

FILED  
COURT OF APPEALS  
DIVISION II

2017 JAN 9 PM 3:49

No. 49287-3-II

STATE OF WASHINGTON

---

BY AS  
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.

---

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

---

Attorneys for Appellants

Allen M. Ressler, WSBA #5330  
Jonathan E. Van Eck, WSBA #47755  
Ressler & Tesh, PLLC  
821 Second Avenue, Suite 2200  
Seattle, WA 98104  
(206) 388-0333

## TABLE OF CONTENTS

	<u>Page</u>
A. ARGUMENT.....	1
(1) <u>State’s Characterization Of The Facts</u> .....	1
(2) <u>DSHS Owed A Duty to M.M.S. under Restatement     (Second) of Tort § 315</u> .....	3
(3) <u>DSHS Owed A Duty to M.M.S. Under RCW 26.44</u> .....	8
(4) <u>The Dependency Court Order Was Not A Superseding     Intervening Cause</u> .....	10
(5) <u>DSHS Had A Duty To M.M.S. Under The Restatement     (Second) Of Torts § 302B</u> .....	12
(6) <u>Other Jurisdictions Finding A Duty To Warn</u> .....	13
(7) <u>Any Argument That Mr. Armstrong’s Character And     Fitness Has Any Bearing On This Case Is A Red Herring....</u> .....	13
(8) <u>DSHS Is Not Immune Under RCW 4.24.595</u> .....	16
B. CONCLUSION.....	17

## TABLE OF AUTHORITIES

Page

### Table of Cases

#### Washington Cases

<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991) .....	8, 9, 17
<i>C.J.C. v. Corp. of Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999).....	6, 7
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962) .....	9
<i>HBH v. State</i> , 47438-7-II, 2016 WL 7212613.....	6, 7
<i>In re Aschauer's Welfare</i> , 93 Wn.2d 689, 611 P.2d 1245 (1980) .....	11
<i>M.W. v. Dep't of Soc. &amp; Health Servs.</i> , 149 Wn.2d 589, 70 P.3d 954 (2003) .....	7
<i>Petcu v. State</i> , 121 Wn. App. 36, 86 P.3d 1234, 1246 (2004).....	10
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1983).....	5
<i>Roberson v Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005) .....	15
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	7, 8
<i>State v. Logan</i> , 102 Wn. App. 907, 10 P.3d 504 (2000).....	9
<i>Terrell C. v. State Dep't of Soc. &amp; Health Servs.</i> , 120 Wn. App. 20, 84 P.3d 899 (2004) .....	7, 8
<i>Tyner v. State Dep't of Soc. &amp; Health Servs., Child Protective Servs.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	7, 10
<i>Volk v. DeMeerleer</i> , 91387-1, 2016 WL 7421397 .....	<i>passim</i>

#### Other State Cases

<i>Satterfield v. Breeding Insulation Co.</i> , 266 S.W.3d 347 (Tenn. 2008) .....	11
-----------------------------------------------------------------------------------	----

#### Statutes

RCW 4.24.595 .....	16
RCW 26.44. ....	7, 8, 9, 15
RCW 74.13 .....	16

Other Authorities

Restatement (Second) Of Torts § 302 .....11, 12  
Restatement (Second) Of Torts § 315 ..... *passim*  
Restatement (Second) Of Torts § 319 .....3, 7

## A. ARGUMENT

### (1) The State's Characterization Of The Facts

The State disputes no fact in Appellants' statement of the case. It does, however, make assertions that are irrelevant, unsupported with citation to the record, or mischaracterize the record. Appellants will limit their reply to those facts outlined in Respondent's pleadings relevant to the legal issues being considered.

The State relies heavily on the declaration of social worker Michelle Christensen, which was submitted to support the State's original Motion for Summary Judgment. Br. of Respondent at 2-6. One of those assertions was that in 2013, J.L.A.'s paternal aunt, Jaquetta Cummings, "never had any concerns about inappropriate behavior by J.[L.]A." CP 166. Contrary to Ms. Christensen's assertion, Ms. Cummings testified when deposed that she had expressed concerns to Ms. Christensen in 2013, regarding J.L.A.'s prior sexually inappropriate behavior. CP 250. Specifically, Ms. Cummings asked Ms. Christensen if J.L.A. had received any counseling. *Id.* Ms. Cummings was concerned about her own daughter's safety. *Id.* Furthermore, Ms. Cummings was assured by the social worker that there was nothing in the records to warrant any concern about J.L.A. CP 250-251. Ms. Cummings testified that she relayed these assurances to Mr. and Mrs. Armstrong. CP 251-253. Ms. Christensen

testified that she never reviewed any records that predated the 2013 dependency. Br. of Appellants at 6.

Regardless, this Court views all the evidence in the light most favorable to Appellants. *Id.* at 8. The only conclusion that the Superior Court Judge could have reached based on the evidence submitted, to the extent it was even relevant, was that Sean Armstrong had minimal involvement with his son from age 2-12 and that the record did not support the social worker's assumption that he had knowledge of his son's history of sexually inappropriate conduct. With respect to Ms. Armstrong, once again, the only conclusion supported by the record was that she had no information of J.L.A.'s history of sexually inappropriate conduct with his half-sister and other foster children.

The State asserts that since Ms. Christensen believed that Mr. Armstrong was a fit parent, she could not recommend against the placement or, apparently, do any investigative action regarding J.L.A. Br. of Respondent at 5. As addressed below, this is contrary to DSHS policies and procedures, the standard of care for a social worker, and Washington law.

The State's sole argument that Ms. Christensen did not have to review J.L.A.'s DSHS records is Ms. Christensen's own conclusory statement to that effect. The State does not address the fact that its own

policies and procedures require that the social worker provide full disclosure about the dependent child to the caregiver nor does it address the standard of care for a social worker with respect to its requirement to review the entire case file of a dependent child in their charge. CP 214.

**(2) DSHS Owed A Duty to M.M.S. Under Restatement (Second) Of Torts § 315**

The Supreme Court of Washington, in an opinion issued last month, clarified the manner in which a Court undertakes a review of the issues of control and supervision as it relates to an analysis of duty under *Restatement (Second) of Torts* § 315. See *Volk v. DeMeerleer*, 91387-1, 2016 WL 7421397 (Wash. Dec. 22, 2016).

In *Volk*, one of the defendant psychiatrist's outpatients murdered two individuals and attempted to murder a third ("the plaintiffs"). 2016 WL 7421397 at 1. The outpatient subsequently committed suicide. *Id.* In the nine years prior to the attack, the outpatient had received outpatient treatment from the defendant psychiatrist, "during which time he expressed suicidal and homicidal ideations" but never named the plaintiffs as potential victims. *Id.* The plaintiffs sued the defendant psychiatrist, alleging that the defendant psychiatrist owed a duty care to them. *Id.* The trial court dismissed the plaintiffs' claims on summary judgment, holding that the defendant psychiatrist owed no legal duty to plaintiffs. *Id.* at 4.

The Washington Court of Appeals, Division Three, reversed the trial court's holding that no legal duty was owed. *Id.* On review, the Supreme Court of Washington, considered “what duty, if any, a private mental health professional (actor) owes to the putative foreseeable victim (other) of the professional's outpatient (third person).” *Id.* at 6.

The *Volk* Court provides an in-depth analysis of the scope of the duties owed under *Restatement* §§ 315 and 319. The Court recognized that a duty under § 315 is “imposed whenever the nature of the relationship warrants social recognition as a special relation, not based on any hypothetical ability to control the patient.” *Id.* at 7. Importantly, when analyzing whether a duty is owed to foreseeable victims (others) under § 315, “the amount of control or the nature of control” over the third party “is not determinative of whether” the actor has a duty to others. *Id.* at 9. A duty under § 315 is distinct from a duty under § 319 and is “without regard for the ‘control’ principle guiding the § 319 take charge cases.” *Id.* “Custodial control is not a prerequisite to the imposition” of a duty under § 315. *Id.* at 14. The *Volk* decision should forever put to rest the Respondent's argument that a special relationship under § 315 requires a “custodial relationship” or “exclusive control of the victim's surroundings.” Br. of Respondent at 18.

The Court in *Volk* considered several factors in finding that a duty existed under § 315, including ability to control, the public's interest in safety from violent assaults, and the foreseeability of harm. *Id.* Regarding the control factor, the Court found that sufficient control existed to weigh in favor of imposing a duty simply because that there were “preventative measures” that could be taken. *Id.* at 11.

The reasoning of *Volk* directly applies in finding a special relationship between a social worker and a dependent child such that a duty would flow to others that could be foreseeably harmed by the dependent child. The nature of the relationship between a social worker and a dependent child is such that the social worker, combined with the social worker's professional knowledge, “stand[s] in the distinct position of being able to mitigate or prevent the dangerousness” of the dependent child, including having the ability to warn foreseeable victims. *Id.* at 9 (citing *Petersen v. State*, 100 Wn.2d 421, 427, 671 P.2d 230 (1983)). The factors considered by the *Volk* Court are directly applicable. The social worker has control over the dependent child via the ability to seek measures to mitigate or prevent the dangerousness of the dependent child, such as recommending a safety plan which would include constant

supervision.<sup>1</sup> There is a strong public interest in the “protection of children.” *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 722, 985 P.2d 262 (1999). It is foreseeable that a dependent child with a history of sexual aggression towards younger children would pose a risk to a younger child in any home in which the dependent was placed.

There are sufficient considerations of public policy to find that DSHS owed a duty to Appellants based on its special relationship with J.L.A. under § 315(a).

In addition to the *Volk* opinion, this Court recently issued its opinion in *HBH v. State*, 47438-7-II, 2016 WL 7212613. In *HBH*, the plaintiffs were foster children who were abused by their foster parents, who later became their adopted parents. 2016 WL 7212613 at 1-2. The plaintiffs brought common law negligence claims against DSHS. *Id.* In finding that DSHS had a common law special relationship with the plaintiffs, the Court rejected exactly the same argument that the State brings now: that a special relationship “must be custodial in nature.” *Id.* at 6; Br. of Respondent at 26, 30.

Though *HBH* addresses DSHS’ special relationship with dependent children under § 315(b), this Court, much like the Court in *Volk*, read broadly what will be considered sufficient for a special

---

<sup>1</sup> DSHS in fact already had in the past adopted such a preventable measure for J.L.A. CP 103.

relationship to be found. The logical extension of *HBH* is that DSHS has a special relationship to the family unit in which it places dependent children. The core mission of the Children’s Administration of DSHS is “[p]roviding for child safety.” CP 14. “Safety is the primary and essential focus that informs and guides all decisions,” including “reunification decisions.” *Id.* Prior or soon after placement, a social worker must have a “candid discussion” with the caretakers and provide “full disclosure of the child’s needs and characteristics.” *Id.*, CP 17, CP 21-22. The purpose of chapter 26.44 RCW (Abuse of Children) and chapter 74.13 RCW (Child Welfare Services) is to “protect ‘the integrity of the family and the safety of children within the family.’” *Sheikh v. Choe*, 156 Wn.2d 441, 454, 128 P.3d 574 (2006) (quoting *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 597, 70 P.3d 954 (2003)); *Tyner v. State Dep’t of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 79, 1 P.3d 1148 (2000) (the “State has a duty to act reasonably in relation to *all members of the family.*” Emphasis added.). Simply put, as “a matter of public policy, the protection of children is a high priority.” *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 722, 985 P.2d 262 (1999).

The State’s argument that there is no special relationship is not persuasive. Its reliance on *Terrell C. v. State Dep’t of Soc. & Health Servs.*, 120 Wn. App. 20, 84 P.3d 899 (2004) is misplaced. *Terrell* is

easily distinguishable from the present case. First, *Terrell* was analyzed solely under § 319, not § 315. *Id.* at 27. As *Volk* now clarifies, the relationships under § 315 are wholly independent from § 319. Second, *Terrell* involved strangers in the community, not members of the dependent child's family with whom he was placed. The facts of this case are a far cry from those presented to the Court in *Terrell*. Plaintiffs' theory of the case in *Terrell* would require warnings to neighbors, schools, youth and church groups, quite possibly running afoul of numerous statutes providing strict limitations on the release of this type of information. The only disclosures required in this case were to the family in which the dependent child was being placed. The State's citation to *Sheikh*, 156 Wn.2d 441, is similarly misplaced, as that case was also analyzed under § 319 and involved a stranger in the community.

**(3) DSHS Owed A Duty to M.M.S. Under RCW 26.44**

The State argues that the tort of negligent investigation under RCW 26.44 requires a report or referral and without one there is no statutory cause of action. The State argues that the Appellants are misreading *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). Br. of Respondent at 11. Under *Babcock*, the Supreme Court of Washington recognized a claim for negligent investigation in the context of negligent

social work.<sup>2</sup> Importantly, *Babcock* did not involve a CPS referral or report generated pursuant to RCW 26.44. The placement occurred because DSHS agreed pursuant to an interstate compact to conduct a home study and supervise a foster care placement. If, as DSHS now argues, there is no cause of action for negligent placement unless there is a prior CPS referral, then *Babcock* cannot be good law. Regardless, DSHS had received numerous reports of J.L.A.'s sexual inappropriateness. CP 59-131, 213-214.

Lastly, the State's assertion that placing J.L.A. with the Armstrong family was not a "placement" and, thus, no negligent placement occurred, is fatuous. Respondent provides no authority that J.L.A.'s placement with Appellants was not a "placement" in the context of a negligent investigation claim. Therefore the Court may assume there is none. *State v. Logan*, 102 Wn. App. 907, 911, 10 P.3d 504 (2000) quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

---

<sup>2</sup> "The gravamen of this complaint is negligent investigation." *Babcock*, 116 Wn.2d at 610.

**(4) The Dependency Court Order Was Not A Superseding Intervening Cause**

The issue of whether or not the dependency court order was a superseding cause is simply whether or not J.L.A.'s extensive history of sexual inappropriateness towards younger children would have been material to the dependency court. The question of materiality is "a question for the jury unless reasonable minds could reach but one conclusion." *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000).

The State presents two arguments to support its position that the dependency court was presented with all material facts.

In support of its first argument, the Respondent cites, but misconstrues, the opinion in *Petcu v. State*, 121 Wn. App. 36, 59, 86 P.3d 1234 (2004). The State contends that the *Petcu* Court found that if a party has *access* to material information to which DSHS also has access, then DSHS need not present that material information. That is not the holding of the Court. The *Petcu* Court held that when analyzing whether or not all material facts were before the court, the determination is based on all the *presented* evidence to the court. There is no requirement under *Petcu* that DSHS must have exclusive control of the material information not presented to the court. Regardless, there is no evidence that Appellants

had access to J.L.A.'s DSHS file and, in fact, the evidence is that Ms. Armstrong was unaware of J.L.A.'s history of sexual inappropriateness. CP 223-224.

For its second argument, the State puts forth the dangerous assertion that J.L.A.'s extensive history of sexual aggression would not be material to a court considering the placement of the dependent child. The State furthers this bold claim by stating that the only issue for the dependency court was whether or not Mr. Armstrong was a fit parent.

This is a gross mischaracterization of the purpose and function of a dependency. The Washington Supreme Court has repeatedly held that the "goal of a dependency hearing is to determine the welfare of the child and his best interests." *In re Aschauer's Welfare*, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). The entire statutory framework is directed to the safety of children and the preservation of the family unit. It is difficult to imagine that J.L.A.'s extensive history of sexual aggression towards younger children would not be something for the dependency court to consider in determining what would be in J.L.A.'s best interests. It is ridiculous to suggest that the dependency court judge would not want to know, before signing off on the decision about whether to send this child with an extensive history of sexual aggression to his father's home in Canada, whether the family was aware of this history, if there were young children

in the home, and whether there were plans in place to provide for the protection and safety of the entire family.

**(5) DSHS Had A Duty To M.M.S. Under The Restatement (Second) Of Torts § 302B**

In its interpretation of *Restatement (Second) of Torts* § 302B, the State argues that the actor must do some action in providing the third party “the actual weapon” into the third party’s hands for a duty to arise under § 302B. Br. of Respondent at 25. As extensively laid in Appellants’ brief, that is simply not a requirement under § 302B. Br. of Appellants at 21-22. Importantly, “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.” *Id.* at 22 (citation omitted). Here, though the social worker’s specific act of failing to warn Ms. Armstrong was an omission, since the social worker failed to follow DSHS’ own policies and procedures (like the defendant in *Satterfield*) and did not meet the standard of care, the State’s conduct, viewed in its entirety, was “misfeasance that created a risk of harm.” Br. of Appellants at 23 (citation omitted); CP 214.<sup>3</sup>

---

<sup>3</sup> The State’s attempt to distinguish *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347 (Tenn. 2008) ignores that the essence of the defendant’s negligence was its failure to warn its employees. Furthermore, contrary to the State’s statement, the social worker did not act in a manner “consistent with the underlying statutory scheme,” as the social worker failed to

**(6) Other Jurisdictions Finding A Duty To Warn**

The State misreads Appellants' analysis of out-of-state cases, asserting, incorrectly, that these cases were cited in the context of *Restatement (Second) Of Torts* § 302B. As made clear in Appellants' opening brief (and by simply reading the cases), these persuasive authorities are cited to reflect that other courts addressing similar circumstances have found a common law duty, a duty not necessarily connected to any one section of the *Restatement*.

These cases are summarily dismissed by the State due its belief that a common law duty cannot arise. As noted above, Washington Courts have conclusively made that argument moot.<sup>4</sup>

**(7) Any Argument That Mr. Armstrong's Character And Fitness Has Any Bearing On This Case Is A Red Herring**

The State makes the confusing argument that the issue in this case is whether Mr. Armstrong was a fit parent. The State might wish that were the issue, but it is not. The real issue is whether the social worker responsible for investigating whether the Canadian home was an appropriate place to send J.L.A., a dependent child, breached her duty of

---

follow DSHS' policies and procedures. Regardless, the duty under § 302B is separate from what statutes may impose.

<sup>4</sup> Curiously, though perhaps not surprisingly, the State makes the assertion that there is "no stand-alone duty to warn biological parents." Br. of Respondent at 30. That is not at issue in this case. Furthermore, the State provides no authority for this claim. To the contrary, the record before this Court is that such a duty does exist. CP 214.

care by 1) not reviewing the prior dependency file, especially after she discovered that there had been earlier reports of sexual inappropriate behavior by the dependent child, 2) not reporting to the dependency court information about the reported history of the dependent child's sexual behavior, and 3) not alerting the family where the child was being sent about the conduct reported.

The only evidence in the record before this Court is that this social worker had a duty to review J.L.A.'s DSHS file and warn Ms. Armstrong and the Court of its relevant contents. CP 214. Appellants have never claimed, and indeed do not believe, that Mr. Armstrong is not a fit parent. The home might have been a fit place for J.L.A. if the family had been warned about his history of sexual contact with his half-sister. Safety plans could have been put in place that prevented the injuries suffered by M.M.S.

The argument by the State that, since Mr. Armstrong was a party to the dependencies, that fact somehow relieves the State of any duty to review its own files of dependent children, is meritless. First, the fact that Mr. Armstrong was a listed party to the dependencies is simply irrelevant, as Mr. Armstrong is not a party in this matter. In fact, the State failed affirmatively to plead in its answer that a non-party is at fault. CP 147-148. Second, the evidence, especially when taken in the light most

favorable to the Appellants, is that Mr. Armstrong was simply not involved in J.L.A.'s life in any meaningful way after he was a toddler until the 2013 dependency, which was one reason there were dependencies in the first place for J.L.A. CP 97, 118, 214. Lastly, it is incredulous to assert that, since Mr. Armstrong was entitled to obtain documents from J.L.A.'s dependencies, the State was relieved from any obligation to review its files regarding J.L.A. and to inform Ms. Armstrong of his history and characteristics. The State cites no authority for such an absurd proposition, which is contrary to DSHS's own policies and procedures. CP 214.<sup>5</sup>

The State seems to suggest that if a biological parent seeks to have his or her child placed with her during a dependency, and that parent has been determined to be fit, then the State has no duty to do anything but agree to the placement. It would make no difference whether the parent was not involved in the child's life for over 10 years, so long as he was presently fit. Taking the State's position to its logical conclusion, DSHS could have actual knowledge that the dependent child has a history of

---

<sup>5</sup> The State's discussion of *Roberson v Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005) is unpersuasive. *Roberson* addressed only negligent investigation under RCW 26.44; common law duties were not at issue. Furthermore, there was no harmful placement decision as a result of a biased or faulty investigation. *Roberson*, 156 Wn.2d at 45-46. Here, as a result of the State's failure to review its own files on J.L.A. and to inform Ms. Armstrong of J.L.A.'s history and characteristics, J.L.A. was placed into Ms. Armstrong's home and M.M.S. was sexually molested. This is a quintessentially harmful placement.

sexually molesting younger children, that the parent had no information about the history of molestation, but still not have to inform the dependency court nor the caregivers of this, even if the placement home contained young children. Appellants' counsel has seen the State take farfetched positions to avoid responsibility for the injuries suffered by children, but this one is the most farfetched.

**(8) DSHS Is Not Immune Under RCW 4.24.595**

The State briefly argues that that RCW 4.24.595 is a complete bar to this lawsuit. This statute has not been addressed in any published Washington appellate opinion. The State's reliance on this statute is flawed for two reasons. First, the State ignores that its alleged negligence (failure to warn and failure to review its files) is wholly independent from the dependency court order; the dependency court did not order DSHS not to warn and not to review its files.

Second, the State's argument that the social worker has immunity as a witness does not save the State from liability for the injuries suffered by M.M.S. As succinctly stated by the Supreme Court of Washington:

An agent's immunity from civil liability generally does not establish a defense for the principal. *Restatement (Second) of Agency* §217 (1958). Accordingly, the immunities of governmental officials do not shield the governments which employ them from tort liability, even when liability is predicated upon respondeat superior.

*Babcock v. State*, 116 Wn.2d at 620.

This statute, to the extent it applies, cannot provide DSHS any protection.

**B. CONCLUSION**

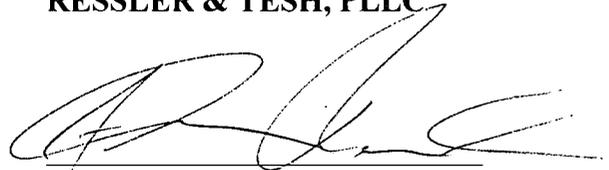
The State violated both statutory and common law duties of care to Appellants. M.M.S. was sexually molested as a direct result of the State's failures. To follow the State's claims that it owed no duties to Armstrong would allow DSHS to act with impunity regarding many placement decisions and, undoubtedly, would occasion many similarly disastrous results.

The State relies only on legal arguments that Appellants do not have a cause of action under common law or statute. The State presented no evidence to rebut Appellants' evidence that the State's actions were a breach of the standard of care. Consequently, if this Court finds that the State had a duty to Appellants, then summary judgment should be reversed and partial summary judgment should be granted to Appellants on the elements of duty, breach, and causation. This matter should be remanded to trial on the sole issue of damages.

Dated this 9<sup>th</sup> day of January, 2017.

Respectfully submitted,

**RESSLER & TESH, PLLC**

A handwritten signature in black ink, appearing to read "A. M. Ressler", written over a horizontal line.

Allen M. Ressler, WSBA #5330  
Jonathan E. Van Eck, WSBA #47755  
Attorneys for Appellants

FILED  
COURT OF APPEALS  
DIVISION II

**DECLARATION OF SERVICE**

2017 JAN 9 PM 3:49

I, Jack Miller, hereby declare under penalty of perjury under the laws of the State

of Washington that on this 9<sup>th</sup> day of January, 2017, I caused to be served a copy

STATE OF WASHINGTON

BY AS

of the "Reply Brief of Appellants" to the attorneys/parties listed below via the

DEPUTY

method indicated:

PETER J. HELMBERGER, WSBA #23041  
OFFICE OF THE ATTORNEY  
GENERAL  
1250 Pacific Avenue, Suite 105  
P.O. Box 2317  
Tacoma, WA 98401  
Tel: 253.593.5243

Via ABC Legal Messenger  
 Via Facsimile  
 Via USPS Mail  
 Via Hand Delivered  
 Via Electronic Mail  
Pursuant to E-Service  
Agreement

DATED this 9<sup>th</sup> day of January, 2017 at Seattle, Washington.

**RESSLER & TESH, PLLC**

  
\_\_\_\_\_  
Jack Miller, Paralegal