

FILED
COURT OF APPEALS
DIVISION II

2016 OCT 10 PM 3:58

STATE OF WASHINGTON

BY  _____
DEPUTY

NO. ~~V~~48828-1-II

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

JERRY PETERSEN, as guardian for T.P., a minor,

APPELLANT,

v.

STATE OF WASHINGTON,

RESPONDENT.

APPEAL FROM THURSTON COUNTY SUPERIOR COURT

REPLY BRIEF OF APPELLANT T.P. a minor

Tyler K. Firkins
Van Siclén, Stocks & Firkins
721 45th St NE
Auburn, WA 98002
253-859-8899
tfirkins@vansiclen.com

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. Argument.....	1
1. An emergent placement investigation is one that occurs within the three days before a shelter care hearing.....	1
2. Whether DSHS’ investigation was negligent and whether A harmful placement occurred are not at issue in this appeal.....	2
3. Genuine issues of fact exist about whether DSHS proximately caused TP’s injuries.....	3
4. The public duty doctrine has no application to TP’s stay in foster care.....	6
5. It was foreseeable that TP would be injured by virtue of her placement with the Halls.....	8
II. Conclusion.....	10

TABLE OF AUTHORITIES

Page No

Washington Cases:

<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	2
<i>J.N. v. Bellingham School District No. 501.</i> , 74 Wn. App. 49, 871 P.2d 1106 (1994).....	9
<i>Joyce v. State</i> , 155 Wn.2d 306, 322, 119 P.3d 825 (2005).....	4
<i>Lewis v. Whatcom County</i> , 136 Wn.2d 450, 149 P.3d 686 (2006).....	2
<i>Mancini v. City of Tacoma</i> , 188 Wn. App. 1006, 2015 WL 3562229 at *6 (2015).....	6
<i>M.W. v. Dep't of Soc. & Health Servs.</i> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	3
<i>McLeod v. Grant Cnt. Sch. Dist., No. 128</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	4, 9
<i>Niece v. Elmview Grp. Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	7
<i>Roake v. Delman</i> , 194 W. App. 442, 447, 377 P.3d 258 (2016).....	1
<i>Ronald Sewer Dist. v. Brill</i> , 28 Wn. App. 176, 180, 622 P.2d 393 (1980).....	3
<i>Schooley v. Pinch's Deli Mkt., Inc.</i> , 134 Wn.2d 468, 478, 951 P.2d 749 (1998).....	3, 4
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	8

<i>Shepard v. Mickle</i> , 75 Wn. App. 201, 877 P.2d 220 (1994).....	7
<i>Terrell C. v. State</i> , 120 Wn. App. 20, 84 P.3d 899 (2004).....	7, 8
<i>Tyner v. State Dep't of Soc. & Health Servs.</i> , 141 Wn.2d 68, 1 P.2d 1148 (2000).....	2, 3, 4

Other Jurisdictions

<i>Cox v. Washington</i> , No. 14-05923RBL, 2015 WL 5825736 at *13 (W.D. Wash. Oct. 6, 2015)	7
---	---

Statutes

RCW 4.24.595(1).....	1
RCW 13.34.065	1
RCW 13.34.130	7

Other Authorities

Harper, Law of Torts, 14 § 7.....	4
Restatement (Second) of Torts § 320	6

I. ARGUMENT

1. An emergent placement investigation is one that occurs within the three days before a shelter care hearing.

An emergent placement investigation is defined as one “conducted prior to a shelter care hearing under RCW 13.34.065.” RCW 4.24.595(1). A shelter care hearing is a hearing that must occur within 72 hours after a child is taken into custody. RCW 13.34.065(1)(a). By incorporating the shelter care statute into the definition of an “emergent placement investigation,” the plain language of RCW 4.24.595 necessarily indicates that DSHS enjoys immunity only for that 72-hour period prior to the hearing.

DSHS nonetheless contends that an “emergent placement investigation” refers to any and all investigation conducted before a shelter care hearing, no matter how long ago the investigation commenced. This interpretation is not supported by the plain language of the statute and is inconsistent with both law and public policy. To be an emergent placement investigation, a *placement* must necessarily occur first. Had this not been the legislature’s intent, it would not have included the word “placement” in the statute. *Roake v. Delman*, 194 Wn. App. 442, 447, 377 P.3d 258 (2016) (legislature means exactly what it says).

Were this Court to accept DSHS' interpretation, it would completely eviscerate the tort of negligent investigation. If DSHS were immune from liability for all investigation before a child was taken into custody, its immunity would be near absolute until it or the police decided to remove a child from his or her home. If that were the case, then *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006), *Tyner v. State Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000), *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991), and numerous other cases could no longer be good law. Further, this near absolute immunity would incentivize DSHS to leave children in their homes, no matter how abusive, until they had completed their entire investigation. Surely this is not what the legislature intended.

Thus, contrary to the trial court's rulings, DSHS cannot possibly be immune for its entire pre-removal investigation, because DSHS received its first sexual abuse referral well over 72 hours before TP was ever removed from her father's care.

2. Whether DSHS' investigation was negligent and whether a harmful placement occurred are not at issue in this appeal.

DSHS contends that this court should not entertain this appeal because Appellant did not address the merits of her negligent investigation claim in her opening brief. This is incorrect. At the trial court, DSHS

asserted that proximate cause was lacking because TP's injuries were caused by court orders.¹ CP 464-67, 932-38. In other words, DSHS argued, and the trial court found, that the court orders were a superseding cause relieving DSHS of liability. This issue was addressed in Appellant's opening brief. Because the trial court dismissed Appellant's negligent investigation claim on this basis, the trial court had no need to address whether DSHS's investigation was biased or incomplete or whether a harmful placement occurred. Appellant is not required to address every single issue that Respondent *could have* raised at the trial court but did not. *See Ronald Sewer Dist. v. Brill*, 28 Wn. App. 176, 180, 622 P.2d 393 (1980). These issues are not properly before the court, and this Court should not consider them.

3. Genuine issues of fact exist about whether DSHS proximately caused TP's injuries.

Proximate cause consists of two elements: cause in fact and legal causation. *Tyner*, 141 Wn.2d at 82. Cause in fact is the actual "but for" cause of the injury. *Id.* at 82 (quoting *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998)). Legal causation focuses on

¹ DSHS also initially asserted that TP's injuries were caused by her parents, but it abandoned this argument on reply and the trial court did not address it. *See* CP 466-67, 932-38.

DSHS has never previously argued, with good reason, that TP was not subject to a harmful placement. Case law clearly establishes that removal from a non-abusive home constitutes a harmful placement. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003).

whether as a matter of policy, the connection between the ultimate result and act of the defendant is too remote to establish liability. *Tyner*, 141 Wn.2d at 82. Cause in fact is an issue for the jury and may be decided as a matter of law only when reasonable minds can come to only one conclusion. *Joyce v. State*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Legal cause is determined by the court as a matter of law. *Schooley*, 134 Wn.2d at 478.

There are more than sufficient facts for a jury to find that DSHS's negligent investigation was the proximate cause of TP's injuries.² Cause in fact is readily apparent from the record. TP was removed from her non-abusive home and placed into an abusive home because law enforcement received a report of sexual abuse. CP 513, 679. This report was provided to law enforcement directly by DSHS employee Evelyn Larson. CP 551-55. As articulated in Appellant's opening brief, had Larson bothered to investigate the claims made by O'Keefe and Calapp, she would have quickly realized that the story was made up and did not warrant referral to

² DSHS asserts that to survive summary judgment, the plaintiff must show that "the way in which" the defendant was negligent caused the plaintiff's injuries. DSHS cites no authority for this proposition, nor could it, as no such requirement exists. *See McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 322, 255 P.2d 360 (1953) ("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 present.") (citing Harper, Law of Torts, 14, § 7).

law enforcement. Instead, Larsen referred the matter to law enforcement simply because someone made an allegation of sexual abuse. CP 673. Thus, had DSHS not negligently failed to investigate the claims it received, TP would never have been removed from her father's home and placed with the Halls.

Further, DSHS' negligence was not so remote for legal causation to be lacking. Contrary to its assertions, DSHS failed to supply all material information to the court in the dependency proceedings. The dependency petition does not include O'Keefe's criminal record, because DSHS did not even request it until the day before it filed its petition. CP 541. O'Keefe's history with CPS is described only with cursory information, with full details omitted. CP 539-41. The dependency petition mentions only in passing that Mr. Petersen had full custody of TP, and notably omitted all information about *why*. CP 540. Finally, Mr. Petersen's Protection Order against O'Keefe was not attached, because Larsen thought it was irrelevant. CP 613. This document, an easily attainable public record, recounted O'Keefe's threats to have TP taken away from Mr. Petersen. CP 589.

These facts, in addition to those noted in Appellant's opening brief, are sufficient to create a triable issue of fact as to whether DSHS

proximately caused injury to TP by removing her from her home and placing her with the Halls.

4. The public duty doctrine has no application to TP's stay in foster care.

The special relationship doctrine is not an exception to the public duty doctrine, but a general tort principle recognizing that in certain circumstances, a person or entity has a duty that extends beyond the basic duty to not create dangerous situations. A private individual can have a special relationship with another, a principle that has been recognized long before the creation of the public duty doctrine. *See* Restatement of Torts (second), 867, § 320 (discussing cases decided prior to the revocation of sovereign immunity).

The public duty doctrine, on the other hand, is a product of the abrogation of sovereign immunity, designed to protect the State from liability for breach of a duty it owes only to the public at large. *Mancini v. City of Tacoma*, 188 Wn. App. 1006, 2015 WL 3562229 at *6 (2015) (unpublished). As Judge Dwyer explained at length in *Mancini*, the public duty doctrine has no application where the duty at issue is not a mandated duty. *Mancini*, at *7. In other words, the public duty doctrine cannot limit the duties owed by the State at common law. *Id.*

The duty placed on the State by virtue of a special relationship is a common law duty.³ A special relationship arises through either an express assurance of protection or assumption of a custodial role; an action that can be undertaken by anyone, not just the State. *See e.g. Niece v. Elmview Grp. Home*, 131 Wn. 2d 39, 929 P.2d 420 (1997) (group home for developmentally disabled); *Shepard v. Mielke*, 75 Wn. App. 201, 877 P.2d 220 (1994) (nursing home). The public duty doctrine therefore is not applicable to this case.

Here, DSHS assumed a custodial role when it placed TP into foster care instead of placing her with a relative. This is precisely the type of situation that the special relationship doctrine was designed to cover. *See Niece*, 131 Wn.2d at 44. DSHS' argument to the contrary "simply does not make sense," in light of the vulnerable situation it purposely placed TP in. *Cox v. Washington*, No. 14-05923RBL, 2015 WL 5825736, at *13 (W.D. Wash. Oct. 6, 2015), *reconsideration denied*, No. C14-5923 RBL, 2015 WL 8539910 (W.D. Wash. Dec. 11, 2015).

Terrell C. v. State, 120 Wn. App. 20, 84 P.3d 899 (2004), cited by DSHS, is inapposite. In that case, much like in *Sheikh v. Choe*, 156

³ Furthermore, DSHS has no mandated duty to assume the care and custody of dependent children. To the contrary, the legislature has provided that dependent children should be placed in the care of relatives, and only in the most unusual circumstances is foster care to be considered. RCW 13.34.130(3).

Wn.2d 441, 128 P.3d 574 (2006), the plaintiff claimed that her son was injured by other children who happened to be subject to dependency proceedings. The court held that DSHS did not have a duty to children outside of its custody. In so holding, the court stated: “Any ‘ongoing’ relationship between the social worker and the child is **to prevent future harm to that child**, not to protect members of the community from harm.” *Terrell C.*, 120 Wn. App. at 28 (emphasis added). *Terrell C.* explicitly recognizes, not disavows, DSHS’ duty to prevent harm to dependent children like TP.

Courts are nearly universal in holding that the State has a duty to ensure the safety of children it places in foster care. A reasonable jury could conclude that DSHS breached this duty, by failing to consider whether the Hall home was appropriate in the first place, and by ignoring all of the red flags raised while TP remained in the home. The trial court erred when it decided otherwise.

5. It was foreseeable that TP would be injured by virtue of her placement with the Halls.

DSHS contends that it was not foreseeable that TP would be abused by the Halls, and therefore it is not liable to any harm caused to her. DSHS too narrowly construes the question of foreseeability. “Whether foreseeability is being considered from the standpoint of

negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). Foreseeability is a question of fact for the jury to decide. *Id.* at 324.

In *J.N. v. Bellingham School District No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994), a first grade student was sexually assaulted by a fourth grade student in an unsupervised bathroom. In determining the occurrence was “foreseeable,” the court held:

Here, the general field of danger - harm to a pupil caused by another pupil – flowed from the arguably inadequate recess supervision and the presence of nearby, assessable, and generally unsupervised restrooms. It is irrelevant to the inquiry on summary judgment that the particular injury that in fact occurred was a criminal assault or that it was sexual in nature. All that is required is evidence that the district knew or in the exercise of reasonable care should have known of the risks that resulted in the harm’s occurrence.

J.N., 74 Wn. App. at 58. When a child is placed in the home of a total stranger, there is always some risk that the child may be harmed, physically, emotionally, or psychologically. Further, given the prior reports of abuse of a young girl by GH and Mrs. Hall (and Mrs. Hall’s defensive behavior in response), and the Halls’ specific request that no girls be placed in their home, there is evidence to suggest that the Hall

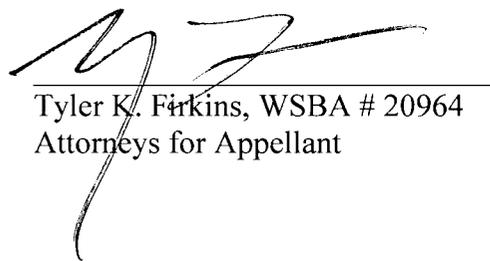
home would be more injurious than helpful to a young girl like TP. A jury could find that the psychological harm that came to TP was within the field of danger foreseeable to DSHS. It was error for the trial court to dismiss TP's negligence claim as a matter of law.

II. CONCLUSION

The facts presented to the trial court were sufficient for a jury to find that DSHS negligently investigated the reports of child abuse made by O'Keefe and Calapp, and that TP suffered injury as a result. The facts are also sufficient for the jury to find that DSHS negligently failed to investigate the Hall home, both before and after TP was placed there. The decision of the trial court should be REVERSED and this matter remanded for further proceedings.

DATED this 10th day of October, 2016.

VAN SICLEN, STOCKS & FIRKINS



Tyler K. Firkins, WSBA # 20964
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on October 10, 2016, I caused a copy of the foregoing document to be served on the following party of record and/or interest party as follows:

Elizabeth Baker
Assistant Attorney General
Attorney General of Washington
Torts Division
7141 Cleanwater Dr. SW
PO Box 40126
Olympia, WA 98504-0126
360-586-6300
By E-Mail and ABC Legal Messengers

DATED this 10th day of October, 2016 at Auburn, Washington.



Diana M. Butler