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NO. 47987-7-II

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

BRANDON K. ROE and TERI L. ROE, husband and wife,

Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF SOCIAL &
HEALTH SERVICES, et al,

Respondents.

Brief of Respondents Cowlitz County, Cowlitz County Sheriff's
Department, Schallert & Gilchrist

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I. INTRODUCTION

Appellants Brandon and Teri Roe (hereafter “the Roes” where applicable) appeal two separate summary judgment orders dismissing their claims of negligent investigation, outrage and malicious prosecution. One order covered claims against Respondents Cowlitz County, Cowlitz County Sheriff’s Department, former and now retired Detective Patricia Schallert, and former Detective and now Undersheriff Marc Gilchrist (hereafter referred to collectively as “County Respondents” where applicable). CP 1389-92. The other order covered claims against various respondents connected to the Washington State Department of Social and Health Services, Child Protective Services (hereafter “CPS” where applicable). CP 1393-95. The Roes contended below that the County Respondents are liable under the three above-described causes of action by virtue of their involvement in a child abuse investigation initiated by CPS upon receipt of a report of visible injuries to the Roe’s three-year-old adopted daughter, N.R., on May 11, 2010, and the County’s subsequent criminal investigation culminating in Teri Roe’s arrest on July 14, 2010 for assault of a child, third degree.

Despite appealing both of the separate summary judgment orders entered in favor of the County Respondents and CPS, the Amended Brief of Appellants (hereafter “Amended Brief”) contains virtually no argument

or citation to the record pertaining to the Roes' claims against the County Respondents, instead focusing nearly exclusively upon arguments and evidence related to actions by CPS. Although this failure leaves much uncertainty about the specific grounds for the appeal of dismissal of the claims against the County Respondents, as shown below, the trial court properly dismissed these claims because the Roes failed to raise a genuine issue of material fact as to the existence of the required elements of all three claims. The dismissals should also be affirmed on grounds of immunities raised by the County Respondents under RCW 10.99.070 and RCW 4.24.595(1) but not specifically relied upon in the trial court's oral ruling granting the County Respondents' motion.

II. COUNTER-STATEMENT OF ISSUES

1. Whether the trial court correctly dismissed the negligent investigation claim against the County Respondents based upon the Roes' failure to raise a genuine issue of material fact as to the required elements of an incomplete or biased investigation that caused a harmful placement decision?

2. Whether the trial court correctly dismissed the outrage claim against the County Respondents based upon the Roes' failure to raise a genuine issue of material fact as to the required elements of outrageous conduct or resulting extreme emotional distress?

3. Whether the trial court correctly dismissed the malicious prosecution claim against the County Respondents based upon the Roes' failure to raise a genuine issue of material fact as to the required elements of want of probable cause and malice with regard to the criminal case pursued against Teri Roe?

4. Whether dismissal of all three claims against the County Respondents should also be affirmed based upon the Roes' failure to raise a genuine issue of material fact regarding application of the immunity from liability set forth at RCW 10.99.070 for acts or omissions of a peace officer in good faith in an action arising from an alleged incident of domestic violence?

5. Whether dismissal of all three claims against the County Respondents should also be affirmed, to the extent the claims are based upon actions up to and including taking protective custody of N.R., because the Roes failed to raise a genuine issue of material fact regarding application of the immunity from liability set forth at RCW 4.24.595(1) for acts or omissions not amounting to gross negligence while conducting an emergent placement investigation prior to a shelter care hearing?

III. COUNTER-STATEMENT OF CASE

A. Facts.

Cowlitz County Sheriff's Deputy Stumph responded to a CPS Office in Kelso on May 11, 2010 in response to a report of suspected child abuse of plaintiffs' three-year-old daughter, N.R., who was brought to the CPS office by her long-time babysitter, Heather Bonnell. CP 288. Deputy Stumph observed redness and bruising on N.R.'s nose, a small scratch below her left eye, a bruise on her right ear, a bruise on her right bicep and scattered redness and bruising on her back. *Id.* Deputy Stumph interviewed Ms. Bonnell, and was told that N.R. told her the bruise on her nose was caused by her mom, but Teri Roe told her that N.R. tripped over their dog and hit her head on the ground. *Id.* He also interviewed two CPS social workers about their contact with Bonnell, their observations of N.R.'s injuries and their knowledge of prior CPS referrals involving allegations of suspected child abuse or neglect against plaintiffs. CP 289. Based upon these facts Deputy Stumph took protective custody of N.R. that same day, transferring custody to DSHS under authority of RCW 26.44.050 based upon probable cause to believe that N.R. had been abused or neglected.³ *Id.*; CP 297.

³ As of May 11, 2010, RCW 26.44.050 provided in relevant part as follows: "Upon receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report A law enforcement officer may

Still that same day, May 11, 2010, DSHS placed N.R. in the home of Julie Hoffman and Eric Kindvall, who were family friends of the Roes and previous day care providers for N.R. CP 303 – 306; CP 532 – 533; CP 233.

Deputy Stumph, Cowlitz County Sheriff's Sergeant Crusier and CPS social worker Stephanie Frost contacted the Roes that same day and interviewed them, and conducted a welfare check of their other children inside their residence. CP 289; 291-92. After leaving the Roes' residence Deputy Stumph returned to the CPS office where he interviewed Ms. Bonnell further, and took photos of N.R.'s injuries. CP 290, 298-302. Sergeant Crusier also obtained and attached to his report a copy of an earlier report generated as a result of a Sheriff's Department response to a report in December 2008 by Teri Roe's then 16-year-old daughter, Nikole Easterly, that Teri Roe was abusing and neglecting her adopted two-year-old sister, N.R., abuse which was also attested to by Nikole's boyfriend at the time, Raymond Hamm, and a prior boyfriend, Scott Schroeder. CP 292-95.

take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order" The statute also authorized investigating law enforcement or the department of social and health services ". . . to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child."

On May 12, 2010 Detectives Patricia Schallert and Marc Gilchrist were assigned the case for further investigation, with Detective Schallert designated as the lead investigator, or Case Officer. CP 284, ¶ 3. As Case Officer, Detective Schallert compiled a case file for this investigation, CCSO Case No. 10-5670. *Id.* Records from the relevant case file, which were attached to Detective Schallert's Declaration in support of the County Respondents' summary judgment motion (CP 283-402), document that over the next two months the Sheriff's Office investigation included, among other actions, the following: (1) A videotaped interview of N.R. by a trained forensic examiner at the Children's Justice and Advocacy Center (CJAC), attended by Detective Schallert, CPS Caseworker Stephanie Frost, and Cowlitz County Deputy Prosecuting Attorney Kathrine Gulmert, the results of which were inconclusive due to difficulty communicating with N.R. (CP 323 – 326; CP 758); (2) interviews of the Roes and all of their children except their two year old deemed too young to interview (CP 351; CP 366 – 370; CP 407 – 409); (3) interviews and statements from Nikole Easterly, Raymond Hamm and Scott Schroeder, all of whom confirmed their statements corroborating Teri Roe's abuse of N.R. they had witnessed in 2008 (CP 350 – 364; CP 371 – 372; CP 390); (4) review of the DSHS referral history on the Roes with regard to prior reports of abuse or neglect of their children (CP 311 – 321); (5) review of

a report from Dr. Hall, a DSHS consultant with the Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center, which revealed both normal prior medical exams for N.R.'s alleged bleeding disorder and clumsiness, and Dr. Hall's opinion that "[t]he findings in this case are all very concerning for physical abuse. The bruising of the ears in this pattern is nearly diagnostic of abuse." (CP 396); and (6) inspection of Ms. Bonnell's cell phone texts for dates relevant to who had access to N.R. when the injuries were reportedly inflicted, one of which showed that N.R. was with Teri Roe when the injuries to N.R.'s face and nose were probably inflicted (CP 391 - 394). Detective Gilchrist submitted a Declaration in support of the County Respondents' motion explaining that he administered Computer Voice Stress Analyzer (CVSA) exams to both Teri Roe and Heather Bonnell during the investigation, the results of which showed Heather Bonnell to be truthful when denying she had abused or caused injury to N.R., but showed Teri Roe to be deceptive when making the same denials. CP 403 - 413. Detective Schallert had requested a CVSA exam of Nikole Easterly, but she refused. CP 373.

Based upon the information gathered during the investigation, Detective Schallert arrested Teri Roe on July 14, 2010 for assault of a child, third degree. CP 398-402.

Other details regarding the Cowlitz County Sheriff's Office (CCSO) investigation, and orders and voluntary placement agreements entered during the pendency of subsequent criminal and dependency cases, will be provided below where applicable.

B. Procedural History.

The Roes initiated this action by filing a Complaint for Personal Injury and Damages in Tort in July 2013. The case was removed to Federal District Court in October 2013 based upon allegations of federal civil rights violations along with various state law claims. Once in Federal District Court, the Roes were granted leave to amend and filed an Amended Complaint for Personal Injury and Damages in Tort in June 2014. CP 226 - 256. The County Respondents moved for summary judgment in November 2014, seeking dismissal of all claims stated against them in the Amended Complaint. CP 258 - 282.

In January 2015, the Federal District Court, the Honorable Benjamin H. Settle, granted the County Respondents' Summary Judgment Motion on the federal civil rights claims and entered an Order dismissing them, and remanding all state law claims to Thurston County Superior Court for resolution. CP 152-160; CP 763 - 771. Once back in Thurston County Superior Court, the County Respondents filed a motion for summary judgment seeking dismissal of all remaining state law claims.

CP 200-222. The trial court heard argument on the County Respondents' motion on July 17, 2015, and entered an order granting the motion and dismissing all state law claims on the same date. CP 1389-92.

IV. ARGUMENT

A. Standard of Review.

CR 56 provides in relevant part as follows:

(c) . . . The judgment sought shall be rendered forthwith if the pleadings . . . together with the affidavits, if any, show 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. . . .

(e) . . . 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.

A defendant moving for summary judgment may prevail by showing that there is an absence of evidence to support an essential element of plaintiff's claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Upon such a showing, the burden shifts to the plaintiff to produce evidence which, when viewed in a light most favorable to the plaintiff, is sufficient to establish the existence of each element essential to plaintiff's claim. *Id.* A nonmoving party must

set forth specific facts; speculation, argumentative assertions, opinions and conclusory statements will not defeat a properly supported summary judgment motion. *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993) citing *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the case. *Dowler v. Clover Park Sch. Dist.*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). If reasonable minds can reach only one conclusion regarding a contested fact, that issue may be determined on summary judgment. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014).

An order granting summary judgment is subject to de novo review, and the appellate court engages in the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. The negligent investigation claim was properly dismissed because the Roes failed to raise a genuine issue of material fact as to whether the County Respondents conducted an incomplete or biased investigation resulting in a harmful placement decision.

It is well-established that no common law cause of action exists in Washington for a law enforcement agency's alleged negligent investigation of criminal conduct. *See, Fondren v. Klickitat County*, 79 Wash. App. 850, 862, 905 P.2d 928 (1995) and cases cited therein.

Washington courts have, however, recognized an implied, statutory cause of action for alleged negligent investigation in the area of suspected child abuse based upon the provisions of RCW 26.44.050. In *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn. 2d 589, 70 P.3d 954 (2003), the court explained the scope of this cause of action as follows:

RCW 26.44.050 requires DSHS to investigate child abuse. We have previously recognized that this statutory duty implies a cause of action for children and parents for negligent investigation in certain circumstances. *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000). As the Court of Appeals noted, and both parties agree, the cases that have recognized such a claim involve allegations that DSHS failed to adequately investigate a child's living situation before making a placement decision to remove a child from a nonabusive home, let a child remain in an abusive home, or place a child in an abusive home. *M.W.*, 110 Wash. App. at 237, 39 P.3d 993.

M.W., 149 Wn. 2d at 595. The plaintiffs in *M.W.* argued that their child allegedly suffered injuries caused by DSHS investigators during their physical examination of the child, and asserted a negligent investigation claim under RCW 26.44.050. Rejecting this claim, the court held as follows:

Our courts have not recognized a general tort claim for negligent investigation. The negligent investigation cause of action against DSHS is a narrow exception that is based on, and limited to, the statutory duty and concerns we discuss above. . . .

When we examine the facts of this case in the light most favorable to J.C.W., they do not support a claim of negligent investigation because they do not give rise to finding that DSHS conducted an incomplete or biased child abuse investigation that resulted in a harmful placement decision. J.C.W. does not argue that DSHS made a harmful placement decision. . . .

M.W., 149 Wn.2d at 601.

The duty owed by law enforcement under RCW 26.44.050 is the same as that owed by DSHS. *See, Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000). *Rodriguez* reversed dismissal of a negligent investigation claim against Douglas County brought by the parents of a suspected child abuse victim, and on remand the claims were tried to a jury which found the County liable and awarded plaintiffs \$3,000,000 in damages. The County appealed, and in the intervening period between trial and appellate argument the opinion in *M.W.*, *supra*, was issued. The County argued for the first time on appeal that under *M.W.* the plaintiffs could not maintain a negligent investigation cause of action in part because plaintiffs had voluntarily sent their child to live with grandparents while the investigation was pending, and therefore could not prove that the County's actions resulted in a harmful placement decision. The Court of Appeals agreed with the County, reversed the jury award and dismissed plaintiff's claim because "their child was not the subject of a negligent criminal investigation that led to a harmful

placement decision.” *Roberson v. Perez*, 119 Wn. App. 928, 934, 83 P.3d 1026 (2004). The Washington Supreme Court granted review of the Court of Appeals’ opinion, and affirmed in *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005). Describing its holding in *M.W.*, the court in *Roberson* explained that

. . . we held that negligent investigation claims were cognizable “only when DSHS conducts a biased or faulty investigation that leads to a harmful placement decision, such as placing the child in an abusive home, removing the child from a nonabusive home, or failing to remove a child from an abusive home.”

. . . Our interpretation of the statute in *M.W.* unequivocally requires that the negligent investigation to be actionable must lead to a “harmful placement decision.”

Roberson, 156 Wn.2d at 45-46 (internal citation omitted). Despite testimony by the plaintiff mother that she preemptively sent her son to live with his grandparents because “I did not want [Daniel] to testify against his parents like all the other kids were being made to do,” (*Id.*, 156 Wn.2d at 47), the court held:

We conclude as a matter of law that the County’s investigation did not result in a harmful placement decision and affirm the Court of Appeals’ dismissal of the Simses’ claims. The Simses’ testimony conclusively established that Daniel was sent from their home, and from the state, through their voluntary acts. Accordingly, no amount of evidence can be produced sufficient to meet the legal standard of a harmful placement decision.

Id. The court characterized the claim as a form of “so-called ‘constructive placement’ decisions,” and supported its holding by explaining that any “harm” resulting from the investigation would be purely speculative since it is unknown what placement action, if any, DSHS or law enforcement might have taken, and claimants could control the extent of their damages since they controlled the length of time the alleged disruption to the family unit lasted. *Id.*, 156 Wn.2d at 46-47.

These principles and cases were very recently reaffirmed and explained in *McCarthy v. County of Clark*, 2016 WL 1448352, at *6 (Wash. State Court of Appeals, Division II, April 12, 2016) as follows:

The negligent investigation cause of action based on RCW 26.44.050 is a “narrow exception” to the rule that there is no general tort claim for negligent investigation. *M.W.*, 149 Wn.2d at 601, 70 P.3d 954. A negligent investigation claim is available only when law enforcement or DSHS conducts an incomplete or biased investigation that “resulted in a harmful placement decision.” *Id.* A harmful placement decision includes “removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home.” *Id.* at 602, 70 P.3d 954. This “harmful placement decision” requirement is strictly applied. *See Roberson v. Perez*, 156 Wn.2d 33, 46-47, 123 P.3d 844 (2005) (rejecting a “constructive placement” argument and holding no harmful placement decision occurred when parents voluntarily sent child to live with grandparents during abuse investigation).

See also, Walker v. King County, 630 F.Supp.2d 1285, 1295-96 (W.D. Wash. 2009) (noting that “[t]he Washington Supreme Court has rejected the notion of a ‘general statutory duty of care’ for child abuse

investigations and has severely limited the scope of the duty to investigate,” court holds that arresting officers’ actions of turning a reported child abuse victim over to her mother two hours before scheduled under an existing parenting plan did not constitute a “harmful placement decision,” even though the mother thereafter refused to return the child as scheduled).

On appeal, the Roes have failed to advance any argument that the County Respondents engaged in an incomplete or biased investigation. Rather, the only argument contained in the Amended Brief which addresses the issue of an incomplete or biased investigation pertains solely to CPS:

Mrs. Roe’s acquittal of all charges by a jury in September 2011 and the subsequent dismissal of the dependency—without going to fact-finding trial—establish the element of a biased/faulty investigation by CPS

The position that CPS conducted a faulty investigation is corroborated by overwhelming evidence.

Amended Brief, pp. 20-21; *see also, Id.*, pp. 19-20. RAP 10.3(a)(6) provides in part that a brief of an appellant should contain “[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” It is well-settled that

[a]n appellate court will not consider a claim of error that a party fails to support with legal argument in her opening

brief. *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wash. App. 476, 486, 334 P.3d 1120 (2014) (citing *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991); *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967); RAP 10.3(a)(6)).

Jackson v. Quality Loan Service Corp., 186 Wash. App. 838, 845, 347 P.3d 487 (2015). An appellant's failure to provide argument in support of an assignment of error constitutes a waiver of the right to appeal on that ground. *Jackson*, 186 Wash. App. at 846; *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004). Moreover, "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wash. App. 533, 538, 954 P.2d 290 (1998), citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Consequently, the Roes should be deemed to have waived their right to contest this necessary element of their negligent investigation claim against the County Respondents.

As close as the Roes come to addressing the issue of an allegedly incomplete or biased investigation by the County is the argument that "[i]n their investigation, Defendants¹ willfully, negligently, and nearly exclusively relied on the statements of Ms. Bonnell." Amended Brief, p. 19. Nothing in the record supports this argument as to the County's

¹ In their Statement of the Case, the Roes assert "... (Defendants Frost, Teeter, Marker, and Payton, when appropriate, will be referred to collectively as "Defendants") ... Amended Brief, p. 8. Despite this limitation, and in the event waiver is not deemed appropriate, the County Respondents will respond to this argument as if it applied equally to the State and County Respondents.

investigation. Rather, in addition to interviews and a statement from Ms. Bonnell, and the actions and observations of Deputy Stumph and Sergeant Crusier on May, 11, 2010, the ensuing Sheriff's Office investigation included, among many other things: (1) A videotaped interview of N.R. by a trained forensic examiner at the Children's Justice and Advocacy Center (CJAC), attended by Detective Schallert, CPS Caseworker Stephanie Frost, and Cowlitz County Deputy Prosecuting Attorney Kathrine Gulmert, the results of which were inconclusive due to difficulty communicating with N.R. (CP 323 – 326; CP 758); (2) interviews of the Roes and all of their children except their two year old deemed too young to interview (CP 351; CP 366 – 370; CP 407 – 409); (3) interviews and statements from Nikole Easterly, Raymond Hamm and Scott Schroeder, all of whom confirmed their statements corroborating Teri Roe's abuse of N.R. they had witnessed in 2008 (CP 350 – 364; CP 371 – 372; CP 390); (4) review of the DSHS referral history on the Roes with regard to prior reports of abuse or neglect of their children (CP 311 – 321); (5) review of a report from Dr. Hall, a DSHS consultant with the Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center, which revealed both normal prior medical exams for N.R.'s alleged bleeding disorder and clumsiness, and Dr. Hall's opinion that "[t]he findings in this case are all very concerning for physical abuse. The bruising of the ears in

this pattern is nearly diagnostic of abuse.” (CP 396); and (6) inspection of Ms. Bonnell’s cell phone texts for dates relevant to who had access to N.R. when the injuries were reportedly inflicted, one of which showed the N.R. was with Teri Roe when the injuries to N.R.’s face and nose were probably inflicted (CP 391 - 394). Detective Gilchrist administered CVSA exams to both Teri Roe and Heather Bonnell during the investigation, the results of which showed Heather Bonnell to be truthful when denying she had abused or caused injury to N.R., but showed Teri Roe to be deceptive when making the same denials. CP 403 – 413. Detective Schallert had requested a CVSA exam of Nikole Easterly, but she refused. CP 373.

These actions are a far cry from the “nearly exclusive reliance on the statements of Ms. Bonnell” claimed by the Roes. Based upon these facts, the only reasonable conclusion which can be reached is that the County’s investigation was not incomplete or biased.

In addition, even if a fact issue were found on the first element, the Roes failed to raise a genuine issue of material fact regarding the existence of the required resulting harmful placement decision. Here, there was no law enforcement involvement in any application to the court affecting placement or custody of N.R. A Domestic Violence No-Contact Order was entered in the criminal case “Prior to arraignment” on July 15, 2010,

it expired “on arraignment,” and it prohibited plaintiff Teri Roe from having contact with N.R. CP 573 - 574. A second Domestic Violence No-Contact Order was entered “Pretrial” on July 28, 2010 following the filing of the criminal charges by the Cowlitz County Prosecuting Attorney’s Office based upon the Deputy Prosecutor’s determination that probable cause existed to support the offense charged (CP 571 -572), it expired “@ Disposition” of the case, and it also prohibited plaintiff Teri Roe from having contact with N.R. CP 575 -576. Both of these Domestic Violence No-Contact Orders were entered by the court pursuant to chapter 10.99 RCW.

The court in *McCarthy* addressed the same scenario, and after reminding that the negligent investigation cause of action under RCW 26.44.050 is designed to be a narrow exception to the rule of non-liability for a claim of negligent investigation, and that the court must also interpret the “harmful placement decision” requirement narrowly, the court rejected the claim that a no-contact order issued in a criminal case constitutes a harmful placement decision as required to support a negligent investigation claim:

There is no indication in the limited case law in this area that a no-contact order issued in criminal proceedings that is not designed to address the parent-child relationship and the child’s residence can trigger liability under RCW 26.44.050.

We hold that a “harmful placement decision” for purposes of RCW 26.44.050 negligent investigation liability does not include a no-contact order issued pursuant to RCW 10.99.040(2)(a) at the arraignment of a parent on domestic violence charges. Accordingly, we hold that Clark County cannot be liable for negligent investigation under RCW 26.44.050 and the trial court did not err in granting summary judgment in favor of Clark County on this claim.

McCarthy, 2016 WL 1448352, at *9.

In addition, on May 13, 2010, two days after the abuse was reported and one day after the case was assigned to Sheriff’s Office Detectives, the Roes signed the first of three Voluntary Placement Agreements with the Washington State Department of Social & Health Services, Children’s Administration (CA) granting CA temporary legal custody of N.R. CP 528 - 531. By signing these Agreements the Roes acknowledged in part: “I voluntarily agree that the above-named child be placed in the care and temporary legal custody of CA, while I participate in services and visits to return the child to my care.” *Id.*, at State’s Bates Number 01010470-71. The second Agreement extended the effective dates of the voluntary placement from June 14 through July 14, 2010, while the third Agreement extended the effective dates from July 14 through July 30, 2010. *Id.* Each of these Agreements also provided that the terms would end upon commencement of a court proceeding (*Id.*), which occurred when DSHS filed a Dependency Petition on July 22, 2010.

CP 535 - 542. Thereafter, through various Shelter Care Hearing Orders and Interim Review Hearing Orders, the Roes agreed to a series of waivers of fact-finding hearings, and agreed to the continuing placement of N.R. with Ms. Hoffman and Mr. Kindvall in the meantime. CP 543 - 569.

As with the criminal case no-contact orders, Cowlitz County Sheriff's Office personnel had no involvement in the application for or entry of any of the above-referenced Orders entered in the dependency action. CP 535 - 569. In addition, the Roes' agreement to the relevant orders in the dependency case should be viewed as forms of "constructive placement," such as the court refused to recognize as actionable in *Roberson, supra*.

Similarly, neither Teri Roe's arrest nor the filing and prosecution of criminal charges constitutes a harmful placement decision as is required to advance a negligent investigation claim under RCW 26.44.050. In fact, it appears that the Roes seek to premise liability against the County Respondents upon the Cowlitz County Prosecuting Attorney's Office's filing and prosecution of criminal charges against Teri Roe (*see* CP 234-35, ¶¶ 3.13, 3.17-3.19), acts for which the Prosecutor and the County are protected by absolute immunity. *See, Musso-Escude v. Edwards*, 101 Wash. App. 560, 4 P.3d 151 (2000); *Creelman v. Svenning*, 67 Wn.2d 882, 410 P.2d 606 (1966). The Roes cannot circumvent this immunity by

alleging that the charges resulted from a negligent police investigation. Rather, since there was no County law enforcement involvement in seeking or obtaining an order of placement of N.R. in any of the three recognized scenarios, no amount of evidence can be produced by the Roes to meet the standard of a harmful placement decision, and the negligent investigation claim was properly dismissed.

Finally, the negligent investigation claim also fails due to the absence of proximate cause as a matter of law. The four elements required to prevail on a negligence claim are duty, breach of duty, resulting in injury, and a proximate cause between the breach and injury. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). The “cause in fact” element of proximate cause refers to the actual, “but for” cause of the claimed injury. *Tyner v. Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). *Tyner* involved a negligent investigation claim against DSHS for the actions of one of its caseworkers who investigated reports made by the mother of two minor children (four-year-old daughter and six-year-old son) that the son accused his father of doing things of a sexual nature to him. CPS was promptly notified and the caseworker assigned to investigate, and within several days the mother filed a petition in court seeking a protective order prohibiting all contact between the children and their father. *Tyner*, 141 Wn.2d at 71-73. In support of the

mother's petition for a protective order, the caseworker submitted a declaration to the court recommending among other things that the father be required to move out of the family home pending the completion of CPS and criminal investigations leaving the mother with custody of the children, that the father have no contact with the children until recommended by a therapist, and advising that DSHS would be filing a dependency petition. The court granted an ex parte temporary order of protection prohibiting all contact between the father and his children. *Id.*, at 73.

Within two weeks the caseworker filed a dependency petition with the court on behalf of DSHS, which resulted in a temporary order continuing custody of the children with their mother and prohibiting all contact with their father. Approximately two weeks thereafter the caseworker completed his investigation and transferred the case to another caseworker, checking a box on his final report form which indicated that the allegations of abuse were "unfounded." However, the caseworker failed to provide the report or his opinion to the father, the mother, their respective attorneys or the court. Approximately one week later, the mother filed a petition for dissolution of marriage. *Id.*, at 74. The dependency proceeding continued for the next four months, and was ultimately dismissed by DSHS after the father successfully completed a

sexual deviancy evaluation, a sexual abuse evaluation of the children was inconclusive, and both parents had participated in court-ordered counseling and therapy focusing on family conflicts identified in the evaluation. The dissolution proceeding was finalized and a parenting plan was ordered which granted the parents joint custody of the children and lifted all restrictions on the father's contact with them. *Id.*, at 75-76.

One of the issues on appeal in *Tyner* was whether the court's no-contact orders separating the father from his children broke the chain of causation, thereby defeating the negligent investigation claim as a matter of law. The court in *Tyner* analogized DSHS's role in the various proceedings to other situations where governmental agents "control the flow of information to the court," *Id.*, at 84, and held as follows:

...a judge's no-contact order will act as a superseding intervening cause, precluding liability of the State for negligent investigation, only if all material information has been presented to the court and reasonable minds could not differ as to this question.

Tyner, 141 Wn.2d at 88. The court reversed dismissal of the claim, finding a disputed issue of fact as to whether all material information was presented to the court. *See also, McCarthy*, 2016 WL 1448352, at *10 (court applied the *Tyner* causation requirement and analysis and upheld summary judgment for a DSHS investigation because DSHS was not

involved in the relevant court proceedings and did not control the flow of information).

Here, again, the Roes' arguments regarding proximate cause are not directed at the County Respondents, but rather are directed solely at the "CPS investigation:"

The evidence shows that there is a dispute as to whether the Defendants (sic) negligent investigation were (sic) the proximate cause of the removal of N.R. from the home of Mr. & Mrs. Roe, especially in a case where the CPS investigation that (sic) relies on unsubstantiated and questionable source that spurs criminal investigation.... Even after the criminal process had run its course and law enforcement was no longer involved in the case—N.R. remained out of the home for an additional eight months based on the decision of the Defendants after September 2011.

Amended Brief, p. 22. Consequently, any argument by the Roes regarding establishing a genuine issue of material fact as to whether the County's investigation proximately caused a harmful placement decision should be deemed waived.

Even if not deemed waived, nothing in the record shows that County law enforcement was involved in or "controlled the flow of information" to the court, or in any fashion withheld material information from the court in the subsequent criminal or dependency proceedings. In fact, the unrefuted evidence establishes that the complete CCSO case investigation file was provided to the Prosecutor's Office at the conclusion

of the investigation. CP 286, ¶ 10. Consequently, those court orders constitute superseding intervening causes of the Roes claimed damages, and provide another basis for dismissal of the negligent investigation claim.

C. The outrage claim was properly dismissed based upon the Roes' failure to raise a genuine issue of material fact as to the nature of the County's conduct during the investigation or the severity of the alleged resulting distress.

In relevant part, the Roes alleged that the following actions support claims against the County Respondents for the tort of outrage:

In determining that Plaintiff Teri Roe was guilty of child abuse, and refusing to consider the factors of their new puppy jumping on their daughter, even after the daughter told the officers that her puppy had hurt her nose . . . ; and

Defendant Officer Gilchrist's screaming, cursing, name calling, and accusatory actions toward the Plaintiff Teri Roe

CP 237, ln. 22 – CP 238, ln. 4.

The standards applicable to a claim for outrage are as follows:

To recover for emotional distress inflicted by intentional or reckless conduct, Washington plaintiffs must plead and prove the elements of the tort of outrage.

The basic elements of the tort of outrage are: “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” . . . The conduct in question must be “*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds*

of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” . . .

Whether conduct is sufficiently outrageous is ordinarily a question for the jury, but initially it is the responsibility of the court to determine if reasonable minds could differ on whether the conduct was so extreme as to result in liability. . . .

In determining whether a case should go to jury, a court considers:

(a) the position occupied by the defendant; (b) whether plaintiff was peculiarly susceptible to emotional distress, and if defendant knew this fact; (c) whether defendant's conduct may have been privileged under the circumstances; (d) the degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and, (e) the actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a conscious disregard of it. . . .

Keates v. Vancouver, 73 Wn. App. 257, 263-64, 869 P.2d 88, *review denied*, 124 Wn.2d 1026 (1994) (internal citation omitted, emphasis in original). The court in *Keates* affirmed the dismissal of an outrage claim against a police officer for the manner in which he had interrogated the plaintiff during an investigation of the murder of plaintiff's wife, reasoning in part as follows:

Here, Johnson . . . was lawfully engaged in the investigation of a serious crime. Keates clearly was a possible suspect. There was no showing that Johnson was aware or should have been aware that Keates was particularly susceptible to emotional distress or that Johnson consciously disregarded an obvious awareness that there was a high probability that his conduct would cause Keates to suffer severe emotional distress.

. . . The authorities had a duty to investigate Karen Keates's murder, Keates was a viable suspect, and the police acted well within their authority in questioning him. We have no doubt that their aggressive questioning left Keates anxious and upset; but, when measured against an objective standard, we cannot say that their actions went "beyond all possible bounds of decency".

Keates, 73 An. App. at 264-65 (internal citation omitted).

Here, at all relevant times Cowlitz County Sheriff's Deputy Stumph, Sergeant Cruser and Detectives Schallert and Gilchrist were acting in their capacities as law enforcement officers, investigating a report of suspected child abuse. Although the experience may have been distressing for the Roes, any distress they experienced would have been no more than would normally occur in an investigation of this type. Reasonable minds could not conclude that any of the officers' conduct here meets the "outrageous, atrocious, and utterly intolerable" standard, since all of the conduct complained of is routine and customary in the course of a criminal investigation.

As for Detective Gilchrist's alleged conduct of "screaming, cursing [and] name calling" during Teri Roe's interview, even though these

allegations would be insufficient to support an outrage claim if true, the County Respondents filed a transcript of the interview establishing irrefutably that they are false. CP 418 – 516. Likewise, the conduct of Detective Gilchrist in conducting the CVSA exam of Teri Roe, and of Detectives Gilchrist and Schallert when interviewing her further after deception was shown, does not meet the required standard of outrageous and utterly intolerable conduct. CVSA exams are a commonly used method of detecting deception in criminal investigations by CCSO, as well as state-wide, nationally and internationally. CP 759 – 761, ¶¶ 6 and 7. Detective Gilchrist conducted Teri Roe’s CVSA exam pursuant to recognized training standards, in a manner which was designed to reduce situational stress during the initial interview phase, and he and Detective Schallert proceeded with less concern for stress by engaging in a more confrontational style of questioning after answers to relevant questions regarding abuse of N.R. showed deception. *Id.*, ¶¶ 3-5.

Nor did the Roes provide sufficient evidence of the required emotional distress which is severe and beyond what would normally occur in such a setting. *See*, Amended Brief, pp. 24-25. The evidence relied upon to establish severe distress and knowledge of susceptibility to it consists of CPS case notes and visitation notes, items of which the County Respondents were not aware, and to which they were not privy. Nor do

the medical records related to Teri Roe's alleged depression support the argument that it started or was in any way related to any actions of the County Respondents. *See*, CP 1304-05; CP 1310-40.

Accordingly, the outrage claim was properly dismissed.

D. The malicious criminal prosecution claim was properly dismissed because the Roes failed to raise a genuine issue of material fact regarding the required elements of want of probable cause or malice.

In support of their malicious criminal prosecution claim, the Roes alleged in relevant part as follows:

Law enforcement . . . identified in Paragraph 1 hereinabove, maliciously pressed and continued charges against Teri Roe, absent probable cause for the institution or continuation of the prosecution, which prosecution terminated on the merits in favor of Mrs. Roe

CP 240, Ins. 23-26. In Washington, a plaintiff must establish the following elements to prevail on a malicious prosecution claim:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

Rodriguez v. City of Moses Lake, 158 Wn. App. 724, 729, 243 P.3d 552 (2010), citing *Clark v. Baines*, 150 Wn.2d 905, 911, 84 P.3d 245 (2004).
“Malice and want of probable cause constitute the gist of a malicious

prosecution action.” *Id.*, citing *Hanson [v. City of Snohomish]*, 121 Wn.2d [552] at 558, 852 P.2d 295 [(1993)]. “Probable cause is a complete defense to malicious prosecution.” *Id.*, citing *Hanson*, 121 Wn.2d at 563.

In addition, “[m]alicious prosecution actions are not favored in law.” *Rodriguez*, 158 Wn. App. at 728-29, citing *Hanson*, 121 Wn.2d at 557. This is because an individual ““who acts in good faith shall not be subjected to damages merely because the accused is not convicted.”” *Id.*, citing *Hanson*, 121 Wn.2d at 557 (quoting *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942)).

Finally, probable cause exists

where the facts and circumstances within the arresting officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed.

Rodriguez, 158 Wn. App. at 729, citing *Bender [v. Seattle]*, 99 Wn. 2d [582] at 597, 664 P.2d 492 [(1993)] (quoting *State v. Gluck*, 83 Wn.2d 424, 426-27, 518 P.2d 703 (1974)).

Here, probable cause existed as a matter of law to support the charge of assault of a child, third degree, under RCW 9A.36.140(1), which occurs where the accused is 18 or older, the child is under the age of 13, and the accused commits the crime of assault in the third degree as defined in RCW 9A.36.031(d) or (f). RCW 9A.36.031(f) provides in relevant part

that a person is guilty of assault in the third degree if he or she “[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” By the time Detectives Schallert and Gilchrist had concluded their investigation and provided the CCSO case file to the Prosecuting Attorney’s Office, they had

(1) reviewed the reports of Deputy Stumph and Sergeant Crusier which included photos of the numerous injuries visible on N.R. on May 11, 2010 and information regarding N.R.’s statement to Bonnell that her mom caused the injury to her nose and conflicting statements made by the Roes about the cause of the injuries when initially interviewed (CP 288 - 302);

(2) reviewed additional photos of current and previous similar injuries on N.R. provided by Bonnell (CP 303 - 309), and Detective Schallert saw N.R. in person and took additional photos of the still visible injuries on May 14, 2010 (CP 333 - 342);

(3) interviewed Heather Bonnell (CP 327 - 332) and obtained a follow up written statement from Bonnell (CP 340 - 349);

(4) interviewed the Roes and were given other possible explanations for N.R.’s bruising and injuries that N.R. had a medical condition which made her bruise easily and an equilibrium issue which caused her to lose her balance and fall often (CP 289); (CP 407 - 409, 439 - 441, 494 - 497), but an examination by a medical doctor found no evidence of either condition (CP 396), and CPS reported that the foster parents who had current custody of N.R. relayed to CPS seeing no signs of excessive bruising or equilibrium problems since they were given custody of her (CP 401);

(5) obtained a copy of a report by DSHS contract consultant Dr. Deborah Hall in which Dr. Hall stated that, based upon her review of records and photos related to the case, “[t]he findings on this case are all very concerning for physical abuse. The bruising of the ears in this pattern is nearly diagnostic of abuse” (CP 395 - 396);

(6) reviewed a report of a Sheriff’s Office investigation of an allegation of abuse of N.R. by Teri Roe in 2008 during which no injuries to N.R. were found (CP 293 - 295), but three witnesses had provided statements saying they had each witnessed physical and verbal abuse of N.R. by Teri Roe, and Detective Schallert re-interviewed all three witnesses who all confirmed their prior statements (CP 350 – 364, CP 390); and

(7) investigated the Roes’ claims that Bonnell had perhaps inflicted the injuries on N.R. so that she could falsely accuse Teri Roe and gain custody of N.R. herself, by interviewing Bonnell a second time (CP 518 - 520), and by searches of texts from Teri Roe, one of which showed that N.R. was with Teri when the injuries to N.R.’s face and nose probably occurred (CP 376, CP 391-94).⁸

Given these facts, probable cause is established as a matter of law.

Probable cause may also be established as a matter of law where “. . . unrefuted evidence shows that before instituting criminal proceedings, a full and fair disclosure was made of all known material facts, and the prosecutor thereupon filed a charge.” *Rodriguez*, 158 Wn.

⁸ Detective Gilchrist also administered the CVSA exams to both Heather Bonnell and Teri Roe, the results of which showed Bonnell was truthful when denying any abuse of N.R., whereas Teri Roe’s CVSA exam showed that she was being deceptive when denying abuse of N.R. (CP 410 – 413; CP 521-524. Although these results were not admissible at Teri Roe’s criminal trial and so were not identified in Detective Schallert’s Probable Cause Statement (CP 400-402), they still informed the Detectives’ decisions during the course of the investigation.

App. at 730, citing *Bender*, 99 Wn.2d at 593; *see also*, *Youker v. Douglas County*, 162 Wn. App. 448, 462-63, 258 P.3d 60, *review denied*, 173 Wn.2d 1002, 268 P.3d 942 (2011), and cases cited therein. Here, there is no evidence that a full and fair disclosure of all known material facts was not made to the prosecutor. In fact, the unrefuted evidence establishes that the complete CCSO case investigation file was provided to the Prosecutor's Office. CP 286, ¶ 10. Thus, probable cause is established for the criminal charge as a matter of law.

Even if there were a fact issue found as to probable cause, dismissal is still required due to the absence of any evidence of malice on the part of Detectives Schallert or Gilchrist. *See, Youker*, 162 Wn. App. at 465 (insufficient evidence of malice is an "independently sufficient" reason to dismiss a malicious prosecution claim, even where probable cause is absent). Malice

. . . may be inferred from lack of probable cause and from proof that the investigation or prosecution was undertaken with improper motives or reckless disregard for the plaintiff's rights. . . . But malice may not be inferred from the lack of probable cause alone; for the inference of malice to be justified, the plaintiff must demonstrate affirmative acts disclosing at least some feeling of " " "bitterness, animosity or vindictiveness towards the appellant." " " . . . The "reckless disregard" that can support an inference of malice requires proof of bad faith, a higher standard than negligence. . . . Recklessness may be shown by establishing that the defendant actually entertained serious doubts. . . .

Youker, 162 Wn. App. at 464 (internal citation omitted). Here, the undisputed evidence establishes that neither Detective Schallert nor Detective Gilchrist engaged in affirmative acts disclosing bitterness, animosity or vindictiveness towards the Roes, or that either Detective Schallert or Detective Gilchrist actually entertained serious doubts about Teri Roe's alleged innocence. To the contrary, the undisputed evidence establishes that neither had been involved in any criminal investigations of the Roes before they were assigned this case, and that they both treated it the same as all other child abuse cases they have investigated. CP 286, ¶ 11; CP 405, ¶ 8.

E. Summary judgment in favor of the County Respondents should also be affirmed because they are entitled to the protection of the immunity from liability under RCW 10.99.070 for good faith acts or omissions by peace officers in actions arising from an alleged incident of domestic violence.

In the oral ruling granting the County Respondents' summary judgment motion, the Honorable Judge Carol Murphy explained that “. . . the Court analyzed each element of each of those claims [negligent investigation, outrage and malicious prosecution] in order to determine whether the record in this case meets the standard to preclude summary judgment” VRP, p. 37, lns. 20-24. The oral ruling included no mention of immunities under RCW 10.99.070 and RCW 4.24.595(1), although these immunities were relied upon by the County Respondents in

support of their summary judgment and were fully briefed by the parties. CP 206; CP 1266-67; CP 1370-75. However, an appellate court “. . . may affirm summary judgment on any theory established and supported by the moving party, even if it is not the basis relied upon by the trial court.” *Skyline Contractors, Inc., v. Spokane Housing Authority*, 172 Wash. App. 193, 289 P.3d 690 (2012), citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

RCW 10.99.070 provides as follows:

A peace officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

“Domestic violence” includes but is not limited to certain crimes, including assault in the third degree under RCW 9A.36.031 “. . . when committed by one family or household member against another.” RCW 10.99.020(5)(a). “Family or household members” means, among others, “. . . persons who have a biological or legal parent-child relationship.” RCW 10.99.020(3). Because the incident being investigated involved an alleged assault by Teri Roe of her daughter, N.R., RCW 10.99.070 provides immunity to the County Respondents from liability for the criminal investigation, including all acts or omissions during the

investigation culminating in Teri Roe's arrest on July 14, 2010, as long as they were done in good faith.

“The standard definition of good faith is a state of mind indicating honesty and lawfulness of purpose.” *Whaley v. State*, 90 Wn. App. 658, 669, 956 P.2d 1100 (1998), citing *Tank v. State Farm*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986). None of the evidence cited by the Roes in opposition to the County Respondents' summary judgment motion before the trial court raises a genuine issue of material fact regarding either detectives' good faith in the course of conducting the investigation. Preliminarily, it is apparent that, through semantic slight-of-hand, the Roes attempted to improperly apply their evidence generally to both detectives. Although in their argument the Roes attributed subjective characterizations of motive made by Nikole Easterly and Raymond Hamm to “defendants,” (CP 1266, ln. 14 – CP 1267, ln. 3), the testimony relied upon attributes these characterizations only to Detective Schallert. *See*, CP 1263, ln. 14 – CP 1264, ln. 10. Consequently, Detective Gilchrist must be found to have acted in good faith due to a complete absence of evidence to the contrary.

Nor did the Roes' evidence warrant a finding of a genuine issue of material fact regarding Detective Schallert's good faith. The Roes relied mainly upon isolated statements by their daughter, Nikole Easterly,

highlighting a portion of her dependency proceeding deposition testimony to the effect that defendant Schallert seemed to her (without knowledge of Detective Schallert's demeanor during other investigations for comparison purposes) to be "gung ho" and "very emotional to the case" when interviewing her. CP 1266, Ins. 21-23, citing CP 1263-64. The context of Detective Schallert's interview of Nikole is more important than Nikole's subjective characterizations of Detective Schallert's demeanor. This is the same Nikole Easterly who, along with her boyfriend Raymond Hamm, had reported Teri Roe's physical and mental abuse of N.R. in 2008. CP 293 - 294. When Detective Schallert interviewed Nikole in 2010 about her observations of abuse in 2008, Nikole did not deny or contradict any of the extensive and degrading abuse she had reported. CP 360 - 62. In addition, the Nikole Easterly dependency proceeding deposition excerpts selectively quoted in the Roes' opposing pleadings below included the following disturbing and telling testimony in regard to why Nikole suspected Heather Bonnell may have caused the injuries to N.R. in 2010:

I'm thinking that she put the scratch marks on [N.R.], because I know for a fact that my mom leaves dirty scratch marks and her fingernails are very short and stubby. So it just doesn't play in - it doesn't match my mom. My mom, if she was going to leave bruises, she would be pretty smart about it. She wouldn't just leave them all over her face. She's not that stupid. I got to give my mom more credit than that.

CP 619 (Easterly Deposition, p. 50), Ins. 8-15 (emphasis added). Given these facts, persistent and challenging questioning by Detective Schallert of Nikole is not probative of dishonesty or an unlawful purpose. Persistence and diligence are not evidence of lack of good faith; they are the hallmarks of a thorough police investigation.

Similarly, Raymond Hamm's subjective characterizations of Detective Schallert as "harsh" and "angry" are not probative of dishonesty or an unlawful purpose. Like Nikole Easterly, Raymond Hamm did not deny or contradict the abuse he reported in 2008 when interviewed by defendant Schallert in 2010. *See*, CP 294; CP 357 - 359; CP 363-364.

Given this evidence, the record does not establish a genuine issue of material fact regarding good faith in conducting the investigation, and the immunity provided by RCW 10.99.070 applies as a bar to all three claims.

F. Summary judgment in favor of the County Respondents should also be affirmed to the extent the claims are based upon actions leading up to the protective custody decision, because they are entitled to the protection of the immunity from liability under RCW 4.24.595 for acts or omissions not amounting to gross negligence while conducting placement investigations prior to a shelter care hearing.

The County Respondents are also immune from liability under a statutory scheme which declares that a child's health and safety interests

prevail over conflicting legal interests of a parent. Specifically, RCW 26.44.280 provides in relevant part as follows:

Consistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and mental health, and safety, and the requirement that the child's health and safety interests prevail over conflicting legal interests of a parent . . . the liability of governmental entities, and their officers, agents, employees, and volunteers, to parents . . . accused of abuse or neglect is limited as provided in RCW 4.24.595.

RCW 4.24.595(1) provides in relevant part as follows:

Governmental entities, and their officers, agents, employees and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW . . . unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

Here, the facts outlined above regarding the actions of Deputy Stumph and Sergeant Crusier in responding to the initial report of abuse on May 11, 2010, taking protective custody of N.R. that same day, and transferring her custody to DSHS unquestionably fit within the immunity provided by RCW 4.24.595(1). Up to that point, the Sheriff's Office investigation concerned the placement of N.R., and it was an emergent placement investigation because it occurred before any shelter care hearing was held, or even scheduled. CP 535 – 569.

Nor does the record support a reasonable conclusion that the conduct during the emergent placement investigation amounted to gross negligence. Gross negligence “is failure to exercise slight care.” *Kelley v. State*, 104 Wash. App. 328, 333, 17 P.3d 1189 (2000), citing *Nist v. Tudor*, 67 Wn.2d 322, 330, 407 P.2d 798 (1965). To prove gross negligence requires “substantial evidence of serious negligence.” *Id.*, citing *Tudor*, 67 Wn.2d at 331. The actions taken by Deputy Stumph and Sergeant Crusier fall far short of this standard.

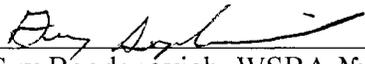
Consequently, the immunity under RCW 4.24.595 applies to all of the Roes’ claims against the County Respondents, to the extent they are based upon actions up to and including taking protective custody of N.R.

V. CONCLUSION

Based upon the foregoing, the Cowlitz County Respondents respectfully request that the Order Granting Cowlitz County Defendants’ Summary Judgment Motion on State Law Claims be affirmed.

RESPECTFULLY SUBMITTED this 28th day of April, 2016.

LAW, LYMAN, DANIEL,
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, on the following parties in the manner indicated below:

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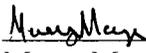
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STATE OF WASHINGTON
BY AM
DEPUTY

By overnight UPS and e-mail to the addresses listed above on the date stated below:

Dated this 28th day of April, 2016.



Marry Marze