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STATE OF WASHINGTON

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No. 49287-3-II

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

M.M.S., a minor (d.o.b. 03/07/2007) and CRYSTAL ARMSTRONG,
Individually and as GUARDIAN AD LITEM for M.M.S.,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, and CHILD PROTECTIVE SERVICES,

Respondent.

BRIEF OF APPELLANTS
M.M.S. AND CRYSTAL ARMSTRONG, INDIVIDUALLY
AND AS GUARDIAN AD LITEM FOR M.M.S.

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A. INTRODUCTION

The Washington State Department of Social and Health Services (DSHS) is responsible for dependent children. It is required to protect the integrity of the family and the safety of children within the family.

When DSHS placed J.L.A., a dependent child, into Crystal Armstrong's home, the assigned social worker failed to review J.L.A.'s DSHS case file, even after being informed by previous caretakers of J.L.A.'s history of sexually inappropriate behavior. To make matters worse, the assigned social worker told J.L.A.'s paternal aunt that there was no information in the records (which she had never reviewed) that warranted any concern about J.L.A. The DSHS case file of J.L.A. contained numerous reports of sexually aggressive behavior by him towards young children and noted he had previously required line of sight supervision when he was with younger children. DSHS' failure simply to review its own files and its failure to warn Ms. Armstrong of J.L.A.'s known history of sexual aggression towards young children resulted in M.M.S., Ms. Armstrong's daughter, being repeatedly sexually molested by J.L.A. after his placement into Ms. Armstrong's home.

The trial court here concluded that the State had no duty to M.M.S. and Ms. Armstrong to review its own files prior to placing J.L.A. into their home and had no duty to warn Ms. Armstrong of J.L.A.'s known history

of sexual aggressiveness towards younger children. The trial court agreed with the State's argument that any duty owed by the State toward M.M.S. had to be created by a legislative enactment and that the record established no cause of action for any statutory violations. The trial court granted summary judgment dismissal of M.M.S. and Ms. Armstrong's claims.

That order should be reversed and partial summary judgment should be granted for M.M.S. and Ms. Armstrong because the undisputed evidence is that the State had a duty to M.M.S. and Ms. Armstrong, that the State breached that duty, and that this breach caused harm to M.M.S. and Ms. Armstrong.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred when it denied reconsideration of summary judgment in its order dated June 17, 2016.

2. The trial court erred when it granted summary judgment dismissal of M.M.S. and Ms. Armstrong's claims in its order dated May 13, 2016, and as amended on June 17, 2016.

3. The trial court erred when it denied partial summary judgment for M.M.S. and Ms. Armstrong's claims in its order dated May 13, 2016, and as amended on June 17, 2016.

(2) Issues Related to Assignments of Error

1. Was summary judgment inappropriate because DSHS had a legal duty under *Restatement (Second) of Torts* §302B to M.M.S. and Ms. Armstrong, and because DSHS placed J.L.A. into their home without warning Ms. Armstrong of J.L.A.'s known history of sexual aggressiveness with younger children? (Assignments of Error Nos. 1, 2)

2. Was summary judgment inappropriate because DSHS had a legal duty under *Restatement (Second) of Torts* §314A and §315 to M.M.S. and Ms. Armstrong, and because DSHS had a special relationship to M.M.S. and Ms. Armstrong to protect the integrity of their family and the safety of the children within the family? (Assignments of Error Nos. 1, 2)

3. Was summary judgment inappropriate because DSHS had a legal duty under RCW 26.44.050, and because DSHS had to assemble and consider as much information as a reasonable person would, including knowing J.L.A.'s DSHS case file and doing what was reasonably necessary to protect the integrity of the Armstrong family and the safety of children within the family, including providing full disclosure to Ms. Armstrong and the dependency court of J.L.A.'s known history of sexual aggressiveness with younger children? (Assignments of Error Nos. 1, 2)

4. Was denial of partial summary judgment in favor of

M.M.S. and Ms. Armstrong's claims in error because DSHS had a duty to M.M.S. and Ms. Armstrong under common law and RCW 26.44.050, because sufficient and un rebutted evidence exists that DSHS breached that duty by failing to review J.L.A.'s DSHS case file and by failing to disclose to Ms. Armstrong and the dependency court the fact of J.L.A.'s known history of sexual aggressiveness with younger children, and because sufficient and un rebutted evidence exists that DSHS' breach caused harm to M.M.S. and Ms. Armstrong? (Assignments of Error Nos. 1, 2, 3)

C. STATEMENT OF THE CASE

J.L.A. was born in November of 2001. CP 66. CPS reports with concerns regarding this young child began in January 2003 and continued into 2014. CP 169. Between 2005 and 2013 DSHS records indicate 22 documented concerns about sexualized behavior by J.L.A., which included reports of inappropriate sexually aggressive contact with his younger sister and with foster children. CP 59-131, 213-214. In 2013 Michelle Christensen, a DSHS social worker, was assigned the dependency case for J.L.A. CP 166. In April of 2013, DSHS and the dependency court concluded the child's mother's home was not a safe place for him. CP 173, 175. J.L.A. had been in and out of foster care or relative placements for most of his young life, and he now, once again, needed a home. CP 213. His father, Sean Armstrong, who had had minimal to no involvement

in J.L.A.'s life since he was age 3, was now considered as a possible placement. CP 181, 214. Sean was married to Crystal Armstrong. CP 167. They lived in British Columbia, Canada with Ms. Armstrong's daughter, M.M.S., age six, and their infant son T.A. CP 167. The dependency court ordered DSHS to investigate J.L.A.'s father and his wife to determine if their home was an appropriate placement for the dependent child. CP 181.

In April of 2013, while DSHS was, purportedly, investigating the placement with the Armstrong family, J.L.A. was sent to live with his paternal aunt Jacquetta Cummings. CP 176. He had previously lived in her home in Yakima for a brief time in 2010. CP 244. Ms. Cummings was married during the time of the 2010 placement. CP 244. Soon after the child was sent to live with this aunt in 2010, the family asked he be removed. CP 244-245. Prior to the 2010 placement, Ms. Cummings and her husband had been at a meeting with DSHS social workers who talked about some inappropriate sexual contact between J.L.A. and his younger sister. CP 245. Subsequently, Ms. Cumming's now ex-husband did not want J.L.A. in his home. CP 247.

In 2013, Ms. Christensen reported that Ms. Cummings informed her that Ms. Cummings' ex-husband had asked DSHS to find J.L.A. another home in 2010 due to what he had heard about J.L.A. being inappropriate with his younger sister. CP 130. Ms. Cummings now had a

young daughter of her own who was about the same age as was J.L.A.'s younger sister in 2010 and wanted to know if there was anything to worry about based on what was overheard in 2010. CP 250-251. She was assured by the social worker there was no information in the records that warranted any concern regarding J.L.A. CP 250-251. Ms. Christensen admitted, when deposed, that she reviewed no records that predated the 2013 dependency. CP 8, 168.

At about this same time J.L.A.'s mother met with Ms. Christensen and told her she had "caught" J.L.A. and his younger sister "with their clothes off a couple of times." CP 8. She told Ms. Christensen she had explained to J.L.A. that "girls have teeth in their vaginas and, if boys get too close, they will bite it off, their hot dog off." CP 8. Ms. Christensen reviewed no records regarding this report and did not know whether what the mother was describing had been the subject of any investigation or whether this description was what the Cummings family had heard the social workers talking about back in 2010. CP 8.

Despite what she told Ms. Cummings about the review of the records, Ms. Christensen reviewed none of the earlier records relating to J.L.A.'s conduct. CP 8, 168. These records included extensive information about J.L.A.'s past sexualized behavior. CP 59-131. She knew nothing about his history of sexually aggressive behavior other than what she had

been told by Ms. Cummings and J.L.A.'s mother. CP 7-8. She was not aware that J.L.A. had been referred to a Sexually Aggressive Youth Committee (SAY). CP 8, 27, 168. She was unaware that, in previous transition plans by social workers, DSHS had required that J.L.A. be in line of sight of an adult whenever he was with his younger sister. CP 53-55. She had never reviewed the earlier reports of J.L.A. and his younger sister naked together or the reports of him humping his sister with his clothes on or the reports of his laying on the top of other foster children. CP 8, 168. She did not know that the SAY committee had recommended that any relative caregiver be directed to watch a SAY informational video and that support groups be considered for the relative care giver. CP 8, 168.

In her report to the dependency court, Ms. Christensen said nothing about the behaviors referenced in the earlier DSHS records or what she had been told by Ms. Cummings or J.L.A.'s mother. Though she knew that Crystal Armstrong had a six-year-old daughter, she said nothing to Ms. Armstrong about what she had been told by J.L.A.'s mother. Ms. Armstrong believed that she had no reason to be concerned and did not need to protect her six-year-old from the dependent child being placed in her home. Soon after J.L.A. moved to Canada, he sexually molested M.M.S.

D. SUMMARY OF ARGUMENT

Under common law tort principles, the State has a duty to individuals with whom it has a special relationship and it has a duty to individuals when its affirmative acts place those individuals in harm's way. Here, the State had a duty to warn Ms. Armstrong of J.L.A.'s known history of sexual aggression towards younger children.

Under RCW 26.44.050, the State had a duty to Ms. Armstrong and M.M.S. to gather complete information regarding J.L.A. and to warn the Armstrong family and the dependency court about J.L.A.'s history of sexual aggression towards younger children to prevent a harmful placement decision.

Since the State had a legal duty to Ms. Armstrong and M.M.S., partial summary judgment should be granted to the Plaintiffs, because the un rebutted evidence is that the State breached its duties and that that breach caused harm to Ms. Armstrong and M.M.S.

E. ARGUMENT

(1) Standard of Review

This Court reviews a trial court's order granting summary judgment dismissal of a plaintiff's claims *de novo*, considering the evidence presented in the light most favorable to the non-moving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). If material

facts on any issue are in dispute, summary judgment is improper. *Id.* “On review of an order granting summary judgment, the appellate court must engage in the same inquiry as the trial court.” *Waller v. State*, 64 Wn. App. 318, 327, 824 P.2d 1225 (1992). A summary judgment motion “should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion.” *Spurrell v. Bloch*, 40 Wn. App. 854, 860, 701 P.2d 529 (1985). Summary judgment exists to examine the sufficiency of legal claims and to narrow issues, not as a substitute for trial. *Babcock v. State*, 116 Wn.2d 596, 598–599, 809 P.2d 143 (1991).

The issues before this Court for appellate review regarding the trial court’s order granting summary judgment for the State involve only questions of law. The issues for review regarding the trial court’s order denying Plaintiffs’ motion for summary judgment involve mixed questions of law and fact. Though the State sought summary judgment (and made no CR 12(b)(6) motion), it claims that the Plaintiffs’ Complaint failed to state a cause of action in that: (1) there is no common law negligence claim that can be brought against the State for placing a sexually aggressive dependent child in a family with young children and not warning the family in which the dependent child is placed of his past behaviors, and (2) there is no statutory cause of action for violation of RCW 26.44.050 when a State social worker places a dependent child with a history of

sexually aggressive behavior in a home with younger children and fails to warn the dependency judge or the placement family of the dependent child's history of sexually aggressive behaviors. The trial court accepted the State's arguments. From these rulings Ms. Armstrong, individually and as guardian for her daughter, (Armstrong) seeks review.¹

(2) The State of Washington Owed a Duty of Care Under the Common Law Based on Affirmative Acts, a Recognizable High Risk Of Harm, and the General Tort Principles in the Restatement (Second) of Torts §314A and §315

The law recognizes that there are situations in which the State must anticipate and guard against the intentional or even criminal misconduct of others. These situations arise (1) where the State's own affirmative acts create or expose children to a recognizable high risk of harm through the misconduct of others, which risks of harm a reasonable social worker must consider, and also (2) where there is a special relationship. The context for determining the tort liability of the State and its social workers is the common law of torts and the legislature's abolition of sovereign immunity.

¹ The State's motion includes a factual summary and an affidavit; their argument, however, does not rely on these facts. It claims: "There is no common law claim of 'negligence.' In fact, there are no common law duties that apply to DSHS' functions involving dependent children.... any tort duty owed would have to arise from a statute." CP 156.

(a) Abolition of Sovereign Immunity

When the Washington Constitution was adopted, the State originally enjoyed sovereign immunity, and it was not liable in tort absent statutory authority permitting the imposition of liability. *See* Charles F. Abbott, Jr., Cmt., *Abolition of Sovereign Immunity in Washington*, 36 Wash. L. Rev. 312, 313-14 (1961); *see also* Wa. Const. art. II, §26 (stating “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state”).

In 1963, the legislature categorically waived sovereign immunity. The statute provides that “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.” RCW 4.92.090.

(b) Negligence

There are four elements of a negligence claim: “(1) the existence of a duty owed to the complaining party; (2) a breach thereof (3) the resulting injury; and (4) proximate cause between the claimed breach and resulting injury.” *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Whether a duty exists is a question of law. *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Once a legal duty has been established and a breach of the duty and injury has been

shown, the plaintiff must show that the breach of duty was the proximate cause of the injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985); *Petersen v. State*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983).

i. Foreseeability

Foreseeability determines the scope of the duty owed and is a question of fact for the jury. Once “a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability serve to define the scope of the duty owed.” *Schooley v. Pinch’s Deli Mkt., Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998). Cases often follow by saying this determination is a factual question for the jury. This Court has previously explained:

Foreseeability is ... one of the elements of negligence; it is more appropriately attached to the issues of whether defendant owed plaintiff a duty, and, if so, whether the duty imposed by the risk embraces that conduct which resulted in injury to plaintiff. The hazard that brought about or assisted in bringing about the result must be among the hazards to be perceived reasonably and with respect to which defendant’s conduct was negligent.

Maltman v. Sauer, 84 Wn.2d 975, 980, 530 P.2d 254 (1975) (emphasis omitted) (quoting *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969)).

In *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989), the Court further explained foreseeability’s limitations on the scope of duty:

The concept of foreseeability limits the scope of the duty owed. We have held that in order to establish foreseeability “the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” The limitation imposed thereby is important because, as this court has previously observed, “a negligent act should have some end to its legal consequences.” Foreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ.

Christen, 113 Wn.2d at 492 (citations omitted) (quoting *Maltman*, 84 Wn.2d at 981); *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976)).

ii. Proximate Cause

“A cause is ‘proximate’ only if it is both a cause in fact and a legal cause.” *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996) (citations omitted). “To establish cause in fact in a negligence suit, there must be substantial evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred but for the defendant’s act or omission.” *Beltran v. State, Dep’t of Soc. & Health Servs.*, 98 Wn. App. 245, 250, 989 P.2d 604 (1999). “This factual aspect of proximate cause is a matter for the jury, unless only one reasonable conclusion is possible.” *Beltran*, 98 Wn. App. at 250 (citing *Hartley*, 103 Wn.2d at 778).

“Cause in fact’ refers to the actual, ‘but for,’ cause of the injury, *i.e.*, ‘but for’ the defendant’s actions the plaintiff would not be injured.” *Schooley*, 134 Wn.2d at 478. “Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury.” *Id.*

Legal causation is a question of law and is differentiated from cause-in-fact:

Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant’s act should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on “mixed considerations of logic, common sense, justice, policy and precedent.”

Hartley, 103 Wn.2d at 779 (quoting *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228).

Legal causation is a “determination of whether liability should attach as a matter of law given the existence of cause in fact.” *Beltran*, 98 Wn. App. at 253. Hence, as the courts have recognized, “the issues regarding whether duty and legal causation exist are intertwined.” *Schooley*, 134 Wn.2d at 479. Though the analysis for a duty and legal causation are similar, the existence of a duty is not to be equated with legal causation. *Id.* Legal causation “permits a court for sound policy

reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.” *Id.*

(c) Special Relationship Under *Restatement (Second) of Torts* §314A and §315

When evaluating whether the State owed a duty to protect M.M.S. from the harmful acts of the dependent child placed with them, we begin by recognizing that Washington has adopted as a general principle of tort law that there is no duty to control the conduct of third persons to prevent them from causing physical harm to another. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (quoting *Nivens v. 7-11 Hoagy’s Corner*, 133 Wn.2d 192, 199, 943 P.2d 286 (1997)); *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013). The rationale for this rule is that “criminal conduct is usually not reasonably foreseeable.” *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007); *Washburn*, 178 Wn.2d at 757.

However, this general rule is not without exception. In certain cases, a duty to protect an individual from a third party may be imposed by statute. See RCW Chapter 26.44. Courts have also recognized that a special duty may arise out of the special relationship between the parties. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 721, 985 P.2d 262 (1999). The *Restatement (Second) of Torts* §§314A – 319

explains the circumstances under which a defendant may have a duty to guard against the criminal conduct of the third party where a special relationship exists between defendant and either the third party or the foreseeable victim of the third party's conduct. *Petersen*, 100 Wn.2d at 426; *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992).

Where negligence is based on the relationship between the parties, the primary inquiry is whether the defendant owes the plaintiff a special duty to protect the plaintiff from the harmful acts of the third party. Under the *Restatement* analysis, the critical question is whether a special relationship exists that will give rise to a duty upon which liability could be based. A special relationship under this framework arises out of the notion that a duty to exercise reasonable care toward the safety of others is essential to the physical security and safety of all persons in civilized society. *See Restatement (Second) of Torts* §314A (1965). In *C.J.C. v. Corp. of Catholic Bishop of Yakima*, the Court concluded, upon review of the *Restatement*, that its approach to the Church's negligence followed various cases analyzing these same issues.

This approach is consistent with our cases recognizing a duty to prevent intentionally inflicted harm where the defendant is in a special relationship with either the tortfeasor or the victim, and where the defendant is or should be aware of the risk. *See, e.g., LaLone v. Smith*, 39 Wn.2d 167, 172, 234 P.2d 893 (1951) (employer liable for employee's criminal assault on third person "because the employer antecedently had reason to believe that an

undue risk of harm would exist because of the employment”); *Taggart v. State*, 118 Wn.2d 195, 223–24, 822 P.2d 243 (1992) (special relationship giving rise to a duty to prevent intentional harm need not be “custodial or continuous,” but arises where ability to supervise is present and necessity for such supervision is or should be known); *Petersen v. State*, 100 Wn.2d 421, 428–29, 671 P.2d 230 (1983) (psychiatrist-patient relationship gives rise to duty to take reasonable precautions to protect all persons foreseeably endangered by mental patient's release into community). Compare *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 256, 868 P.2d 882 (1994) (employer liable for security guard's attempted rape if employer knew of or should have known of guard's violent propensities and nevertheless conferred position of authority and responsibility), with *Peck v. Siau*, 65 Wn. App. 285, 289, 292–94, 827 P.2d 1108 (1992) (school not liable for teacher's off campus sexual assault of student where it did not know, nor reasonably should have known, of the risk posed by teacher).

C.J.C., 138 Wn.2d at 724–25.

The focus under these sections of the *Restatement* and the cases cited is on the relationship between the defendant and the victim plaintiff. In some ways the analytical framework offered under §314A to §319 of the *Restatement* collapses into an inquiry that asks if there is a special relationship between the plaintiff and the defendant. Under this inquiry, a policy based approach determines whether a special relationship exists and, consequently, whether a duty is owed. The policy based approach focuses on a five factor balancing test. Under this test the court weighs: (1) the foreseeability of the risk, (2) the likelihood of injury, (3) the magnitude of the burden, (4) the burden upon the defendant and (5) the consequences of placing that burden upon the defendant and balancing these factors. *See*

e.g. Marquay v. Eno, 139 N.H. 708, 662 A.2d 272 (1995) (cited with approval in *C.J.C.*, 138 Wn.2d at 723); *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49 (1983); *Lance v. Senior*, 36 Ill. 2d 516, 224 N.E.2d 231 (1967).

In her meetings with Ms. Cummings, Ms. Christensen assured her there were no issues with the dependent child with which Ms. Cummings needed to concern herself. Ms. Christensen asserted there was nothing in the records regarding the rumors Ms. Cummings had heard during meetings with the assigned social workers in 2010 about sexually inappropriate behavior. But Ms. Christensen had also learned from J.L.A.'s mother of his sexual activities with his younger sister. Ms. Christensen did not share the verbal report made to her by the mother with either the Ms. Cummings or the Armstrong family.

Ms. Christensen never examined the records and had no idea from those records whether J.L.A. presented a problem about which the Armstrong family taking custody should be warned. She did not examine the records despite the fact her conversation with J.L.A.'s mother put her on notice that there was potentially a serious problem regarding sexualized behavior and despite the fact that DSHS' own policies mandate such a review. CP 14-15, 17, 19-22, 213. Liability is premised not on failing to control the child's behaviors, but on failing to discover what was in the

records after being told about past behaviors and then failing to alert the dependency court or the new caretakers about the dependent child's history of inappropriate conduct dangerous to younger children.

The only conclusion this Court can reach given the record is that an agency placing a child into a home has a duty not only to the child being placed, but also to the other children in the home. When the State knows or should know that a dependent child being placed presents a foreseeable risk to the health, safety, and welfare of other children in that home, then, at the very least, the State must investigate the dependent child's behavioral history and report that history to the dependency court and to the new caretakers.

It was reasonably foreseeable that a child with a known history of being sexually aggressive might sexually abuse again if placed in a home with young children. The burden on the State social worker to review the old records, once she heard about the rumors of past sexually aggressive behavior and once she received a description by the dependent child's mother about sexual behavior engaged in by the child with his younger sister, was minimal given the potential consequences of placing this dependent child with younger children. The consequences of placing this burden on the State are also minimal given the danger presented by not alerting the dependency court and the known family of the history of

abusive sexual behaviors. Even if the social worker found it too burdensome to review the records, she could and should have told the family about what the biological mother had described to her, instead of making the statement there was nothing in the records. She had no right to assure Ms. Cummings that the records established no reason for concern, especially where she had verbally heard clear reasons for such concern.

(d) Duty Under *Restatement (Second) of Torts* §302B

Under *Restatement* §302B, no special relationship is required when the duty arises from the affirmative act, specifically “[w]here the actor has brought into contact or association with the [victim] a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.” *Restatement (Second) of Torts* §302B cmt. e(D); *Restatement (Third) of Torts: Liab. Physical Harm* §37, cmt d. (“*Restatement (Third) of Torts*”).² However, for a duty to arise under

² “Section 315 of the *Restatement Second of Torts* contributed to frequent judicial pronouncements, contrary to the explanation above, that absent a special relationship an actor owes no duty to control third parties. *Restatement (Second) of Torts* §315 (1965), however, must be understood to address only an affirmative duty to control third parties. It did not address the ordinary duty of reasonable care with regard to conduct that might provide an occasion for a third party to cause harm. The *Restatement (Second) of Torts* §302B (1965), Comment e, provides for a duty of care when “the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such [third-party] misconduct.” Section 449 of the *Second Restatement* also contemplated liability, without regard to any special relationship, for acts that are negligent because of the risk of the third party’s conduct.”

§302B due to an omission or failure to act, rather than due to an affirmative act, some special relationship must exist. *Robb v. City of Seattle*, 176 Wn.2d 427, 435–439, 295 P.3d 212 (2013); *Washburn*, 178 Wn.2d at 758.

As our Supreme Court explained in *Robb v. City of Seattle*, a defendant may have a duty:

to take action for the aid or protection of the plaintiff in cases involving misfeasance (or affirmative acts) where the actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other. Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists.

Robb, 176 Wn.2d at 436.

The determination of what constitutes an “act” or “omission” is “far from easy to draw.” *Robb*, 176 Wn.2d at 437 (quoting *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 300, 545 P.2d 13 (1975)). The *Robb* Court interpreted misfeasance as “circumstances where an actor exposes another to danger by creating a situation of peril[,]... involves active misconduct resulting in positive injury to others[,]... necessarily entails the creation of a new risk of harm to the plaintiff.” *Id.* “On the other hand, through nonfeasance, the risk is merely made no worse,” consisting of “passive inaction or failure to take steps to protect others from harm.” *Id.* (internal quotations omitted).

Since the distinction between misfeasance and nonfeasance is not always clear, one “can be led astray by thinking that a defendant’s negligent act must be characterized as an affirmative act for a duty to exist, rather than appreciating that it is the defendant’s entire course of conduct that must constitute an affirmative act creating a risk of harm and that negligence may consist of an act or omission creating an unreasonable risk.” *Restatement (Third) of Torts*, §37, Reporter’s Note, cmt. c (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 356 (2008)). A classic illustration of this point is “where a negligent driver fails to apply his or her brakes as a pedestrian crosses in front of the car.” *Robb*, 176 Wn.2d at 437. Even though the driver’s failure to apply brakes is an omission, “the driver affirmatively created a new risk to the pedestrian by failing to stop his or her car.” *Id.* “Thus, even though the specific negligent act may constitute an omission, the entirety of the conduct may still be misfeasance that created a risk of harm.”³

Satterfield v. Breeding Insulation Co. is instructive whether a failure to warn is misfeasance. In *Satterfield*, the estate of a 25-year-old woman who died from mesothelioma brought a wrongful death claim against decedent’s father’s employer, alleging that defendant negligently permitted decedent’s father to wear his asbestos-contaminated work

³ *Restatement (Third) of Torts*, §37, Reporter’s Note, cmt. c (quoting *Satterfield*, 266 S.W.3d at 357).

clothes home from work, regularly and repeatedly exposing decedent to asbestos fibers over an extended time period. *Satterfield*, 266 S.W.3d at 351–52. Summary judgment for the defendant was granted on the narrow ground that the employer owed no legal duty to the decedent. *Id.* at 352. The appellate court reversed and, subsequently, the Tennessee Supreme Court affirmed. *Id.* In pertinent part, the Tennessee Supreme Court held that the defendant manufacturer’s failure to warn the decedent’s father of the known risks of the asbestos-contaminated clothes was an affirmative act of misfeasance resulting in a legal duty that extended to the decedent. *Id.* 363–364. The Court explicitly rejected the defendant’s argument that its failure to warn was nonfeasance. *Id.*

Here, the State’s failure to warn Armstrong or to inform the Court of J.L.A.’s known history of sexual inappropriateness with younger children, was an affirmative act, much like the defendant’s failure to warn in *Satterfield* and the hypothetical driver’s failure to brake in *Robb*. Viewing the State’s conduct in its entirety, its conduct was “misfeasance that created a risk of harm.” *Robb*, 176 Wn.2d at 437. Furthermore, “logic, common sense, justice, policy, and precedent” supports the existence of a legal duty. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005). Not only is it logical and basic common sense to warn caretakers of a child’s known abusive characteristics, there is a “strong

public policy in favor of protecting children against acts of sexual abuse.” *C.J.C.*, 138 Wn.2d at 726. Furthermore, “the deterrence of unreasonable behavior through tort liability is, after all, one of the guiding principles of the abolition of sovereign immunity.” *Washburn*, 178 Wn.2d at 761.

These policy considerations strongly favor Armstrong’s cause of action in this matter. The considerations include the principle of compensating victims of negligence to recompense their injury and to deter future negligence. This is a principal fundamental in our judicial system. As a general rule, a plaintiff injured as the proximate result of a defendant’s negligence is entitled to compensation even if the government is a tortfeasor. Consequently, unless the legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail. As a matter of law and common sense the State, before it placed J.L.A. in the home of his biological father and step-mother with her six-year-old daughter, had a duty to tell the parents about at least J.L.A.’s behaviors and characteristics of which they were aware and which were potentially dangerous to younger children.

Summary judgment for the State was inappropriate, because it owed a duty to Armstrong under *Restatement (Second) of Torts* §302B.

(e) Other Jurisdictions Have Found a Duty to Warn

Several courts considering this issue have concluded under similar fact patterns that the plaintiff stated a cause of action for negligence when a dependent child with a history similar to that of J.L.A. was placed in a home and the State failed to warn the new caretakers.

In *P.G. v. State, Dep't of Health & Human Servs., Div. of Family & Youth Servs.*, 4 P.3d 326 (2000), the Court concluded that the State owed a duty of due care to protect prospective parents from harm by a child being placed in their home and that the duty took the form of requiring a reasonable disclosure. The court held that the State had to provide the parents with reasonable information about the child prior to placing that child in the home and that the State had to gather that information.

In *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968), the Court held that when the State placed a child with the plaintiff, they owed a duty to warn the family of any latent, dangerous qualities suggested by the history of the child. The California Supreme Court cited several cases, all of which concluded that the law imposes a duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril. The State owes a duty to inform the family of any matter that its agents knew or should have

known might endanger the family. At a minimum this would have included any history of violence or aggression in the child's records.

In *Hobbs ex rel. Winner v. N. Carolina Dep't of Human Res.*, 135 N.C. App. 412, 520 S.E.2d 595 (1999), the Court concluded that the likelihood of a foster child acting out his aggressive behavior made the State's conduct negligent in failing to obtain his records and sharing that information with the family in whose home the child was being placed. In failing properly to investigate and in failing to inform, the State breached its duty to the parents in whose home they were placing the child; any injuries suffered by the family because of the negligence was something for which the State could be found liable. The Court found the contact between the social worker and the family dictated that the defendants had to assess the individual characteristics and circumstances of the dependent child in whose home he was being placed. The process must involve a thorough review and analysis of the records to determine whether the dependent child poses a risk of danger to the other children in the home. The Court held that dismissal was contrary to the law in that the individual defendants who failed to provide information to the family could be found to be individually liable. *Hobbs*, 135 N.C. App. at 422.

In *Anderson By & Through Anderson/Couvillon v. Nebraska Dep't of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995), the Nebraska

Supreme Court concluded that where the State knew or should have known of the violent and abusive behavior of the child being placed in the home of the plaintiff, it had a duty to inform the child's caretakers of the child's behavior and it had a duty to respond truthfully to safety related inquiries made by family members regarding the child being placed in the home. There, the Court held that caseworkers in the County Department of Public Welfare were liable to the wife for the death of her husband, who was killed by a boy placed in their home.⁴

In *Savage v. Utah Youth Vill.*, 104 P.3d 1242, 514 Utah Adv. Rep. 19 (2004), the Utah Supreme Court explicitly recognized a cause of action for negligent placement of a child in foster care. The Court reasoned that the duty existed after weighing the foreseeability and likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon the agency. Further, the Court reasoned that because of this special duty, placement agencies should be held liable for their "negligence in the process of placement that results in sexual abuse." *Savage*, 104 P.3d at 1247. The Court reversed the District Court order granting the defendant's motion for summary judgment based on the defendant's failure to provide the foster parents with the child's records which contained information about his sexual history and criminal record.

⁴ See also *Snyder v. Mouser*, 149 Ind. App. 334, 272 N.E.2d 627 (1971).

In light of the above persuasive authorities, the trial court erred when it agreed with the State and concluded there is no common law cause of action for failing to warn M.M.S.'s family and/or the Dependency Court of J.L.A.'s history of sexually aggressive behavior.

(3) The State Owed Armstrong a Statutory Legal Duty Under RCW 26.44.050, the Tort of Negligent Investigation

The trial court, after hearing oral argument and considering all the evidence, concluded that Armstrong's negligent investigation claim had no merit where the record established that a sexually aggressive dependent child was placed into a home with vulnerable younger children and where the State failed to conduct a complete and adequate investigation of the dependent child's prior records. The trial court concluded that the only investigation DSHS was required to undertake was an investigation into whether the father was a fit person to take custody of his dependent child. The trial court further concluded that DSHS did not need to investigate whether the child was a fit person to be put into a home with young children, given his history of sexual aggression.

The claim of "negligent investigation" is available to "children, parents, and guardians of children who are harmed because DSHS has gathered incomplete or biased information that results in a harmful placement decision." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d

589, 602, 70 P.3d 954 (2003). In *M.W.*, the Washington Supreme Court identified three possible examples of what a harmful placement decision would include: (1) wrongfully removing a child from a nonabusive home, (2) placing a child into an abusive home, or (3) allowing a child to remain in an abusive home. *M.W.*, 149 Wn.2d at 597-98. In recognizing these three categories for negligent investigation claims, the Supreme Court explicitly adopted the analysis of Judge Morgan’s dissenting opinion in the Court of Appeals. *Id.* at 594-95, 600.

In dissent below, Judge Morgan analyzed twelve previously published cases involving negligent investigations by DSHS. *M.W. v. Dep’t of Soc. & Health Servs.*, 110 Wn. App. 233, 248–55, 39 P.3d 993 (2002). He described the common thread involved in the three derivations of the claim “negligent investigation” that had been before Washington courts:

Each of these categories shows that before DSHS makes a child-placement decision—in other words, *before it decides to place a child in a home*, leave a child in a home, or remove a child from a home—it *must assemble and consider as much information as a reasonable person would assemble* and consider under the same or similar circumstances. If it fails to do that, and its failure is a proximate cause of harm to the child or parents, it is liable for “negligent investigation.”

110 Wn. App. at 255 (emphasis added).

The law is well-established that children injured because of the State's negligence may sue the State under RCW 26.44.050 for negligent investigation. *M.W.*, 149 Wn.2d 589.

The State should be liable under RCW 26.44.050 for negligent investigation when it has reason to believe that a dependent child may have a history of sexually aggressive behavior, fails to review the child's history, and then places the sexually aggressive dependent child in a home with young vulnerable children without warning the new caretakers of the dependent child's history of sexually aggressive behavior.

In *Babcock v. State*, 116 Wn.2d 596, the Washington Supreme Court concluded that qualified immunity had not been considered under the proper standard and this issue had to go back to the trial court for the court to determine whether the social worker had followed "...statutory and regulatory procedures in every respect, that their actions were reasonable, and that their statutory duties required their actions." *Babcock*, 116 Wn.2d at 618.

However, the qualified immunity of the State's employees did not extend to the State itself because of the legislature's repeal of sovereign immunity under RCW Chapter 4.92. The Court opined:

Section 4.92[.090] provides for actions against the State and repeals sovereign immunity. The common law immunity we have granted caseworkers today is reasonably consistent with the

legislative policy.... [s]ound policy considerations justify granting caseworker some immunity. We must, however, do so in a manner which does not deprive those wronged by DSHS' actions of a remedy which the Legislature contemplated they would have.

Babcock, 116 Wn.2d at 620 (emphasis added).

The *Babcock* Court concluded allowing tort claims against the State for negligent placement decisions was sound public policy, stating:

The existence of some tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility that those injured by DSHS negligence can recover.

...

We affirm the trial court's dismissal of the claims for alienation of affection and outrage but reverse dismissal of the *Babcock*'s negligence claims. We hold the State has no immunity from suit and that absolute immunity does not apply in this case.

Babcock, 116 Wn.2d at 622

In *Estate of Shinaul M. v. State Dep't of Soc. & Health Servs.*, 96 Wn. App. 765, 980 P.2d 800 (1999), the Court of Appeals reversed that trial court's grant of summary judgment on the issue of legal causation. The court noted legal causation "is grounded in policy determination as to how far the consequences of a defendant's act should extend." *Estate of Shinaul M.*, 96 Wn. App. at 770–71 (citation omitted). The Court opined that a "paramount public policy concern is the health, welfare, and safety of the child." *Id.* at 772 (citing RCW 26.44.010). The Court held that:

policy, logic and common sense demand that DSHS not be absolved of liability for resulting foreseeable injuries where a DSHS employee breaches its duty to a developmentally disabled

child and the breach of duty is a “but for” cause of the injury... *precluding liability in the present case would lead to an illogical and insupportable result, i.e., DSHS and its caseworkers could breach their duty to children with impunity.*

Id. at 772–73. (emphasis added).

The State would have this Court hold that there is a cause of action under RCW 26.44.050 where a dependent child is placed in a home and is harmed because of an incomplete investigation, but not where an incomplete investigation results in a sexually aggressive dependent child being placed in a home with a vulnerable six-year-old who is then sexually molested by the dependent child.

In both cases children are harmed. In both cases the harm results from an incomplete investigation. The harm flows from the State’s failure to do what it is legally required to do, from its failure to adhere to the standard of care required of social workers, from its failure to adhere to its own policies, and from its failure to review records and to conduct an investigation regarding the history of a child it knew had been involved in some improper sexual contact with his younger sister.

Though the assessment of the suitability of the caregiver is one part of the State’s duty in deciding whether to place the child with his biological father, it is not the only duty of the State. The State’s own policies explicitly mandated that the caregivers of a dependent child must

be provided disclosure of the dependent child's needs and characteristics.
CP 14-15, 17, 19-22, 213.

In order fully to discharge its duties under the statutes and under the order of the dependency court, the State had to determine not only if the placement in the Armstrong home was appropriate for J.L.A., but also whether it was appropriate for the Armstrong family. This determination would have led to the conclusion that putting J.L.A. into a home with Ms. Armstrong's younger daughter was not appropriate for him without, at the very least, various safeguards in place, including those that had been mandated by DSHS in 2010.

In *M.W.*, the Court concluded that the plaintiffs failed to establish a cause of action under RCW 26.44.050 because the third part of the *Bennett* analysis was not satisfied. *See Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). That third prong calls for an analysis of whether the underlying purpose of the legislation is consistent with inferring a remedy. *Bennett*, 113 Wn.2d at 920. In *M.W.*, a cause of action for negligent investigation was not established because the plaintiffs failed to prove or even allege "that DSHS conducted an incomplete or biased child abuse investigation that resulted in a harmful placement decision." *M.W.*, 149 Wn.2d at 601. In Armstrong's case, to the contrary, the evidence

establishes an incomplete investigation that resulted in a harmful placement decision.

Babcock, Beltran, Shinaul, and M.W. all instruct that a cause of action against the State for the negligent investigation of the child being placed into the home is available to Armstrong under the facts and circumstances of this case.

(4) Partial Summary Judgment Should be Granted in Favor of Appellants

Generally, an order denying summary judgment is not appealable. *McDonald v. Moore*, 57 Wn. App. 778, 779, 790 P.2d 213 (1990); K. Tegland, 14A Wash. Prac., Civil Procedure §25:25 (2d ed.). This Court, however, has reviewed such orders when both parties moved for summary judgment and there was an appeal from summary judgment by the party for which summary judgment was denied. See *Firth v. Lu*, 103 Wn. App. 267, 278–79, 12 P.3d 618 (2000); *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 106 P.3d 290 (2005); *Ruff v. County of King*, 72 Wn. App. 289, 865 P.2d 5 (1993), *decision rev'd on other grounds*, 125 Wn.2d 697, 887 P.2d 886 (1995). In this context, review of an order denying summary judgment is proper, as further proceedings would serve no purpose. K. Tegland, 4 Wash. Prac., Rules Practice CR 56 (6th ed.) (citing *Firth v. Lu*, 103 Wn. App. 267).

It is undisputed that Ms. Christensen failed to review J.L.A.'s DSHS file and failed to disclose J.L.A.'s extensive history of sexual aggression both to the dependency court and to Ms. Armstrong. The State had a duty to do so. The State's failure to do so was an undisputed breach of that duty, something that the State did not below, and cannot now, contest. The State's failure resulted in placing J.L.A. into Ms. Armstrong's home with no safety plan or safeguards. This resulted in M.M.S. being sexually molested by J.L.A.

Here, because the State relied upon purely legal arguments, if this Court finds there is a duty to the Appellants, the unrebutted evidence submitted by Appellants regarding breach and causation necessitate a finding of summary judgment for Appellants on the elements of duty, breach, and causation.

(5) Other Issues Raised by the State Below

The State raised various arguments below. If the State relies on those arguments on appeal, Appellants rely upon their own arguments in their response to the State's motion for summary judgment. CP 203-208.

F. CONCLUSION

The State violated both statutory and common law duties of care to Armstrong. M.M.S. was sexually molested as a direct result of the State's failures. To follow the State's claims that it owed no duties to Armstrong

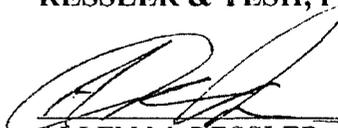
would allow DSHS to act with impunity regarding many placement decisions and, undoubtedly, would occasion many similarly disastrous results.

Summary judgment should be reversed and partial summary judgment should be granted to Armstrong on the elements of duty, breach, and causation.

Dated this 8th day of September, 2016.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Khanh T. Tran, hereby declare under penalty of perjury under the laws of the State of Washington that on this 8th day of September, 2016, I caused to be served a copy of the "Brief of Appellants" to the attorneys/parties listed below via the method indicated:

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DATED this 8th day of September, 2016 at Seattle, Washington.

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Khanh T. Tran, Paralegal

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