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DIVISION II

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STATE OF WASHINGTON

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NO. 46912-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JESSICA L. WRIGLEY, et al

Appellants

v.

STATE OF WASHINGTON, DSHS, et al

Respondents.

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BRIEF OF APPELLANTS

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GARY A. PREBLE, WSB #14758  
Attorney for Appellants  
Jessica L. Wrigley, et al

PREBLE LAW FIRM, P.S.  
2120 State Avenue NE, Suite 101  
Olympia, WA 98506  
(360) 943-6960  
Fax: (360) 943-2603  
gary@preblelaw.com

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## **A. ASSIGNMENTS OF ERROR and ISSUES**

### **Assignments of Error**

1. The trial court erred in finding DSHS owed no duty to appellants under RCW 26.44.050.
2. The trial court erred in finding the only allegations of abuse and neglect made under RCW 26.44 regarding [A.A.] were related to the Wrigley home; Finding 2
3. The trial court erred in finding DSHS never received any report of abuse or neglect made pursuant to RCW 26.44 regarding Anthony Viles. Finding 4
4. The trial court erred in finding Plaintiffs did not allege any negligence-based claims other than those that arise under RCW 26.44.050. Finding 5
5. The trial court erred in denying appellants' Motion for Leave to Amend?

### **Issues Pertaining to Assignments of Error**

1. Whether DSHS and its employees have a duty under RCW 26.44.040 to prevent placement of a child in a home where he is killed by his father, when the child was initially removed as result of non-negligent investigation of the mother with whom he was then residing and when the mother warned the social worker of the danger of placement with the father?
2. Whether DSHS and its employees have a duty under the special relationship doctrine?
3. Whether there were other negligence claims pleaded besides negligent investigation under RCW 26.44.050?
4. Whether the trial court wrongly denied plaintiffs' Motion to Amend (and subsequent Motion for reconsideration) when most if not all discovery had been done, when there were no new facts alleged and when the court had stricken the trial date due to the court's scheduling such that there would have been sufficient time to engage in any further discovery?

## **B. STATEMENT OF THE CASE**

### **Synopsis**

A.A. had behavioral problems, was removed from his mother, Appellant Jessica Wrigley, by Child Protective Services, and was placed in shelter care in Clark County in late 2010. His father, Anthony Viles, lived in Idaho and requested A.A. be placed with him. Mrs. Wrigley reported to social workers that Mr. Viles was violent, among other things. When she learned DSHS had placed A.A. with Mr. Viles at the end of January 2011, Mrs. Wrigley told social worker Don Watson that A.A. would be “dead within six months” if he was with Mr. Viles. Mrs. Wrigley was wrong. It took Mr. Viles only two and a half months to beat A.A. so badly he died.

### **Mr. Viles**

Jessica Wrigley met Anthony Viles in December 2004. CP 869 During their relationship, Viles used methamphetamine, cocaine, and heroin and abused alcohol. *Id.* As the relationship progressed, Viles became physically violent and threatened to kill Mrs. Wrigley. CP 869–870. In August 2005, Viles told Mrs. Wrigley that if she broke up with him, he would make the Laci Peterson story look “like a walk in the park.” CP 870. A few days later, Mrs. Wrigley obtained a protection order. *Id.*; 883–891. A.A. was born the next month on October 19, 2005. CP 70.

Viles' violent behavior and abuse of drugs and alcohol preceded his relationship with Mrs. Wrigley and persisted after their relationship ended. From 1998-2001, he was detained in juvenile detention facilities for assaultive behavior, suicidal threats. CP 763-766. In 2000, Viles was taken into mental protective custody after making suicidal threats. CP 528-530. Viles' mother, Rose Viles, informed law enforcement that Viles "ha[d] problems with his violent tendencies." CP 529. Viles was again taken into mental protective custody in July 2000 after he attempted suicide. CP 531-533. In August 2000, Viles was incarcerated at the Psycho Social Rehab Center in Pocatello, where he had to be physically restrained after assaulting an inmate. CP 534-536. Viles "became combative and began throwing the chair around and yelling and screaming" when confronted by law enforcement. CP 535. In September 2000, Viles' mother called law enforcement due to a domestic disturbance between her and Viles. CP 537-539.

In 2001 Viles pleaded guilty to battery. CP 215. In 2002, he pleaded guilty to minor in possession of alcohol and was accused of rape; the alleged victim completed a computer voice stress analysis that concluded she was being truthful, Viles refused. CP 216. In June 2002 law enforcement was called for a physical altercation between Viles and his girlfriend, Jami Carranza. CP 549-552. In October 2002, Viles' grandfather, Roy Viles, reported a domestic disturbance between him and Viles. CP 552-554.

In September 2003 law enforcement was called because of a disturbance with Ms. Carranza. CP 555–561. During the investigation, Viles admitted to pushing Ms. Carranza. *Id.* After a physical altercation with law enforcement, Viles pleaded guilty disturbing the peace. CP 229. In May 2004 Ms. Carranza reported to law enforcement that Viles had arrived at her home intoxicated, gotten into an argument, and drove away drunk. CP 562–564.

In October 2005, Viles’ grandfather, Roy Viles, reported a domestic disturbance between him and Viles. CP 564–566. Roy Viles reported that Viles had physically threatened him and was using drugs. CP 565–566. In January 2006, Viles was stabbed in a fight with a screwdriver. CP 574–575.

In January 2007, Viles pleaded guilty to contributing to the delinquency of a minor when he provided alcohol to and harbored a fifteen-year-old runaway female. CP 225–226. Viles admitted to law enforcement that he had marijuana in his home. CP 579.

In January 2009, Ramon Garcia, the fiancée of Ms. Carranza, reported Viles breaking into a shed in his back yard. CP 582–585. Viles was charged with unlawful entry. CP 224–225.

In December 2011, just one month before A.A. was placed with Viles, William Viles and Ashley Eskelson called law enforcement to report Viles having come to their home and threatened to “break [William Viles’] neck.” CP 586–588.

### **Mrs. Wrigley's reports to CPS about Mr. Viles**

Mrs. Wrigley attended a family team decision meeting (“FTDM”) on October 4, 2011. Mrs. Wrigley told the social workers at the meeting that Viles had threatened to cut her head off, had tried to run over her, had dragged her up the stairs by her hair and had a reputation for violence in Pocatello. CP 878. Mrs. Wrigley also informed Defendant social workers that Viles had multiple children by other women. CP 136.

On October 24, 2011, SW Don Watson called Mrs. Wrigley to get additional information about Viles and she told him that Viles had an extensive criminal history, had been arrested for providing alcohol to minors, had a restraining order against him, and A.A. had never met him. CP 878–879, 1081–1082.

When she learned A.A. had been placed with Mr. Viles, she “called Mr. Watson hysterical” and reminded him again of incidents where Viles had been violent with her or threatened her. She told him that because of A.A.’s behavioral problems, if A.A. was with Mr. Viles, “he would be dead within six months.” CP 880.

### **DSHS did not tell Mr. Viles of A.A.’s significant behavioral issues**

Despite A.A.’s behavioral and developmental issues, DSHS merely conveyed to Viles that A.A. “had trouble with school and acted out a lot. That was pretty much it.” CP 731. In fact, Viles testified that “[t]hey really had no

information for me.” CP 731. In the absence of more explicit and specific information, Viles was left to “assume[] it was mainly throwing . . . temper tantrums.” CP 733. Nobody at DSHS thought it in A.A.’s or Viles’ best interest to explain to Viles that A.A. had been removed from several schools and daycare providers. CP 740. Nobody at DSHS thought it in A.A.’s or Viles’ best interest to tell Viles that A.A.’s behavioral issues were longstanding and included concerns and diagnoses of ADHD, PTSD, anxiety, pervasive developmental disorder, oppositional defiant disorder, autism, anger/rage concerns, depression, sleep disturbance, and enuresis. *See generally*, CP731–740. Viles clearly expressed the inadequacy with which DSHS conveyed A.A.’s behavioral issues when he explained that “[w]e could have used more help as far as being aware of what his mental issues was [sic] and the exact behaviors that he was establishing.” CP 742.

A.A.’s foster parents requested and received respite care for A.A. from January 11, 2012-January 15, 2012 “due to A.A.’s high behavioral needs.” CP 642–643; CP 693.

On January 25, 2012, Mr. Wrigley reiterated concerns to SW Watson about A.A. being placed with Viles due to his history of violence. CP 645.

### **Procedure**

Defendants moved for partial summary judgment, which the court granted as follows:

The Court finds that the following facts are not disputed:

1. Defendants removed [A.A.] from the home of Jessica and Jared Wrigley based on allegations of abuse and neglect made against the Wrigleys;
2. The only allegations of abuse and neglect made under RCW 26.44 regarding [A.A.] were related to the Wrigley home;
3. There is no evidence that the investigation of the allegations related to the Wrigley home was faulty;
4. DSHS never received any report of abuse or neglect made pursuant to RCW 26.44 regarding Anthony Viles; and
5. Plaintiffs do not allege any negligence-based claims other than those that arise under RCW 26.44.050.

Based on the above undisputed facts, the Court found the following facts were disputed, but construed them in favor of the Plaintiffs for purposes of summary judgment.

1. At the January 30, 2012 placement hearing (“Placement Hearing”), DSHS offered testimony of social worker Donald Watson that only highlighted positive aspects of the potential placement of [A.A.] with Anthony Viles. Argument by DSHS’s representative, Assistant Attorney General, Meghan Collins, also only highlighted positive aspects of the potential placement of [A.A.] with Anthony Viles;
2. At the Placement Hearing, DSHS took the lead in offering testimony related to [A.A.]’s potential placement with Anthony Viles;
3. DSHS had more information than it provided to the court at the Placement Hearing; and
4. Social worker Donald Watson’s understanding of his authority to conduct an investigation related to [A.A.]’s placement in Anthony Viles’ home evolved over time. Social worker Watson believed he did not have authority to utilize tools available via the ICPC process to conduct a more thorough investigation. Information that would have been available to Mr. Watson through a more thorough investigation include: Mr. Viles’ juvenile conviction for battery, the restraining order between Jessica Wrigley and Anthony Viles, allegations regarding Anthony Viles’ anger issues, and a parenting

assessment completed as part of custody litigation in which Anthony Viles was a party.

5. In addition, Mr. Watson did not conduct a follow-up investigation regarding the parenting assessment or the restraining order between Mr. Viles and Mrs. Wrigley—information that Mr. Watson was aware of in November 2011, prior to [A.A.]’s placement with Anthony Viles.

Based on the foregoing undisputed facts and construing disputed facts in the light most favorable to the Plaintiff, the Court makes the following Conclusions of Law:

1. Assuming the existence of a duty owed to Plaintiffs by Defendants under RCW 26.44, there is a genuine issue of material fact as to whether Defendants breached that duty; and
2. Assuming the existence of a duty owed to Plaintiffs by Defendants under RCW 26.44, there is a genuine issue of material fact as to whether Defendants’ breach was the proximate cause of Plaintiff’s injuries.

Based on the above undisputed and disputed facts and Conclusions of Law, NOW THEREFORE, it is HEREBY Ordered that State Defendants’ Motion for Partial Summary Judgment is GRANTED as to all of Plaintiffs’ negligence-based claims including Plaintiffs’ claims for Wrongful Death, all Survival Actions, Negligent Investigation, Negligent Training and Supervision, and Loss of Consortium, as Defendants did not owe a duty to Plaintiffs.

CP 1596–1598

After the court dismissed all negligence-based claims, Plaintiffs sought leave to amend the complaint to add a general negligence claim. At the same time the court bumped the trial due to other trials, with which the state agreed. Though most if not all discovery had already been completed, the continuance of the trial provided sufficient time to do any further discovery. CP 1722 The court denied the motion.

Plaintiffs filed a Motion for Reconsideration which was also denied. This appeal followed.

### **C. SUMMARY OF ARGUMENT**

The DSHS owed a duty to Appellants, under statute for negligent investigation, under the court order, as well as the common law claim of special relationship and other theories of negligence. The trial court should have allowed Appellants to have amended their complaint to more clearly add a common law negligence claim.

### **D. ARGUMENT**

Review of a summary judgment is de novo. *Lewis v. Whatcom Cty.*, 136 Wn. App. 450, 453, 149 P.3d 686 (2006). Duty is the only issue addressed in this appeal because the court found, assuming the existence of a duty (which the court in fact did not find), that there was a genuine issue of material fact as to both breach and proximate cause.

#### **I. THE DSHS OWED A.A AND THE OTHER PLAINTIFFS A DUTY OF CARE.**

The trial court found no duty under RCW 26.44.050 and therefore dismissed all the negligence-based claims of Plaintiffs on summary judgment on August 24, 2016. CP 1595–1599.<sup>1</sup> The Department seems to have argued

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<sup>1</sup> Appellants do not now challenge the summary judgment order entered September 16, 2016 as to remaining claims, though that order also contained the order denying Plaintiffs' Motion to Amend and which is being appealed.

that the only basis for its liability is found in the statute. In its oral ruling, the trial court stated its ruling was based on *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015) which interpreted and applied *M.W. v. DSHS*, 149 Wn.2d 589, 70 P.3d 954 (2003) and *Robertson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005). Each of these cases relied on the tort duty implied from RCW 26.44.050, which states in relevant part:

[U]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

A recent Division II case, however, has further clarified the case of *M.W.* that it was not meant to limit liability to statutory liability. Rather, special relationship is also a basis for DSHS liability.

*M.W.* does contain language which, read in isolation, could suggest that all claims of negligence in monitoring the welfare of foster children are limited to this statutory liability. For example, after noting that our courts have not recognized a general tort claim for negligent investigation, the court stated, “The negligent investigation cause of action against DSHS is a narrow exception that is based on, and limited to, the statutory duty and concerns we discuss above.” *Id.* at 601. However, the court’s entire analysis in *M.W.* was restricted to determining whether liability lay in *M.W.*’s case under the statute. It

examined the wording of the statute, its purpose, and case law interpreting it. Its gaze did not reach the larger question presented here: whether a special relationship is present from which a tort duty to exercise ordinary care would arise. This narrow focus on statutory liability cannot be the basis for a denial of any liability in tort, especially when the cornerstone of that liability, the special protective relationship, was not even discussed. In addition, any duty under the statute is triggered only if a report is received of possible abuse or neglect. To read *M.W.* to deny any liability outside the statute, then, is to restrict liability to situations where a report has been made. Such a narrowing of liability, and its consequent reduction of legal protection of foster children, cannot rest on a doubtful implication from ambiguous language.

*HBH v. State*, WL 7212613 (Div 2, Dec. 13, 2016).

A. DSHS owed Plaintiffs a duty under RCW 26.44.050.

As the *HBH* court stated, and as the statutory language states, the implied duty under RCW 26.44.050 is triggered “upon the receipt of a report concerning the possible occurrence of abuse or neglect”. Of note is that the cases construing the statute seem to presume the meaning of “report” and “abuse or neglect,” as well as the words “possible occurrence.” The trial court made the same presumptions as seen in Findings 2 and 4 that the only RCW 26.44.050 allegations were related to the Wrigley home and that DSHS received no report of abuse or neglect regarding Anthony Viles. An inquiry into the meaning of the terms shows, however, that the statute does indeed apply to Viles; for there were reports made of the possible occurrence of abuse and neglect.

### **1. Abuse or neglect.**

The meaning of “abuse or neglect” in RCW 26.44.050 is found in RCW 26.44.020(1) and (16). It includes what would generally be thought of as abuse, but it also includes “the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child,”<sup>2</sup> which is separately defined in subparagraph (16).

“Negligent treatment or maltreatment” is defined in relevant part as

an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare, or safety. When considering whether a clear and present danger exists, evidence of a parent’s substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight. . . . [E]xposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.

Thus, though Mr. Viles’ fatal beating of A.A. was certainly abuse as generally understood, the statutory meaning of the term “abuse or neglect” is much broader. Thus, if Viles failed to act in some regard such that it posed a clear and present danger to A.A., that would constitute abuse or neglect even though there was no physical harm.

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<sup>2</sup> Though the statute is not quite clear, it would appear that the “neglect” portion of “abuse or neglect” is found in subparagraph (16). And a child who has been neglected or who has been subject to negligent treatment or maltreatment is by definition abused: “An abused child is a child who has been subjected to child abuse or neglect as defined in this section.” RCW 26.44.020(1).

## **2. Possible occurrence.**

If abuse or neglect can include inaction that evidences a serious disregard of consequences so as to constitute a clear and present danger to a child's health or a child's welfare or a child's safety, then such inaction would come within the meaning of "possible occurrence." This term is not defined but it does not necessarily mean that a person did something.

## **3. Report.**

Contrary to the court order that DSHS never received a report of abuse or neglect "pursuant to RCW 26.44 regarding Anthony Viles,"—suggesting there is a specific way to report abuse—there is no definition in chapter 26.44 RCW of how, when and to whom a non-mandated reporter would make a report. All the statute says is that mandated reporters (and others) must report to law enforcement or the Department. RCW 26.44.030(1)(a)–(g). As far as non-mandated reporters, such as Jessica Wrigley, RCW 26.44.030(3) states that she may verbally report abuse or neglect to the Department and that if requested, the report be put in writing. RCW 26.44.040.

## **4. DSHS received a report of the possible occurrence of abuse or neglect.**

Mrs. Wrigley consistently told the DSHS social workers that Mr. Viles was a dangerous man. She told them at the FTDM in October and she told Don Watson later in October. And when she learned that A.A. had been sent to live with Viles, she immediately called "hysterical" the social worker

Watson to tell him A.A. would be dead in six months if he lived with Viles. What had she reported? That Viles was violent, abusive, a drug user, had a reputation in Pocatello for violence, had a criminal history, and that she had a restraining order against him.

It is true that domestic violence in itself is not negligent treatment or maltreatment if the child was not the victim. RCW 26.44.020(16). However, the violence that Mrs. Wrigley reported was well beyond what might be considered typical domestic violence. Viles threatened to kill her; to cut her head off; to make the notorious the Laci Peterson story look “like a walk in the park;” he dragged her up the stairs by her hair; he had a criminal record including assault; and she had gotten a restraining order against him. In addition, he had children by other women. Most of these things are well beyond “typical” domestic violence.

DSHS might say they did not have to investigate her reports because A.A. was not with Viles. Even if that were true, she gave her most chilling—and tragically accurate—report *after* A.A. had already gone to Idaho. She told Mr. Watson that, due to A.A.’s behavior issues and Viles’ violent nature, A.A. “would be dead within six months” if he was with Mr. Viles.

The DSHS should have investigated Mrs. Wrigley’s reports. Had they done so, A.A. would likely still be alive. “Nothing in the statute suggests that

the Department of Social and Health Services must stay its hand until actual damage to the endangered child has resulted. *In re Welfare of Frederiksen*, 25 Wn. App. 726, 733, 610 P.2d 371 (1979).

B. DSHS owed Plaintiffs a duty under the court order.

On January 30, 2012, social worker Don Watson wrote a letter “to who it may concern” stating the Department had custody of A.A. and that it had “placed” A.A. with Mr. Viles, “relative care provider . . . for care and supervision [and that] the Department has delegated authority” to Mr. Viles. CP 614. It is clear from the Department’s own document that it still considered itself in control of A.A. and that Mr. Viles was in a subordinate position,, even though he was A.A.’s father. His authority was only what the Department delegated to him, but A.A. even then “is” in the temporary custody of DSHS. *Id.*

But in delegating and placing A.A. with Viles as a “relative care provider”, the Department failed to fulfill its court-ordered duty: “DSHS . . . shall continue to make reasonable efforts to locate *and investigate* an appropriate relative or other suitable person who is available and willing to care for the child, and is authorized to share information . . . as necessary to determine their *suitability* and willingness as a placement for the child.” CP 180 (Shelter Care order). (Emphasis added.)<sup>3</sup>

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<sup>3</sup> One reason to investigate Mr. Viles was because he himself admitted in waiving shelter care and signing the order that there was “no parent . . . to

C. DSHS owed Plaintiffs a duty because of special relationship.

DSHS owes a duty of reasonable care to investigate the health and safety of children it places in foster homes based on a special protective relationship between the agency and those children.

*HBH v. State*, *id.* at 4. Though *HBH* dealt specifically with foster children, the nature of the relationship—entrustment—was the defining factor.

[I]t is clear from *Caulfield* [*v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001)] that custody is not a crucial element of such a relationship. There, the contracted caregiver, not the county case worker, had a custodial relationship to the disabled client. 108 Wn.App. at 245–46. The case worker’s relationship with the client extended only to planning, monitoring, and providing other support services. *Id.* at 256. The fact that the case worker was entrusted with ensuring the client’s wellbeing proved crucial in our assessment of the relationship. *Id.* at 255. *Caulfield* stands for the proposition that entrustment, not custody, is at the heart of a special protective relationship for purposes of imposing a common law tort duty. *Niece* [*v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997)], on the other hand, did involve a custodial relationship between the group home operator and the resident. As noted, however, *Niece* did not base its finding of a special relationship on custody, but rather on the same ground as *Caulfield*, entrustment of a vulnerable individual. *Niece*, 131 Wn.2d at 50, 929 P.2d 420; *Caulfield*, 108 Wn.App. at 255. Thus, the decisions of both the Supreme Court and this court signal that custody is not a prerequisite to a protective special relationship.

*Id.*

Because of the special relationship, it was incumbent upon the Department to at least advise Mr. Viles that his son’s behavioral issues were significant. This is what Mrs. Wrigley had told the social worker when she

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provide supervision or care” for A.A., that the Department had been “unable to remedy the unsafe conditions in the home,” and that releasing A.A. “would present a serious threat of substantial harm” to A.A. CP 178.

learned A.A. had been sent to Idaho. He would be dead within six months because A.A.'s behavior and Viles' violent nature were a deadly mix.

The fact that Viles was the father rather than the foster parent is not a relevant difference in this case because, as noted above, the Department was still retaining custody and merely delegating authority to Viles.

## II. THE COURT SHOULD HAVE GRANTED LEAVE TO AMEND.

CR 15(a) provides that a petitioning party may amend its pleadings within twenty days, as a matter of right, if a responsive pleading is not served. Otherwise, a party may only amend by leave of court or written consent of the adverse party. CR 15(c) further provides that any additional claims sought via a motion for leave to amend related back to the date of the original complaint if the additional claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

"The purpose of notice pleading is to 'facilitate a proper decision on the merits.' In pursuit of this, the trial court should freely grant leave to amend 'when justice so requires.' The trial court considers several factors to determine whether to grant leave to amend, including undue delay, juror confusion, and unfair surprise." *Watson v. Emard*, 165 Wn. App. 691, 697, 267 P.3d 1048 (2011) (citing *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999)) (internal citations omitted).

For the reasons described below, none of the *Watson* factors weigh against granting Plaintiffs' Motion. Here, as described above, DSHS has been on notice of Plaintiffs' negligence claims from the outset and this issue has been the primary focus of litigation. DSHS simply cannot contend that the addition of a general claim for negligence presents an unfair surprise. Similarly, with the other negligence claims dismissed on summary judgment because of the narrow scope of DSHS' duty with respect to non-subject parents under RCW 26.44.050, this would be the only negligence-related claim presented to the jury. Thus, there can be no argument that the addition of a general negligence claim could confuse the jury. In *Kalberg v. Otten*, 167 Wn. App. 522, 529, 280 P.3d 1123 (2012), the Court rephrased the second *Watson* factor as "the introduction of remote issues." *Id.* (citing *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001)). Regardless of the phrase this Court adopts, the application of this factor remains the same, negligence is at the heart of this case, it has been alleged from the beginning, and it has been the parties' primary focus in discovery and litigation. DSHS cannot the addition of a general negligence claim creates a remote issue.

DSHS may contend that Plaintiffs' addition of a general negligence claim is the result of undue delay. Undue delay alone, however, is an insufficient basis for the Court to deny Plaintiffs' Motion. Undue delay "must be accompanied by prejudice to the nonmoving party." *Evergreen*

*Moneysource Mortgage Co. v. Shannon*, 167 Wn. App. 242, 262, 274 P.3d 375 (2012) (citing *Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334 (1988)). Here DSHS cannot show that they will be prejudiced by Plaintiffs amending their Complaint to include a general negligence claim. With the October 3 trial continued, DSHS will have an opportunity to bring a dispositive motion related to Plaintiffs' claim for negligence. Additionally, in the unlikely event additional discovery is necessary because of the negligence claim, DSHS will have sufficient time to conduct same. That being said, it is unlikely that additional discovery will be necessary simply because Plaintiffs added the negligence claim as the facts underlying the negligence claim mirror the facts initially pleaded and which have been thoroughly litigated over the pendency of this case.

“The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.” *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). The *Caruso* case involved a 5 year 4 month delay, but the court said that a “delay alone in the instant case does not rise to the level of prejudice required. Other courts have allowed to amendments to complaints 5 or 6 years after the filing of the original complaint.” *Id.* In fact, the criteria of “jury confusion” suggests that an amendment can be made during the pendency of a trial.

In *Caruso*, the court granted a continuance of the trial to alleviate surprise. Moreover, *Caruso* noted that the party opposing amendment had notice of a “possible issue” of defamation at the time of the original complaint. That “notice” in *Caruso* was that the plaintiff had alleged something that was not an element of the claim but was alleged in anticipation of a probable defense. The circumstances in the present case are much clearer and the notice was much more obvious. The state’s negligence for the death of the child has been front and center throughout.

**The question then becomes what prejudice is there to the state?**

When the court asked DSHS what prejudice there would be to the state, the only thing mentioned was they would have to file another summary judgment motion. In *Caruso*, the court allowed a continuance to enable the nonamending party to “prepare a defense and contact witnesses.” Certainly having to file another summary judgment—especially one where the issue of public duty doctrine is commonly litigated by the state and would require little or no significant case research—is no more onerous and is probably less so than contacting witness and preparing a defense.

This brings us to the language of Civil Rule 15(a) that “leave shall be freely given when justice so requires.” In balancing the justice of a child’s death due to the possible negligence of the state against the justice of alleviating the state of the burden of filing another summary judgment motion

of an already well-researched issue, there should be no comparison. The state would lose little. The plaintiffs have already lost much and stand to lose much more. Another argument regarding the breadth of CR 15, though not immediately obvious when arguing CR 15(a), is the language of 15(b).

Specifically, the relevant portion of that rule states:

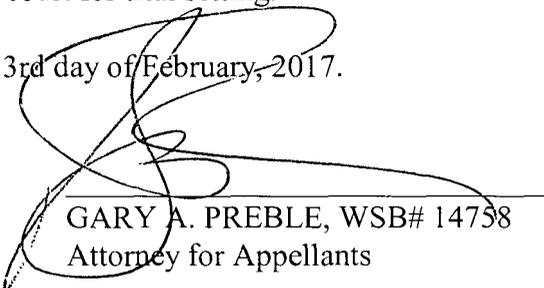
If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Especially in a summary judgment, when a party's right to go to trial is cut off summarily, it is important to recognize the value that the rules place upon presentation of the merits of the action.

#### **E. CONCLUSION**

Based on the foregoing, Appellants request the court to reverse the courts' grant of summary judgment on the issue of duty as to all claims in the partial summary judgment order, to reverse the order denying leave to amend, and to return the case to the trial court for trial setting.

Respectfully submitted this 3<sup>rd</sup> day of February, 2017.



GARY A. PREBLE, WSB# 14758  
Attorney for Appellants

DECLARATION OF SERVICE

I certify that on February 3, 2017, I caused to be served a copy of the Appellant's Brief, on the following, at the email addresses set forth below:

Allison Croft, AAG  
AllisonC@ATG.WA.GOV

JodiE@atg.wa.gov

Elizabeth Baker, AAG  
ElizabethB3@atg.wa.gov

SusanJ2@atg.wa.gov

TOROLYEF@atg.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed this 3rd day of February, 2017, at Olympia, Washington.

  
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JODIE PETERSON, Paralegal

Preble Law Firm, PS  
2101 State Avenue NE, Suite 101  
Olympia WA 98506  
(360) 943-6960  
Fax (360) 943-2603

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