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DIVISION II

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NO. 49287-3-II STATE OF WASHINGTON

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

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M.M.S., a minor (DOB 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,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Department of Social and Health Services complied with a court order that 12-year-old J.L.A., be returned to his father's care. In bringing this suit against DSHS, the plaintiffs have not raised an actionable tort duty against DSHS for following the court order. DSHS had no duty to defy the court order and to prevent a fit parent from taking custody of his son. The statutory duty of negligent investigation is inapplicable because there were no allegations of abuse related to J.L.A.'s placement in his father's home to investigate. Nor was there a duty to warn. A common law duty under *Restatement (Second) of Torts* § 302B (1965) arises when an actor engages in affirmative conduct that creates a reasonably high degree of risk of harm. A failure to warn is not affirmative conduct, especially in the context of complying with a court's placement order.

Even if an actionable tort duty had been raised, both statutory and common law immunity would apply. DSHS is entitled to absolute common law immunity for complying with court orders. In addition, RCW 4.24.595 specifically grants DSHS comprehensive, statutory immunity for actions related to the dependency placement process, including witness testimony.

## II. STATEMENT OF RELEVANT FACTS

J.L.A. and his siblings resided off and on with his mother through two dependencies. The second dependency ended in 2010. On April 16, 2013, a third dependency was initiated through the entry of a Shelter Care Order. The Order directed in part that DSHS should explore placing J.L.A. with his biological father, Mr. Sean Armstrong and his family who resided in Canada. CP at 166. The permanent plan goal was for J.L.A. to reside with his father so that the shelter care proceeding could be dismissed. CP at 166, 173-82. Both Mr. and Mrs. Armstrong requested that J.L.A. reside in their home. CP at 166, 173-82.

In May 2013, social worker, Michelle Christensen, was assigned to J.L.A.'s dependency. CP at 166. J.L.A. was placed with Jacquetta Cummings, Mr. Armstrong's sister when Ms. Christensen took over the case in May 2013. Social worker, Ms. Christensen, spoke with Ms. Cummings in person regarding J.L.A.'s prior placement in her home in 2010. Ms. Cummings indicated that her ex-husband had requested that J.L.A. be removed based on a "rumor" he heard about at a dependency court hearing about J.L.A.'s sexual acting out. Ms. Cummings told social worker Christensen that she never had any concerns about inappropriate behavior by J.L.A. either when he was placed with her in 2010 or in 2013. CP at 166. Ms. Cummings also testified that Mr. Armstrong, her brother,

had participated in a family team meeting by telephone in which J.L.A.'s sexual acting out history was discussed. CP at 245-46. Ms. Cummings also testified that she had spoken with Mr. Armstrong about J.L.A.'s sexual acting out after the request that he be removed from her home in 2010. CP at 248-49. Ms. Cummings also indicated in her deposition that she had relayed information about J.L.A.'s sexual acting out in a telephone conversation with Sean and Crystal Armstrong prior to J.L.A. being placed in the Armstrong home in 2013. CP at 251-54.

During J.L.A.'s prior dependencies, the Individual Service and Safety Plans indicated:

- March and May 2005 – J.L.A. resides with paternal grandparents; has sexually acted out on two different occasions. CP at 68, 71.
- September 2007 – J.L.A. continues to reside with paternal grandparents; grandparents shared concerns that J.L.A. was touching himself in his genital area on a regular basis. CP at 80.
- July 2008 – Nothing noted about sexual acting out. CP at 97.
- May 2010 – J.L.A. residing in relative care; allegations that J.L.A. has sexually acted out with his younger siblings. CP at 118.

Each of these service and safety plan notations indicate Mr. Armstrong and his attorney as principals in the dependency. CP at 66, 70, 79, 96 and 116.

In the spring of 2013, as part of the process of becoming more involved in J.L.A.'s life, Crystal Armstrong took care of J.L.A. at the

Cummings residence while Cummings was recovering from knee surgery. During this time Crystal was accompanied by her three children including M.M.S. CP at 167. In addition, Crystal took J.L.A. and her children, including M.M.S., to Yakima to visit Mr. Armstrong's family, including Mr. Armstrong's parents, for several days while Cummings was recovering from surgery. CP at 167.

Social worker Christensen was in close contact with Crystal Armstrong and, according to Christensen, Crystal was aware that J.L.A. had challenges, such as J.L.A.'s ADHD and behavioral problems at school, but they wanted to have J.L.A. live with them. Christensen did not receive any indication from Crystal that she had any concerns regarding J.L.A. while she was staying with Cummings or during any of J.L.A.'s visits to Canada. CP at 167-68.

Because Mr. Armstrong and Crystal were requesting that J.L.A. come live with them in Surrey, British Columbia, and because that was the plan, on July 25, 2013, DSHS filed a motion requesting an order allowing J.L.A. to travel and overnight visits to his father's house in British Columbia. CP at 167, 184-87.

On August 1, 2013, Mr. Armstrong's lawyer filed a motion for the Juvenile Court to order that J.L.A. be placed with Mr. Armstrong and Crystal's home. CP at 167, 189-91. The assigned GAL was Robert Lee. Lee

visited the home in Canada prior to J.L.A.'s move and found it appropriate. CP at 168. According to Christensen, there was no reason to believe that Mr. Armstrong was not a fit parent and no grounds to argue against Mr. Armstrong's motion to have J.L.A. reside in his home. CP at 167. The motion was heard on August 6, 2013, at which time the Juvenile Court entered an order that directed J.L.A. be moved to his father's home in British Columbia. CP at 196.

On September 23, 2013, Christensen received a call from Crystal Armstrong stating that J.L.A. had been inappropriate with her daughter, M.M.S. CP at 168-69. Crystal stated that her daughter disclosed that J.L.A. had pushed her down, grabbed her hair, wrapped his legs around her and kissed her on the lips and he told her not to tell anyone. Crystal informed Christensen that the Canadian authorities had been notified. She stated that as a safety precaution, M.M.S. was sleeping with her and Mr. Armstrong. She did not request that J.L.A. be removed from their home at this time. This was the only incident reported to Christensen between August 7, 2013, and October 13, 2013. CP at 168-69.

On October 1, 2013, Crystal Armstrong requested that J.L.A. be removed from the home in Canada. After obtaining court approval, J.L.A. was brought back to Washington State where he had a couple of short stays in licensed foster care before an assessment bed opened up at Haven House.

After approximately one month at Haven House, J.L.A. was placed in a therapeutic foster home where he has continued to reside. CP at 169.<sup>1</sup>

The gist of the plaintiffs' lawsuit is social worker Christensen did not review the records from the prior dependencies and then share that information with Mr. Armstrong and Crystal. Christensen was not aware of the extent of prior instances of J.L.A. touching other children in a sexually inappropriate way and/or acting sexually inappropriately. CP at 168. However, Christensen was aware that J.L.A. had been placed in the home of Mr. Armstrong's parents during prior dependencies. CP at 168.

As far as the prior DSHS records, Christensen did not request that the prior dependency matters be recalled from archives for review because 1) when a dependency matter is closed/dismissed, it generally means that the issues underlying the dependency at that time have been resolved, and 2) the prior dependency matter was dismissed for three years before the 2013 dependency. CP at 168. In addition, Mr. Armstrong was a party to these matters and J.L.A. had been placed with both Mr. Armstrong's parents and Mr. Armstrong's sister. CP at 168. Christensen didn't know that

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<sup>1</sup> In May 2014, J.L.A. completed a psychological evaluation with a psycho-sexual component in which it was concluded that he was not a sexual predator but an opportunist. It should be noted that this did not rule out J.L.A.'s ability to return to Sean and Crystal's home and in fact, during the entire process which followed from September 2013 until roughly August 2014, Crystal was adamant that J.L.A. be returned to her and Sean's care. CP at 169-70. As recently as December 2015, Crystal asked that J.L.A. be able to come up to Canada for an extended visit (over winter break). CP at 170.

Mr. Armstrong and Crystal allegedly had no knowledge of J.L.A.'s history of inappropriate sexual misconduct.

### **III. LEGAL AUTHORITY**

#### **A. Summary Judgment Standard of Review**

Trial courts properly grant summary judgment motions where the pleadings and evidence submitted to the trial court fail to show a genuine issue of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. CR 56(c). This Court reviews summary judgment orders de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982).

In an action sounding in negligence, a plaintiff must prove duty, breach, causation, and damages. *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 563, 54 P.3d 197 (2002). The threshold question is whether the defendant owes a duty of care to the plaintiff; the plaintiff bears the burden of establishing the duty. *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 804, 43 P.3d 526 (2002).

#### **B. Plaintiffs Have Not Raised a Recognized Cause of Action**

A government employee may owe a duty to a plaintiff: 1) if a statute creates specific duties or implies a remedy, or 2) if the employee's action triggers a duty owed under the common law. Plaintiffs make two allegations, and neither involves the breach of a statutory or common law

duty. The first is a claim of negligent investigation. The second is the DSHS social workers had a special relationship with M.M.S. and therefore they should have prevented her from being put at risk of harm.<sup>2</sup> There is no statutory duty common law cause of action applicable to these allegations.

Because these claims are based on the social workers' interactions with children involved in a dependency matter, any duty owed necessarily flows from a governing statute. "State agencies are creatures of statute, and their legal duties are determined by the Legislature, not by state employees." *Murphy v. State*, 115 Wn. App. 297, 317, 62 P.3d 533, review denied, 149 Wn.2d 1035, 75 P.3d 968 (2003). But there is no statutory cause of action applicable to the DSHS social workers following a court order in a dependency matter.

1. **The negligent investigation claim is not applicable where there is no allegation of abuse to investigate and placement was pursuant to court order**
  - a. **A cause of action based on negligent investigation does not apply where there is no allegation of abuse or neglect reported in that home**

There is no common law cause of action for negligent investigation against the various state and local agencies charged with investigatory

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<sup>2</sup> Below, plaintiffs did not assert a special relationship theory until after the motion for summary judgment was granted. Plaintiffs first asserted this theory in a motion for reconsideration which the trial court denied.

functions. The sole exception to this rule is a claim for negligent investigation premised upon RCW 26.44.050. *E.g., Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999). The statute imposes a duty on law enforcement and DSHS to investigate if they receive a report of an occurrence of abuse or neglect. RCW 26.44.050. If law enforcement has probable cause to believe the child is abused or neglected, the child may be taken into custody without a court order. *Id.*

In applying this duty, the Supreme Court has found that a negligent investigation may occur when the child reported to be abused is placed in a harmful situation, such as removing the child from a nonabusive home, putting the child into an abusive home, or leaving the child in an abusive home. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 598, 70 P.3d 954 (2003). The Court cautioned that they will “**decline to expand this cause of action beyond these bounds because the statute from which the tort of negligent investigation is implied does not contemplate other types of harm.**” *M.W.*, 149 Wn.2d at 602 (emphasis added).

Reliance on the tort of negligent investigation is of no use here for several reasons. First, the tort of negligent investigation requires an allegation of abuse or neglect to trigger the investigation: the RCW 26.44.050 duty only arises *after* the police or DSHS receive a report of child abuse or neglect. *See* RCW 26.44.050 (“Upon the receipt of a

report. . . .”). There was no referral concerning abuse or neglect in the Armstrong home and therefore no investigation of abuse or neglect in the Armstrong home.

In the years since the *M.W.* decision, Washington courts have repeatedly rejected claims against DSHS based on negligence which falls outside the scope of RCW 26.44.050. *See, e.g., Roberson v. Perez*, 156 Wn.2d 33, 46-48, 123 P.3d 844 (2005) (rejecting a request to enlarge the negligent investigation cause of action to include harms caused by “‘constructive placement’ decisions”); *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003) (implying a cause of action in RCW 74.14A.050, RCW 74.13.250, or .280 would be inconsistent with the broad power vested in DSHS to administer these statutes.); *Aba Sheikh v. Choe*, 156 Wn.2d 441, 457-58, n.5, 128 P.3d 574 (2006) (no private cause of action can be implied from three WAC regulations pertaining to dependent children, citing *Braam*); *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26, 84 P.3d 899 (2004) (statutes governing social workers do not give rise to an obligation to protect the general public from harm inflicted by client-children of DSHS social workers).

In enacting RCW 4.24.595, the Legislature further limited liability solely to instances where DSHS fails to remove a child from a harmful

environment after a CPS referral alleging abuse or neglect is made. In addition, the Legislature enacted a second statutory provision that codified the Legislature's intent to limit the claims and damages formerly available to parents under *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2001) (the court recognized an implied cause of action under RCW 26.44.050 for parents, guardians and custodians who were improperly separated from a child as the result of a negligent investigation). RCW 26.44.280 provides:

***Consistent with the paramount concern of the department to protect the child's interests of basic nurture, physical and mental health, and safety, and the requirement that the child's health and safety interests prevail over conflicting legal interests of a parent, custodian, or guardian, the liability of governmental entities, and their officers, agents, employees, and volunteers, to parents, custodians, or guardians accused of abuse or neglect is limited as provided in RCW 4.24.595.***

(Emphasis added).

Plaintiffs contend that liability may be placed based on the placement decision itself. This is incorrect. Their argument is based on a misreading of *Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991). The *Babcock* case only addressed whether DSHS social workers were entitled to absolute immunity from suit, not whether an actionable tort duty was owed. *Babcock*, 116 Wn.2d 596 (“Our role is not to

determine whether the caseworkers' action constituted actionable negligence.”).

In the twenty years since *Babcock* was decided, subsequent cases have significantly narrowed the applicability of *Babcock*, and have continued to narrowly define the singular cognizable cause of action to be found in the child welfare statutes. *See, e.g., M.W.*, 149 Wn.2d at 601-02 (statutory duty is narrow and limited to situations where a harmful placement results from an incomplete or biased investigation of a referral of child abuse). *Petcu v. State*, 121 Wn. App. 36, 58-59, 86 P.3d 1234 (2004).

In the present case, there was no placement decision by DSHS social workers. Mr. Armstrong moved the court to allow his son to reside in his home. There were no grounds to prevent this placement let alone describe it as negligent when, in fact, Mr. Armstrong was a fit parent. Parents have a constitutional right to associate with their children that can only be taken away if there is evidence that a parent poses a serious risk of substantial harm. RCW 13.34.065. Accordingly, there is no cause of action for negligent investigation available to Mrs. Armstrong and M.M.S.

**b. The court order in the dependency case severs any liability**

Even if there were a duty supporting plaintiffs' negligence claim, it

would be severed by the juvenile court order granting Mr. Armstrong's motion for J.L.A. to reside with him. To prevail on a claim for negligent investigation, a plaintiff must prove the alleged faulty investigation was the proximate cause of the harmful placement decision. *M.W.*, 149 Wn.2d at 596, 601; *Petcu*, 121 Wn. App. at 58. 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), *review denied*, 131 Wn.2d 1013 (1997). In certain situations, judicial action breaks the causal connection between the alleged negligent act and the subsequent harm. *E.g.*, *Bishop v. Miche*, 137 Wn.2d 518, 532, 973 P.2d 465 (1999).

Thus, "[i]n a lawsuit based on negligent investigation, a caseworker may be legally responsible for a parent's separation from a child, even when the separation is imposed by court order, but only if the court has been deprived of a material fact due to the caseworker's faulty investigation." *Petcu*, 121 Wn. App. at 56 (citing *Tyner*, 141 Wn.2d at 88). Otherwise, court intervention operates as a superseding intervening cause that cuts off DSHS liability. *Id.*<sup>3</sup>

The plaintiff in *Petcu* argued that the court should consider only the information put forth by DSHS when deciding whether the court had all of

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<sup>3</sup> The "existence of proximate cause may be decided as a matter of law when the court is aware of all material information and reasonable minds could not differ on the issue." *Petcu*, 121 Wn. App. at 58, quoting *Tyner*, 141 Wn.2d at 86.

the material information. The court rejected that argument, because to do otherwise would create a much broader cause of action than recognized by Washington courts. *Petcu*, 121 Wn. App. at 58-59, citing *M.W.*, 149 Wn.2d at 601-02. “Thus, it would be improper for us to solely consider whether the information produced by DSHS's investigation was biased or incomplete in determining whether Petcu has alleged sufficient facts to support an actionable breach of duty.” *Petcu*, 121 Wn. App. at 59. The issue is whether the Court was deprived of a material fact because of a faulty investigation, not because of a faulty presentation of evidence. This determination must of necessity take into account all of the information presented to the court, not just information provided by DSHS.

The plaintiffs argued that the Court was deprived of a material fact because the Court was not made aware of J.L.A.'s history of sexually acting out. That is insufficient for two reasons.

First, the plaintiffs are seeking to establish liability based solely on the information provided by DSHS even though the information regarding J.L.A. was not in the exclusive control of DSHS. The reports of J.L.A.'s sexual acting out the plaintiffs suggest was missing was not held exclusively by DSHS but rather was held by Mr. Armstrong's family members and in the records maintained by DSHS but completely available

to Mr. Armstrong if not previously provided to Mr. Armstrong.<sup>4</sup> This is not information exclusively held by DSHS as is required under *Petcu*.

The plaintiffs assert liability based solely on the information DSHS did not provide the court, but this was information that Mr. Armstrong had every legal authority to possess. The *Petcu* court explicitly rejected the proposition that DSHS has an obligation to make sure the Juvenile Court has “all material facts.”<sup>5</sup> *Petcu*, 121 Wn. App. at 58

Second, as discussed above, J.L.A.’s history was not material because the issue on the August 6, 2013, motion was whether Mr. Armstrong was a fit parent. As discussed at length above, the statutes governing dependencies are based on the premise that a child is removed from their biological parent’s home when the home environment is

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<sup>4</sup> In 2010, J.L.A. resided with Jacquetta Cummings, Sean Armstrong’s sister. In her deposition, Ms. Cummings testified that Mr. Armstrong attended a family team meeting by phone in 2010 in which J.L.A.’s sexual acting out history was discussed. CP at 245-46. In addition, Ms. Cummings testified that she talked with Sean Armstrong again by phone regarding J.L.A.’s sexual acting out after she requested that J.A. be removed from her home. CP at 248-49. Ms. Cummings also testified that she spoke with DSHS social workers in 2013 regarding what had happened with J.L.A. and his sister and whether or not he had received counseling prior to J.L.A. being placed in her home. CP at 250. Ms. Cumming relayed the information she received from the social workers regarding J.L.A.’s sexual acting out in a phone conversation to Sean and Crystal Armstrong prior to J.L.A. being placed in the Armstrong home. CP at 251-54.

<sup>5</sup> Furthermore, it is purely speculative that had the Court been informed of J.L.A.’s history, it would have determined that Sean was not a fit parent. It is axiomatic that cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Estate of Bordon v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004) (reversing a plaintiff’s jury verdict and dismissing § 319 case because “the conclusion that Jones [the assailant] would have been incarcerated on the day of the accident has to be based on speculation.”); *Hungerford v. Dep’t of Corr.*, 135 Wn. App. 240, 252 (2006) (claim rejected because while summary judgment would be inappropriate if the trial court did not have all of the material facts, plaintiffs “may not rest on speculation or argumentative assertions that factual issues remain.”)

abusive or the parent is otherwise unfit to parent the child. *See* RCW 13.34.050, .060, and .065 (children are taken into protective custody and placed in shelter care when there is reasonable grounds to believe that *child's* “health, safety and welfare will be seriously endangered if not taken into custody . . . .”); RCW 13.34.030 (a “dependent child” has been abused, abandoned, or had no parent capable of adequately caring for the child such that the child is at risk for substantial psychological or physical damage).

The issue on Mr. Armstrong’s motion to amend placement for J.L.A. to reside in his home was whether any of the criteria governing dependencies – abuse or unfit – were present. DSHS social workers had no evidence to refute Mr. Armstrong’s August 1, 2013, motion, and certainly no obligation enforceable in tort to successfully refute Mr. Armstrong’s motion. Furthermore, it is purely speculative that had the Court been informed of J.L.A.’s history, it would have determined that Mr. Armstrong was not a fit parent. The Court’s August 6, 2013, order severs liability.

**2. A special relationship is not created when DSHS implements court-ordered services**

Plaintiffs’ assert that DSHS social workers had a special relationship with them that entitled them to protection from J.L.A.’s acts. This is incorrect. “As a general rule, there is no duty to control the conduct

of a third person to prevent him from causing physical harm to another unless a special relationship exists.” *Caulfield v. Kitsap County*, 108 Wn. App. 242, 252, 29 P.3d 738 (2001). An exception to that rule exists if the plaintiff and defendant have a “special relationship.” Here the plaintiffs rely on the special relationships as described in §§ 314A and 315, and also assert an independent duty based *Restatement* § 302B of Torts.

**a. Social workers do not have a custodial or supervisory relationship with foster children**

The first type of special relationship cited by the plaintiffs derives from the *Restatement (Second) of Torts* § 315 (1965), which provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a *duty upon the actor to control the third person's conduct*, or

(b) a special relation exists between the actor and the other which gives to the other a *right to protection*.

*Donohoe v. State*, 135 Wn. App. 824, 836-37, 142 P.3d 654 (2006)

(emphasis in original).<sup>6</sup>

A special relationship may exist “between the defendant and either the third party or the foreseeable victim of the third party's

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<sup>6</sup> The other type of special relationship requires proof of an “express assurance” by a government employee in response to a “direct inquiry” from the plaintiff, and the assurance “clearly sets forth incorrect information,” which the plaintiff justifiably relied on to his or her detriment. *Taylor v. Stevens Cty*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988). There are no allegations which give rise to this type of special relationship.

conduct.” *Caulfield*, 108 Wn. App. at 253. Under subsection (b), a special relationship may apply where the relationship between the defendant and the foreseeable victim is “protective in nature, historically involving an affirmative duty to render aid.” *Caulfield*, 108 Wn. App. at 253.

In cases where a special relationship has been found, the employer or business entity has a custodial relationship with the perpetrator and/or essentially exclusive control over the victim’s surroundings where the harm occurs. These relationships have an element of “entrustment” where one party was entrusted with the well-being of the other party, are “typically custodial, or at least supervisory” such as “between a doctor and patient, jailer and inmate, or teacher and student.” *Caulfield*, 108 Wn. App. at 255. Accordingly, “Washington courts have recognized this type of special relationship, and corresponding duty, between certain individuals and schools, common carriers, hotels, hospitals, business establishments, taverns, possessors of land, and custodial mental institutions.” *Donohoe*, 135 Wn. App. at 837.

The cases relied on by the plaintiffs all have the component custodial control and/or supervision of either the perpetrator or the victim or both. *See C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (the church was the employer of the perpetrator, had knowledge of prior allegations of abuse regarding that person, and placed

him in in a position of trust over those children); *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (Department of Corrections had supervisorial relationship with paroled offender by statutorily imposed duty to enforce court-ordered conditions of release); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (a State psychiatric hospital psychiatrist failed to take reasonable steps to maintain custody of known dangerous patient prior to release); *Carlson v. Wackenhut Corp.*, 73 Wn. App. 247, 868 P.2d 882 (1994) (an employer failed to conduct a proper background check of a security guard who sexually assaulted a patron).

However, this type of special relationship does not apply in the context of dependency actions. The relationship between social workers and dependent children is based on a statutory scheme that does not create the sort of control and supervisorial responsibility that result in a situation of “entrustment” for day-to-day well-being.

This case is essentially identical to the case of *Terrell C. v. Dep’t of Soc. & Health Servs.*, 120 Wn. App. 20, 26-29, 84 P.3d 899, *review denied*, 152 Wn.2d 1018 (2004). In that case, a dependent child sexually assaulted a neighbor child who resided in the same duplex. DSHS was aware the child had sexual acting out behaviors and that he lived in a duplex next to younger children. The neighbors sued DSHS arguing that

DSHS had a special relationship entitling them to protection and compared social workers to a parole officer's special relationship borne of their supervision of parolees. The Court of Appeals rejected that argument.

The legislative purpose underlying the juvenile justice statutes is to protect DSHS client children from abuse while preserving family integrity. The statutes are not based on a statutory duty to protect the general community. *Terrell C.*, 120 Wn. App. at 26. The “statutes do not support a claim that protecting children from abuse includes a duty to reasonably foreseeable victims of those children.” *Id.* at 26.

In reaching that conclusion, the *Terrell C.* court contrasted that the relationship between the social worker and dependent children, which is to protect them from harm inflicted by someone else, namely a parent, with the relationship that a community corrections officer has in supervising an offender in community supervision status, which is to protect the community from the harm inflicted by that person. *See Terrell C.*, 120 Wn. App. at 26-29.

After analyzing that comparison, the court stated:

The statutory scheme does not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate services in accord with the child/s best interest and the needs of the family. Any “ongoing” relationship between the social worker and the child is to prevent

further harm to that child, not to protect members of the community.

*Terrell C.*, 120 Wn. App. at 28 (emphasis theirs); *See also Aba Sheikh*, 156 Wn.2d at 454-55 (expressly holding that DSHS has no special relationship duty to control dependent children to prevent them from harming others).

In both *Terrell C.* and *Aba Sheikh*, the courts did not rule that the relationship between social workers and children was a “special relationship,” as was argued by the plaintiffs in both of those cases. In fact, the courts artfully used the word “any” to describe the “ongoing” relationship and put the word “ongoing” in quotes. The court purposefully did *not* use the words “special” to describe the relationship because it is not a special relationship.

The social worker’s role is to coordinate and integrate services in accord with the child’s needs and the needs of the family. But that does not create a duty to protect members of the community and M.M.S. was a member of the community, albeit residing in the same home, but not a duplex.<sup>7</sup>

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<sup>7</sup> Instead of social workers, it is the foster parents who have the obligation for day-to-day supervision. RCW 74.13.330 provides that “Foster parents are responsible for the protection, care, supervision, and nurturing of the child in placement.” *See also* WAC 388-73-014(5) (foster parents are responsible for the “direct care and supervision of children placed in their care”); WAC 388-73-312 (same). *See Aba Sheikh*, 156 Wn.2d at 454-55.

In this case, it was the role of the social workers to protect J.L.A. from the abusive home from which he came (his mother's home) and to further the statutory goals of family unity, where J.L.A.'s father Mr. Armstrong stepped forward. But the social workers did not have a duty to supervise J.L.A. on a day-to-day basis to prevent harm to others in the community or house. The same reasoning in *Terrell C.* applies here. There is no special relationship at issue here, either with J.L.A. or with the plaintiffs.

**b. Failing to warn is not affirmative action creating a duty under Restatement § 302B**

The plaintiffs assert that, even if there is no special relationship, under *Restatement* § 302B, a duty existed to warn the Armstrongs of J.L.A.'s behaviors. This is incorrect. A *Restatement (Second) of Torts* § 302B (1965) duty applies where an actor engages in affirmative conduct that creates an unreasonably high degree of risk of harm to another. Such a duty does not apply when a social worker is implementing court orders, and the alleged affirmative conduct is a failure to warn a parent about his biological son.

The circumstances in which a duty under § 302B may be owed are explained in *Robb v. City of Seattle*, 176 Wn. 2d 427, 295 P.3d 212 (2013). In *Robb*, a § 302B duty was asserted against the Seattle Police Department based on the conduct of two police officers while conducting

an investigation into a burglary. During a stop of two suspects, the police officers noticed shotgun shells on the ground next to the suspects, but did not inquire about them or pick them up. After the suspects were released, one of the suspects immediately returned, picked up the shells. The suspect later killed Mr. Robb with the shells and the guns stolen in the original burglary. *Robb*, 176 Wn.2d at 430.

In addressing liability, the Court explained that section 302B provides that “an act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.” *Id.* at 434. The Court explained that absent a special relationship via a duty to control, monitor or supervise as provided by *Restatement (Second) of Torts* §§ 314, 316-320 (1965), an independent duty may still be owed per § 302B, Comment e:

*There are, however, situations, in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or ever criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.*

*Robb*, 176 Wn.2d at 434 (emphasis added).

Accordingly, a § 302(B)(e) duty “requires an affirmative act that creates or exposes another to a situation of peril. Foreseeability alone is an insufficient basis for imposing a duty.” *Robb*, 176 Wn.2d at 434-35. The *Restatement’s* own illustrations to § 302B(e) and the courts’ interpretation of that section in Washington and elsewhere suggest that the § 302B(e) duty is meant to apply only where a defendant’s “affirmative act” essentially furnishes the criminal or negligent party with the means used to injure the plaintiff at a later time. See *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 231-32, 802 P.2d 1360 (1991).

The sole precedent in Washington for imposing a duty upon a government agency under § 302B(e) is *Parrilla v. King Cty.*, 138 Wn. App. 427, 157 P.,3d 879 (2007). In *Parrilla*, a King County employed bus driver, in response to an erratic and deranged passenger becoming threatening, ordered everyone off of the bus and the driver also exited the bus leaving the keys in the ignition and the engine running. The deranged passenger then commandeered the bus and began careening down Martin Luther King, Jr. Way in Seattle before plowing into and injuring the Parrillas. The *Parrilla* court held that a duty was owed under § 302(B)(e) because the “bus driver affirmatively acted by leaving [a

deranged passenger] alone on board the bus with its engine running.”  
*Parrilla*, 138 Wn. App. at 438.

The social workers were obligated to follow the Juvenile Court’s order to have J.L.A. reside with his father, per his father’s motion, so there is no way that § 302(B)(e) applies to that action of “placing.” Accordingly, the plaintiffs assert that the alleged failure to warn Mr. Armstrong or M.M.S.’s mother of J.L.A.’s sexual inappropriateness with younger children was an “affirmative act” giving rise to liability under § 302(B)(e). This is incorrect.

**(1) § 302(B)(e) does not create a duty to warn**

Failing to provide a warning to the Armstrongs is not an affirmative act such as turning a bus with the engine running over to a deranged and dangerous passenger, which essentially places the actual weapon in the hands of the criminal. Here the social workers are operating under an intricate statutory scheme that directs unification of family and strictly limits those circumstances in which social workers can interfere with and intrude into a family’s existence. This is not a situation where a social worker essentially furnished J.L.A. with the means to harm the plaintiffs.

To support their failure to warn theory, the plaintiffs rely heavily on *Satterfield v. Breeding Insulation Co.*, 266 S.W. 3d 347 (2008). In

*Satterfield*, an employer failed to warn its employee not to wear asbestos-contaminated work clothes home from work. The employee regularly and repeatedly exposed his daughter to that asbestos and she later died of mesothelioma. The Tennessee Supreme Court held that the failure to warn amounted to affirmative conduct resulting in a legal duty under § 302B(e).

Underlying *Satterfield* was that the decedent's father worked daily with asbestos under conditions which violated Alcoa's internal safety standards and OSHA standards. As a result, Mr. Satterfield's clothes collected significant amounts of asbestos fibers, even though Alcoa was aware of this dangerous condition and Alcoa even went so far as to dissuade employees from using on-site bathhouses to change their clothes. *Satterfield*, 266 S.W. 3d at 363-64.

According to the *Satterfield* court, the affirmative action did not turn on the failure to act regarding a third party, but on the "injurious affirmative act of operating its facility in such an unsafe manner that dangerous asbestos fibers were transmitted outside the facility to others who came in regular and extended close contact with the asbestos-contaminated work clothes." *Satterfield*, 266 S.W. at 364. The "failure to warn" was part of a much larger situation of non-compliance upon which liability was based.

*Satterfield* is easily distinguishable from this case. Here, the social worker's goal was to restore J.L.A.'s family unit and the social workers were following the governing statutes in place to effectuate that very thing. There is simply no way to compare the situation in *Satterfield* where the company was acting in a way that violated worker safety standards with social workers operating in a manner consistent with the underlying statutory scheme and a court order. The social worker was acting in concert with the juvenile justice system and thus not engaging in affirmative conduct which created harm.

**(2) There is no statutorily imposed duty to warn.**

Because there is no duty to warn created by the common law, any tort duty to disclose information would have to be statutorily imposed. *See Murphy*, 115 Wn. App. at 317. Under RCW 26.33.350 and .380, social workers do have an obligation to provide information to foster adoptive parents regarding a foster child's dangerous proclivities which gives rise to a claim for "negligent failure to warn," but the statute is strictly limited to adoptive parents. *See RCW 26.33.350 and .380; McKinney v. State*, 134 Wn.2d 388, 407, 950 P.2d 461 (1998); *Price v. State*, 96 Wn. App. 604, 614-15, 980 P.2d 302 (1999) (citing *McKinney*). This makes sense because adoptive parents would otherwise have no means by which to

review the DSHS records containing vital information regarding the potentially troubled child they would be bringing into their home. However, this statute does not extend to biological parents – and plaintiffs do not argue that it does – because the biological parents have the same access to the DSHS files as the social worker.

In this case, Mr. Armstrong was a party to the prior dependencies, and therefore entitled to all of the records DSHS gathered and maintained while those cases were actually going on. The rationale for imposing tort liability for failing to provide information to adoptive parents does not apply to a family that is entitled to review the record in the first place. This is particularly true here because J.L.A. was with Mr. Armstrong's parents' and sister's home for a substantial period of his life, and it was Mr. Armstrong's parents who reported the majority of the sexual acting out behaviors, and where Mr. Armstrong's brother-in-law requested J.L.A. out of his home because of reports of sexual acting out. The reasoning behind the duty to disclose information in a DSHS file has no applicability here. The plaintiffs in this case are trying to create a duty that the Legislature did not create, and is in fact contrary to the legislative intent as the Legislature specifically did not include biological parents in the governing statute.

The plaintiffs rely on a myriad of cases to illustrate that a failure to warn can be the sort of affirmative action that triggers a duty under § 302B(e). But every one of those cases involves a dangerous child being placed in a foster home. Furthermore, none of these cases premised liability on § 302B(e) and instead found liability because there was a special relationship creating a duty to protect which included a duty to warn. See *P.G. & R.G. v. State, Dep't of Health & Human Servs., Div. of Family & Youth Servs.*, 4 P.3d 326, 331 (2000) (“The state conceded it owes a duty of due care to protect prospective foster parents from harm by foster children and that the duty takes form in a requirement of reasonable disclosure”); *Johnson v. State*, 69 Cal. 2d 782, 785, 447 P.2d 352 (1968) (“As the party placing the youth with [foster parent], the state's relationship to plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by parolee's history or character.”); *Hobbs ex rel. Winner v. N. Caroline Dep't of Human Res.*, 135 N.C. App. 412, 520 S.E.2d 595, 600-01 (1999) (plaintiffs specifically asked if it was safe to have a particular foster child placed in their home, which were discussions commonly held with prospective foster parents); *Anderson By & Through Anderson/Couvillon v. Nebraska Dep't of Soc. Servs.*, 248 Neb. 651, 653, 538 N.W. 2d 732 (1995) (claim based on the negligent placement of a “foster boy” into their mother's care); *Savage v. Utah*

*Youth Vill.*, 104 P.3d 1242, 1246, 514 Utah Adv. Rep. 19 (2004) (issue was whether defendant had a special duty extending to warning foster homes regarding the foster children being placed in those homes).

The result of the cases relied upon by the plaintiffs are essentially identical to the results of similar cases brought under Washington law, but are based on Washington statute and not a special relationship. *See* RCW 26.33.350 and .380; *McKinney*, 134 Wn.2d at 407; *Price*, 96 Wn. App. at 614-15.

There is no stand-alone duty to warn biological parents. Duties imposed upon state employees acting within the scope of their employment are set forth by the Legislature. The Legislature did not impose an obligation on social workers to warn a dependent child's own family about that child. Furthermore, there is no support that a duty to warn exists in this context per § 302B(e), nor is there a special relationship at issue in this case.

**C. There Is No Legal Causation Because Mr. Armstrong Is a Biological Parent and Party to the Prior Dependencies**

It is fundamental to any negligence action that a breach of duty must be shown to have proximately caused the claimed injury. *Minahan v. W. Washington Fair Ass'n*, 117 Wn. App. 881, 887-88, 73 P.3d 1019 (2003). "Proximate cause" has two elements: cause in fact and legal cause. *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 251, 139 P.3d

1131 (2006). Cause in fact is the actual “but for” cause of the injury. *Id.* Legal causation is “grounded in policy determinations and focuses on whether as a matter of policy, the connection between the ultimate result and act of the defendant is too remote to establish liability.” *Id.* In other words, “was the defendant under a duty to protect the plaintiff against the event which did in fact occur?” *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Although cause in fact is generally left to the factfinder, legal cause is a question of law for the court to decide. *Minahan*, 117 Wn. App. at 888.

The question for this Court is essentially whether DSHS had an obligation to assert and convince the Juvenile Court that Mr. Armstrong was not a fit parent and therefore should not be allowed to have his biological son reside in his home. The answer is no. The statutes governing DSHS direct toward reunification of families. The Court ordered at Shelter Care and later pursuant to a motion brought by Mr. Armstrong that J.L.A. be placed in the Armstrong home. J.L.A. had been placed with Mr. Armstrong’s parents, and his sister on prior occasions. Mr. Armstrong was a party to the prior dependency matters and therefore entitled to receive all documents.

One of the public policies favoring disclosure of information to prospective adoptive parents is to permit them to make their own

decisions about the care that their children may need. *McKinney*, 134 Wn.2d at 468.<sup>8</sup> But this has no application to this case because Mr. Armstrong was a party to the prior dependency matters and therefore entitled to review the entire DSHS file.

Consider the Supreme Court's decision in *Roberson v. Perez*, 156 Wn.2d 33, 46, 123 P.3d 844 (2005), where the plaintiff's parents alleged a cause of action for negligent investigation and sought damages for the disruption to their family caused by their decision to voluntarily place their child with a family member. *Roberson*, 156 Wn.2d at 46. Plaintiffs alleged that although DSHS or law enforcement had not removed their child from the home, there had been a "constructive removal," because they placed him with his grandmother in another state as a result of the investigation. *Id.* The Supreme Court rejected this claim, noting that it would not only allow a plaintiff the ability to control the extent of their own damages but could encourage individuals to frustrate investigations of child abuse and neglect. *Id.* at 46-47. In other words, the

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<sup>8</sup> There are certain circumstances where the establishment of cause-in-fact establishes legal causation as a matter of law. See *Lowman v. Wilbur*, 178 Wn.2d 165, 171, 309 P.3d 387 (2013) (policy preference for liability for negligence in connection with construction and maintenance of utility poles supported legal causation notwithstanding negligence of driver); *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 475-76, 656 P.2d 483 (1983) (for wrongful life claim, cause-in-fact establishes legal cause as a matter of law). Defendant submits that the policies underlying the adoption disclosure statutes do not support such a finding, as discussed above, especially on the facts of this case.

voluntary decision of the plaintiff was relevant to determining whether DSHS could be held liable for its alleged negligence.

This is the flip side of the coin. Here, Mr. Armstrong's family unit is bringing a lawsuit asserting liability based on J.L.A. residing in their home which Mr. Armstrong requested. Mr. Armstrong was a party to the prior dependency matters and made choices based on an information set far greater than the 2013 social workers possessed. It would be fundamentally unfair to derive a new form of tort liability imposing a duty on DSHS social workers that is not found in common law or statute and based on alleged failure to provide information which the father had every right if not obligation to review, assuming he did not in fact know.

In essence, plaintiffs are trying to establish liability based on the premise that the social worker should have retrieved long ago dismissed dependency matters in order to refute Mr. Armstrong's motion to have J.L.A. placed *in his home*, by showing the he was not a fit parent. The statutes governing social workers do not support this assertion. *See* RCW 13.34.020 (The Legislature declares that the family unit is a fundamental resource of American life which should be nurtured); RCW 13.34.050, .060, and .065 (children are taken into protective custody and placed in shelter care when there is reasonable grounds to believe that *child's* "health, safety and welfare will be seriously endangered if not

taken into custody . . . .”); RCW 13.34.030 (a “dependent child” has been abused, abandoned, or had no parent capable of adequately caring for the child such that the child is at risk of substantial danger).

Here, as in the summer of 2013, there were no grounds for a social worker or Assistant Attorney General to argue that Mr. Armstrong was not a fit parent. Embracing a tort claim under these circumstances would be based on the premise that DSHS should have argued successfully to prevent Mr. Armstrong’s motion from being granted. The doctrine of legal causation was developed for this very reason, to avoid absurd results.

**D. Even if a Valid Cause of Action Were Raised, DSHS Is Immune From Liability**

Even if valid cause of action were raised, DSHS would be immune from liability. CP at 296-297. DSHS is statutorily required to comply with court orders, “including shelter care and other dependency orders.” RCW 4.24.595(2). The legislature has specifically provided that DSHS and its employees “are not liable for acts performed to comply with such court orders.” *Id.* Therefore, DSHS and its employees are immune from suit for following the juvenile court’s order and placing J.L.A. in his father’s care.

In addition to immunity for complying with the court’s order, DSHS and its employees are immune from the plaintiffs’ contentions that they should be held liable for testifying that returning J.L.A. to his father would be appropriate. RCW 4.24.595(2) states that “[i]n providing reports and

recommendations to the court” DSHS and its employees “are entitled to the same witness immunity as would be provided to any other witness.”

Throughout their brief, the plaintiffs contend that the social workers should have included more information in their reports and recommendations. Specifically, plaintiffs contend that the court should have been told that J.L.A. acted out sexually with other children. This assertion misses the point for two reasons. First, as this Court has recognized, witness immunity is given a broad scope. *Bruce v. Byrne-Stevens & Assoc. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). The immunity extends to the basis for the social workers’ reports and recommendations to the court.

There is no way to distinguish the testimony from the acts and communications on which it is based. Unless the whole, integral enterprise falls within the scope of immunity, the chilling effect of threatened litigation will result in the adverse effects described above, regardless of the immunity shielding the courtroom testimony.

*Id.* at 135.

The second flaw in the plaintiffs’ argument is that J.L.A.’s behavior was not relevant to the issue before the juvenile court in the August 2013 dependency proceeding. The question before the court was whether out-of-home placement could continue pursuant to RCW 13.34.130(5), or whether the father’s motion should be granted. Under RCW 13.34.130(5),

the dependent child is not on trial. The court was charged with determining whether the father could care for his son.

In essence, the plaintiffs contend that the social workers should have ignored the applicable law, and prevented the court from granting Mr. Armstrong's motion. The law leaves no room for this claim. DSHS and its employees are immune from liability based on their testimony and compliance with the court order.

#### IV. CONCLUSION

Based on the foregoing, the order granting summary judgment should be affirmed.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of December, 2016.

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I certify that on this 9<sup>th</sup> day of December, 2016, I caused a true and

*AK*  
DEPUTY

correct copy of Brief of Respondents to be served on the following in the manner indicated below:

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