal information on Josiah and his mother but was told there was none, or at least very little. (CP 18, p. 435, item 17) Nothing was produced. This was in the same month as Josiah's adoption of May 16, 1997.

Approximately two years later, on March 1, 1999, Josiah, now six years old, flew into a rage at home, tore off and destroyed the mini-blinds, broke the big screen television, broke dishes and large ceramic planters. Completely unfamiliar with this type of behavior, the Raglins took him to see a homeopathic/naturopathic physician, Dr. Briggs. (CP 18, p. 435, items 20-22)

By September 1999, Josiah was enrolled in first grade at Carrolls Elementary School rather than second grade. By January 2000, school officials had met with the Raglins and suggested that Josiah had Attention Deficit Disorder. The parents met with Dr. Linnel, a pediatrician, who tested Josiah. By March 4, 2000, Josiah was on medication. In May 2002 Mrs. Raglin was told by Mrs. Troutman of Carrolls Elementary School that Josiah needed summer school and Healing Intervention Prevention (HIP) counseling. Josiah was enrolled in summer school July 22, 2002 to the end of August 2002. On September 18, 2002, Josiah met with a psychologist/psychiatric nurse, Dr. Susan Mejo, for medication and counseling. This continued until October 27, 2003. (CP 18, p. 436, item

33) Dr. Mejo told the Raglins that Josiah was not going to get better, he wasn't going to change. Mrs. Raglin started to cry and Dr. Mejo told her she would be going through a grieving process. On August 27, 2003 Josiah was taken to the Center for Behavior Solutions where Dr. Shirley Shin recommended that Josiah be transferred to a self-contained classroom at Butler Acres Elementary School for the remainder of the 5th grade. (CP 18, p. 436, item 34)

Because of what Dr. Mejo and Dr. Shin had said, Mrs. Raglin called the DCFS Region 6 office in Olympia in September 2003. She spoke with Jan Spear about all the problems and inquired, again, if there was any information in the file about the birth mother and child abuse/neglect of Josiah. Ms. Spear promised to get back to her after looking in the archives. (CP, p. 436, item 35)

Ms. Spear called Mrs. Raglin in October 2003 and said that there was really no history available. Mrs. Raglin explained that the family had received practically no information and asked that Ms. Spear send at least what she had. Ms. Spear then replied that she could only send what pertained to the Raglins which was a copy of the waiver giving up any medical or financial benefits for Josiah. She said it was a legally binding document and that it said the Raglins knew what they were signing. Mrs. Raglin told Ms. Spear that Josiah's case had to be different from most

adoptions because Josiah had become seriously troubled. Ms. Spear said that since the Raglins had signed the waiver there was nothing DSHS could do. She went on to say thta there was no way to predict if Josiah would have developed the way he did and the Raglins wouldn't have listened, anyway, because Josiah was Mrs. Raglin's nephew. She concluded by wishing Mrs. Raglin luck and promising to send a copy of the waiver they signed. (CP, p. 437, item 36)

In the spring of 2004 Mrs. Raglin was invited by a friend to attend a speech to foster parents put on by Lonnie Locke, a Program Administrator for Region 6. After the lecture, Mrs. Raglin approached and explained all the problems they were having with Josiah. Ms. Locke assured Mrs. Raglin that there was nothing the department could do to assist since the waiver for post-adoption support had been signed. (CP, p. 437, item 37)

By June 2004, Mrs. Raglin had heard about the "Adoption Support Reconsideration Program". She called Region 6 in Olympia and spoke to Nancy Williams, Adoption Support Manager, and explained the frustrations with Josiah and his needs. As a result of the consultation, Mrs. Raglin filed an application for reconsideration. (CP, p. 537, items 38-39)

On August 27, 2004, the Raglins received a letter from Ms.

Williams denying their application. The letter explained that Josiah did not meet the criteria of extenuating circumstances.

The applicable code section defining "extenuating circumstances" states:

"Relevant facts regarding the child, the biological family or child's background were known by the agency placing the child for adoption and not presented to the adoptive parents prior to the legalization of the adoption."

WAC 388-27-0315(1)

On November 23, 2004, with the help of Carol Biesanz, a social worker and county mental health professional, the Raglins put together a timeline and petitioned, pro se, the Office of Administrative Hearings for review of the denial. (CP, p. 438, item 41)

During this time, Josiah's behavior continued to escalate and the Kelso School District had a psychological evaluation performed by Dr. Stephen Meharg, Ph.D. by March 2005.

The Administrative Law process resulted in pre-hearing conferences on December 24, 2004, January 28, 2005 and March 11, 2005 attended by the Raglins pro se. After the last one, on March 18, 2005, Mrs. Williams called the Raglins indicating that the Department agreed to disregard the Raglins' waiver, and by March 28, 2005, the Assistant Attorney General representing DSHS mailed a proposed settlement to the

Raglins. (CP 18, p. 438, item 48)

The settlement letter, for the first time, indicates the DSHS's knowledge of potential civil liability. Inserted was the following language:

"The Department also asks that you agree that this settlement resolves all claims that may exist with respect to Josiah's placement with you and his adoption by you."

On April 5, 2005, Mrs. Williams drove down from Olympia to Longview to meet with the Raglins and discuss settlement. She listened to the Raglins go over the history again and their concerns for Josiah and his future. The Raglins do not recall her ever discussing the potential civil suit. Ms. Williams gave them, finally, the information on Josiah and his mother's family history which had been sought for eight years. (CP 18, p. 439, item 49) Thereafter, the Raglins signed an Agreed Order which was later signed by Administrative Law Judge Hale on April 22, 2005. The full title of the agreed order is "AGREED ORDER REGARDING THE EXISTENCE OF EXTENUATING CIRCUMSTANCES". (CP 17, pp. 107-08)

Four days later, on April 9, 2005, the Raglins received from Ms. Williams a list of mental health providers for Josiah and a note saying she was being transferred and Jan Spear would now be working with them.

(CP 18, p. 439, item 50)

Following the entry of the Agreed Order, the parties were expected to negotiate the support amount necessary to care for Josiah's needs. The Raglins explained that Josiah needed a boarding school, tutoring, replacement costs for destroyed property, and counseling. They requested a total of \$4,800 per month. On July 25, 2005 Jan Spear called and scolded the Raglins for requesting that much ("Did you really think we'd pay \$4,800 per month?!" CP 18, p. C.Raglin Decl., p. 440, item 55) and said the Department was limited to \$600 per month by statute. If the Raglins didn't like it, they could take it up with the federal government; besides, she had over 3,000 cases on her desk just like Josiah's. (CP 18, p. 440, item 55) By August 10, 2005, Ms. Spear had offered \$1,300 per month, but, again, she said that was absolutely all the law would allow. At deposition she testified that the \$1,300 was a limit self-imposed by DSHS. (CP 17, p. 80, subpage 49, lines 15-25 & subpage 50, lines 1-11)

Throughout negotiations with the Raglins, Jan Spear consistently and implacably made any payment of support or back support contingent upon the Raglins not suing DSHS for wrongful placement.

Jan Spear was deposed on February 1, 2007, approximately six months after her retirement. She had been employed by DSHS since 1991 and had worked on the Raglin adoption file for purposes of support. She

acknowledged the mandate of disclosure and its purpose to inform prospective parents. (CP 17, p. 78, subpage 30, lines 16-25)

Peggy DeVoy was deposed on October 30, 2006. At the time of her deposition, she had worked for DSHS for sixteen years. She had worked on the Raglin file. She was an adoption worker in Kelso from February 1995 to November 1996 when she transferred to the Vancouver DSHS office. She testified that she understood DSHS to have a duty to disclose but did not recall ever having a supervisor tell her that. (CP 17, p. 86, subpage 17, lines 9-25; subpage 18, line 1)

Linda Klein was a social worker with DSHS for 30 years, worked on the Raglin adoption file and is now retired. She stated by declaration that after review of the file it was clear that the adoption form regarding disclosure to the Raglins was incorrect. The form indicated critical information was "unavailable" which was patently untrue. (CP 29, p. 188, subpage 7, lines 10-25. subpage 8, lines 1-25; p. 189, subpage 9, lines 1-25; subpage 10, lines 1-3; 191, subpage 18, lines 22-25, subpage 19, lines 1-19)

C. **When an adoption takes place, the parents must sign a DSHS 13-041(X) disclosure form.**

When the Raglins adopted Josiah, they were required to sign a form created by DSHS that purports to show that the Raglins had received

all of the information required under RCW 26.33.380. The DSHS 13-041(X) form signed by the Raglins at the adoption hearing had "unavailable" in a number of areas. (CP 17, pp. 100-01)

Jan Spear was the Adoption Support program manager for Region 6 (CP 17, p. 77, subpage 18) She trained the adoption workers and adoption supervisors (CP 17, p. 81, subpage 58). Region 6 includes Cowlitz County. She was deposed on February 1, 2007 and testified that it was improper to mark "unavailable" on the adoption form when the file contained relevant information and if it did not contain adequate information, the caseworker should go out and get it. (CP 17, p. 81, subpage 60, lines 6-25; p. 82, subpage 61, lines 1-25, subpage 62, lines 1-10)

D. What went wrong.

Linda Klein was an adoption worker for nine of her 30 years with DSHS. She was transferred from her adoption position in January 1995. (CP 29, p. 187, subpages 3; p. 188, subpage 5) She was never asked or directed to train her replacement. (CP 29, p. 188, subpage 6) Her caseload went to Peggy DeVoy. (CP 29, p. 188, subpage 11) On Peggy DeVoy's first day on the job as an adoption worker in 1995, she inherited around 80 cases. (CP 17, p. 84, subpage 8) Current guidelines limit a caseworker to 40 active files (CP 17, p. 85, subpage 9) When Peggy

DeVoy left after approximately 19 months, she had 150 active cases. (CP 17, p. 86, subpage 20) She had no prior experience in pre-or post-adoption work. (CP 17, p. 84, subpage 7) She received complaints that she wasn't processing adoption files fast enough. (CP 17, p. 85, subpage 10) There were no other adoption workers except her at the Kelso office. (CP 17, p. 85, subpage 11) She recalls that on at least one occasion a family that had adopted a child returned later and wanted information from the child's parents' file. Her boss, Debbie Marker, told her that the adoptive family was not entitled to the information and not to provide it. (CP 17, p. 86, subpages 18-20) That result did not sit well with Peggy DeVoy. (CP 17, p. 86, subpage 20) Debbie Marker is perhaps willing to tamper, hide or change files to keep herself from looking bad, opines Peggy DeVoy at p. 49: "I believe she has done it in other cases." (CP 17, p. 90, subpage 49)

After Peggy DeVoy, Lori Whittaker was given the Raglin adoption file by her supervisor, Debbie Marker. (CP 17, p. 110, subpage 6) She became an adoption worker in January 1997 (CP 17, p. 110, subpage 7) and it was months before she knew there was a manual on how to do adoptions. (CP 17, p. 110, subpage 8) She was tasked with doing the Raglin post-placement report but she didn't read the entire file regarding Josiah. (CP 17, p. 111, subpage 10) This is despite 20 years of social work experience and being enrolled in an MSW program. (CP 17, p. 110,

subpage 7) How she could write a post-adoption report without reading Josiah's file is unexplained. She was actually *teaching* adoption classes shortly after getting her new job in January 1997, (CP 17, p. 115, subpage 32) yet Debbie Marker had to orally direct her how to close the Raglin adoption in a cookbook, step by step, instruction. (CP 17, p. 113, subpages 17-18)

Lori Whittaker never made any effort to obtain the records of Josiah from birth. She assumed "that all that had been done". (CP 17, p. 113, subpage 17) But, if someone else had gotten the birth records, they still would have shown up in the file. (CP 17, p. 113, subpage 19) She testified that her signing of the adoption form would have been at the instruction of her supervisor. (CP 114, subpage 9, lines 3-25, subpage 26, lines 1-25, subpage 27, lines 1-22)

The health history of both parents is important to the adoption workers because many conditions are genetically linked. (CP 17, p. 89)

By the year 2000 Jan Spear had become the Adoption Support Program Manager for Region 6 (a large region including Cowlitz County). (CP 17, p. 75, subpages 10-11) Before being appointed to the managerial position she had never participated in an adoption in her entire life. But she had supervised adoptions in Grays Harbor County for about two years. (CP 17, p. 75, subpage 12) Notwithstanding, she had not done any

adoptions or participated in any adoptions before she became the adoption supervisor in Grays Harbor. (CP 17, p. 76, subpage 13) She testified that as a supervisor she would check caseworker court reports for accuracy but admitted that accuracy was really only determined by the caseworker. (CP 17, p. 76, subpage 14, lines 8-25, subpage 15, lines 1-23, subpage 16, lines 19-25; p. 77, subpage 17, lines 1-2)

E. DSHS was in a position to predict the child's problems.

Lori Whittaker, at the time she had the Raglin adoption file, felt that there was a likelihood that Josiah might develop special needs if he hadn't already developed them. (CP 17, p. 117, subpage 37, lines 16-19) If she had realized the child's history and mother's history she absolutely would have encouraged the Raglins to apply for post adoption services and support. (CP 17, p. 118, subpage 43, lines 7-35, subpage 44, lines 1-8)

DSHS offered no training, guidance, help, or suggestions to the Raglin family at any time, pre- or post-adoption. (CP 29)

Peggy DeVoy knew it was her job to assemble all the information regarding Josiah, his family, their histories, and place it all in the Raglin adoption file. (CP 17, p. 87, subpages 39-40) At the time she was tasked with doing all of this, she knew what "fetal alcohol syndrome" meant and that it can be difficult to identify in two- or three-year olds. She understood the dilemma a parent would face with behavioral problems

surfacing in a child five years post-adoption. This is commonly understood by DSHS employees and it is the responsibility of DSHS employees to inform parents of potential problems. DSHS is responsible for gathering information even if that means an investigation must be done. (CP 17, p. 88, subpage 42, lines 11-25, subpage 43, lines 1-25, subpage 44, lines 1-3) Jan Spear remembers the Raglins requested post-adoptive support because the child needed more services than the Raglins could afford. She had no reason to doubt their statements. (CP 17, p. 79, subpage 34, lines 21-25, subpage 35, line 1)

Linda Klein, upon reading the file after retirement, opined that it was foreseeable that Josiah would exhibit developmental and learning disabilities. It was also foreseeable that those disabilities would cost somebody significant money to treat. (CP 29, p. 192, subpage 21, lines 4-12)

F. DSHS did not monitor the child.

Once the Cowlitz County Superior Court approved the petition for relinquishment, custody of the child was awarded to the prospective adoptive parents, the Raglins, who were appointed legal guardians. RCW 26.33.090 (4). DSHS had a duty to monitor the child no less than at least once every 90 days and report to the Court every six months how the child was doing. But, in reality, no social worker or other agent of DSHS saw

the Raglins or the child between May 1993 and October 1996, much less offered any social services. (CP 18, p. 434, item 11) No notes appear in any file indicating a contact between the child or Raglin family and DSHS for this period. But the 6-month court review documents all suggest that a social worker had checked on him/them. This never occurred. (CP 18, p. 434, items 9 and 11)

Lori Whittaker, who finalized the adoption, testified that she never met the child face to face until February 1997 and nothing in the file reflected any contact since placement in May 1993, despite Mrs. Raglin writing her a letter on December 19, 1996 complaining that no one from DSHS ever came by. (CP 17, p. 119, subpage 53, lines 20-25, subpage 54, lines 1-25, subpage 55, lines 1-25, subpage 56, lines 1-25; p. 120, subpage 57, lines 1-2)

G. After ignoring the Raglins and child, DSHS rushed the adoption.

Once the Superior court placed Josiah in the Raglin home, DSHS failed to monitor him. The child was five years old when the adoption took place on May 16, 1997; he had been in the home for four years. The Raglins had fallen through the cracks.

Ms. DeVoy sent a memo dated September 18, 1996 to Cecelia Raglin. (CP 17, p. 131) She refers to returning the adoption packet to her

"...so that the process can begin now that the appeal is resolved". However there was no appeal in this case as it was a voluntary relinquishment by both biological parents.

During the rush to finalize the adoption, DSHS never had a social worker go over the packet of information Linda Klein had sent the Raglins just before she was transferred. Ms. Klein remembers in August of 1994 she had contact with the Raglin family and she sent them an adoption application and adoption support application. The forms are long and an adoption worker needs to help the family fill out all the paperwork. She has never seen a case where prospective adoptive parents could fill them out themselves. She was transferred before she could complete the adoption. (CP 29, 187, subpage 4, lines 24-25; p. 188, subpage 5, lines 1-22)

Peggy DeVoy, the second social worker on the adoption between Linda Klein and Lori Whittaker, never gathered the necessary information for the full disclosure to the Raglins despite implying to the Raglins that Josiah might be removed from their home. Apparently she provided sufficient motivation to the Raglins because they not only adopted Josiah without any of the necessary medical histories, but waived post-adoption support as well. She acknowledges that the adoptive parents would need to receive the child's medical and family background report prior to

finalization. It was her job to solicit the information. She remembers the mother Carrie having another child, Brandon, during the Raglin adoption but she doesn't believe she would have contacted any of the caseworkers on Carrie's case for information. She never met with Carrie nor recorded any information about her. (CP 17, p. 87, subpage 39, lines 4-25, subpage 40, lines 1-25; p. 88, subpage 41, lines 1-25, subpage 42, lines 1-6)

Ms. Whittaker was supposed to write the post-placement report and review the disclosure form with the Raglins on May 16, 1997. Either she or her boss, Debbie Marker, wrote in "Not Available" regarding Josiah's and his mother's medical history. Appellants' theory of the case is that the Raglin adoption went far more rapidly as long as the Raglins were kept in the dark about Josiah's potential problems, especially when Lori Whittaker knew that Josiah was likely to have special needs in the future.

Thereafter, Jan Spear was introduced to the Raglin files. She was the fourth social worker but her involvement was far from being that of a social worker; she was the State's negotiator, otherwise known as Adoption Support Program Manager for Region 6. She was responsible for making offers and contracts with adoptive parents. (CP 17, p. 77, subpage 20)

V. **ARGUMENT**

A. **DSHS had a duty to provide all of the information to the Raglins they possessed or could possess.**

RCW 26.33.380 required DSHS to transmit to the Raglins as prospective adoptive parents, prior to placement, a family background and child and family social history report, including a chronological history of the circumstances surrounding the adoptive placement and any available psychiatric reports, psychological reports, court reports pertaining to dependency or custody, or school reports. Failure to do so results in civil liability. *McKinney v. State*, 134 Wn.2d 388 (1998).

The standard of review of an order on summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. Summary judgment is appropriate only in the absence of issues of material fact. *Genie Industries v. Market Transport*, 138 Wn.App. 694, 700 (2007).

B. **Issue preclusion mandated summary judgment for Appellants.**

Ashe v. Swenson, 397 U.S. 436, 90 S. Ct., 1189, 1195, 25 L. Ed. 2d 469 (1970):

"'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principal in our adversary system of justice. It means simply that when an issue of ultimate fact has once been

determined by a valid and final judgment,
that issue cannot again be litigated between
the same parties in any future lawsuit."

Ashe, 90 S. Ct. at 1194.

"When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel." *Hilltop Terrace Assn. v. Island Co.*, 126 Wn.2d 22, 31 (1995). Issue preclusion, or collateral estoppel, requires:

- a) identical issues
- b) a final judgment on the merits
- c) that DSHS was a party to both matters
- d) application of issue preclusion must not work an injustice against DSHS

Shoemaker v. Bremerton,
109 Wn.2d 504, 507 (1987);
Malland v. Dept. of Retirement Systems,
103 Wn.2d 484, 489 (1985)

Res Judicata, when used to mean claim preclusion, encompasses the idea that when the parties to the successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be relitigated. *Hansen v. Kelly-Hansen*, 87 Wn.App. 320, 329 (1997).

The Agreed Order Regarding Existence of Extenuating Circumstances (Exhibit 9) signed by Administrative Law Judge Gina L. Hale is dispositive as to whether adequate disclosure was made to the

Raglins before adoption.

The FINDINGS OF FACT No. 3:

- "3. At the time the child was placed in their home and at the time of the adoption, Thomas and Cecelia Raglin were not aware that the child was at risk for developing mental health problems. The adoptive parents state the relevant facts regarding the child, the biological family or child background were not provided to them prior to finalizing the adoption. Because of this lack of information, they did not pursue the Adoption Support Program further."

The FINDINGS OF FACT No. 6:

- "6. The Department and the parents agree that there are extenuating circumstances relative to this case in that the appellants state they were not provided medical information about the child's birth family which they believe was available to the Department prior to finalization of the adoption. Had the appellants been informed about the child and family's medical and social background they state they would have applied for adoption support at the required time (i.e. prior to the adoption)."

The CONCLUSIONS OF LAW Nos. 2 and 3:

- "2. CFR 1356.40(b)(1) requires that any adoption support agreement must "be signed and in effect at the time of or prior to the final decree of adoption." However, federal guidelines, set forth in DSHS PA-01-01 at 16, and WAC 388-27-0315 permit an otherwise eligible child to participate in the program post-adoption, if an Administrative Law Judge finds extenuating circumstances, such as an agency's failure to inform the adoptive parents about the child and biological family's medical and social background.

3. Extenuating circumstances meeting the criteria of PA 01-01 and WAC 388-27-0315 exist in this case."

The DECISION AND ORDER

"Extenuating circumstances, as defined in WAC 388-27-0315, are present in this case. The failure of the adoptive parents to apply for adoption assistance on behalf of the child prior to completing the adoption of the child, is not a ground for denying participation in the adoption assistance program."

C. **The release signed by the Raglins was unenforceable.**

The "Agreement" cited by DSHS was the first evidence that DSHS knew all along of its exposure. The "Agreement" ostensibly was to settle a dispute about the enforceability of the support waiver. The waiver had never been enforceable because of the Raglins' lack of informed consent. Yet the State introduced a self-serving clause completely unrelated to the issue in controversy seeking to terminate the Raglins' potential claim for wrongful adoption.

The Agreement is nothing more than an agreement to agree in the future. To effectively forswear their claim, the Raglins would have to have negotiated and accepted some unknown sum. This has not occurred. To date, the Raglins have received nothing for Josiah. Since receipt of support for Josiah was a condition precedent to the Raglins not pursuing a claim for wrongful placement, they should be allowed to proceed with this action.

A condition precedent is an event occurring after the making of a valid contract that must occur before there is a right to performance. *Ross v. Harding*, 64 Wn.2d 231, 236 (1964). Failure to comply with a condition precedent excuses performance under the contract. *State v. McNally*, 125 Wn.App. 854, 867-68 (2005).

Both American general jurisprudence and specifically Washington common law has long recognized how the disparity in information, bargaining power, and clean hands can form the basis of setting aside contracts and releases.

At the time the release was executed, the Raglins were unaware of the statutory duty to disclose and the existence of a tort for wrongful adoption. (CP 56) A release is a contract whereby one party agrees to abandon or relinquish a claim, obligation, or cause of action against another party. Releases are to be construed according to the legal principles applicable to contracts. *Boyce v. West*, 71 Wn.App. 657, 662 (1993). The first rule in interpreting a contract is to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663 (1990). It is clear from the record that the Raglins' intent was to get support for their son; something they could not afford. *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845 (1988), is the controlling case for voiding releases on grounds of public policy. It will be discussed later.

But even before *Wagenblast*, Washington courts were relieving oppressed parties of their responsibilities under a release. In *Basin Paving v. Port of Moses Lake*, 48 Wn.App. 180 (1987), a paving company knew that it had been overpaid \$70,000 by the Port. The paver was able to get the Port to sign a release long before the Port discovered the overpayment.

"First, did the court err when it relieved the Port of its obligation under the terms of the release? We note that a release which by its terms is clear and unambiguous will not be overturned short of 'fraud, false representation, overreaching or a mutual mistake of which the evidence is clear and convincing.' *Metropolitan Life Ins. Co. v. Ritz*, 70 Wn.2d 317,321, 422 P.2d 780 (1967). Basin argues there was no such evidence in this case. We disagree."

Basin, at 184.

"We hold that because Basin, in negotiating the settlement, knew the Port was unaware of the overpayment, it had a duty to inform the Port of this fact if it expected to avail itself of the \$70,000 under the terms of the release. *Cf. Barry v. Lewis*, 259 A.D. 496, 20 N.Y.S.2d 88, 90 (1940) (defendant's insurance adjuster had duty to inform plaintiff release contained clause releasing defendant from liability for unknown injuries when he knew plaintiff was unaware of the provision). Its conduct in failing to do so constitutes false representation and overreaching and, thus, the release must be overturned.

Our holding is supported by analogy to the rule applied in *Snap-On Tools Corp. v. Roberts*, 35 Wn.App. 32, 35, 665 P.2d 417 (1983) (citing, *inter alia*, *Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc.*, 22 Wn.App. 781, 784, 591 P.2d 1220 (1979); *Puget Sound Nat'l Bank v. Selivanoff*, 9 Wn.App. 676, 681, 514 P.2d 175 (1973)). There, the courts held that a unilateral mistake may be grounds for relieving a party from a contract if the other party knows or is charged

with knowing of the mistake."

Basin, at 184-85.

The "Agreement" of April 15, 2005 contains an "exculpatory clause" wherein in return for consideration the Raglins agreed to relinquish any cause of action or claim they may have had against DSHS for the placement of Josiah. An exculpatory clause is much like a release but it is intended to deny an already injured party the right to recover damages from the party that negligently caused the injury. *Scott v. Pac. West Mt. Resort*, 119 Wn.2d 484, 492 (1992).

"An exculpatory clause is enforceable unless (a) it violates public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) it is inconspicuous."

Vodapest v. MacGregor, 128 Wn.2d 840, 848 (1996); See also *Nationwide v. Watson*, 120 Wn.2d 178, 187 (1992).

D. "Agreement" Void for Public Policy

An issue in this summary judgment was whether the agreement of April 15, 2005 was unenforceable because it violated public policy.

In *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 855 (1988), our supreme court adopted a list of six nonexclusive factors for determining whether exculpatory agreements violate public policy. Our supreme court has noted that the six factors are not the exclusive considerations to which a court may look in the determination of public policy, but, rather, general

characteristics taken from prior court cases that can only give a 'rough outline' of the type of settings in which exculpatory agreements have not been allowed. The six factors are:

- (1) the agreement concerns an endeavor of a type generally thought suitable for public regulation;
- (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;
- (3) the party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;
- (4) because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;
- (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and
- (6) the person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

In applying this test, our state supreme court stated that the more of the foregoing six characteristics that appear in a given exculpatory agreement case, the more likely the agreement is to be declared invalid on

public policy grounds. *Wagenblast*, at 858. Subsequently, the same court focused on the second of the six factors as one of the important characteristics on which Washington courts have focused in determining whether a particular exculpatory agreement is void as against public policy. *Vodopest v. McGregor*, 128 Wn.2d 840, 858 (1996).

All of the factors are present here:

Factor 1.

Both the legislature's and DSHS's own policies address adoption procedures and support. Common law addresses wrongful adoption.

Factor 2.

It cannot reasonably be disputed that DSHS and adoptions through its agencies are of great service and importance to the public; DSHS is also highly regulated. The following are examples of much lesser "services" Washington courts found sufficient to invoke public policy. In *Eelbode v. Chec Medical Centers, Inc.*, 97 Wn.App. 462, 471 (1999) the court held that, in light of increasing demands by employers that prospective employees submit to pre-employment physical examinations, these private examinations were a matter of public importance. *Wagenblast* found that school sports were highly regulated; *Vodopest* found medical research on human subjects was highly regulated. In those cases, a higher degree of

regulation was a factor in favor of finding that a release would violate public policy.

Factor 3.

DSHS provides its services to any and all members of the public.

Factor 4.

It cannot be reasonably disputed that DSHS has MSWs, intimate knowledge of common law (through the Attorney General), statutory and WAC knowledge. This Court's oral finding described the Raglins as "naive". *Wagenblast*, at 855 described the School District's position as "near-monopoly power"; this sounds like a reasonable description of DSHS..

Factor 5.

The Agreement may or may not have been standardized. What is not disputed is that DSHS had an overwhelmingly superior bargaining position. There was no provision for additional fees that the Raglins could have paid to protect against DSHS negligence and the State's refusal to follow the statutory demands of full disclosure. It is undisputed that the Raglins lacked the information necessary for informed consent to the Agreement. The Raglins thought they were bargaining for support; DSHS was really bargaining for a release.

Factor 6.

The Raglins were completely and entirely at the mercy of DSHS.

They were demonstrably at risk for carelessness on the part of DSHS. The court in *Vodopest* noted that the element of a researcher's control over a subject is common to most medical research projects and is one of the reasons why such strict regulations are imposed. The court explained that the relationship between investigator and subject has been described as a fiduciary relationship. *Vodopest*, at 859-60. In *Wagenblast*, our supreme court held that this factor was met because, as a natural incident to the relationship of a student athlete and his or her coach, the student athlete is usually placed under the coach's considerable degree of control. *Wagenblast*, at 856. In *Chauvlier v. Booth Creek*, 19 Wn.App. 334, 344 (2001), the court held that this factor was met because, although the plaintiff had control over which runs he chose to ski down, as well as how prudently he would ski, he was subject to the risk that Booth Creek, which owned the ski area in which he was injured, would be careless in maintaining the runs and trails.

The Appellants have demonstrated that all of the *Wagenblast* factors are met. *Vodopest* at 855 reminds us that courts are more likely to negate an exculpatory clause when the case involves personal injury rather than property damage. *Vodopest, supra*, 855.

E. **Unconscionability.**

The issue of unconscionability is an issue for the Court to decide as a

matter of law. *Nelson v. McGoldvick*, 127 Wn.2d 124 (1995). The decision by the Court, however, is based on the factual circumstances surrounding the transaction in question. *Jeffery v. Weintraub*, 32 Wn.App. 536 (1982).

"Washington recognizes two types of unconscionability – substantive and procedural. Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh..."

Nelson, at 131 quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260 (1975).

"Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including '[t]he manner in which the contract was entered,' whether each party had 'a reasonable opportunity to understand the terms of the contract,' and whether 'the important terms [were] hidden in a maze of fine print..."

Nelson, at 131.

When the Court examines the Agreement, it will appear that the actual release part is tucked away, almost like an afterthought. It is Appellants' position that given the relative dollar values of post-adoption support DSHS was willing to pay versus the potential value of a wrongful adoption suit, the Attorney General's office made a calculated decision to disguise the release language inside a larger document dealing with another matter entirely (support).

F. Unilateral Mistake.

Gill v. Waggoner, 65 Wn.App. 272, 276 (1992):

"One party to a contract is not liable if the contract is based on that party's unilateral mistake and the other party to the contract knows of or is charged with knowledge of the mistake. *Basin Paving, Inc. v. Port of Moses Lk.*, 48 Wn.App. 180, 185, 737 P.2d 1312 (1987); *Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc.*, 22 Wn.App.781, 784, 591 P.2d 1220 (1979). A mistake is a belief not in accord with the facts. *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984) (citing Restatement (Second) of Contracts sec. 151 (1981))."

The *Gill* court, at 279, cites to *Basin Paving, supra*, and *Appleway Leasing, supra*, and flatly states that all a party seeking to enforce an agreement must show is that it had no knowledge of the unilateral mistake. This is something DSHS cannot possibly do. As explained above, the Raglins knew of no other claims they may have had against DSHS *other* than some form of post-adoptive support. DSHS was careful *never* to tell the Raglins what amounts Jan Spear would attempt to get the Raglins to accept. Nor was DSHS going to give the withheld file to the Raglins until *after* the Raglins signed. Nor was DSHS ever going to tell the Raglins about the State's absolute duty to provide the oft requested records. It was clearly a unilateral mistaken act by the Raglins to sign the agreement while being carefully kept in the dark by DSHS.

G. Pre-Existing Duty Rule.

A party's promise to perform a pre-existing legal duty is not valid consideration. *Harris v. Morgensen*, 31 Wn.2d 228, 240 (1948); *Multicare*

Med. Ctr. V. Holm, 114 Wn.2d 572, 584-85 (1990).

DSHS had a pre-existing duty to pay post-adoption support. The Raglins *should* have been offered it upon adoption. The "extenuating circumstances" allowing the adoption support waiver to be set aside and support to flow to the Raglins had been agreed to by DSHS in the agreed order. Since the whole sad process the Raglins went through to challenge the waiver administratively was predicated on the State's wrongful denial of support, the consideration to the Raglins for signing the agreement simply does not exist.

H. Failure of Consideration.

The State, in the case at bar, does not come to court with clean hands. Aside from the failure to disclose, the agreement stated that the Raglins' appeal would be dismissed only *after* a negotiated amount of post-adoption support was agreed upon. No agreement was reached but the appeal was dismissed anyway.

An old case, *Hederman v. George*, 35 Wn.2d 357, 361 (1949), stated that a Washington court will not enforce a contract that is illegal or contrary to public policy. A new case, *Pierce County v. State*, 185 P.3d 594, 624 (2008), explains that a contract that conflicts with statutory requirements is illegal and unenforceable as a matter of law, citing *Failors Pharmacy v. DSHS*, 125 Wn.2d 488, 499 (1994). The agreement is illegal because it is

coercive. It told the Raglins that they might get some support if they never sued DSHS for violating the mandatory disclosure statutes. The consideration to the Raglins was support (which they never got) and no hearing on extenuating circumstances until support was negotiated. *None* of the above happened for the Raglins.

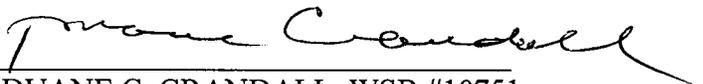
VI. CONCLUSION

There is clearly a culture at DSHS, epitomized by Jan Spear, where DSHS sees itself in an adversarial position with those people it was created to help. Whether through negligence or a calculated business decision, an infant with all the historical precursors to develop into an extremely troubled youth was placed in the home of a naive, good-hearted family. Once pathologies started to manifest themselves in the child, the parents sought specific background information from DSHS, none of which was produced and the extent lied about. At the time of the adoption any department support was waived; DSHS unloaded a time bomb that would normally require DSHS funding into a family with health insurance and two employed parents. It is difficult to understand the steadfast refusal to provide information; the insistence upon defending the support waiver; the dogmatic refusal to provide otherwise mandated funding unless the Raglins promised never to sue DSHS for its obvious misconduct. As one would predict, the placement of Josiah had a

devastating effect on the Raglin family, and, presumably, the refusal of DSHS to provide support and services directly to Josiah has continued to injure the boy.

DATED this 5 day of December, 2008.

CRANDALL, O'NEILL, MCREARY &
IMBODEN, P.S.

By: 
DUANE C. CRANDALL, WSB #10751
of Attorneys for Appellants

Pursuant to RAP 9.6, the undersigned submits the attached Appellants' Opening Brief. The undersigned has caused copies of the attached documents to be served on Respondent's counsel and filed with the Court of Appeals, Division II.

DATED this 5 day of December, 2008.

CRANDALL, O'NEILL, MCREARY &
IMBODEN, P.S.

By: *Duane Crandall*
DUANE C. CRANDALL, WSB #10751
1447 Third Ave., Ste. A
PO Box 336
Longview, Washington 98632
(360) 425-4470

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