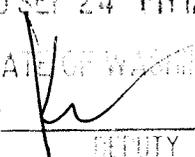


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 405105-II

IN THE COURT OF APPEALS
DIVISION II

JUSTIN J. WEAR, an individual, and VIRGIL WEAR, individually
and as guardian and on behalf of JUSTIN J. WEAR, Plaintiff,

Petitioners,

v.

MAUREEN E. WEAR, an individual; and LEE GILES and
MRS. LEE GILES, husband and wife, individually and their
marital community; and CITY OF TACOMA,
TACOMA POLICE DEPARTMENT,

Respondents

RESPONDENT CITY OF TACOMA'S RESPONSE BRIEF

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I. Introduction

This case concerns the nature and scope of an employer's liability for the intentional, criminal acts of an employee, acts which have no connection to the tasks, premises and instrumentalities of employment. As they did with the trial court, Plaintiffs¹ ask this Court to greatly expand the legal duty that will support a claim of negligent supervision. Specifically, Plaintiffs ask this Court to expand liability to include any circumstance where the employer "has notice of information tending to suggest that the employee may be abusing the child." Further, plaintiffs ask this Court to expand liability for negligent supervision to criminal acts which were not caused or facilitated by the tasks, premises and instrumentalities of employment.

As outlined herein, plaintiffs' claims have no basis in either law or fact. The superior court did not err in so finding and in granting the City of Tacoma's motion for summary judgment.

¹ For clarity and to avoid confusion in the record, Maureen Wear, Justin Wear and Virgil Wear will be referred to herein by their first names. No disrespect is intended.

II. Issues Pertaining to Assignments of Error

1. Did the superior court err in granting the City of Tacoma's motion for summary judgment on Justin's negligent supervision claim where there was no evidence that the tasks, premises, or instrumentalities of Giles' employment caused or facilitated the abuse and where there is no evidence that the City knew or should have known of Giles' dangerous propensities.
2. Did the superior court err in dismissing Virgil's negligent supervision claim against the City of Tacoma where there is no evidence that Giles, or any other City employee, committed any tort against Virgil.
3. Did the superior court err in striking Plaintiffs' Exhibits 2, 4, 5 and 8, offered in response to the City of Tacoma's motion for summary judgment, when these exhibits were incomplete, lacked an adequate foundation and failed to meet evidentiary standards for admissibility.

III. Statement of the Case

Lee Giles was a Tacoma police officer from March of 1970 to January of 2000. CP 20-21. In 2006 (six years after he retired), Giles was arrested by the Tacoma Police Department and charged with Rape of a Child for crimes he committed against Justin Wear. CP 23-26. At the same time, Justin's mother, Maureen Wear, was also arrested and charged with Rape of a Child for crimes she committed against Justin. CP 28-32. It was later determined that Giles and Maureen Wear had been sexually abusing Justin for a number years, at Giles' home. CP 45, paragraphs 4 and 5.

In 2006, Virgil and Justin commenced this action against Maureen Wear and Lee Giles. Plaintiffs subsequently amended the complaint to add the City of Tacoma as a party. Plaintiffs' sole claim against the City of Tacoma was that the City knew or should have known that Lee Giles was likely to sexually assault Justin. CP 37, lines 19-23. Thus, the only claim asserted against the City of Tacoma were claims for negligent supervision².

In the trial court, the City of Tacoma moved for summary judgment on three grounds. First, the City moved for summary judgment on any claims being asserted on the basis of vicarious liability, as Giles was outside the scope of employment when he abused Justin. CP 4, 6-7. Second, the City moved for summary judgment on Justin's claim for negligent supervision, as Giles' abuse of Justin was not caused or facilitated by the tasks, premises or instrumentalities of Giles' employment. CP 4, 7-11. Further, the City argued that Justin's claim for negligent supervision also failed

² Although plaintiffs did not specifically identify the cause of action being asserted against Tacoma in their complaint, the allegation made against Tacoma is a statement of the legal standard applicable to a claim of negligent supervision. Further, as Justin's testimony makes clear, Justin's developmental disabilities have made it impossible for him to understand the nature of the claims he is asserting against Tacoma. See CP 42-43 (Excerpts from the Deposition of Justin Wear).

as there was no evidence to establish that the City knew or should have known that Giles was a pedophile. CP 94 – 96. Finally, the City moved for summary judgment on Virgil's claim for negligent supervision, as there was no evidence that Giles – or any other City employee – committed a tort against Virgil. CP 4, 11-12. The superior court granted the City's motion, dismissing all claims, in their entirety and with prejudice. CP 142-144.

Based on appellant's opening brief, it appears that only Justin is appealing the dismissal of his claim of negligent supervision. However, the City has struggled with appellants' opening brief and with understanding the scope of issues being appealed. Therefore, in the interests of a complete record and to avoid inadvertent waiver of any arguments, the City has also addressed herein the superior court's ruling as it relates to Virgil's claim of negligent supervision.

IV. Standard of Review

In reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court. Rice v. Dow Chemical Co., 124 Wn.2d 205, 208, 875 P.2d 1213 (1994). Issues of law are reviewed de novo. Id.

On a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A *defendant* can meet this burden in one of two ways. First, the defendant can set forth its version of the facts and allege that there is no material issue as to those facts. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 916, 757 P.2d 507 (1988). In the alternative, the defendant can meet its burden by showing that there is absence of evidence to support the nonmoving party's case. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Under the latter method, the defendant is not required to support its motion with affidavits or other materials *disproving* the plaintiff's case. Burnet v. Spokane Ambulance, 54 Wn. App. 162, 166, 772 P.2d 1027 (1989), reversed on other grounds by 131 Wn.2d 484 (1997). The defendant need only "identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of

material fact.” Guile v. Ballard Community Hosp., 70 Wn. App. 18, 22, 851 P.2d 689, rev. denied, 122 Wn.2d 1010 (1993).

After the defendant makes its required showing, the burden then shifts to the plaintiff:

If, at this point, the plaintiff [as nonmoving party] “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial”, then the trial court should grant the motion....”In such a situation, there can be ‘no genuine issue as to any material fact,’ since **a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.**”

(emphasis added) Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Consequently, the plaintiff “must do more than express an opinion or make conclusory statements”; **the plaintiff must set forth specific and material facts to support each element of his prima facie case.** Id.

V. Argument

A. The superior court did not err in dismissing Justin’s negligent supervision claim.

1. There is no special relationship between Justin and the City that would give rise to a legal duty.

“As a general rule, there is no duty to prevent a third party from intentionally harming another unless ‘a special relationship

exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.” Niece v. Elmview Group Home, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). “A duty arises where:

(a) a special relation exists between the [defendant] and the third person which imposes a duty upon the [defendant] to control the third person's conduct, or

(b) a special relation exists between the [defendant] and the other which gives the other a right to protection.”

Id.

In the instant case, there was no relationship between the City of Tacoma and Justin Wear that would give Justin a right of protection. Such claims are generally limited to circumstances where one party is “entrusted with the well being of another.” Id. at 50 (recognizing that the special relationship between a group home and vulnerable residents creates a duty of reasonable care, owed by the home to the residents, to protect the residents from all foreseeable harm.). See also Johnson v. State, 77 Wn. App. 934, 894 P.2d 1366, rev. denied, 127 Wn.2d 1020 (1995) (finding that university owed dormitory resident on campus a duty, based on relationship between student and university, to protect student from foreseeable criminal acts by third parties); Shepard v. Mielke, 75

Wn. App. 201, 877 P.2d 220 (1994) (finding that convalescent home owed duty to protect vulnerable residents from reasonably foreseeable risks of harm).

Plaintiffs argue the Court should find a duty based on the relationship between the City and Justin because Justin is a child of a City employee. Plaintiffs cite no authority for this proposition and that is not surprising, as the law imposes no such duty (the weight of which would crush employers everywhere). Plaintiffs also make an oblique reference to RCW 26.44.050, which governs investigations of reports of child abuse or neglect, but fail to identify any specific report of abuse or neglect at issue in this case and further fail to articulate how this statute advances their cause.

2. Giles' abuse of Justin was not caused or facilitated by the tasks, premises or instrumentalities of Giles' employment, and therefore, the City did not owe Justin a legal duty.

As there is no legal basis for a duty based on Justin's relationship with the City, Justin's negligent supervision claim must be based on the employment relationship between the City and Lee Giles.

"An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the

exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries." Betty Y. v. Al-Hellou, 98 Wn. App.146, 148-49, 988 P.2d 1031 (1999). "***But the employer's duty is limited to foreseeable victims and then only 'to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.'***" (emphasis added) Id. (quoting Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 1997) ("[T]he relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.")).

The court's analysis in Betty Y. v. Al-Hellou is dispositive of Justin's claim of negligent supervision against the City. Betty Y. v. Al-Hellou, 98 Wn. App.146, 988 P.2d 1031 (1999). In Betty Y., a convicted child sex offender (Al-Hellou) was hired by a company to rehabilitate some vacant apartments. At the time Al-Hellou was hired, his employer knew of his conviction in Texas for molesting a child. Id. at 147-48. While Al-Hellou was at work, he had contact with a teenage boy who lived on the same block as the complex

where Al-Hellou was working. Id. at 148. After a week and a half of regular contact between Al-Hellou and the child, Al-Hellou raped the boy. Id.

The boy's mother sued Al-Hellou's employer for negligent supervision, alleging that the employer should have known that Al-Hellou presented a risk to others because of his prior conviction and that his employment was the proximate cause of the boy's injuries. The employer moved for summary judgment and the superior court granted the employer's motion, finding that Al-Hellou's employment was not the proximate cause of the boy's injuries. Id. at 147. On appeal, the Court of Appeals affirmed the dismissal, finding that the employer did not owe the boy a duty under these circumstances. Id. at 147-48.

In affirming the dismissal, the Court of Appeals reviewed the standard imposed on this cause of action by the Supreme Court in Niece v. Elmview Group Home, *supra*, namely that the duty is limited to foreseeable victims and only to preventing "the tasks, premises or instrumentalities" entrusted to the employee from harming others. Id. at 149. The Court of Appeals reasoned that in the Betty Y. case, the employer did not owe the boy a duty because

the rape was not facilitated by the tasks, premises and/or instrumentalities of Al-Hellou's job:

Here, Al-Hellou was not hired to work with potential victims, the rape did not occur on the work premises, ***and most importantly, the job duties did not facilitate or enable Al-Hellou to commit the rape. Thus, the tasks, premises, and instrumentalities entrusted to Al-Hellou were not what endangered the victim.***

(emphasis added) Id. at 150. See also C.J.C. v. Corporation of the Catholic Bishop, 138 Wn.2d 699, 723, 985 P.2d 262 (1999)

(adopting test for negligent supervision that requires proof that the association between the victim and the employee was occasioned by the employee's job); La Lone v. Smith, 39 Wn.2d 167, 171, 234 P.2d 893 (1951) (employer liable for employee's criminal assault "because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment."); Carlsen v. Wackenhut Corp., 73 Wn. App. 247, 256, 868 P.2d 882 (1994) (employer liable for security guard's assault if employer knew or should have known of guard's violent propensities and nevertheless conferred position of authority and responsibility).

The instant case is indistinguishable from the Betty Y. case. Like the assault in the Betty Y. case, Giles' sexual abuse of Justin was not facilitated, *in any way*, by Giles' employment. Virgil Wear

himself concedes that the only reason Giles had access to Justin was because Giles was dating Justin's mother. CP 36, lines 5-23. Moreover, video evidence found during the criminal investigation unequivocally showed that the abuse occurred in Giles' home. CP 45. No facts have been alleged or developed during the course of discovery to support the contention that Giles' abuse of Justin was somehow assisted or made possible by Giles' position as a police officer. And since the abuse did not involve the tasks, premises or instrumentalities of Giles' job, as a matter of law, the City of Tacoma did not owe Justin Wear a legal duty under these circumstances.

3. Plaintiffs adduced no evidence to establish that the City knew or should have known of Giles' dangerous propensities.

A claim of negligent supervision requires proof that the employer knew or should have known of the employee's dangerous tendencies and the need to take steps to protect third parties. Niece v. Elmview Group Home, 131 Wn.2d 39, 51-52, 929 P.2d 420 (1997). The "knowledge" required to sustain this cause of action is a knowledge of the particular and specific danger that the employee presents. Id. See also LaLone v. Smith, 39 Wn.2d 167, 172-73, 234 P.2d 893 (1951) (employer liable for negligent

supervision, where employer knew of employee's vicious temperament, and thus should have known employee was likely to assault persons during the course of employment); Smith v. Sacred Heart Medical Center, 144 Wn. App. 537, 544, 184 P.3d 646 (2008) (no liability for negligent supervision where there was "no showing that [employee] had engaged in *similar acts* before he committed the intentional torts alleged here." (emphasis added)); Thompson v. Everett Clinic, 71 Wn. App. 548, 860 P.2d 1054 (1993) (no liability for negligent supervision where "there was no prior knowledge of Dr. Nakata's behavior [sexually assaulting patients during physical examinations for his own sexual gratification] by the Clinic or any of its shareholders or staff."); Peck v. Siau, 65 Wn. App. 285, 292-94, 827 P.2d 1108 (1992) (no liability for negligent supervision where there was no evidence that School District had reason to know that teacher was likely to sexually assault student). It is not sufficient to simply claim that the employee was "dangerous."

To establish what the City knew or should have known, plaintiffs offer a series of disjointed, seemingly unrelated "facts," but do not articulate how these facts establish this element of their prima facie case or even how these facts relate to Justin's claim of

negligent supervision. For example, plaintiffs assert that “[i]n 1980, LEE GILES acted in a sexually inappropriate manner at the Daffodil Parade.” Appellants’ Opening Brief, p. 3. Plaintiffs do not cite to any portion of the record to support this assertion and a careful review of the record will reveal that there is no competent, admissible evidence in the record to establish this “fact.” Plaintiffs then rely upon this unsupported contention as foundation for their assertion that “[t]here was ample notice to the CITY that GILES posed a potential threat.” Appellants’ Opening Brief, p. 9. Plaintiffs’ have not, however, explained how the “Daffodil Parade incident” put the City on notice, what this incident allegedly put the City on notice of, or even what the “Daffodil Parade incident” involved. They just make a bald, conclusory assertion that this incident supports their contention that the City knew or should have known that Giles was dangerous.

Similarly, plaintiffs argue that when Giles was arrested, police found evidence from other child pornography cases in his home, evidence that Giles allegedly stole. Plaintiffs do not address, however, how the discovery of this evidence in 2006 was supposed to put the City on notice of Giles’ sexual propensities during the course of his employment (1970 – 2000). Further, plaintiffs seem

to be suggesting that the mere fact that Giles possessed this stolen child pornography is evidence that the City failed to appropriately supervise Giles. However, this same claim – brought by the victim depicted in the stolen child pornography – has already been considered *and rejected* by the superior court. CP 100 – 102; CP 105 – 113.

A careful review of the record will demonstrate that plaintiffs adduced no evidence in response to the City’s motion for summary judgment to establish that the City had reason to know that Giles was a pedophile, likely to abuse Justin. Absent such evidence, a claim of negligent investigation simply cannot stand and the superior court did not err in so holding.

B. The superior court did not err in dismissing Virgil’s negligent investigation claim.

Virgil Wear’s claim of negligent supervision fails, as a matter of law, for the same reasons as Justin’s claim. First, because Giles’ abuse of Justin was wholly unrelated to his employment, the law does not impose a duty on the City of Tacoma to control Giles’ conduct under these circumstances. Second, plaintiffs adduced no evidence to establish that the City of Tacoma should have known

that Giles was a pedophile or was likely to sexually abuse a child.

Virgil's claim also fails, however, for yet another reason.

A claim for negligent supervision against an employer for an employee's tortious acts requires evidence that the employee actually caused the plaintiff to suffer an injury. See, e.g., Niece v. Elmview Group Home, 131 Wn.2d at 48-49 (claim of negligent supervision requires showing, *inter alia*, that the employer's failure to supervise was the proximate cause of injuries to plaintiff); Gilliam v. DSHS, 89 Wn. App. 569, 584-85, 950 P.2d 20, rev. denied, 135 Wn.2d 1015 (1998) ("When an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising employee." (emphasis added)).

In his deposition, Virgil Wear testified that his claims were based on the fact that Giles and Maureen Wear sexually abused Justin. CP 37, lines 19-23. When asked if Lee Giles had done anything directly to Virgil, his answer was "No." CP 38, lines 3-5. And when asked if any City of Tacoma employee had done anything directly to Virgil since 2003, again his answer was "No." CP 38, lines 6-25; CP 39, lines 1-7.

In support of the instant appeal, Virgil alleges that Tacoma police officers harassed him in the years after his divorce and

claims that this harassment prevented him from having access to Justin, thereby prevented him from recognizing that Justin was being abused. Appellants' Opening Brief, p. 10. Even viewed in the light most favorable to plaintiff, these claims are specious.

First, Virgil's argument is speculative and stretches the concept of causation to the breaking point. He offers no specific factual allegations to support the contention that he was harassed or to show how the alleged harassment prevented him from having access to Justin. He simply opines that the officers harassed him and that had they not done so, "Justin's behavior issues would have triggered inquiry by Virgil."

Second, any harm caused by this alleged harassment is barred by the applicable statute of limitations. Although the declaration Virgil Wear filed in opposition to the summary judgment is full of broad and vague allegations, his deposition testimony was quite clear:

Q Am I correct in understanding that the claims in this lawsuit, your claims, are based on the fact that Giles and Maureen Wear sexually abused Justin? Is that correct?

A Yes.

Q And it's your contention, based on the parade incident, that the City knew or should have known of his pedophilic tendencies; is that correct?

A Yes.

Q Is there anything that Lee Giles did directly to you that is the bases for this lawsuit?

A No.

Q Is there any conduct or actions by Tacoma employees directed against you which forms the basis of any claims?...

A. ...I was being stalked by the Tacoma Police Department...

Q This is the harassment that you allege occurred between 1990 and 1997?

A Exactly.

Q Anything that has happened since 2003?

A No...

CP 130, lines 19-25; CP 131, lines 1-12; CP 132, lines 3-7. Thus, the "harassment" about which Virgil complains occurred between nine and sixteen years before he commenced the instant suit and any claims stemming therefrom are time barred. See, e.g., RCW 4.16.080 (outlining actions to which a three year limitations period applies); RCW 4.16.100 (outlining actions to which a two year limitations period applies).

Finally, Virgil's claim that, but for the alleged harassment, he would have inquired into the problems Justin was having and thereby discover the abuse is especially offensive, given Virgil's deposition testimony. According to his deposition testimony, Virgil had regular, biweekly contact with Justin during the period the abuse was occurring and knew that Justin was acting out sexually in a number of ways. CP 121 - 127. Based on Justin's sexualized behavior, Virgil assumed that Justin was being abused, but did not know who was responsible for the abuse. CP 126, lines 22-25; CP 127, lines 1-16. He cannot now fault the City for his own failure to follow up and protect his son.

In response to the City's motion for summary judgment, Virgil Wear did not allege or prove any direct injury or harm caused by a City of Tacoma employee who Tacoma had a duty to control. Virgil has no standing to recover for injuries caused to Justin and he has no injuries of his own. As a matter of law, he has no claim and the superior court did not err in so finding.

C. **The superior court did not err in striking plaintiffs' exhibits 2, 4, 5 and 8 as those exhibits do not satisfy evidentiary standards for admissibility.**

To properly oppose a motion for summary judgment, the non-moving party must go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial from which a reasonable trier of fact could find for the nonmovant. "CR 56(e) is explicit in its requirements which serve the ultimate purpose of a summary judgment motion. Affidavits (1) must be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Further,

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

CR 56(e)." Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

In Grimwood, the Supreme Court left no doubt as to the standards that must be applied to evidence offered in opposition to a summary judgment motion:

It is apparent that the emphasis is upon *facts* to which the affiant could testify from personal knowledge and which would be *admissible in evidence*. Thus, there is a dual inquiry as to whether an affidavit sets forth "material facts creating a genuine issue for trial": does the affidavit state material facts, and, if so, would those facts be admissible in evidence at trial? If the contents of an affidavit do not satisfy both standards, the affidavit fails to raise a genuine issue for trial, and summary judgment is appropriate.

(emphasis in original) Id. The superior court properly applied these standards to plaintiffs' exhibits 2, 4, 5 and 8 when it entered an order striking these exhibits.

Exhibits 2, 4, 5, and 8 are all hearsay and the superior court did not err in deciding that these exhibits could not be considered on summary judgment. Int'l Ultimate v. St. Paul Fire & Marine, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) ("Although a 'ruling on a motion to strike is discretionary with the trial court,' a 'court may not consider inadmissible evidence when ruling on a motion for summary judgment.>"). Washington Evidence Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove

the truth of the matter asserted.” ER 801(c) defines “hearsay” as a statement, other than one made while testifying at trial or hearing, that is offered to prove the truth of the matter asserted. ER 801(a) defines “statement,” *inter alia*, as any oral or written assertion.

Under these definitions, there is no question that the documents themselves are hearsay. Further, these exhibits include statements that purport to be verbatim and are attributed to individuals other than the authors of the documents. These alleged statements are a separate level of hearsay and must independently be justified by a recognized exception to the hearsay rule. ER 805.

On appeal, plaintiffs concede that these exhibits are hearsay, but argue that the documents “are admissible to show notice by the City of the various [sic] stated therein.” Appellants’ Opening Brief, p. 14. Plaintiffs do not provide any reasoned argument; however, to support the contention that these documents show “notice” and an examination of the documents does not cure the problem. For example, Exhibit 2 (CP 61) is an excerpt from a letter ostensibly sent by someone in the Pierce County Prosecutor’s Office to the Office of Legal Counsel for the National Center for Missing & Exploited Children. In this letter, the unknown author refers to pornography found in Giles’ home when the search

warrant was executed in 2006. As outlined above, plaintiffs have failed to offer any explanation as to why evidence recovered in 2006 would have put the City on notice of anything that occurred during Giles' employment (1970 to 2000).

Similarly, Exhibit 4 (CP 66) purports to be an excerpt from the Pre-sentence Investigation done for Giles in the context of the criminal prosecution. There is nothing in this exhibit to identify the author or recipient of the document and nothing contained therein to authenticate the specific statements highlighted by plaintiff. As with the earlier exhibit, plaintiffs seem to be pointing to that portion of the document that references pornography found in Giles' home and thus, is equally deficient to establish that the City had notice of anything during Giles' employment. The other two exhibits suffer from the same evidentiary deficiencies. See CP 66 and 78-79. In short, none of the exhibits which are the subject of this motion are related, in any way, to the information that Virgil claims he conveyed to the City about Maureen Wear or Lee Giles.

The proponent of a hearsay statement has the burden of showing that the statement is admissible under some well recognized exception to the rule against hearsay. Spokane Research & Def. Fund v. Spokane County, 139 Wn. App. 450, 462,

160 P.3d 1096 (2007). Plaintiffs have not identified any recognized exception to the hearsay rule which would render any of these documents admissible. In fact, for some of these exhibits (Exhibits 2, 4 and 8), plaintiffs offer only purported excerpts of a larger document, but offer nothing to authenticate these excerpts, or the larger documents from which the excerpts were taken. ER 901. Finally, plaintiffs' proffer of only a portion of Exhibit 8 (CP 78-79) is opening misleading, as plaintiffs have omitted the investigatory conclusion from the exhibit, which was that the allegations concerning pornography on Maureen Wear's computer were unfounded.

The superior court carefully examined each of the proffered exhibits and evaluated whether each exhibit met the standards for admissibility. Following a careful examination, the superior court concluded that these exhibits did not meet the requisite standards. It was not error to strike these exhibits and this Court should also refrain from considering these exhibits in deciding the instant appeal.

VI. Conclusion

As outlined herein, the superior court did not err in granting the City of Tacoma's motion for summary judgment or in granting the City's motion to strike Exhibits 2, 4, 5 and 8.

As demonstrated above, there is no relationship between Justin and the City sufficient to create a legal duty owed to Justin to protect him from the criminal acts of third parties. Thus, any claim of negligent investigation would have to be premised on the City's relationship with Lee Giles, as the City's employee.

The City's duty to protect third parties from the acts of Giles is limited to preventing the tasks, premises and instrumentalities of the position from being used to harm another. And there is no question that Giles' abuse of Justin was wholly unrelated to Giles' employment. Giles had access to Justin by virtue of Giles' relationship with Maureen Wear, Justin's mother, and all of the sexual abuse occurred in Giles' home. Thus, as a matter of law, the City did not owe Justin a legal duty to protect him from Giles' actions in the circumstances presented in this case.

Further, a claim of negligent investigation requires proof that the employer had information which did or should have put the employer on notice that the employee had the particular dangerous

propensities at issue and there is no such evidence in this case. A careful review of the record reveals that there was no evidence available to the City during Giles' employment to suggest that Giles was a pedophile, likely to sexually abuse young boys. Absent such evidence, plaintiffs' claims fail as a matter of law. Hiatt v. Walker Chevrolet, 120 Wn.2d 57, 66, 837 P.2d 618 (1992)("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

With respect to any claim of negligent supervision being pursued by Virgil Wear, his claims fail for all the same reasons as Justin's claims. Additionally, Virgil has failed to state a claim upon which relief can even be granted, as he has no standing to assert such a claim based on torts committed against Justin and he concedes that no torts were committed against him.

Finally, the superior court did not err in granting the City's motion to strike and striking Exhibits 2, 4, 5 and 8. The documents themselves are hearsay and further, contain additional levels of hearsay. Plaintiffs failed to establish the admissibility of these documents under a recognized exception to the hearsay rule. Further, for three of these exhibits, plaintiffs offered only an excerpt of the document and failed to lay a proper foundation as to the

source and authenticity of the exhibits. These exhibits were correctly stricken by the superior court and should not be considered on appeal.

The superior court gave plaintiffs' claims and the evidence they proffered in support of those claims careful and appropriate consideration. The court correctly determined that plaintiffs' claims failed, as a matter of law. Therefore, the City of Tacoma asks this Court to affirm the grant of summary judgment in favor of the City.

DATED this 24th day of September, 2010.

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