

NO. 46347-4

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

FEARGHAL MCCARTHY; CONOR MCCARTHY, a minor, by and
through FEARGHAL MCCARTHY, his father; and CORMAC
MCCARTHY, a minor, by and through FEARGHAL MCCARTHY, his
father,

Appellants,

v.

COUNTY OF CLARK, CITY OF VANCOUVER, DEPARTMENT OF
SOCIAL AND HEALTH SERVICES, CHILDREN'S PROTECTIVE
SERVICES,

Respondents.

**BRIEF OF RESPONDENT STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

ROBERT W. FERGUSON
Attorney General

MATTHEW H. RICE
Assistant Attorney General
WSBA No. 44034
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300
OID #91023

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I. INTRODUCTION

Patricia McCarthy made a police report alleging physical abuse of her son, Cormac McCarthy, by her husband, Fearghal McCarthy. Fearghal¹ was arrested. Thereafter, the Department of Social and Health Services, Child Protective Services (DSHS) received a referral reporting possible physical abuse from a medical professional who treated Cormac. DSHS investigated the referral and concluded it was “founded.”² After receiving additional information, including a reduction in the charge in Fearghal’s criminal case, a recantation/retraction by a witness to the alleged abuse (Conor McCarthy), and information calling Patricia’s credibility into question, the “founded” finding was revised to “inconclusive.”

Fearghal, Conor, and Cormac filed suit against DSHS, alleging they were wrongfully separated from each other because of allegedly negligent investigation of Patricia’s report of abuse. The trial court entered summary judgment in favor of DSHS on each of the four claims

¹ Mr. McCarthy and his family members are referred to herein by their first names to avoid confusion; no disrespect is intended. As directed by this Court, DSHS submits this brief in answer to both the Opening Brief of Appellant Fearghal McCarthy (Fearghal Br.), and the Opening Brief of Appellants Conor and Cormac McCarthy (Minor Children’s Br.).

² “Founded” means “the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur.” RCW 26.44.020(11). “Inconclusive” means “the determination following an investigation by the department that based on available information a decision cannot be made that more likely than not, child abuse or neglect did or did not occur. RCW 26.44.020(12).

advanced by Appellants: negligent investigation, negligence, “reckless disregard,” and negligent infliction of emotional distress.³

The trial court’s judgment should be affirmed. Though quick to criticize the investigation conducted by DSHS, Appellants presented no evidence that anything done (or not done) during that investigation caused any cognizable injury. Fearghal was subject to no-contact and restraining orders before, during, and after DSHS completed its investigation. These orders were not entered upon the request of DSHS; DSHS was not party to any of the actions in which the orders were entered; no court sought or received testimony from DSHS regarding the propriety of the orders; and there is no indication that the existence or outcome of DSHS’s investigation was considered by or material to any court’s decision to prohibit contact between Fearghal and his sons. Thus, no reasonable jury could find that DSHS caused a harmful placement, an essential element of a claim for negligent investigation.

Fearghal’s other claims are no more than alternate articulations of the negligent investigation cause of action, and thus rise or fall with the resolution of that claim. (Conor and Cormac appear to have abandoned these alternative claims on appeal). And Fearghal’s claim for negligent

³ Appellants initially pleaded a claim for outrage, also known as intentional infliction of emotional distress, but abandoned that claim against DSHS prior to the summary judgment hearing below.

infliction of emotional distress fails for the additional reason that he failed to offer competent medical evidence showing emotional distress by objective symptomatology.

The trial court's summary judgment in favor of DSHS should be affirmed in all respects.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly granted summary judgment in favor of DSHS on Appellants' claim for negligent investigation under RCW 26.44, because Appellants offered no evidence of a harmful placement decision caused by the alleged negligence of DSHS. (Fearghal's Assignment of Error 2; Minor Children's Assignment of Error 1)

2. The trial court properly granted summary judgment in favor of DSHS on Fearghal's negligence, negligent infliction of emotional distress, and "reckless disregard" claims, because these claims were based upon the same facts and circumstances supporting Fearghal's claim negligent investigation. (Fearghal's Assignment of Error 2)

3. The trial court properly granted summary judgment in favor of DSHS on Fearghal's claim for negligent infliction of emotional distress, because Fearghal presented no competent medical evidence to support his alleged emotional distress by objective symptomatology. (Fearghal's Assignment of Error 2)

4. The trial court did not enter judgment in favor of DSHS on Appellants' claim for intentional infliction of emotional distress (outrage), because that claim was withdrawn as to DSHS. (Fearghal's Assignment of Error 2; Minor Children's Assignment of Error 3)

III. STATEMENT OF FACTS

A. Fearghal's Arrest For Assault IV – Domestic Violence

Appellants' claims originate in a police report made by Patricia. On June 3, 2005, Patricia called 911. Clerk's Papers (CP) at 1342, p. 3. Patricia reported that the night before Fearghal "knocked" Cormac "across the head 2x last night so hard it knocked him and the high chair over." CP at 1342, p. 4. Clark County Sheriff's Deputy Edward R. Kingrey was dispatched to respond to the report. CP at 1342, p. 4. Kingrey spoke with Patricia by phone. CP at 1342, p. 4. Patricia reported that Fearghal had threatened to physically harm her if she ever reported the abuse to the police. CP at 1342, pp. 4-5. Patricia reported that Fearghal had been physically and emotionally abusive to her and the couple's children over the past year. CP at 1342, p. 5. In this particular incident, Fearghal "whacked" Cormac across the head twice, with the second blow causing Cormac to "hit his head on the table" and fall to the floor. CP at 1342, p. 5. Fearghal then reportedly returned Cormac to the chair, and told Patricia that he would do the same again if Patricia did not bring Cormac under

control. CP at 1342, p. 5. According to Patricia, Fearghal told her she needed “to slap him and show him who’s boss.” CP at 1342, p. 5.

Kingrey also spoke to Patricia’s mother, Regina Greer, who reported that she had heard about Fearghal striking Cormac from the couple’s other son, Conor. CP at 1342, p. 5. Ms. Greer also reported incidents involving discipline using a wooden spoon, including “[b]reaking a wooden spoon on their hands.” CP at 1342, p. 5.

After interviewing Fearghal (who denied any abuse), Kingrey arrested Fearghal for Assault IV – Domestic Violence, and transported him for booking. CP at 1342, p. 6. Thereafter, Kingrey returned to the residence, met with Patricia, and informed her that a no-contact order would be entered prohibiting Fearghal from returning to the residence or contacting her or the children once he was released. CP at 1342, p. 6. Patricia stated she was fearful that Fearghal would not abide by a no-contact order, and that she planned to stay with her parents for the time being. CP at 1342, p. 6.

B. Child Protective Services Received A Report Of Possible Physical Abuse Involving Cormac

The next day, on June 4, 2005, a referral was received by CPS from a pediatric nurse practitioner at Kaiser Clinic in Vancouver,

Washington. CP at 1368, 1372. The allegations received by CPS included:

- Ms. Greer reported to the referrer that Cormac “fell off the stool and hit his head on the floor;”
- Conor reported to the referrer that Fearghal was angry with Cormac, Fearghal hit Cormac, and Cormac then fell off the stool and hit his head on the floor; and
- Cormac has a “slight brown bruise mark on the left forehead, about the size of a U.S. Nickel.”

CP at 1369. After receiving the referral, the CPS intake worker attempted contact with Ms. Greer, but did not make contact. CP at 1380. The intake worker confirmed that Fearghal was in custody, and concluded that there was no imminent danger to the child. CP at 1380. The referral was screened in for investigation and ultimately assigned to social worker Patrick Dixson.

On June 8, 2005, CPS received a hard copy of Deputy Kingrey’s report. CP at 1380-81. The service episode record (SER) entered by the social worker reviewing the report indicated that Patricia was informed by Deputy Kingrey that a no-contact order would be issued which would prohibit Fearghal from returning to the residence or contacting Patricia or the children. CP at 1380-81.

C. Child Protective Services Investigates The Referral

On June 13, 2005, Dixson visited Patricia, Conor, and Cormac. CP at 1322, ¶ 3.⁴ Patricia described specific instances of abuse to Dixson, including the June 2, 2005, incident involving Cormac. CP at 1322, ¶ 4. Patricia confirmed to Dixson that a no-contact order had been entered, prohibiting contact between Fearghal and either Patricia or the children. CP at 1322, ¶ 4; *see also* CP at 1438, 109:2-24.

Based upon his observations of Patricia, it appeared to Dixson that she was taking appropriate steps to protect the children. CP at 1322, ¶ 5, 1438. It did not appear to Dixson that Patricia was under the influence of drugs or alcohol. CP at 1322, ¶ 5. Dixson discussed with Patricia entering into a voluntary safety plan, which she agreed to do. CP at 1322, ¶¶ 5-6. Patricia agreed that she would not allow Fearghal to have contact with the children until the no-contact order was lifted, that she would seek domestic violence counseling through YWCA, and that she would be protective of the children and keep them safe from harm and domestic

⁴ Appellants dispute that Dixson met with the children, on the basis of the following: (1) a log at Cormac's daycare center that did not indicate Cormac leaving the center on the day that Dixson visited (CP at 2038-39); and (2) a declaration from Conor that he did not recall meeting with a "black man." CP at 1779, ¶ 7. Whether this testimony creates a dispute of fact regarding who was present during Dixson's interview, it was not material to the question whether the outcome of Dixson's investigation caused a harmful placement.

violence. CP at 1366. The term of the safety plan was from June 13, 2005, to September 13, 2005. CP at 1366.

Thereafter, Dixson did not receive additional information regarding the abuse allegations, including any information that would cause him to conclude that the children were at risk of abuse by Patricia. CP at 1322, ¶ 11. Dixson closed the referral with a “founded” finding on April 12, 2006. CP at 1322, ¶ 13. Dixson’s supervisor, Denise Serafin, received Dixson’s request to close the referral. Based upon a review of the file, Ms. Serafin concluded that no additional investigation was needed, and that there was ample evidence to make a finding of abuse, including Fearghal’s arrest, the bruise observed by a healthcare provider, as well as Mr. Dixson’s observations. CP at 1318, ¶ 4. Accordingly, Ms. Serafin approved closure of the investigation, and sent a letter to Fearghal communicating the findings of that investigation. CP at 1318, ¶ 6; *see also* CP at 1409.

Fearghal sought review of the “founded” finding on May 8, 2006. CP at 1318, ¶ 7; *see also* CP at 1416. In June 2006, a DSHS area administrator, Marian Gilmore, affirmed the “founded” finding. CP at 1318, ¶ 7; *see also* CP at 1405. In October 2006, based upon new information provided by Fearghal to the agency, Ms. Gilmore changed the “founded” finding to a finding of “inconclusive.” CP at 1318, ¶ 8; CP at

1391. The new information supporting Ms. Gilmore’s decision included: “retraction/recantation by older child witness, indication of coaching of child witness by mother, reduction of the assault charge to disorderly conduct and father’s indication that he agreed to plea in order to avoid deportation, medical report that contradicted cause of alleged injury, and information that called into question mother’s credibility.” CP at 1391.

D. No-Contact And Restraining Orders Are Entered In Various Criminal And Civil Cases Involving Fearghal And Patricia

As Deputy Kingrey had advised Patricia, a no-contact order was entered upon Fearghal’s release from custody following his booking on charges for Assault IV – Domestic Violence. CP at 1442. That order was followed by a number of orders restricting contact between Fearghal and Patricia and/or their children, entered both in Fearghal’s criminal action and in a marital dissolution proceeding initiated by Patricia, including:

Date	Pertinent Terms
6/6/2005 ⁵	No-Contact With Cormac, “includes within 500 ft of Residence or Workplace”; “includes school and Daycare of Children”
7/28/2005 ⁶	Fearghal, <i>inter alia</i> , “RESTRAINED from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing of or service of court documents by a 3 rd party or contact by Respondent’s lawyer(s) with [Patricia, Conor, and Cormac].” Effective until 8/10/2005.

⁵ CP at 1442. This order was rescinded on March 20, 2006.

⁶ CP at 1444.

Date	Pertinent Terms
8/10/2005 ⁷	Extending 7/28/2005 Order to 8/31/2005
8/31/2005 ⁸	Both parties “restrained and enjoined from assaulting, harassing, molesting or disturbing the peace of the other party or of any child.” Both parties “restrained and enjoined from going onto the grounds of or entering the home of the other party.” Fearghal granted supervised visits with Conor. Effective until 8/31/2006 ⁹
12/8/2005 ¹⁰	Fearghal prohibited from contact with Cormac, or from going within 250 feet of Cormac’s residence. Effective until 12/8/2010.
1/17/2006 ¹¹	All contact between Fearghal and Conor ordered terminated.
1/19/2006 ¹²	Fearghal agrees “to terminate contact with [Conor] pending hearing”
2/15/2006 ¹³	“1. All contact between [Fearghal] and [Conor] is hereby terminated until further order of the court. 2. [Fearghal] shall have no telephone contact with [Conor]. 3. After [Fearghal’s] criminal matter is resolved, the matter can be returned to court for review.”
2/21/2006 ¹⁴	Prohibiting contact between Fearghal and Patricia and Cormac, expiring 2/21/2008
2/21/2006 ¹⁵	Same
6/28/2006 ¹⁶	“The father Fearghal McCarthy shall have no contact with either child. – No Phone Call – No Email – No Photographs.”

⁷ CP at 1448.

⁸ CP at 1450.

⁹ In a declaration submitted in connection with the court’s consideration of Patricia’s request for a restraining order, Fearghal stated that he did not oppose an order of no-contact with Patricia, but that he opposed an order of no-contact with respect to Conor. CP at 1426, ¶¶ 13-14. In that same declaration, Fearghal acknowledged the existence of a continuing no-contact order prohibiting him from contact with Cormac. CP at 1426, ¶ 6.

¹⁰ CP at 1454.

¹¹ CP at 1456.

¹² CP at 1458.

¹³ CP at 1460.

¹⁴ CP at 1462.

¹⁵ CP at 1464.

¹⁶ CP at 1465.

Date	Pertinent Terms
8/1/2006 ¹⁷	Fearghal to have no-contact with Patricia or Cormac before 8/1/2008.
8/1/2006 ¹⁸	Sentence for Disorderly Conduct Charge, same as above.

On April 6, 2007, the no-contact order entered as a part of Fearghal’s sentence for Disorderly Conduct was rescinded. CP at 1468.

There is no evidence that any representative of DSHS offered evidence in support of or in opposition to any of the orders listed above. Patrick Dixson never “appear[ed] in court to advocate for either McCarthy concerning my investigative findings regarding the June 2005 abuse referral.” CP at 1322, ¶ 12.¹⁹

On October 24, 2008, Fearghal and Patricia filed a joint declaration in support of a final parenting plan in their dissolution action. CP at 1655. In that stipulation, Fearghal and Patricia testified that the separation between Fearghal and their two children was “a result of court decisions based upon [Fearghal’s] June 3, 2005, arrest and the additional criminal charges made against [Fearghal].” CP at 1655, ¶ 2.30.

¹⁷ CP at 1466.

¹⁸ CP at 1470.

¹⁹ In one sentence of a 21-paragraph declaration submitted in connection with her petition for dissolution, Patricia stated “Children’s Protective Services came to investigate.” CP at 1644, ¶ 15. There is nothing in the record to suggest that the existence of a CPS investigation affected any ruling of the Superior Court to which Patricia submitted this declaration. Nor is there anything in the record to suggest that the court addressing Fearghal’s criminal charges received any testimony or evidence regarding Mr. Dixson’s investigation.

E. Fearghal's Referral Regarding Patricia

On January 8, 2006, Fearghal made a referral to CPS regarding alleged neglect of Conor and Cormac by Patricia. CP at 1998. The events supporting the referral reportedly were communicated to Fearghal by Conor. CP at 2001. Fearghal reported that Cormac was left in the care of Patricia's then-boyfriend, and Cormac suffered dog bites while in his care. CP at 2002. Cormac was reportedly treated at the hospital and released. CP at 2002. Fearghal also reported that Conor was allowed to ride his bike along the road unattended without a helmet. CP at 2002. Fearghal also reported frustration that Patricia sleeps with her boyfriend, and that both children witnessed him being in bed with their mother. CP at 2002. Last, Fearghal reported that Conor (age 6) bathed in the same tub with Patricia's boyfriend's daughter (age 3). CP at 2002.

The intake worker noted the alleged lack of supervision, and noted as mitigating factors the existence of a contested custody situation in which both parents had been accused of abuse and/or neglect. CP at 2003. The intake worker also noted that no abuse or neglect report had been received from the medical professional who had seen Cormac. CP at 2003. On the basis of these observations, the worker made a referral decision of "information only" and did not screen in the report for investigation. CP at 2003.

F. Relevant Procedural History

On October 1, 2010, Appellants' then-counsel Thomas Boothe wrote to defense counsel regarding the status of the case. CP at 1433. In that letter, Mr. Boothe confirmed that Appellants would not be pursuing claims against DSHS for violation of the Washington Law Against Discrimination or for intentional infliction of emotional distress, stating that the complaint should be treated as amended to remove those claims. CP at 1433, p. 2.²⁰ Appellants' counsel stated that they would proceed with claims for negligence, negligent investigation, reckless disregard, and negligent infliction of emotional distress. CP at 1433, p. 2.

At the hearing on DSHS' motion for summary judgment, Appellants' counsel confirmed that Appellants' claim for negligent investigation subsumed Appellants' separately pleaded causes of action:

The same thing for the State. Having the State free not to supervise their employees and with regard maybe

²⁰ Based upon this concession, DSHS did not move for summary judgment on Appellants' claim for intentional infliction of emotional distress (also known as outrage). Nor did the trial court enter judgment on that abandoned claim. Thus, the Court should disregard Appellants' contention that the trial court improperly entered summary judgment in favor of DSHS on this claim, because this claim was neither presented to the trial court nor properly preserved for review. *E.g.*, *Fearghal's Br.*, Assignment of Error 2, *see also* pp. 68-71; *Minor Children's Br.*, Assignment of Error 3, *see also* pp. 41-45. *See* RAP 9.12; *Cano-Garcia v. King County*, 168 Wn. App. 223, 277 P.3d 34 (2012) ("Cano-Garcia raised this claim in his complaint. Cano-Garcia did not, however, raise this issue in his pleadings in opposition to summary judgment, argue this theory at the hearing, submit evidence in support of this theory, or object to the trial court's order dismissing all claims. Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal.").

Negligent Supervision and Negligent Infliction, they are all really subsets of the 26.44.050 claim.

They're pled separately but they are really all to that number one of the statute requiring an independent investigation.

Verbatim Report of Proceedings at 247:20-248:1.

After taking the matter under advisement at the conclusion of oral argument, the trial court entered summary judgment in favor of DSHS on each of Appellants' claims. CP at 2072.

IV. SUMMARY OF ARGUMENT

Based upon the evidence and issues presented to the trial court, summary judgment was properly entered on each of Fearghal, Conor, and Cormac's claims against DSHS.²¹ Although titled alternatively as "negligence," "negligent infliction of emotional distress," and "reckless disregard", Appellants proceeded below on a claim for negligent investigation pursuant to RCW 26.44, the statute governing reporting and investigation of claims of child abuse and neglect. Under well-settled Washington Supreme Court precedent, a claim for negligent investigation, foreign under the common law, is available only upon proof that (1) a biased or faulty investigation (2) leads to a harmful placement decision,

²¹ The claims addressed to the trial court were: Negligence (Third Cause of Action); Negligent Investigation (Fourth Cause of Action); Reckless Disregard (Fifth Cause of Action); Negligent Infliction of Emotional Distress (Seventh Cause of Action). CP at 2072-74; *see also Second Amended Complaint*, CP at 1-19.

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. v. Dep’t of Soc. & Health Serv.*, 149 Wn.2d 589, 590, 70 P.3d 954 (2003) (affirming dismissal of negligent investigation claim absent harmful placement decision).

Here, as in *M.W.*, Appellants produced no evidence that a harmful placement decision resulted from the allegedly negligent investigation of the report of physical abuse received by DSHS involving Fearghal and Cormac. A dependency petition was not filed, Cormac was not placed into protective custody, and DSHS took no action beyond entering into a voluntary safety plan with Patricia. Rather, the separation about which Appellants complain was caused by no-contact orders entered before, during, and after the investigation, by Clark County courts in actions to which DSHS was not party and in which DSHS offered no evidence. Having received no evidence to support an essential element of Appellants’ negligent investigation claim, the trial court properly entered summary judgment.

Appellants separately complained that DSHS failed to act upon a report of neglect made by Fearghal in January 2006. This referral was not investigated by DSHS, and no evidence presented to the trial court supported a conclusion that the decision not to accept that report for

investigation was incorrect, much less actionable. Moreover, no evidence established that an investigation of that referral would have caused the removal of either child from Patricia's care, or that an investigation of that referral would have resulted in the placement of the children with Fearghal. The trial court's summary judgment thus was proper with respect to this claim, too.

The trial court also properly entered summary judgment on Fearghal's claims for general negligence and "reckless disregard." Appellants conceded below that the crux of their complaint was a negligent investigation, and that they had simply been careful to properly plead it. But to the extent these are separate claims, no evidence supports them. The sole contacts between DSHS and this family involved the purportedly negligent investigation of reports of abuse or neglect. Appellants cannot escape the requirements of pleading and proof for a claim of negligent investigation by attempting to state claims for violation of general common law duties of care.

Last, the trial court properly entered summary judgment on Appellants' claim for negligent infliction of emotional distress, which again was not based upon facts separate and apart from the claim for negligent investigation. No competent medical evidence was offered to

prove emotional distress based upon objective symptomatology, as would be required to sustain such a claim.

The trial court's summary judgment in favor of DSHS should be affirmed in all respects.

V. ARGUMENT

A. Standard For Review

This Court reviews summary judgment orders *de novo* and generally performs the same inquiry as the trial court. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). It examines the pleadings, affidavits, and depositions before the trial court and “take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Affirming the trial court's award of summary judgment is proper if the record before the trial court establishes “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. and Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). “Questions of fact may be determined as a

matter of law ‘when reasonable minds could reach but one conclusion.’”

Id. at 788.

B. The Trial Court Properly Entered Summary Judgment In Favor Of DSHS On Appellants’ Negligent Investigation Claim, Because Appellants Offered No Evidence Of A Harmful Placement Caused By DSHS Negligence

1. The June 4, 2005, Referral Of Alleged Physical Abuse.

There is no general tort claim for negligent investigation. *M.W.*, 149 Wn.2d at 601. Rather, the supreme court has recognized a “narrow exception,” based upon and limited to statutory duties to investigate reports of child abuse and neglect. *Id.* To prevail on a claim for negligent investigation, it is mandatory that a plaintiff show that the allegedly biased or incomplete investigation resulted in a harmful placement decision. *Id.* at 590; *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004) (“To prevail, the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement.”). In other words, proof that the investigation did not meet the applicable standard of care “in the air” is insufficient as a matter of law to permit a plaintiff to recover. Thus, in *M.W.*, a caseworker’s negligent physical examination of a child, alleged to have caused post-traumatic stress disorder, did not support a negligent investigation claim, because caseworker’s negligence did not result in a harmful placement decision. *Id.* at 602; *see also Roberson v. Perez*, 156

Wn.2d 33, 46-47, 123 P.3d 844 (2005) (affirming summary judgment on negligent investigation claim where plaintiff failed to establish a harmful placement as a matter of law).

Here, Appellants have neither pleaded nor proven a harmful placement decision caused by DSHS' alleged negligent investigation. Apart from reaching its findings in that investigation, the only action taken by DSHS was to enter into a voluntary safety plan agreed to by Patricia. This was not a placement decision. The children were already in Patricia's care; there was no evidence received by the DSHS investigator that the children were unsafe in her care; and the agreement was entirely voluntary. CP at 1366. Perhaps for this reason, Appellants disavowed to the trial court that their claim was based upon the safety plan. *See* CP at 1762 ("The issue here is not whether CPS is liable for the separation of the children for the first 90 days from the referral Instead, it is for the separation that continued for so many months afterward.").

Instead, Appellants appear to argue that DSHS had a duty to provide Fearghal with an "inconclusive" finding for his use in the criminal and civil proceedings in which he was party. Fearghal Br. at 52; Minor Children's Br. at 30. There is no precedent for such a duty. Although Appellants are correct that an intervening no-contact order does not always cut off liability for negligent investigation, *e.g.*, *Tyner v. Dep't of*

Soc. & Health Serv., 141 Wn.2d 68, 86, 1 P.3d 1148 (2000), DSHS is aware of no authority for the proposition that a DSHS caseworker has a duty to provide information in an unrelated civil or criminal proceeding to which DSHS is not a party and in which no DSHS representative offers (or is asked to offer) testimony.

In *Tyner*, DSHS instituted a dependency proceeding in connection with an investigation into reported sexual abuse. *Tyner*, 141 Wn.2d at 74. The responsible caseworker offered testimony that the filing of the dependency petition was based in part upon the father's refusal to cooperate in having the children evaluated by a sexual assault professional. *Id.* After the hearing, the court entered a no-contact order, and prohibited contact between the father and his children. *Id.* Four days later, the caseworker completed his investigation, finding that the allegations of abuse were "unfounded". *Id.* Although he had previously testified in support of the dependency petition, the caseworker neither provided a copy of his report to the court, or to any of the parties or their counsel. *Id.* The plaintiff father secured a jury verdict against DSHS on a negligent investigation theory. *Id.* at 76. On appeal, the court of appeals held that the no-contact order entered by the trial court severed legal causation between the State's negligence and the plaintiff's separation

from his children, because reasonable minds could not differ that all material information was before the court. *Id.*

The supreme court reversed, agreeing with the court of appeals that an intervening no-contact order does not automatically cut-off legal causation, but concluding that the court issuing the order had not been presented with all material information necessary to make a decision. *Id.* at 86. The court held that a jury could have found, on the basis of expert testimony offered below, that the caseworker should have informed the trial court and the parties that he had reached an “unfounded” decision, and what collateral sources had to say about the subject of the investigation. *Id.* at 87. This was so, the court reasoned, because “[t]here is little question that courts rely heavily on the judgment of CPS caseworkers in making dependency determinations.” *Id.* Based upon these two categories of material information not provided to the trial court, the supreme court held that causation was not absent as a matter of law. *Id.* at 89.

Here, unlike in *Tyner*, there is no evidence in the record that any of the multiple court orders restricting contact between Fearghal and his children were in any way affected by information provided (or not provided) by DSHS. Indeed, the first such no-contact order was entered on June 6, 2005, *before* DSHS had any contact with Patricia. CP at 1442.

That order and those entered thereafter did not arise from a dependency proceeding initiated by DSHS, no DSHS representative testified at any hearing at which a no-contact order was entered, and there is no evidence that any court relied upon what a DSHS caseworker believed should be the appropriate course of action with respect to Fearghal, Conor, or Cormac. There is no evidence, for example, that a copy of the voluntary safety plan signed by Patricia was ever presented to any court, or that any party made a representation to a court that CPS had reached any conclusion whatsoever regarding the allegations of abuse. Nor was their expert testimony offered that the standard of care requires a caseworker to affirmatively seek out pending proceedings for the purposes of offering unsolicited testimony. In short, this is not a case where a court deferred to testimony of a DSHS caseworker, because no such testimony was ever received, asked for, or necessary.²²

In this regard, *Gausvik v. Abbey*, 126 Wn. App. 868, 107 P.3d 98 (2005), is instructive. In *Gausvik*, the plaintiff father was arrested for child rape and convicted at trial. *Id.* at 876. Later, the charges against him

²² It is a distinction without difference to say that had a non-negligent investigation been conducted, that Fearghal could have been armed with additional ammunition for his criminal case or for his dissolution proceeding adverse to Patricia. The negligent investigation cause of action does not rely upon – or create – a duty to generate evidence for private litigants. Rather, *M.W.* and its progeny stand for the proposition that DSHS cannot petition the court for relief, and then fail to offer the court complete information material to the court's decision. To accept Appellants' attenuated articulation of proximate cause would significantly expand the scope of the negligent investigation cause of action.

were dismissed, after questions arose about the interview techniques employed by the investigating detective. *Id.* at 876-77. The trial court entered summary judgment on civil rights claims brought against DSHS social workers involved in the investigation, concluding that the plaintiff had failed to establish proximate cause. *Id.* at 878. The court of appeals affirmed, finding:

While Gausvik shows how material information was kept from courts deciding other cases, he fails to show the same situation exists here. Gausvik cannot use the language from *Tyner* to support his argument because there is simply no evidence in the record to suggest that information was withheld from the court when it made decisions regarding Gausvik and the children's removal. Gausvik fails to show proximate cause and the court did not err by dismissing his § 1983 claim.

Id. at 887; *see also* *Cunningham v. City of Wenatchee*, 214 F. Supp. 2d 1103, 1112-13 (E.D. Wash. 2002) (cited in *Gausvik*) (granting summary judgment on proximate cause grounds where a “criminal investigation was already under way” before a DSHS social worker became involved, and there was “no evidence” that the social worker “altered the course of the criminal action”); *In re Scott County*, 672 F. Supp. 1152, 1166 (D. Minn. 1987) (cited in *Gausvik*) (plaintiff failed to establish but-for causation where “the decision to arrest plaintiffs and to separate children from parents was made by others, with only very minimal input, if any at all, from the social workers”).

Here, as in *Gausvik*, *Cunningham*, and *Scott County*, there is no evidence that DSHS caused a harmful placement or materially affected the court orders separating Fearghal from Conor and Cormac.

Likewise, there is no evidence that *any* material information was not provided to the courts that entered the no-contact orders, whether that information was known by DSHS or not. Although Fearghal asserts that DSHS “imped[ed] Fearghal’s ability to convince courts to remove no-contact orders that were in place,” Fearghal Br. at 51, it is unclear what evidence supports this conclusion.

The very information provided to DSHS that resulted in a modification of its finding from “founded” to “inconclusive” came from Fearghal himself. CP at 1391. Presumably Fearghal also communicated that same information to the courts (or could have done). It is Appellants’ burden to show that material information was not provided to a court entering a no-contact order. *Petcu*, 121 Wn. App. at 59-60. Just as the plaintiff in *Petcu* had the opportunity to challenge the allegations made against him, Fearghal had repeated opportunities to make the same arguments based upon the same facts to the courts entering no-contact and restraining orders. And just as in *Petcu*, there has been no showing that any material information was not before the courts at the time that the no-contact orders were entered.

Appellants have neither shown that the courts entering the multiple no-contact and restraining orders affecting Fearghal were without material information; nor have they shown that DSHS had any part to play in securing those orders. As a result, Appellants have not shown a harmful placement decision caused by an allegedly negligent investigation. Thus, the trial court properly entered summary judgment in favor of DSHS.²³

2. The January 8, 2006, Report of Alleged Neglect.

The same conclusion must be reached with respect to Appellants' claim that DSHS was negligent by failing to investigate Fearghal's referral of neglect in January 2006. *E.g.*, Fearghal Br. at 47. Although Appellants submitted a copy of the CPS intake report regarding that referral, *see* CP at 1998, Appellants identified no manner in which the intake decision – to classify the referral as “information only” – failed to meet the standard of care. The intake worker appropriately documented both the risks presented by the referral, and the mitigating factors – including that the

²³ Appellants contend that this Court should apply a “substantial factor” proximate cause analysis, rather than traditional “but-for” causation. This Court should decline to do so. *First*, this argument was not made to the trial court and has not properly been preserved for appeal. *Second*, Appellants cite to no authority for the proposition that a “substantial factor” analysis is appropriate in a negligent investigation context. Courts have rejected application of the “substantial factor” analysis in the context of negligent investigation claims. *See Gausvik*, 126 Wn. App. at 886-87 (declining to apply substantial factor test, citing *Cunningham*, 214 F. Supp. 2d at 1114 (collecting Washington authority regarding causation in negligent investigation cases, and concluding that substantial factor analysis not warranted)). *Third*, it cannot be said that DSHS negligence was even a “substantial factor” causing the no-contact orders, as discussed in more detail above.

referral was received in the context of a contested custody dispute, and that no referral had been received from the medical professional who treated Cormac. CP at 2002-03.

According to Fearghal, “CPS *must* assess or investigate all reports of alleged child abuse or neglect,” citing RCW 26.44.050. Fearghal Br. at 47. But this duty arises only upon acceptance of the referral by the Department for investigation. See RCW 26.44.050 (“Except as provided in RCW 26.44.030(11)...); RCW 26.44.030(11) (“Upon receiving a report of alleged abuse or neglect, the department shall use one of the following discrete responses to reports of child abuse or neglect *that are screened in and accepted for departmental response...*”) (emphasis added). In this case, the intake worker determined that the report did not meet the criteria for investigation. CP at 2003.²⁴ There is no evidence in the record to support a conclusion that this conclusion was incorrect, or negligent.

There is also no evidence in the record to support the conclusion that had this referral been investigated, the result would have been a removal of Conor or Cormac, or their placement with Fearghal. Any such inference would be unreasonable: at the time of the referral, Fearghal was

²⁴ A “screened-out report,” such as this one, is “a report of alleged child abuse or neglect that the department has determined does not rise to the level of a credible report of abuse or neglect and is not referred for investigation.” RCW 26.44.020(21).

prohibited by court order from contact with Cormac, CP at 1454, and his visitation with Conor was terminated shortly thereafter, CP at 1456, 1458, 1460.

In all events, Appellants failed to produce evidence of either a negligent investigation or a harmful placement with respect to the January 8, 2006 referral.

C. The Trial Court Properly Entered Summary Judgment In Favor Of DSHS On Fearghal's Negligence And Reckless Disregard Claims

As conceded by Appellants' counsel at oral argument below, the gravamen of Appellants' complaint is an allegedly negligent investigation that they claim caused a harmful placement. In other words, although pleaded separately, the claims for negligence and negligent infliction of emotional distress (and, although not directly addressed by Appellants' concession below, their claim for "reckless disregard") are superfluous. In his brief, Fearghal does not argue for relief on a negligence theory arising from separate facts or a separate injury. Thus, the trial court's summary judgment on the general negligence claim should be affirmed.

Fearghal (but not Conor or Cormac) argue that summary judgment was inappropriate on the claim "reckless disregard." Fearghal Br. at 71-72. Fearghal's claim appears to be based upon the argument that DSHS was reckless by retaining or supervising Dixson or by assigning him to

perform the investigation into the referral regarding his alleged abuse of Cormac. Fearghal Br. at 71-72. Fearghal cites no support for the existence of such a cause of action under Washington law. “Reckless disregard” describes a state of mind or degree of intent with respect to underlying conduct, not an independent claim for relief. In any event, granting the inference that DSHS was reckless in retaining and/or supervising Dixson does not create a claim for relief for Fearghal. If Dixson negligently investigated a referral of abuse or neglect, and such investigation resulted in a harmful placement, DSHS may be liable. But DSHS does not claim that Dixson acted outside the scope of his employment. Thus, a claim for “negligent supervision” (or “reckless supervision”) merely “collapses” into the claim for negligent investigation, and need not be separately resolved. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 52, 929 P.2d 420 (1997).

The trial court’s summary judgment on this claim – whether characterized as negligent supervision or “reckless disregard” – likewise should be affirmed.

D. The Trial Court Properly Entered Summary Judgment In Favor Of DSHS On Fearghal’s Negligent Infliction Of Emotional Distress Claim

Conor and Cormac do not contest the entry of summary judgment on their separate negligent infliction of emotional distress claim. Fearghal

contends that summary judgment on this claim was error, because he has presented sufficient evidence of objective symptomatology to proceed. Fearghal Br. at 72-74.

The trial court's ruling was correct. A claim for negligent infliction of emotional distress requires proof of negligence (*i.e.* duty, breach of the standard of care, proximate cause, and damage) plus proof of the additional requirement of objective symptomatology. *Strong v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008).

In the first instance, the conclusion that Fearghal had no claim for negligent investigation requires the conclusion that he has likewise failed to establish a claim for negligent infliction of emotional distress. *E.g.*, *Hannum v. Dep't of Licensing*, 144 Wn. App. 354, 361, 181 P.3d 915 (2008) (affirming summary judgment on negligent infliction of emotional distress claim where underlying claim for negligence was barred by the public duty doctrine). In other words, Fearghal did not present "separate facts" which would support a negligent infliction of emotional distress claim independent of his underlying negligent investigation claim. *See Haubry v. Snow*, 106 Wn. App. 666, 678, 31 P.3d 1186 (2001) (no separate NIED claim absent "separate factual basis" from underlying negligence claim).

Beyond this, however, Fearghal has failed to submit evidence establishing emotional distress by objective symptomatology – *i.e.*, medical evidence. Fearghal relies upon the declaration of Dr. James Boehnlein, CP at 1786, but his declaration does not provide competent medical *evidence*. Rather, Dr. Boehnlein testified that based upon the review of declarations submitted by Fearghal and Conor, “elements of multiple diagnosable mental health conditions are present that would need to be explored in more detail.” CP at 1786, ¶ 3. But Dr. Boehnlein also testified that no “reliable diagnoses” could be made “without further history and direct interviews with the subjects.” CP at 1786, ¶ 3. This testimony perhaps rises to the level of informed speculation, but it is not “medical evidence” sufficient to avoid summary judgment. *See Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998) (To satisfy the objective symptomatology requirement, “a plaintiff’s emotional distress must be susceptible to medical diagnosis and proved through medical evidence.”); *Haubry*, 106 Wn. App. at 679 (objective evidence must show “the severity of the distress and the causal link between the actions of the [defendant] and the subsequent emotional reaction of the [plaintiff]”).

Because the trial court properly entered summary judgment on Fearghal’s underlying claim for negligence, and because Fearghal did not provide competent medical evidence of objective symptomatology, the

trial court properly dismissed Fearghal's claim for negligent infliction of emotional distress.

E. Costs On Appeal

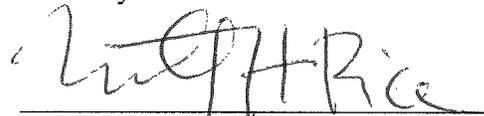
Appellants are not entitled to costs on appeal unless they prevail. In all events, DSHS disputes that Appellants are entitled to an award of attorney's fees, which are not available under any cause of action pressed here. (RCW 49.60.030(2), cited by Fearghal, is inapplicable to the claims against DSHS.) Pursuant to RAP 18.1, DSHS requests its costs on appeal should the Court affirm the trial court's decision. *See* RCW 4.84.060.

VI. CONCLUSION

For the reasons stated above, DSHS respectfully requests the Court enter an order affirming the trial court's summary judgment in favor of DSHS on all counts.

RESPECTFULLY SUBMITTED this 27 day of May, 2015.

ROBERT W. FERGUSON
Attorney General



MATTHEW H. RICE
Assistant Attorney General
WSBA No. 44034
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300
OID No. 91023

CERTIFICATE OF SERVICE

I certify that on or before the date referenced below I served by e-mail (per all parties' written consent) a copy of the foregoing document to all counsel of record and the plaintiff as listed below:

Mr. Fearghal McCarthy
fearghalmccarthy001@gmail.com

Erin Sperger
erin@legalwellspring.com

Daniel G. Lloyd
dan.lloyd@cityofvancouver.us

Taylor Hallvik
Dino Gojak
taylor.hallvik@clark.wa.gov
dino.gojak@clark.wa.gov

DATED this 29th day of May, 2015.

/s/ Matthew H. Rice
MATTHEW H. RICE, WSBA No. 44034

WASHINGTON STATE ATTORNEY GENERAL

May 29, 2015 - 11:00 AM

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fearghalmccarthy001@gmail.com

erin@legalwellspring.com

dan.lloyd@cityofvancouver.us

taylor.hallvik@clark.wa.gov

dino.gojak@clark.wa.gov

matthewR3@atg.wa.gov