

NO. 48502-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TAMIKA BOONE, individually, and on behalf of her minor children,
D.B., individually, and D.B., individually,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and PATRICIA SMITH d/b/a STARCHILD
DAYCARE,

Respondents.

APPELLANTS' REPLY BRIEF

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I. REPLY

The Appellants/Plaintiffs (hereinafter “the Boone family”) submit this memorandum in reply to the pending appeal. This appeal involves whether or not this matter should be submitted for jury consideration in accord with CR 56. In that regard, it must be noted that DSHS’s own internal post-closure investigatory files confirm the most pertinent facts including (1) the abuse history associated directly with the Boone children, (2) the prior CPS referrals, and (3) Mr. Ali’s extensive and disqualifying background. Specifically, DSHS records from 2006 reflect as follows:

Investigator spoke with Detective Lindsey Wade and she stated that she had been assigned to the referral. She asked if investigator was aware of Abdullah Ali’s history. She stated his name is also Gary Alexander. She reported the Tacoma Police Department has a history with Mr. Ali. She reported he had been arrested a

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* * *

number a times for various violations since 1990 and is late as 2005. She was asked what his listed home address is and she reported it was 1909 south M street and that is the only address they had ever contacted him at. She stated the department should contact LESA for a full list of his criminal history. She stated she would speak with the prosecutor and try to see if an interview could be conducted on the child in [REDACTED]. She asked for and was given the child’s address and contact information as well as the information for [REDACTED]. She stated she would start by calling the child’s mother in [REDACTED].

LESA records was contacted and they will pull the records for the last 15 years and send them to investigator.

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* * *

¹ CP 191-223

² *Id.*

DLR/CPS has uncovered information on the provider's husband Abdullah which show a continuing extensive criminal history. Many of the offenses are disqualifying. The Tacoma Police Department shows Abdullah residing at the provider's address since the first offense. Last offense was 2005. Provider has been licensed (this time) since 1998 and Abdullah and [REDACTED] have never been listed on the application. The provider admitted to this licensor and the DLR/CPS investigator that Abdullah resides in her home some of the time. Based on this new evidence, another staffing was held between AAG (Lucretia Greer), DLR/CPS (Eavanne O'Donoghue and Gerard Lloyd) and licensing (Sheila Jelks and Ingrid McKinney). It now appears the provider now only neglected to list [REDACTED] on the application but has been less than truthful about a number things. She has failed to report the sexual abuse when she was contacted by the referant on 1/24/06, failed to list [REDACTED] and Abdullah on any of her licensing applications, failed to report that Abdullah was residing in the home and failed to submit a criminal background check on him. The Department has concluded that the safety and welfare of the children are now a serious concern. The Department has elected to summary/suspend the license at this time.

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DSHS's own records confirm that Mr. Ali had an extensive and disqualifying record, that the information contained within the record was discoverable prior to 2006, and if properly discovered should have prevented the Boone children from being abused.⁴ According to the expert testimony of Barbara Stone, Mr. Ali's background should have been discovered during licensing inquiries and double-checked in relation to successive CPS referrals from 1992 and 1997 that originated within the Star Child daycare.⁵ Additionally, as a product of the 2006 CPS referral, the Boone family should have been warned of the dangers posed within the Star Child daycare, but were not.⁶ Based upon the extensive factual record, as confirmed by DSHS, there is an abundance of evidence upon which this matter should be remanded for trial.

³ *Id.*

⁴ *Id.*

⁵ CP 191-212

⁶ *Id.*

II. ARGUMENT RE: BACKGROUND CHECK MANDATE & THE DUTY TO THE BOONE CHILDREN

DSHS offers a long and winding brief that does not provide much specificity of response to the actual arguments that were raised by the Boone family. On the background check issue, the purpose of RCW 43.43.832 and the related regulations, WAC 388-155-070(c)(ii); WAC 388-06-0130, is clear: to protect children in childcare facilities. In this regard, according to DSHS expert Barbara Stone, the Star Child daycare should have been shut down long before the Boone children were abused.

*DSHS should have conducted a LESA background check of all the individuals that might have unsupervised access to children in any daycare facility. See RCW 43.43.832; WAC 388-155-070(c)(ii). As documented on February 18, 1995, DSHS was informed that in relation to the Star Child daycare facility, these individuals included Mr. Ali. In this regard, it has been confirmed by DSHS that Mr. Ali has possessed disqualifying convictions that should have precluded Ms. Smith from being permitted to operate the Star Child daycare facility ever since 1990.*⁷

Ms. Stone also opined that the CPS referrals from 1992 and 1997 should have prompted a full background check upon Mr. Ali.⁸ On this basis alone, in accord with CR 56, this matter should be remanded for trial.

In response, DSHS argues that no duty was owed to the Boone children specifically, and that the breaches that pre-dated the Boone's patronage of the Star Child daycare cannot give rise to any duty. DSHS's

⁷ CP 191-212

⁸ CP 191-212

arguments are contrary to law and principles of foreseeability. Foreseeability turns upon the “general field of danger” that should have been anticipated rather than the identity of the “particular” victim. *McLeod v. Grant School District*, 42 Wn.2d 316, 255 P.2d 360 (1953) (children being assaulted in an unsupervised room is foreseeable). “The sequence of events need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are met.” *Rickstad*, at 269. In this regard, by failing to conduct proper background checks, DSHS should have foreseen that children, such as the Boone twins, could be injured. On this basis, in relation to the duty issues, DSHS’s argument should not be well taken.

**III. ARGUMENT RE: THE CPS REFERRALS FROM 1992,
1997, and 2006 WERE NEGLIGENTLY HANDLED
AND GIVE RISE TO A DUTY OF CARE TO
FORESSEEABLY INJURED CHILDREN**

DSHS inaccurately contends that the CPS referrals at issue from 1992, 1997, and 2006 do not give rise to a duty of care. “It is well established that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action where the

statute is violated and the injured party was one of the persons designed to be protected.” *Donaldson v. City of Seattle*, 64 Wash. App. 661, 667, 831 P.2d 1098 (1992). The law in Washington is very clear: “RCW 26.44.050 creates a duty to **all** children who may be abused or neglected, regardless of the relationship between the child and his or her alleged abuser.” *Lewis v. Whatcom County*, 136 Wash. App. 450, 452, 149 P.3d 686 (2006) (emphasis added); *see also Yonker v. Department of Social & Health Services*, 85 Wash. App. 71, 930 P.2d 958 (1997). On page 13 on DSHS’s response, it was conceded that “*the duty under RCW 26.44.050 is owed to the child who is the subject of the referral. If during an investigation DSHS has reasonable cause to believe other children are at risk, the duty to may extend to those other children.*”⁹ In this instance, the “other children” at issue were all of the patrons of the Star Child daycare including the Boone twins.¹⁰

Ms. Stone opined that the CPS referrals from 1992 and 1997 were negligently handled and, at a minimum, should have prompted an exploration into Mr. Ali’s background:

The record also reflects that the Child Protective Services investigation that originated on May 1, 1992 was also handled negligently in that the intake was never fully investigated. The documents attached to the declaration of Mary Quinlan document the fact that the nature of the

⁹ DSHS Response Brief, Page 13

¹⁰ *Id.*

allegations and that the investigation was never completed:

WILKINSON, ROBERT, A. (14414)	SMITH, PATRICIA, A. (608411)	Sexual Abuse	Unable to complete invest - No Finding
<p>Describe the nature and extent of the alleged maltreatment of concern: ROBERT WILKINSON (AGE 2 1/2) WAS S/A BY PARTIES UNKNOWN. REFERENT STATES S/A HAS BEEN SUBSTANTIATED BY PHYSICAL EXAM BY DR. ROSS KENDALL (REGULAR PHYSICIAN IS DR. MCGROARTY). CHILD IS SCHEDULED FOR A PROCTOSCOPY ON MAY 6 TO FURTHER ASSESS RECTUM FOR POSSIBLE DAMAGE. CHILD WOULD NOT COOPERATE WITH INITIAL EXAMINATION SO PHYSICIAN WILL SEDATE CHILD AND DO PROCTOSCOPY. ***** CHILD INDICATED TO PARENTS THAT HIS "POO POO" HURT. CHILD DISCLOSED THAT A MAN AND A WOMAN STUCK A STICK UP HIS BUTT. CHILD WOULD NOT DISCLOSE ANY FURTHER INFORMATION. ***** REFERENT STATES ROBERTS WAS AT PATRICIA SMITH'S DAYCARE, 1908 SOUTH M STREET, PHONE 572-7409. THIS WAS A DAYCARE HOME. REFERENT STATES CHILD WAS AT THIS DAYCARE ONLY ONE TIME. THAT WAS IN FEBRUARY 1992. IT WAS AFTER THE STAY AT THE DAYCARE THAT CHILD BEGAN COMPLAINING ABOUT HIS "POO POO" HURTING. THE NEXT TIME REFERENT TOOK CHILD TO STAY AT THAT DAYCARE - THE DAYCARE WAS CLOSED. OUT OF BUSINESS.</p>			

These were very serious allegations that should have prompted some sort of disposition other than "no finding" whatsoever. The only investigatory record reflects that the investigator was informed that Mr. Ali was Ms. Smith's husband, and that he purportedly was not home at the time of the alleged assault: "Ms. Smith was contacted...Her husband was not home..." A diligent Child Protective Services investigation would have required further confirmation regarding Mr. Ali's location. Moreover, the allegation also should have prompted a full background check to be conducted upon Mr. Ali, but this never occurred.

The intake dated March 25, 1997 was also negligently handled. As documented the intake indicated that children at the daycare were involved in sexualized behaviors that prompted the referral: "CRYSTAL HAS BEGUN CERTAIN ACTING OUT ACTIVITIES THAT ARE SEXUAL IN NATURE..." The referral was never referred to Child Protective Services:

This referral and intake was mishandled in violation of the mandatory reporting obligations under RCW 26.44.030. Based upon the fact that the allegation involved possible sexual impropriety, the social worker that accepted the referral was required to send the information to Child Protective Services for investigation. That never occurred. Had such an investigation occurred, at a minimum, a diligent investigation should have revealed that Mr. Ali was residing at the Star Child daycare and was not qualified,

based upon background data, to have unsupervised access to children.

DSHS's own records confirm that the 1997 referral was not properly reported to CPS for an investigation:

SER Text

Patricia Smith personally delivered a letter, August 2, 2006, requesting a copy of the referral alleging sexual misconduct in 1997. 5-day letter has been sent along with a redacted copy of the licensing investigation into the allegations reported on 3/25/97. There was some confusion whether this was a CPS or licensing and based on the C/AN findings of Physical Neglect and Sexual Abuse both None. It appears the referral was referred to CPS and then was referred to licensing. CPS was never involved in this investigation per GUI.

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This referral and intake was mishandled in violation of the mandatory reporting obligations under RCW 26.44.030 and 050. According to DSHS expert Barbara Stone, the associated failures should have led to the prevention of abuse of the Boone children.

Additionally, as a result of the 2006 CPS referral, the Star Child's daycare's license was summarily suspended.¹² As an extension of that investigation, in accord with RCW Chapter 26.44, DSHS attempted to inform all of the families of the danger that existed within the home.¹³ At common law, "[a]s a general rule, one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance." *Borden v. Olympia*, 113 Wash. App. 359, 53 P.3d 1020 (2002); *Pruitt v. Savage*, 128 Wash. App.

¹¹ CP 223

¹² CP 215

¹³ CP 174, 198-99.

327, 115 P.3d 1000 (2005). In this regard, according to Ms. Stone, DSHS failed to properly advise the Boone family:

After the sexual assault allegations involving Marcus (mother Royal Princess) dated January 26, 2006, DSHS failed to protect children that remained in the daycare, including the twins, for several months thereafter. The Star Child daycare was closed in May of 2006 and, only then, stopped attending. DSHS should have initiated a summary suspension and/or immediately informed all of the parents that were patronizing the facility that Mr. Ali was unqualified and that the son, Rasul Mohammed, was accused of molesting another child within the home. DSHS did send out some notices to certain families in letters dated March 12, 2006 of the concerns at the Star Child daycare:

Dear Ms. [REDACTED]

I am writing in my capacity as a State of Washington, Division of Licensed Resources, Child Protective Services Facility Investigator, to bring the following information to your attention.

A person who lived in the Star Child Day Care was recently accused of child molestation involving a daycare child.

Parents may, understandably, be concerned that a person accused of child molestation was in the same premises as their child's day care. If you would like your child interviewed and/or if your child has indicated, either directly or indirectly (through behavior changes, etc.), that he or she may have been molested, you should contact me so that an interview of your child can be arranged. Also, please feel free to call if you simply have questions you would like answered.

You are encouraged not to discuss the matter with your child(ren). Direct questioning of children who have not previously reported sexual abuse or inappropriate touching, if not handled properly, poses two risks: 1) it can jeopardize investigations of legitimate claims; and, 2) it can lead to claims of abuse when no abuse or touching actually occurred.

Please feel free to contact me at 983-6134 by 3/31/06 if you would like to discuss any questions or concerns that you may have.

Sincerely,
Gerad Lloyd

However, the twins' mother, Tamika Boone, was never provided such a notice. As a result, the twins continued to reside in the harmful environment for several avoidable and harmful months with their abusers, Mr. Ali and Mr.

*Mohammed.*¹⁴

DSHS own records confirm that the Boone twins continued to patronize the Star Child daycare, and that they fell victim to Mr. Ali:

I. Findings			
SMITH, PATRICIA A		Person ID: [REDACTED]	Role: Subject
Referral ID	CA/N	Findings	
1749056	Negligent Treatment or Maltreatment	Founded	

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* * *

ALI, ABDULLAH		Person ID: [REDACTED]	Role: Subject
Referral ID	CA/N	Findings	
1749056	Sexual Abuse	Founded	

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Based upon the evidence of DSHS and CPS's failures in relation to the succession of referrals from 1992, 1996, and 2006, in accord with the duties set forth under RCW Chapter 26.44 and CR 56 summary judgment standards, this matter should proceed to a trial on the merits.

IV. ARGUMENT RE: CAUSATION

“Negligence and proximate cause are ordinarily factual issues, precluding summary judgment.” Tegland and Ende, 15A Washington Practice: Washington Handbook on Civil Procedure Section 69:20, at 581 (2012 ed.). Proximate cause is an essential element of any negligence

¹⁴ CP 191-212

¹⁵ CP 203-5

¹⁶ *Id.*

theory; it consists of two elements: (1) factual or “but for” causation and (2) legal causation. *Baughn v. Honda Motor Corp.*, 107 Wash.2d at 142, 727 P.2d 655; *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Factual causation is established between a defendant's act and a subsequent injury only where it can be said the injury would not have occurred “but for” the defendant's act. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Torts* § 42, at 273 **1184 (5th ed. 1984). As noted in *Baughn*, 107 Wash.2d at 142, 727 P.2d 655: “Cause in fact refers to the ... physical connection between an act and an injury.” The existence of factual causation is generally a question of fact for the jury. *Baughn*, at 142, 727 P.2d 655 (1986). According to DSHS expert Barbara Stone’s declaration, the abuse of the Boone twins was preventable and never should have occurred.¹⁷ There is nothing speculative about this causative correlation to the assorted CPS failures from 1992, 1996, and 2006. On this evidence, this matter should be remanded for a trial on the merits.

V. CONCLUSION

Based upon the evidence and law cited herein, it is clear that DSHS owed the Boone family a duty of care to conduct background checks of Mr. Ali and the properly handle the other indications of abuse

¹⁷ CP 191-212

within the daycare facility. DSHS failed to do so. Therefore, DSHS' motion for summary judgment was improperly granted.

DATED this 27th day of September, 2016.

Respectfully submitted

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellants' Reply Brief

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