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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

NO. ~~X~~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

OPENING BRIEF OF APPELLANT T.P. a minor

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I. INTRODUCTION

In 1990, the Washington legislature declared that “[t]he right of a child to basic nurturing includes the right to a safe, stable, and permanent home.” RCW 13.34.020. The Department of Social and Health Services (“DSHS”) is tasked with preserving these rights. Among its obligations under statute and the common law, are the duties to non-negligently investigate reports of child abuse and to ensure the safety of children in its custody.

For TP, however, DSHS did more to interfere with her right to a stable home than to preserve it. When CPS received a story of child abuse that was obviously false, DSHS accepted it at face value rather than doing any investigation. DSHS removed TP from a stable home with her father, and placed her into an abusive foster home. DSHS then neglected to investigate reports coming from the foster home, advocated placing TP with her severely drug-addicted mother, and continued to claim sexual abuse based on false or misleading second hand reports, even though TP herself disclosed no abuse whenever she was interviewed. A reasonable jury could find that these actions constitute negligence on DSHS’ behalf. This Court should REVERSE the trial court’s dismissal of TP’s claims and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by granting in part Defendants' first motion for summary judgment.
2. The Superior Court erred by granting Defendants' second motion for summary judgment.
3. The Superior Court erred by denying Plaintiffs' motion for reconsideration.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is DSHS entitled to qualified immunity under the emergent placement statute, where DSHS classified the investigation as non-emergent and did not remove the child until two weeks after it received the allegation of abuse?
2. Are there material issues of fact about whether DSHS adequately investigated Tina O'Keefe's allegations of abuse, both before and after removing TP from the home?
3. Does DSHS owe a common law duty to protect children it places into foster care?
4. Are there material issues of fact about whether DSHS acted negligently by placing TP and allowing her to remain in the abusive Hall foster home?

IV. STATEMENT OF THE CASE

A. DSHS fails to adequately investigate the claim made by Tina O'Keefe.

TP¹ is the child of Jerry Petersen and Tina O'Keefe. From nearly the day TP was born, O'Keefe began making false accusations of criminal activity by Mr. Petersen. In one such instance, O'Keefe tore up her own home and then scratched her own arms bloody before calling the police to report physical abuse by Mr. Petersen. CP 529-30. TP, who was three years old at the time, told the police that her mother had fabricated the incident. *Id.* Police then inspected Mr. Petersen's hands and observed that he did not have nails capable of making the kind of scratches on O'Keefe's arms. *Id.* O'Keefe was arrested for false reporting. *Id.*

Mr. Petersen got custody of TP in 2000 because the Court had concluded that O'Keefe could not provide an adequate home for the girl. In that case, the parenting plan evaluation filed by Family Court Investigations indicated that O'Keefe "suffers long-term impairment resulting from drug, alcohol, and prescription medication abuse that interferes with her performance of parenting functions." CP 547. Family Court Investigations recommended at that time that Ms. O'Keefe not even provide daycare for TP due to the danger. CP 547. O'Keefe had originally

¹ TP is currently still a minor and is referred to throughout this brief by her initials.

lost custody of TP after a DUI, during which she had TP in the car and was too high to remember TP's name. CP 547, 557.

By 2001, O'Keefe had an extensive criminal history and arrest record, mostly for drug offenses, but also for domestic violence against male partners, theft, and criminal impersonation. CP 534. O'Keefe also had an extensive record with DSHS dating back to 1991. CP 539-40. O'Keefe's older son, born with cocaine in his system in 1991, was the subject of a dependency petition in 1995 after O'Keefe was arrested for heroin trafficking. CP 538.

In June 2003, Mr. Petersen petitioned for a protection order after O'Keefe broke into his home, stole some items, then left increasingly angry voice mail messages, including one threatening, "Know what [Jerry], all gloves are off, guess what now, you're not gonna have a fucking job, you're not gonna have a daughter, you're not gonna have nothing." CP 589. Many of these incidents were reported to the Snohomish County Sheriff's Office, who kept its notes and copies of the voicemails on file. CP 586-91. The court granted Mr. Petersen a protection order on July 7th, 2003. CP 585. In response, O'Keefe threatened to call CPS and have TP taken away from him. CP 1172. It would not take her long to follow through on that threat.

Four days later, on July 11, 2003, O’Keefe called CPS to report that TP had been sexually abused by her father. CP 497. O’Keefe claimed to have received this information from Angela Calapp, Mr. Petersen’s then-girlfriend, who had called her a few days prior. CP 497. The referral was accepted for investigation. Although initially assigned a moderate but emergent risk tag, “this 3E changed to 3NE [non-emergent] after cc with ref, who detailed her concerns re her attempt to get custody, and related more specifically just what she heard from Jerry’s current girlfriend.” CP 498. The case was assigned to CPS investigator Evelyn Larsen.

Larsen attempted to meet with Mr. Petersen and TP on July 24, 2003, thirteen days after the initial referral. CP 510. Nobody was home at that time, so she left a card. On July 25, 2003, Larsen received two messages from Mr. Petersen attempting to reach her. CP 510. Larsen claimed she was not working that day, although it was a Friday. CP 510.

On July 28, 2003, Pixie Seeds, a friend of Tina O’Keefe, called CPS with a referral alleging a variety of bad acts by Mr. Petersen towards TP. CP 503. Among the allegations was a repeat of the allegation made by Tina O’Keefe on July 11, 2003. CP 504.

On July 29, Angela Calapp called Larsen directly to make allegations against Jerry Petersen. It was unclear to the worker how Calapp came to know that Larsen was investigating Petersen. CP 511. In

the “referral” Calapp tells Larsen that on July 27, 2003, TP allegedly reported for the first time that she had been abused by Mr. Petersen. CP 511. Ms. Calapp also stated to Ms. Larsen, in a readily apparent lie, that Calapp had met the mother for the *first time* on July 28, 2003, and reported the incident to her then. CP 511. Larsen’s own SER refuted the story, but she made no inquiry. Shortly after Calapp called Larsen, O’Keefe called Larsen and made yet another referral, adding to her previous report. CP 512. Rather than investigate the obvious efforts by Calapp and O’Keefe to fabricate abuse allegations, Larsen faxed the July 11, 2003 referral to Snohomish County Sheriff’s Office. CP 551-55.

The lie apparent in Calapp’s report was not the only thing Evelyn Larsen overlooked. On July 29, 2003, O’Keefe stated that TP had made a disclosure of sexual abuse at her day care, Judy’s Mother Goose. CP 512. Larsen never attempted to speak to anyone at the day care. CP 796.

Larsen did not review O’Keefe’s criminal record, DSHS record or any of the records from the earlier custody dispute before removing TP from the home. Larsen did not even look into the protection order despite being informed about it, because it was “an issue between the parents” and, in her mind, somehow not relevant to the matter. CP 613. These records were not presented to the dependency court or made a part of the dependency petition. CP 662. Larsen failed to alert the Court to the

obvious credibility issues raised, the threats made by O’Keefe, the past history of perjury by O’Keefe, the inconsistent statements contained in her own records, or the results of the police investigation—unfounded. By her own admission, the only consideration that went into Larsen’s decision to file a dependency petition was that someone had made an allegation of sexual abuse..7 CP 661. On July 29, TP was taken into protective custody by the Snohomish County Sheriff’s Department. CP 513, 679. She was interviewed by a forensic specialist. TP made no allegations against Mr. Petersen. CP 673. TP did disclose that her mother was abusing her physically during visitations. CP 672. No CPS referral was made, and no investigation conducted as to this disclosure by TP herself. Instead, Larsen actually recommended that TP be placed with her mother. CP 755. TP was physically examined and interviewed again. CP 679. She again made no disclosures of sexual abuse, and the physical findings were non-specific. CP 679.

In the final paragraph of the police report, the officer notes that Calapp’s claim that TP referred to her vagina as her “PeePee” contradicted her forensic interview in which TP could not identify the body part. CP 681. TP was 4 years old at the time. Unknown to the police officer was a prior referral by Calapp to CPS wherein she accused her ex-husband of sexually abusing her daughter just six months earlier.

CP 803. In her allegations, Calapp used the words “PeePee” also. Id. The police concluded their investigation in August and no charges were filed. Id.

On multiple occasions, DSHS workers observed O’Keefe heavily intoxicated when she was supposed to be caring for TP. On October 7, 2003, O’Keefe visited TP while “loud mouthed and stumbling drunk.” CP 507. One month later, in a phone call with social worker Cyndi Black a few hours before her scheduled visitation, O’Keefe was observed slurring her words and dodging questions about her treatment status. CP 684. On November 26, 2003, a visitation supervisor reported smelling alcohol when O’Keefe came to pick up TP. Yet, even as of mid-October, DSHS still wanted to place TP with this woman permanently. CP 1188.

CPS concluded its investigation on October 15, 2003..² CP 598. Its finding regarding the allegation was “inconclusive.” *Id.* Still, TP remained in the Hall foster home for another two months. CP 1039. Additionally, TP was not returned to Mr. Petersen’s custody until April 15, 2004. CP 701.

B. DSHS fails to adequately ensure TP’s safety in foster care.

² It should be noted that although the investigation was officially concluded in October, no investigative work was done after August 15.

Even though Mr. Petersen identified a number of relative placements, Larsen claimed that no one was available and decided to place TP into foster care. CP 694-95. One potential placement identified by Mr. Petersen was his sister, Vickie Lopez, who was a licensed daycare provider in Idaho. CP 688, 759. The placement Larsen chose for TP instead was the home of Daniel and Doreen Hall. CP 1032.

Daniel and Doreen Hall were licensed as foster parents in 2000. CP 1051. The Halls had one biological son, GH, and by the time TP was placed in the home, they had adopted two other young boys.

In May 2002, Doreen Hall called CPS to report that she had seen her five year old foster daughter lying on a bed with her legs spread apart. CP 1235. Hall also reported that her three year old adopted son was in the room. *Id.* According to Hall, the boy told her that “we’re going to get on top of each other.” *Id.* CPS found that Hall responded appropriately and did not investigate the matter. *Id.*

In February 2003, Hall requested that no more girls be placed in the home. CP 1024. At that same time, the Halls received an amended license to decrease the number of foster children in their home. CP 1228-29. In addition to numerical limitations, the license amendment request form includes a box for gender limitations. CP 1228. However, DSHS

licensor Patty Todd did not mark the requested gender limitation on the license amendment request. *Id.*

On March 14, 2003, CPS received a referral from a respite provider, who reported that a girl who had just been removed from the Hall home cried every night before bed. CP 1037, 1047. According to the provider, the girl reported that Doreen Hall would get in the child's face, yell at her to stop crying, and if that didn't work, threaten to put a blanket over her face. *Id.* The girl also reported that GH would yell at her to "get out of the home and that he does not want her in the home." *Id.* CPS referred the matter to licensing and did not perform any further investigation. *Id.*

DSHS' licensing division did not follow up on the referral until almost two months later. CP 1035. When the licensor did finally confront Ms. Hall with the allegation, she not only denied it, but called it "payback" by the social worker for requesting that the girl be moved. *Id.* However, Ms. Hall did admit to getting "'face to face' with the child." *Id.* The licensor performed no further investigation. *Id.* No one at CPS ever spoke to the child about the allegations.

TP was placed in the Hall foster home in July 2003. There is no indication in any of DSHS' files that Larsen reviewed DSHS' history on the Halls, assessed TP's needs as a foster child, determined the suitability

of the Hall home, or did anything besides placing TP in the first available home she could find. CP 1143.

On August 25, 2003, Doreen Hall took TP to Counselor Lisa Glendenning, reporting that TP had engaged in “inappropriate behavior.” CP 1058, 1187. The “inappropriate behavior” mentioned by Hall – but not reported to CPS until a week later - included amorous kissing and laying on top of her four year old son. CP 1176, 1187. DSHS never investigated the allegation and never spoke to Glendenning. Instead, Larsen simply accepted Hall’s report as true and filled out an ISSP stating that the foster parents had heard from Glendenning that the alleged “sexualized behaviors” were typical signs that the child had been sexually abused. CP 772. In fact, Glendenning had actually concluded the exact opposite - that the incidents of alleged sexualized behavior did *not* necessarily indicate that sexual abuse had occurred. CP 772. Larsen nevertheless used this unsubstantiated “evidence” of abuse to keep TP in foster care and away from her father, even when TP had not disclosed any sexual abuse after multiple interviews.³ CP 525.

In August 2003, during a supervised visit, TP told her father that Doreen Hall had been bitten by the Hall’s dog. CP 1032. At the following visit, TP arrived with a band-aid on her arm, and informed her

³ None of the “sexualized behavior” was ever exhibited in TP’s new foster home. CP 772.

father that she had been bitten by the same dog. *Id.* TP had not received any medical treatment for the bite, even though she had asked her foster parents to be taken to a doctor. CP 723. Both incidents were reported to Larsen. Larsen, however, “did not believe the bite had broken the skin,” and declined to perform any investigation. CP 1033. Mr. Petersen contacted the licensing division after learning that Larsen had not done anything in response to the earlier reports. CP 1032-33. The licensing department performed no investigation into the matter. CP 1032.

In early October, Ms. Hall informed Larsen that she was having frequent contact with O’Keefe. CP 521, 1025. Cynthia Black, another social worker for DSHS, received similar information. Ms. Hall allowed O’Keefe to have unsupervised or overnight visits with TP as she pleased. CP 1025, 1029. When it came to Mr. Petersen, however, Hall refused to facilitate his court-ordered visits because she felt it was inconvenient for her to drive to Blockbuster to drop TP off with her aunt, Vickie Lopez. CP 690, 1030. Hall also reported to DSHS that she was concerned about Ms. Lopez supervising visits, based on a rumor she heard from O’Keefe. CP 1029. Black was concerned about Hall’s “boundary issues” with O’Keefe, but these were not noted until after TP was no longer in the home. CP 1039.

On November 18, 2003, Ms. Hall contacted Black requesting that TP be removed from her home due to a “strained relationship” with GH. CP 686, 1028. Apparently this had been a concern of Hall’s for some time, but “she didn’t say anything earlier as she thought the child would be returned to the [m]other.” *Id.* During the same conversation, Hall also indicated that she thought O’Keefe was “appropriate” and noted that “she had no concerns about the mother’s ability to parent the child.” *Id.* Hall regularly stated that she thought O’Keefe was a good parent who was totally clean and sober. CP 521, 686. However, just the previous day, Black had seen O’Keefe in court, shaking, yelling, rocking in her chair, and making noises whenever Mr. Petersen’s attorney spoke. CP 685-86, 1027.

On December 10, 2003, O’Keefe reported to TP’s guardian ad litem that TP had been touched inappropriately by GH. CP 1045. TP was then moved to the home of Corrie Hayes. CP 1039. When DSHS spoke to Ms. Hayes, she informed them that she knew Doreen Hall, and that she was concerned because Hall was sending her children to a person who had an open CPS case against her. CP 1039. Ms. Hayes also “said the Halls tried to adopt [name redacted] who was adopted by the Harju’s. She said Hall’s have [name redacted], the 4 year old brother of [name redacted]. Ms. Hayes said there was some sexual acting out by [name

redacted] and kids her age, in the past before the Harju's which was reported and investigated previously." CP 1039-40.

While TP resided with the Halls, she was subjected to abuse from every member of the family. In 2003, TP reported to DSHS that GH, then 12 years old, would kick, hit, pinch, and slap her. CP 1041. TP later described all three boys tormenting her and trying to get her to kiss them for the entire five months she was in the home. CP 711-13. Doreen Hall once demanded that TP eat a tuna and olive sandwich, and when TP refused, she was not fed anything for the next three days. CP 714. TP was even thrown down the stairs by Daniel Hall in fits of anger on multiple occasions. CP 716. DSHS did not know any of this, because no one from DSHS ever visited the Hall home during the entire time that TP resided there. CP 1149.

Within the year after TP disclosed the abuse in the Hall home, DSHS received reports that two other children were emotionally abused by GH and Doreen Hall. CP 1053, 1146, 1243-45. To this day, TP has nightmares about being taken away from her father and placed into the abusive foster home. CP 728.

C. Procedural facts

TP filed suit against DSHS on March 31, 2014, for negligence, negligent infliction of emotional distress, and negligent investigation. CP

5-11. DSHS moved to dismiss Plaintiff's negligent investigation claims on October 14, 2015. CP 447-72. The trial court granted DSHS' motion in part, dismissing TP's claim for the negligent investigation that resulted in her being separated from her father because the trial court concluded DSHS was immune. CP 940. However, the trial court also denied DSHS' motion in part, declining to dismiss TP's claims as they pertained to DSHS' pre- and post-investigation of the Halls. CP 940. The trial court did not address TP's claims for common law negligence and negligent infliction of emotional distress, because Respondent had not addressed either claim in its motion. CP 940.

DSHS filed its second motion for summary judgment on December 31, 2015, arguing that it had no duty to protect TP from the harm inflicted by the Halls. CP 978-1000. The trial court granted the motion. CP 1119-20.

Appellant filed a motion for reconsideration on February 16, 2016. CP 1121-34. The trial court denied the motion and dismissed Appellant's suit in its entirety. CP 1300-01. Appellant timely filed her notice of appeal on April 7, 2016. CP 1302-11.

B. ARGUMENT

A. Standard of Review.

This Court reviews decisions on summary judgment de novo. *Coronado v. Orona*, 137 Wn. App. 308, 313, 153 P.3d 217 (2007). Summary judgment is appropriate only when there is no genuine issue of material fact. *Id.*; CR 56. A genuine issue of material fact exists when reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The party moving for summary judgment has the burden of proving that summary judgment is appropriate. *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 9, 586 P.2d 410 (1993). In reviewing a motion for summary judgment, all facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

A motion to summary judgment is not meant to be a practice run of the trial. As the Supreme Court has stated,

it is well established that the function of the trial court in ruling upon a motion for summary judgment is not to resolve the basic factual issues, with the ultimate finality which is expected and is appropriate at the final or 'full-blown' trial stage of a lawsuit. Rather, the trial court's function is to determine whether a genuine issue as to any material fact exists.

Chase v. Daily Record, Inc., 83 Wn.2d 37, 43, 515 P.2d 154 (1973).

B. DSHS is not entitled to immunity on TP's negligent investigation claims.

At the proceedings below, the State asserted that it was immune from liability on TP's negligent investigation claims under RCW 4.24.595(1). The trial court agreed. The trial court erred.

Statutes granting immunity must be narrowly construed. *Matthews v. Elk Pioneer Days*, 64 Wash.App. 433, 437-38, 824 P.2d 541 *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992). RCW 4.24.595(1), by its terms, applies only to emergent placement investigations. By its own admission, DSHS' investigation of the alleged abuse of TP was not emergent. "Admissions by a party are competent evidence against him," *Barnett v. Bull*, 141 Wash. 139, 141, 250 P. 955 (1926), and should be construed in the plaintiff's favor on summary judgment. DSHS' file states that the investigation of the alleged abuse against TP was "changed to 3NE after cc with ref, who detailed her concerns re her attempt to get custody, and related more specifically just what she heard from Jerry's current girlfriend." CP 498. DSHS should not have been permitted to claim immunity under the emergent placement investigation statute, when DSHS itself deemed the investigation non-emergent.

Additionally, DSHS' investigation could not have qualified as an emergent placement investigation, as that term is defined by statute. An

emergent placement investigation is an investigation that occurs during the 72 hours between when a child is removed from a home and when a shelter care hearing is held. RCW 4.24.595(1); RCW 13.34.065. The investigation (or lack thereof) at issue in this case began on July 11, 2003, two weeks before TP was removed from her home and well before a shelter hearing was scheduled. Therefore, DSHS cannot be immune under RCW 4.24.595.

Even if the State's investigation in this matter could accurately be characterized as an emergent placement investigation, the State is still not entitled to immunity. The State does not possess unqualified immunity for emergent placement investigations and decisions arising therefrom. "In determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity." *Gilliam v. DSHS*, 89 Wn. App. 569, 571, 950 P.2d 20 (1998).

Here, the relevant statute states:

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 including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, **unless the act or omission constitutes gross negligence.**

RCW 4.24.595 (emphasis added).⁴ Gross negligence is ordinarily defined as the “failure to exercise slight care.” *Kelley v. State*, 104 Wn. App. 328, 333, 17 P.3d 1189 (2000). However, this does not mean that the plaintiff needs to demonstrate a total absence of care. *Id.*

Failing to consider the obvious can constitute gross negligence. For example, in *Petersen v. State*, 100 Wn.2d 421, 424, 438, 671 P.2d 230 (1983), the court found sufficient evidence of gross negligence where a psychiatrist released a mentally ill and drug-addicted patient from the hospital, despite having seen the patient driving recklessly in circles around the parking lot the night before. Similarly, in *Bader v. State*, 43 Wn. App. 223, 229, 716 P.2d 925 (1986), the court determined that gross negligence was a jury question, where a mental health center failed to follow up on multiple missed appointments despite having been warned that the individual posed a substantial danger to others when not following his treatment regimen.

Sufficient facts have been presented here for a jury to find that DSHS was grossly negligent in its investigation before it removed TP from her home. CPS investigator Larsen performed little to no investigation at all before removing TP from her father’s home and

⁴ This statute has not been cited, much less interpreted, in any published case in Washington.

placing her in foster care. Any evidence she compiled tended to exonerate Mr. Petersen.

Despite being informed about a very recent restraining order and O’Keefe’s history of animosity toward Mr. Petersen, Larsen made no effort to look into it, instead deeming it irrelevant. CP 613. Furthermore, Larsen did not even read DSHS’ prior file entries. Had she done so, she would have found a two-week-old phone call nearly identical to the one she received on July 29, 2003, including the details that TP disclosed the abuse “a couple days ago” and that O’Keefe and Calapp had never met until the day before – details which could not have been true on both July 11 and July 29. Had Larsen put even minimal effort into investigating the July 29 allegation, she would have uncovered an obviously concocted story consistent with O’Keefe’s threats made just days before the abuse allegations. A reasonable jury could find that DSHS’ failure to perform any investigation before removing TP from her home constitutes gross negligence, for which DSHS does not enjoy statutory immunity.

Furthermore, DSHS does not enjoy immunity for omitting material information in dependency proceedings. The courts do not issue dependency orders in a vacuum. Before a court may order that a child should be taken into custody, DSHS must submit an affidavit or declaration “setting forth specific factual information evidencing

reasonable grounds that the child's health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child.” RCW 13.34.050. This information will, in a substantial majority of cases, result from the investigation performed by DSHS in response to a report of child abuse. Like Chapter 26.44, Chapter 13.34 RCW also provides that the paramount concern in all proceedings is the best interests of the child. RCW 13.34.020. This chapter also declares that “the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized.” *Id.* It therefore follows that the State must provide all pertinent information to the court; a court cannot issue an order in the child’s best interests if it is missing material facts.

As such, where the Department has failed to fully inform the court of all relevant information, a court’s act that is based on the Department’s incomplete record will not sever proximate cause. As the Supreme Court has noted, it is DSHS who controls the flow of information to the court. *Tyner*, 141 Wn.2d at 84. In *Tyner*, DSHS failed to inform the court that it believed that the allegations of abuse were unfounded, as well as failed to interview important collateral sources, including the plaintiff’s neighbors and family members. *Id.* at 87-88. The Court held that because DSHS

had failed to supply all material information to the court, any order arising therefrom could not constitute a superseding intervening cause. *Id.* at 88.

In this case, DSHS also failed to supply all material information to the court in the dependency proceedings. In fact, DSHS supplied little information at all when it initiated the dependency. As CPS investigator Larsen admitted, DSHS moved for dependency based solely on the fact that they had received an allegation of sexual abuse. CP 661. Larsen did almost no investigation even after filing the dependency petition, failing to review O’Keefe’s criminal record, prior custody dispute records, the no contact order that Mr. Petersen told her he had obtained, or even DSHS’ own decade-long record on O’Keefe. The inadequacy of Larsen’s investigation was glaring – for the first few months, DSHS was recommending that TP be permanently placed with O’Keefe, the same woman who had an extensive criminal history and who had her first child placed on dependency after dealing heroin. CP 1188. On these facts, a reasonable jury could certainly conclude that DSHS negligently failed to provide all material information to the court.

C. The State has a common law duty to protect dependent children that it places in foster case.

No case has created more confusion and mischief in the realm of dependent children than has *M.W. v. Dep’t of Soc. & Health Servs.*, 149

Wn.2d 589, 70 P.3d 954 (2003). In that case, a biological father alleged that the foster parents of his child J.C.W. were sexually abusing her. As a result of the allegation, the foster parents were directed to bring the child to a DSHS office, where social workers took the child into a conference room. The unqualified social workers then “examined” the infant’s vaginal area by touching it. The foster mother’s description of the “exam” sounds like a sexual assault. *M.W.*, 149 Wn.2d at 592. The infant was later taken to a hospital to be examined by appropriate professionals who found no evidence of sexual abuse. *M.W.*, the foster father and his wife, then sued the State on behalf of J.C.W. alleging negligent investigation. *Id.*

The primary issue in *M.W.* was the scope of the tort of negligent investigation. The Court ultimately decided that in order to state a claim for negligent investigation, the plaintiff must allege that “DSHS has gathered incomplete or biased information that results in a harmful placement decision.” *M.W.*, 149 Wn.2d at 602. Thus, the tort of negligent investigation did not encompass the sexual assault against J.C.W. by DSHS investigators. However, in reaching this conclusion, the Court reasoned:

Our conclusion not to expand the cause of action of negligent investigation is bolstered by our determination that DSHS has an existing common law duty of care not to negligently harm children. An expansion of the action of negligent investigation is therefore unnecessary.

M.W. 149 Wn.2d at 600. The Court declined to explain what it meant by that statement, or what precisely it envisioned as the common law duty that made expansion of the tort of negligent investigation unnecessary.

In the cases that followed, the courts have by and large ignored this portion of *M.W.*'s reasoning. Instead, courts now characterize *M.W.* with sweeping generalizations such as "Washington law does not recognize a general tort claim for negligent investigation." *Albertson v. State*, 191 Wn. App. 284, 299, 361 P.3d 808 (2015). In *Petcu v. State*, 121 Wn. App. 36, 59, 86 P.3d 1234 (2004), the Court seemed to have disregarded this portion of *M.W.* completely, stating that "our Supreme Court has rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures." Strangely enough, the very case *Petcu* cites for this proposition is *M.W.*

In the 13 years since *M.W.* was published, not one case has examined the State's common law duties to children. Yet so long as *M.W.* remains good law, trial courts cannot dismiss negligence claims under negligent investigation principles. Yet, this is what many courts, including the trial court here, do in the face of *M.W.*'s confusing progeny. To

alleviate this confusion, this Court must examine the State’s common law duties to children in its care. This case presents that opportunity.

1. The State has a common law duty to protect children in places in foster care.

In 1963, the Washington legislature waived sovereign immunity for common law tort actions and decided that agencies such as DSHS should be liable to the people harmed by their negligence, just like a private person or corporation. Laws of 1963, ch. 159, § 2, codified at RCW 4.92.090 (“The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation”). Since the legislature waived sovereign immunity, the State and its subdivisions have been held to the same general duty of care to which private individuals are held—that of a reasonable person under the circumstances. *See Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 237 (2002). Parties who suffer personal injury or property damage due to the negligence of employees of the State are able to bring suit for damages, subject to procedural rules. *See Medina v. Pub. Util. Dist. No. 1 of Benton Cnty.*, 147 Wn.2d 303, 53 P.3d 993 (2002). The Washington Supreme Court has recognized that this waiver is “one of the broadest waivers of sovereign immunity in the country” and makes “the State

presumptively liable in all instances in which the Legislature has not indicated otherwise.” *Savage v. State*, 127 Wn.2d 434, 444-45, 899 P.2d 1270 (1995).

Under principles of common law negligence, foreseeability determines both whether a duty is owed, and if so, what the scope of that duty is. *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 764, 344 P.3d 661 (2015). This principle was applied by the Court in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013), when it held that all persons have a duty to protect others from the foreseeable consequences of their actions, as well as to avoid exposing others to “harm from the foreseeable conduct of a third party.” (citing Restatement (Second) of Torts § 281 cmts. c-d, § 302). All persons also have a duty to actively protect others from the harm caused by third parties where the person ““realizes or should realize that [his actions] involve[] an unreasonable risk of harm.”” *Id.* (quoting Restatement (Second) of Torts § 302B). These duties apply to the State, just as they do to everyone else. RCW 4.92.090; *see also Washburn*, 178 Wn.2d at 752.

These principles are aptly demonstrated in *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 252 P.3d 914 (2011). In that case, five year old M.H. was a congregant at the Saint James Cathedral. Father Boyle was a pastor at the Cathedral and, unbeknownst

to M.H. and her family, had a long history of sexual misconduct and association with other sex offenders. *Id.* at 186. When another man offered to give M.H. a ride to a picnic, M.H.'s mother agreed after Father Boyle assured her that it would be a good idea. *Id.* at 187. The man sexually abused M.H. on the way to the picnic, and when M.H. told Father Boyle about it, he covered it up. *Id.*

M.H. sued the Archdiocese for negligence, for having placed Father Boyle in a position to facilitate M.H.'s sexual abuse. The church asserted that it did not owe a duty to protect M.H., because there was no connection between it and the abuser and because the harm was not foreseeable. The Court of Appeals held that there was a sufficient causal connection between the abuser and the church, whose agent placed M.H. in the hands of the abuser. *Id.* at 192. The Court further held that M.H.'s abuse was foreseeable, given that Father Boyle had a known history of sexual misconduct and the church had "placed him in a position that allowed him to arrange the abuse of M.H. by someone he knew would sexually molest her." *Id.* at 193. Thus, given the foreseeability of the harm and the church's ability to prevent it, the church owed a duty to M.H. to protect her from sexual abuse. *Id.*

Furthermore, under the common law, a person who undertakes a course of action must complete it in a non-negligent manner. *Burg v.*

Shannon & Wilson, Inc., 110 Wn. App. 798, 808, 43 P.3d 526 (2002). For example, a person who agrees to fix a roof must complete the roof so that it doesn't collapse. This principle applies to the care and custody of children. In fact, "it is well settled ... that one who voluntarily assumes responsibility for the care of a child has a duty to exercise reasonable care to protect that child." *Curran v. City of Marysville*, 53 Wn. App. 358, 365, 766 P.2d 1141 (1989).

By removing a child from her home, the State immediately assumes physical custody of the child. See RCW 26.44.050. A finding of dependency then transfers legal custody to the State. *In re Welfare of Ca.R.*, 191 Wn. App. 601, 608, 365 P.3d 186 (2015) (citing *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007)). By assuming physical and legal custody of the child, it must carry out the responsibilities of custodian in a non-negligent manner. Cause of Action for Negligent Placement in or Supervision of Foster Home, 43 Causes of Action 2d 1, § 6 (2010). Worded differently, "The placement in foster homes of defenseless children, and the supervision of their health and care, once committed to the custody of the welfare department must be accomplished with the reasonable care commensurate with the circumstances." *Koepf v. York Cty.*, 198 Neb. 67, 73-74, 251 N.W.2d 866, 871 (1977); see also *Babcock v. State*, 116 Wn.2d 596, 641, 809 P.2d 143

(1991) (Andersen, J., concurring in part, dissenting in part) (stating that “any time the State assumes a *parens patriae* role over a minor child, then by definition, it owes a duty to that child”).

In *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 703, 81 P.3d 851 (2003), the Washington Supreme Court held that the State has an affirmative duty to protect dependent children, such that it “must affirmatively take reasonable steps to provide for [foster children’s] care and safety.” *Braam*, 150 Wn.2d at 703. “To be reasonably safe, the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.” *Id.* at 700. To fulfill this obligation the State has promulgated an extensive number of regulations that govern the day to day operation of foster homes, from topics including the assignment of bedrooms, the level of privacy children must be afforded, where medicine should be kept, and what types of milk a child can drink. *See* WAC 388-148. Foster families may be subject to discipline for failure to follow those regulations. WAC 388-148-1625. Such extensive oversight indicates that the State intended to retain its responsibility to protect the children in its legal custody. *See Hunte v. Blumenthal*, 238 Conn. 146, 164-65, 680 A.2d 1231 (1996). Simply put,

the State cannot simply place a child into a foster home and wash its hands of all liability thereafter.

The State owed a duty to protect TP from harm, as it voluntarily assumed her care and because injury at the hands of her foster family was foreseeable.⁵ Unlike the duty to investigate claims of child abuse, which is mandatory, DSHS is not obligated to remove a child from a home and place them in foster care, absent a court order. RCW 26.44.050 (“...the law enforcement agency or the department of social and health services **must** investigate ... A law enforcement officer **may** take, or cause to be taken, a child into custody without a court order ...”) (emphasis added). Here, TP was removed from her home and placed in foster care not on

⁵ The State’s duty to protect children in the foster care system is not just a common law duty, but a constitutional duty as well. The Washington Supreme Court has held that

at its core, foster children have a substantive due process right to be free from unreasonable risk of harm, including a risk flowing from the lack of basic services, and a right to reasonable safety. Exposure of the child to an unreasonable risk of harm violates the substantive due process clause.

Braam ex rel. Braam v. State, 150 Wn.2d 689, 699, 81 P.3d 851 (2003) (citations omitted). This holding is in accord with numerous federal courts, which have held that children in foster care have a liberty interest in safe and adequate care, and that the State’s failure to provide that care constitutes a violation of substantive due process. *Tamas*, 630 F.3d at 846; *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1246 (10th Cir. 2003); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc); *Norfleet ex rel. Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990); *Taylor By & Through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Doe v. New York City Dep’t of Soc. Servs.*, 649 F.2d 134, 141–42 (2d Cir. 1981).

court order, but on the decision of DSHS investigator Evelyn Larson. Having voluntarily undertaken to become TP's custodian, DSHS was thereafter responsible for her care until TP's adoption or return to her father.⁶

Additionally, it was readily foreseeable that TP would be harmed by her removal from the only home she had ever known and placement with the Halls. "Courts have concluded that state child protective agencies expose children in their care to a danger they otherwise would not have faced when the agency makes poor placement decisions." *Cox v. Washington*, 2015 WL 5825736, at *7 (W.D. Wash. Oct. 6, 2015). The well-being of children, suddenly removed from the home of the only parent they have ever known, is crucially dependent on the child's initial placement. CP 1147. The legislature has recognized the harm that can come to children from multiple foster care placements. RCW 74.13.310. It is crucial that the State get it right the first time, to avoid creating the instability that the legislature recognizes as harmful. RCW 74.13.290. This is why relatives are mandated as the first choice for placement of dependent children. RCW 13.34.130(3). DSHS should have known about the emotional harm that would come to TP by placing her with simply whoever happened to be available.

⁶ Cyndi Black agreed that DSHS assumes responsibility to do what is best for the child once taken into custody. CP 751.

As in *M.H.*, there is a definable causal connection between DSHS and TP's injuries at the hands of the Halls. Had DSHS initially considered relative placement as it was obligated to, TP likely would have been placed in the care of Vickie Lopez, a person who DSHS approved of once it actually got around to considering her as a placement option. Obviously, TP could not have been abused by Doreen and GH had she never been placed there.

DSHS placed TP, against her will, in a position where she could easily be harmed. This potential harm is foreseeable and has been recognized by experts and the state legislature alike. Further, DSHS alone was in a position to remedy the harm that it had placed TP in. Everyone, including the State, has a duty to protect those whom they place in harm's way. The failure to do so constitutes negligence at the common law. The trial court erred by when it concluded otherwise.

2. The State assumes a special relationship with children it removes from their homes.

The Court may additionally find that the State owed a duty to protect TP by virtue of a special relationship. A special relationship is created between the state and an individual where the individual has relied on express assurances from the state, or where the state assumes a role that is "protective in nature." *Caulfield v. Kitsap Cty.*, 108 Wn. App. 242, 251-

53, 29 P.3d 738 (2001). Where a special relationship exists, the custodian (here, the State) has the duty to reasonably protect the individual from all foreseeable harms, including harms that may be inflicted by third parties. *Caulfield*, 108 Wn. App. at 255. “Special relationships are typically custodial” and will arise where an individual is dependent upon the state for care. *Id.* at 255-56 (state and county had special relationship with profoundly disabled individual); see also, *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420, 423 (1997)(applying Restatement §315).

A dependent child easily fits within the parameters of a special relationship. *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010); *Cox v. Washington*, 2015 WL 5825736, at *8 (W.D. Wash. Oct. 6, 2015). In fact, “it is well settled ... that one who voluntarily assumes responsibility for the care of a child has a duty to exercise reasonable care to protect that child.” *Curran v. City of Marysville*, 53 Wn. App. 358, 365, 766 P.2d 1141 (1989).

The compulsory nature of a child’s relationships has long been recognized as a basis to impose a duty to ensure the safety of child in one’s care. In *McLeod v. Grant Cnt. Sch. Dist., No. 128*, 42 Wn.2d 316, 319, 255 P.2d 360 (1953), the Supreme Court held that the mandatory nature of school attendance imposed upon the school a duty to protect the students from foreseeable dangers. Foreseeable dangers include not just

the actions of the school, but also of third parties. In that case, the Court held that the school could be held liable for negligence, where two male students raped a female student in an unsupervised, dark room behind a set of bleachers. *McLeod*, 42 Wn.2d at 322.

TP's relationship with DSHS and the Halls was similarly compulsory. TP was forcibly removed from her father's home. DSHS then assumed both physical and legal custody over T.P. RCW 26.44.050; *In re Dependency of Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007). DSHS placed TP into the Hall foster home without input from anyone, including TP's relatives. TP certainly had no means of turning elsewhere for protection, since she was only four years old at the time. Because TP was compelled into DSHS' custody, DSHS had a special relationship with her and was obligated to protect her from harm.

3. DSHS breached its duty to protect TP from harm while in foster care.

The record in this matter establishes that there are sufficient facts for a jury to find that DSHS breached the duty it owed to protect TP from harm while in foster care. Even before she was placed there, DSHS had information that should have indicated that the Hall foster home would not be a "safe, stable, and permanent home" for TP. In 2002, over a year before TP was placed in the home, CPS received a report that a five year

old foster girl and the Hall's three year old son were engaging in sexual behavior, i.e. that they were "going to get on top of each other." CP 1235. This report was remarkably similar to the report made about TP in August 2003, where Hall was reporting that TP had gotten "on top of" the same young boy. CP 1187. Yet, in neither instance was the allegation investigated or followed up on. DSHS also did not note the similarity between these two allegations.

In February 2003, Hall requested that no more girls be placed in the home. CP 1024. Because the Halls needed an amended license to decrease the number of foster children, this would have been an appropriate time for DSHS to modify the license to be boys-only, as Hall had requested. The license amendment request form even includes a box for such a request. CP 1228. It was not marked, nor did DSHS acknowledge this request when it placed TP in the home.

On March 14, 2003, CPS received a referral that a girl who had recently been removed from the Hall home reported that Doreen Hall would get in her face, yell at her to stop crying, and if that didn't work, threaten to put a blanket over her face. CP 1037, 1047. DSHS never spoke to the girl about the allegation, in violation of their mandatory duty to investigate all reports of child abuse. When DSHS spoke to Hall about it, two months after the fact, she got defensive, blaming the girl's social

worker and accusing her of making it up. CP 1035. However, Hall admitted that at least part of the allegation was true – she did get in the girl’s face. DSHS did not follow up afterward.

After TP was placed with the Halls, DSHS still retained the authority to remove her if necessary. *See Babcock v. State*, 116 Wn.2d 596, 610, 809 P.2d 143 (1991). DSHS had ample opportunity to unearth the abuse TP suffered at the hands of the Halls. That it did not was the product of its own failure to follow up on anything. DSHS received a report of TP engaging in “sexualized behavior” that was markedly similar to a report it received about the previous foster child – DSHS never followed up. DSHS received three reports of a dog biting multiple residents in the home – DSHS never followed up. Hall kept praising O’Keefe’s sobriety and parenting skills, even as O’Keefe was showing up to visitations and court appearances drunk – DSHS never followed up. Hall asked that TP be removed because of issues with GH – DSHS never followed up.

The legislature has mandated that DSHS exercise oversight over children in foster case, precisely so that it can prevent and remedy the harms foreseeable in out-of-home placements. RCW 74.13.031(6) provides that:

The department or supervising agencies shall monitor placements of children in out-of-home care and in-home dependencies to assure the safety, well-being, and quality of care being provided is within the scope of the intent of the legislature. ... The department or supervising agencies shall conduct the monthly visits with children and caregivers to whom it is providing child welfare services.

There is no indication that DSHS did any monitoring of TP's placement with the Halls. Neither Larsen nor Black ever conducted a single visit to the home.

The State cannot remove a child from her home, place her in foster care, and then wash its hands of any and all responsibility thereafter. *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) ("a state could not avoid the responsibilities which that decision had placed on it merely by delegating custodial responsibility to irresponsible private persons."). Yet, this is essentially what DSHS did here when it left TP with the Halls. On these facts, a reasonable jury could find that DSHS was negligent in failing to protect TP from foreseeable harm.

VI. CONCLUSION

DSHS is not entitled to immunity for non-emergent investigations, nor is it entitled to immunity for gross negligence. DSHS also owes a common law duty to those children it removes from their homes and places in foster care, to ensure their safety while they remain in State custody. Here, DSHS for weeks failed to investigate an obviously false

report of abuse. It took TP from her father and put her in a foster home that the foster parents themselves had acknowledged was not an appropriate place for her. It did nothing to remove TP from that home for over four months, even as multiple events should have and occasionally did raise its suspicions.

The facts presented to the trial court were sufficient for a jury to find that DSHS negligently investigated the report of child abuse against TP and negligently left her in an abusive foster home. This Court should reverse the decision of the trial court and remand for further proceedings.

DATED this 23rd day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that on June 23, 2016, I caused a copy of the foregoing document to be served on the following party of record and/or interest

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