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

K.C. and L.M.,

Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The non-moving party in a summary judgment proceeding may not rely on speculation or unsupported argumentative assertions that factual issues exist to defeat summary judgment. Nor are conclusory, non-specific statements in an affidavit sufficient. The court will not presume missing facts where the non-moving party fails to establish an essential element of a claim on which it has the burden of proof. Instead, in the absence of sufficient evidence to support any essential element of the non-moving party's claim, dismissal on summary judgment is required.

Here, the court should affirm dismissal on summary judgment in favor of Defendants, State of Washington and Department of Social and Health Services (DSHS) because plaintiffs K.C. and L.M. cannot establish two essential elements of their statutory negligent investigation claims: breach and causation. The Court should reject their attempt to rely on speculation and unsupported argumentative assertions to establish these elements of their claims regarding Child Protective Services (CPS) investigations dating back to the early 1980s. Furthermore, the doctrine of laches equitably prevents K.C. and L.M. from raising old contentions where they had knowledge of the underlying facts, they unreasonably delayed in commencing their actions, and that delay caused harm to the defense. K.C. is also unable to avoid the statute of limitations issue as to

her claim. The trial court properly granted summary judgment. This court should affirm.

II. RESTATEMENT OF THE ISSUES ON APPEAL

- 1) Did the trial court correctly dismiss K.C.'s and L.M.'s negligent investigation claims against DSHS because the plaintiffs cannot establish that DSHS conducted a biased or incomplete investigation of their abuse claims?
- 2) Did the trial court correctly dismiss K.C.'s and L.M.'s negligent investigation claims against DSHS because the plaintiffs cannot establish that any allegedly biased or incomplete investigation by DSHS resulted in a harmful placement decision, namely was the proximate cause of their claimed injuries?
- 3) Does the doctrine of laches require dismissal of K.C.'s and L.M.'s negligent investigation claims against DSHS because the plaintiffs had knowledge of the facts, unreasonably delaying commencement of their actions, and this delay cause harm to DSHS because records no longer exist and potential witnesses have passed away?
- 4) Did the trial court correctly dismiss K.C.'s negligent investigation claim against DSHS because her claim is time barred as she has had PTSD symptoms her whole adult life and has not suffered a qualitatively different injury within the statute of limitations?

III. RESTATEMENT OF THE CASE

The plaintiffs, K.C. and L.M., filed suit in 2013 against DSHS, maintaining that DSHS negligently investigated sexual abuse allegations between the early 1980s and the early 1990s as to Walter (Carl) Johnson. He was married to their mother, Donna Johnson, during part of this time period. Most of the old records surrounding these DSHS investigations have been destroyed pursuant to DSHS's record retention policy

schedules,¹ and numerous potential witnesses have since passed away. Those witnesses still alive have little recollection of the underlying events because of the lengthy passage of time combined with the lack of remaining records.

K.C. and L.M. rely on four different sets of sexual abuse allegations to support their negligent investigation contention. First, they focus on allegations from the early 1980s that Walter Johnson sexually abused his own daughter, Jacqueline Johnson, prior to him living in the same home as K.C. and L.M. They next point to allegations from the mid-1980s that Walter abused Jacqueline while the two lived in the same home with K.C. and L.M. Third, the plaintiffs point to an allegation from 1990 that Walter sexually abused L.M. while in the home. Finally, K.C. and L.M. rely on allegations from the early 1990s that Walter abused L.M. after he was no longer married to their mother and no longer resided in their home. But, the limited surviving records demonstrate that DSHS investigated each of these allegations. As a result, K.C. and L.M. cannot establish essential elements of their negligence claims without resorting to impermissible speculation and unsupported argumentative assertions.

¹ RCW 40.14 provides for the preservation, and destruction, of records in accordance with official record retention schedules. *See e.g.* RCW 26.44.031.

A. Walter Johnson Pled Guilty To Indecent Liberties In 1980 As To His Daughter Jacqueline, Who Had Been Declared A Dependent Child, But By 1982, The Juvenile Court Dismissed Jacqueline's Dependency And The Criminal Court Approved Johnson Residing With Donna Johnson And Her Children, K.C. And L.M.

Law enforcement arrested and charged Walter Johnson with indecent liberties as to his daughter, Jacqueline Johnson, in March 1980. Clerk's Papers (CP) 558. DSHS filed a dependency petition on Jacqueline at the same time, alleging that Walter had been sexually molesting her (dependency cause number 800626). CP 858-59. Walter Johnson, and his then wife, Elizabeth Johnson, each agreed to the dependency. CP 848-51. The juvenile court then placed Jacqueline with Elizabeth, who apparently had separated from Walter. CP 848-51.

In September 1980, Walter pled guilty to one count of indecent liberties as to Jacqueline and he received a deferred sentence. CP 544-45. Judge Morrison ordered that Walter serve five years of probation and "continue as required by parole officer re: counseling." CP 533.

The following year, in September 1981, the juvenile court dismissed the dependency on Jacqueline, with the child residing with her mother, Elizabeth Johnson. CP 852. One month later, in October 1981, Probation Officer Kenneth Davis filed a written report with Judge Morrison of the criminal court, seeking a determination on whether Walter

should now be permitted to move into the residence of his then “reported fiancée” Donna Johnson (Melby).² CP 524-25. Walter apparently had begun a relationship with Donna Johnson, the mother of K.C., L.M., and other children, while on probation. In his written report, Officer Davis presented past and current information regarding Walter to the criminal court. CP 524-25. Officer Davis detailed that Walter, after initially being involved in sex offender counseling with Nichols and Molinder, then began participating in such counseling with Dr. Sheehy of Good Samaritan Mental Health. CP 524-29. Officer Davis provided reports from both counseling agencies to the court. CP 524-29. Mr. Johnson’s prior provider opposed him being permitted to move into the home. CP 526-27.

Dr. Sheehy, Walter’s then current treatment provider, documented Walter’s subsequent progress in treatment and recommended that he be permitted to move into Donna Johnson’s residence. CP 528-29.

Dr. Sheehy noted, in his August 1981 recommendation, that “up until this point Mr. Johnson has not been allowed to stay overnight at that residence by orders of C.P.S.” CP 528. That recommendation was issued the month before the juvenile court dismissed the dependency on Jacqueline Johnson. CP 852. Dr. Sheehy also stated in his report to the court that “I feel it is

² Walter and Donna were subsequently married on November 23, 1981. CP 76.

appropriate for Mr. Johnson to make his residence [with Donna and her children] at this time.” CP 529.

Officer Davis then detailed that Walter Johnson’s prior probation officer, Susan Cole, had previously ordered him off the property. CP 524. In response to Officer Davis’ inquiry, CPS worker Peter Coleman advised Davis that Walter should continue to be ordered off the property. CP 524. CPS had not allowed Walter to be on the property of Donna Johnson while the dependency on Jacqueline remained on-going. CP 528. However, the juvenile court had dismissed the dependency as to Jaqueline in September 1981, and thus no longer had jurisdiction over Walter Johnson or Jacqueline Johnson. CP 525, 852. Officer Davis presented all of this information to Judge Morrison. CP 524-25.

The records that still survive do not contain a specific order recording Judge Morrison’s decision in 1981 or 1982 on Officer Davis’ request. However, Judge Morrison’s September 1985 dismissal order of Walter Johnson’s criminal case notes, “Johnson has lived at the above address for the past 3½ years with his wife, Donna, and her five children.” CP 521-22. Three and a half years earlier would have been early 1982. It appears, therefore, that in early 1982, Judge Morrison approved Walter Johnson residing with Donna Johnson and her children, including K.C.

and L.M., and that Walter remained there for the next three and a half years, completing his probation.

B. The Juvenile Court Placed Jacqueline With Walter Johnson, And The Criminal Court Dismissed His Criminal Matter

The surviving records establish that DSHS filed a second dependency on Jacqueline Johnson in November 1981, this time removing Jacqueline from the care of her mother, Elizabeth. CP 852-54. Both Elizabeth and Walter stipulated to this second dependency on Jacqueline (cause number 019766). CP 830-31. The juvenile court ordered that “[v]isitation between the child and [Walter] shall not be forced; the child shall be involved in decision making as to what type of contact shall be maintained between she [sic] and her father.” CP 830. The juvenile court also ordered the father and the child to participate in therapy to address visitation issues. CP 830.

In June 1983, the juvenile court placed Jacqueline with her father, Walter.³ CP 799-800. Walter had been residing with Donna Johnson and all of her children, including K.C. and L.M., for over a year, based on the prior criminal court ruling by Judge Morrison. CP 521-22. Walter, Donna, and Jacqueline Johnson had all been involved in family counseling during this dependency, as ordered by the juvenile court. CP 799-800. They

³ K.C. and L.M. incorrectly maintain that the juvenile court returned Jacqueline to her father in September 1983. *See* Appellants’ Opening Brief (Opening Br.) at 6.

continued in counseling after the juvenile court placed Jacqueline with Walter in June 1983. CP 799-804.

In October 1984, Walter Johnson obtained a family court order modifying his dissolution action with Elizabeth Johnson so that he would have full custody of Jacqueline. CP 774-75. The juvenile court then dismissed this second dependency on Jacqueline Johnson in March 1985, with Jacqueline residing with Walter and Donna and her children, including K.C. and L.M. CP 773. The dependency dismissal order noted the allegations that resulted in the dependency no longer exist. CP 773. These events occurred while Walter remained on probation before Judge Morrison until September 1985. CP 521-22.

Judge Morrison issued his September 1985 criminal dismissal order, which detailed that during Walter's five-year probation period, "Johnson was accused by his wife's ex-husband [Mr. Melby] of molesting her children." CP 521-22. The order further stated, "The family underwent a vigorous investigation by Children's Protective Services as well as the juvenile courts and probation officer, and it was determined that the allegations were untrue. . . . Since that time, the entire family has received counseling and the situation has been continuously monitored." CP 521-22. The abuse allegations by Mr. Melby would have occurred during the second dependency on Jaqueline Johnson.

However, DSHS's records regarding the "vigorous investigation" of Mr. Melby's allegations that Walter Johnson was molesting K.C., L.M., and Mr. Melby's other children, no longer exist. Nor do specific court records concerning the "vigorous investigation" by the juvenile court and probation officers into Mr. Melby's allegations exist either. Finally, records of the continuous monitoring by DSHS and probation officers of the Johnson home, as well as records of the counseling provided to the entire family no longer exist.

C. Jacqueline Johnson Requested Out-Of-Home Placement Due To Parent-Child Conflict With Walter Johnson, Leading To The Third Dependency Action In 1986

Detailed records regarding a subsequent third 1986 dependency action on Jacqueline Johnson no longer exist. The surviving records demonstrate that in mid-February 1986 Jacqueline Johnson asked to be voluntarily removed from the home of Walter and Donna Johnson. CP 716-17. Jacqueline initially stated that Walter had been waking her up by kissing her stomach and her thighs since the previously ordered counseling ended. Report of Proceedings (RP) 716. However, the surviving records establish that Jacqueline recanted these 1986 allegations of sexual abuse by Walter Johnson, and acknowledged that she had only said them to get out of the house. CP 285. Instead, she admitted he only would wrestle with her. CP 285. The prosecutor's office did not pursue any charges. CP 664.

Two weeks later, when Jacqueline still did not want to return to the Johnson home, DSHS filed this third dependency petition on Jacqueline. RP 716-17.

No other records remain to document the full extent of DSHS's investigation into these initial allegations or Jacqueline's subsequent recantation. Nor do any records remain that document the full extent of DSHS's actions and involvement with the other children, including K.C. and L.M., who were also living in the Johnson home at this time.

This third dependency petition on Jacqueline, however, noted only an imminent risk of psychological harm to the child, not a risk of sexual harm. CP 716. The surviving records establish that Jacqueline was unwilling to reside in the custody of Walter and that he was unwilling to take custody of Jacqueline. CP 681-84. Accordingly, the juvenile court established this 1986 dependency as to Walter Johnson under only a "no parent capable" basis, as opposed to an abuse or neglect basis. CP 682. Due to the mutual unwillingness by both the parent and the child, the court ordered that visitation between "father and child to be supervised and at request of the child." CP 683.

The only court ordered service for Walter in the dispositional portion of his agreed 1986 order of dependency was that "father and child [are] to participate in family counseling prior to consideration of child

being returned to father's home." CP 683. Mr. Johnson was also directed by the court "to demonstrate [the] ability to meet the child's emotional, psychological and emotional [sic] needs." CP 683. These limited, surviving records demonstrate the on-going parent-child conflict that remained between Walter and Jacqueline, following Jacqueline recanting her 1986 allegations of abuse.

The few remaining records also establish that the juvenile court and all of the parties were aware that Walter Johnson continued to reside with his wife, Donna Johnson, and her five children, including L.M. and K.C., as shown in the motion, affidavit, and order of appointment of court counsel for the father. CP 703-04. The records also show that in the months that followed, both Walter and Jacqueline remained unwilling to visit with each other. CP 672, 676. The juvenile court dismissed this third dependency in September 1987, after Jacqueline turned eighteen and the court lost jurisdiction. CP 667. No records remain that document the full extent of DSHS's monitoring of Walter during this third dependency.

About two years later, in June 1989, Donna Johnson and Walter Johnson separated. CP 76. Donna obtained a temporary restraining order against Walter in her dissolution action in July 1989. CP 84-86. However, they dismissed this dissolution action in November 1990 after they reconciled and reunited. CP 88-89.

D. DSHS Investigated 1990 Referrals Alleging Sexual Abuse Of K.C. And L.M. By Walter Johnson

The limited surviving records demonstrate that, after the Johnsons reconciled, Elaine Miller made a November 16, 1990, referral to CPS alleging abuse of L.M.⁴ CP 98-104, 263. Ms. Miller, an educator, reported to CPS that L.M. had alleged that Walter had come into her bedroom and pulled down her underwear. CP 101. CPS screened in this referral for investigation under the 72-hour response.⁵ CP 98.

The surviving records establish that a CPS worker talked to L.M. at her school as part of investigating this referral. CP 109. In addition, law enforcement also interviewed L.M. in response to this allegation. CP 261-64. During the law enforcement interview, L.M. insisted that Walter had never touched her. CP 266. In this same interview, L.M. stated that she did not remember ever telling Elaine Miller that Walter had been touching her, but might have said it because she was mad. CP 266.

About two weeks later, on November 28, 1990, Donna Johnson made her own CPS referral, alleging that the family was in chaos. CP 106-

⁴ K.C. and L.M. incorrectly maintain that Elaine Miller made her CPS referral on November 11, 1990 (Veteran's Day holiday). *See* Opening Br. at 9-10.

⁵ A screened in referral is a report of alleged child abuse/neglect that rises to the level of a credible report and is referred for investigation, as opposed to a screened-out report. *See* RCW 26.44.020(21). RCW 26.44.030 provides that DSHS shall notify law enforcement within 72 hours of receiving a report of alleged sexual abuse. RCW 26.44.030(4).

11. Donna Johnson noted that she was unaware of any sexual abuse occurring within the family. CP 109. But she felt that L.M. had been sexually abused by an acquaintance of the family, even though L.M. denied this. CP 109. Only the intake report concerning this referral remains, not any records documenting the full extent of DSHS's subsequent investigation into the referral.

Ann Kaluzny, however, served as a Family Reconciliation Services social worker during this time, providing crisis intervention services to adolescents and their families. CP 289-90. She recalls investigating this November 28, 1990, referral, and that she met with the family. CP 289-90. Ms. Kaluzny interviewed K.C. CP 116, 290. K.C. indicated that she was uncomfortable in the home. CP 116, 290. K.C. did not report that she was the victim of any sexual abuse to Ms. Kaluzny. CP 116, 290.

The surviving records demonstrate that law enforcement interviewed K.C., having already interviewed L.M. CP 267. In her law enforcement interview, K.C. admitted she had complained because Walter Johnson was always mean to her. CP 267. When asked multiple times during this interview if Walter had ever touched her, K.C. was insistent that he had never touched her. CP 267. No additional records remain to establish the full extent of the DSHS investigation into these referrals.

E. DSHS Investigates May 1991 Referral Concerning K.C.'s And L.M.'s Teenage Brother, Ken

Remaining DSHS records next establish that Elaine Miller made a second CPS referral, on May 29, 1991, this time concerning K.C.'s and L.M.'s brother, Ken. CP 120-26. Ms. Miller reported that Donna Johnson had put a lock on L.M.'s door to keep the child's brother, Ken, out of her room, but K.C. woke up and found her brother Ken in her room. CP 124. Ms. Miller, in her CPS referral, noted "Everyone makes allegations and then recants them." CP 124. Her CPS referral contained no new or current allegations as to Walter Johnson. CP 124. CPS screened in this referral regarding the brother, Ken, for investigation under the 72-hour response. CP 120. No other DSHS records detailing the extent of the subsequent investigation remain in existence.

Three days after Ms. Miller's May 29, 1991, CPS referral, Donna and Walter again separated, and she filed for dissolution a second time. CP 91-93. Walter, therefore, moved out of the home within the 72-hour response time of Ms. Miller's CPS referral. In her 2014 deposition, K.C. testified that, after Walter moved out, she had no further contact with him. CP 244. The limited surviving records establish these facts.

F. DSHS Investigates Mary Kralik's CPS Referrals Regarding Walter Having Contact With L.M. After He Had Moved Out

Few records also remain that can document the full extent of DSHS's investigations into subsequent referrals alleging that Walter continued to abuse L.M. after he moved out of the home in June 1991. In November 1991, Mary Kralik served as a counselor to a student group at L.M.'s and K.C.'s high school. CP 275. That month, Ms. Kralik made a CPS referral, saying L.M. had disclosed that: (1) Mr. Johnson had molested L.M. in the past, and (2) although he was no longer living in the home, he was still having unsupervised contact with L.M., driving her to the hospital, and fondling her while doing so. CP 131. The surviving records establish that CPS screened in Ms. Kralik's referral for investigation under the 72-hour response. CP 128. DSHS noted that Walter no longer resided with Donna Johnson and her children. CP 129-30. Law enforcement confirmed Walter no longer lived in the home. CP 285.

The surviving records establish that law enforcement interviewed L.M., asking her if there was something that happened while she and Mr. Johnson were going to the doctor's office. "L.M. said that [Walter] would drive her to her appointments. He would tell her that he was jealous and didn't want any guys around her. He told her he wanted her all to

himself. L.M. said [Walter] made lots of comments like that every day.” CP 288. Law enforcement also asked “if [Walter] has given her any touches in the year he has been back with her mom. L.M. said no, he just says things she doesn’t like.” CP 288. There are no additional records remaining that document the full extent of DSHS’s investigation into this referral.

Several months later, in February 1992, Mary Kralik made a second referral, alleging that Walter was at the family home for L.M.’s birthday and that he also visited the home several times in the past two weeks. CP 135-40. DSHS screened in this referral for investigation under the 72-hour response, noting that Walter did not reside with Donna and her children. CP 135-37. Only this intake report remains, not any records documenting the full extent of subsequent DSHS’s investigation.

G. In 2013, More Than 20 Years Later, K.C. And L.M. Sued DSHS

In 2013, more than 20 years after the last referral, K.C. and L.M. sued DSHS, alleging negligent investigation of the above referrals. DSHS filed a motion for summary judgement. K.C. and L.M. responded with a declaration by their expert, Barbara Stone, alleging DSHS should have filed dependency petitions on K.C. and L.M., in response to each referral, removing them from their mother’s home if it was necessary to protect them. CP 361-80.

At summary judgment, Judge Katherine Stolz found that K.C. and L.M.'s position is "predicated on some sort of speculation as to what somebody should have, could have, or would have done" and there is "no way to reconstruct what happened with anything other than speculation as to what someone could have or should have done." RP 09/26/14 at 16. The court reasoned that, "For a jury to try and actually make . . . some sort of decision, they're going to have to make a lot of assumptions and a lot of speculation. The law is very clear that that's not what they're to do." RP 09/26/14 at 18. The court granted DSHS's motion for summary judgment and dismissed DSHS from the case. CP 908-10. In 2018, after K.C. and L.M. obtained final judgments against other parties to the lawsuit, they filed this appeal of the summary judgment ruling. CP 1312-13.

IV. SUMMARY OF ARGUMENT

This Court should affirm the summary judgment dismissal of K.C.'s and L.M.'s negligent investigation claims against DSHS. First, because K.C. and L.M. cannot establish the necessary breach and causation elements of their negligent CPS investigation claims without relying solely on impermissible speculation and unsupported argumentative assertions, they are unable to establish any genuine issue of material fact. Second, the doctrine of laches equitably bars K.C.'s and L.M.'s claims based on these decades-old allegations where they had

knowledge of the allegations, there was an unreasonable delay in commencing the actions, and there is damage to the defense as a result of this unreasonable delay. Finally, K.C.'s claim is barred because she has not suffered a qualitatively different injury within the statute of limitations; having attributed her PTSD to her childhood sexual abuse, and having her symptoms present her whole adult life.

V. ARGUMENT

A. Standard Of Review

Summary judgement is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014). An appellate court engages in the same inquiry as the trial court when reviewing an order of summary judgment. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). Once the party moving for summary judgment points out the absence of evidence to support an essential element in the opposing party's case, the burden shifts to the non-moving party to come forward with such evidence. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In resisting summary judgment, the non-moving party may not rely on either speculation or argumentative assertions that factual issues remain. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Hungerford v. Dep't of*

Corrs., 135 Wn. App. 240, 250, 139 P.3d 1131 (2006). Conclusory, non-specific statements in an affidavit are not sufficient for summary judgment purposes. *Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *affirmed and remanded*, 110 Wn.2d. 912, 757 P.2d 507 (1988). Furthermore, the non-moving party cannot simply present some metaphysical doubt. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If there is no evidence in the record, the court cannot draw an inference in favor of the non-moving party. *Hungerford*, 135 Wn. App. at 252.

If the plaintiff fails to make a showing sufficient to establish any element essential to the case, the action must be dismissed. *Young*, 112 Wn.2d at 225. To prove negligence, a plaintiff must prove duty, breach, causation, and damages: that the defendant owed a duty to the plaintiff, breached that duty, and that the breach caused the complained-of injury to the plaintiff. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552–53, 192 P.3d 886 (2008). “If any of these elements cannot be met as a matter of law, summary judgment for the defendant is proper.” *Id.* at 553.

B. K.C.’s And L.M.’s Negligent Investigation Claims Under RCW 26.44.050 Fail As A Matter Of Law Because They Cannot Establish Breach Or Causation

No general cause of action for negligent investigation exists. *M.W.*, 149 Wn.2d at 595. Instead, a negligent investigation claim is a narrow exception that arises from the State’s statutory duty under RCW 26.44.050 to investigate allegations of child abuse. *Tyner v. State Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 77, 1 P.3d 1148 (2000); *M.W.*, 149 Wn.2d at 602. To prevail on a claim for negligent investigation, a plaintiff must prove (1) that DSHS conducted a biased or incomplete investigation, and (2) that the investigation resulted in a “harmful placement decision.” *M.W.*, 149 Wn.2d at 602. For a “harmful placement decision” to be actionable, there must preliminarily be (1) the receipt of a report of child abuse or neglect, and (2) a biased or incomplete investigation of that report conducted pursuant to RCW 26.44.050. *M.W.*, 149 Wn.2d at 602; *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004). Such harmful placement decisions include leaving a child in an abusive home. *M.W.*, 149 Wn.2d at 602. In order to be successful, a negligent investigation claim must show that the investigation’s deficit—the breach—*caused* a harmful placement. *Id.*

Where a court order directs a child’s placement, that order operates as a superseding cause, breaking the causal chain and severing DSHS’s

liability for the placement decision, unless the court was deprived of a material fact due to a faulty investigation. *Tyner*, 141 Wn.2d at 88; *Petcu*, 121 Wn. App. at 56. A material fact is one that would have changed the outcome of the court's decision. *Petcu*, 121 Wn. App. at 56. The plaintiff has the burden to demonstrate that the trial court did not have all of the relevant facts, otherwise, the trial court's action is an intervening act. *Joyce v. State Dep't. of Corrs.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005); *Hungerford*, 135 Wn. App. at 251. Because K.C. and L.M. cannot establish that DSHS breached its duty to investigate under RCW 26.44.050, or establish causation, without resorting to impermissible speculation and unsupported argumentative assertions, summary judgment is required.

1. Plaintiffs Cannot Establish That DSHS Breached Its Duty To Investigate Without Resorting To Impermissible Speculation

K.C. and L.M. contend that DSHS breached its duty to them by “conduct[ing] a faulty investigation in multiple aspects” and failing to “take steps to prevent [them] from living in a home with Walter Johnson.” Appellants’ Opening Br. (Opening Br.) at 14. But they fail to come forward with any admissible evidence that the investigations conducted by DSHS were faulty. Indeed, the limited records that still remain indicate that DSHS conducted “vigorous investigations.” K.C. and L.M. cannot

establish through the speculative opinions of their expert that DSHS breached its duty to them. Conclusory, non-specific, and speculative statements in an affidavit are not sufficient to survive summary judgment. *Hash*, 49 Wn. App. at 133.

a. DSHS Opposed The Criminal Court Request For Walter Johnson To Reside In The Plaintiffs' Home, And Vigorously Investigated Subsequent Abuse Referrals As To Johnson

K.C. and L.M. first contend that DSHS breached its duty to them when Officer Davis contacted DSHS as part of his October 1981 request that the criminal court determine whether Walter could move into the plaintiffs' residence. Opening Br. at 14. But, the plaintiffs cannot identify any specific information available to DSHS that DSHS failed to discover or failed to present to the criminal court when that court authorized him to move into the home. Thus, summary judgement is required.

The available records establish that DSHS had not allowed Walter onto the property of Donna Johnson while the first dependency on Jacqueline remained on-going. CP 528. However, the juvenile court dismissed this dependency in September 1981, and thus, it no longer had jurisdiction over Walter or Jacqueline. CP 525, 852. The following month, in response to Officer Davis' October 1981 inquiry, CPS worker Peter Coleman advised Davis that Walter should continue to be ordered off the

property. CP 525. Officer Davis presented this information, and additional comprehensive information, to the criminal court as part of his report. CP 524-29. The criminal court, however, authorized Walter to move into the home over DSHS's documented opposition. CP 521-22, 525.

After the criminal court specifically authorized Johnson to move into the home, the surviving records demonstrate that DSHS conducted "a vigorous investigation" into subsequent allegations by Mr. Melby that Walter Johnson was molesting Mr. Melby's children. CP 521-22. The criminal court found that (1) DSHS conducted a vigorous investigation; (2) the juvenile court and probation officers had also investigated; (3) the situation had been continuously monitored and; (4) the allegations were untrue. CP 521-22. There is no evidence, apart from speculation, that DSHS breached its duty to investigate.

In response, K.C. and L.M. offer the unsupported assertion by their expert, Barbara Stone, that "CPS allowed the contact and failed to prevent the abuse." CP 365. This is incorrect. Peter Coleman of CPS opposed allowing Walter Johnson to move in after the September 1981 dismissal of the dependency on Jacqueline. CP 525. Judge Morrison, however, ruled otherwise and permitted Walter to reside there. CP 521-22.

Plaintiffs' expert next asserts that DSHS should have filed a dependency petition, removing K.C. and L.M. from the care of their

mother, in response to Officer Davis' October 1981 inquiry to Peter Coleman regarding whether Walter Johnson should be permitted to move into the home. Opening Br. at 15, CP 364-65. However, Davis' inquiry was not a report of any current child abuse or neglect, only a request for information and input. CP 525. Walter had not yet moved into the home, and he did not move in until the criminal court authorized him to do so over DSHS's documented opposition. CP 521-22, 525. Plaintiffs' expert can only speculate that DSHS should have somehow required Walter to reside elsewhere in response to the criminal court order authorizing him to move into the home. *See* Opening Br. at 14-15; CP 364-65, 521-22, 525.

Furthermore, when actual reports of child abuse or neglect did subsequently arise as to K.C. and L.M., based on Mr. Melby's later allegations, the surviving records demonstrate that DSHS conducted a vigorous investigation, alongside the juvenile court and probation, and continuously monitored the situation. CP 521-22. Thus, K.C. and L.M. cannot establish that DSHS breached its duty to investigate.

b. Plaintiffs Cannot Demonstrate That DSHS Conducted A Biased Or Incomplete Investigation When Jacqueline Requested On-Going Out-Of-Home Placement In 1986 Due To Parent-Child Conflict After She Recanted Her Abuse Allegations

K.C. and L.M. next contend that DSHS breached its duty to investigate when it filed the third dependency petition on Jacqueline in late February 1986 but did not to remove L.M. or K.C. from their mother's home. *See* Opening Br. at 15. The plaintiffs fail to establish through admissible evidence that DSHS conducted a biased or incomplete investigation regarding Jacqueline's removal in 1986 due to on-going parent-child conflict following her recanting of her prior abuse allegations.

The surviving records demonstrate that, although Jacqueline initially alleged Walter Johnson had been waking her up by kissing her stomach and her thighs, she soon recanted these allegations of sexual abuse and only said them to get out of the house. CP 285. She admitted that Walter would only wrestle with her. CP 285. Two weeks after first asking to leave the home, teenage-age Jacqueline still did not want to return to the Johnson home at the end of February 1986, due to the on-going parent-child conflict with her father. RP 716-17. Thus, DSHS filed a third dependency petition on Jacqueline, because this teenager continued to refuse to return home. CP 716.

Plaintiffs incorrectly contend that “[DSHS] removed Jacqueline from the home premised upon the indecent liberties.” Opening Br. at 17. However, the surviving records show that DSHS removed the child based on the imminent risk of psychological harm to her as a result of the on-going parent-child conflict after Jacqueline recanted her abuse allegations, and not because of any risk of sexual harm to her. CP 716. Jacqueline was unwilling to reside in Walter’s custody and he was unwilling to take custody of Jacqueline. CP 681-84. Due to this mutual unwillingness by parent and child, the juvenile court ordered visitation between “father and child to be supervised and at request of the child.” CP 683.

In response, K.C. and L.M. offer unsupported assertions in the affidavit by plaintiffs’ expert Barbara Stone, including that “based on the risk of future sexual offense, it was again confirmed that Walter Johnson could not be left alone or unsupervised with [Jacqueline].” Opening Br. at 8; CP 366-67. Barbara Stone also asserts that “with regard to Jacqueline Johnson, we know that the juvenile court determined that Walter Johnson was a threat to young children.” CP 368. These are inaccurate assertions that are not supported by any facts.

Instead, the available record establishes the juvenile court limited Walter’s contact with Jacqueline, not due to the risk of future sexual offense, but because both of them remained unwilling to visit with each

other. CP 672, 676. The juvenile court established this dependency under a “no parent capable” basis, not on an abuse or neglect basis as to either young children or teenagers such as Jacqueline. RCW 13.34.030(2)(c); CP 682. The dispositional order focused only on a service to address their parent-child conflict, namely “father and child [are] to participate in family counseling prior to consideration of [the] child being returned to father’s home.” CP 683. Mr. Johnson was also directed by the juvenile court, as a result of this on-going parent-child conflict, “to demonstrate [the] ability to meet the child’s emotional, psychological and emotional [sic] needs.” CP 683. The resulting court orders document the evolving nature of this dependency, as DSHS conducted further investigations. The limited remaining records from 1986, therefore, establish that DSHS conducted a thorough investigation over many weeks, rather than a biased or incomplete investigation that halted after her initial allegations.

Plaintiffs’ expert further speculates that “any investigation, or by just asking Jaqueline, [sic] would have led [CPS] to the understanding that Walter Johnson was living in a home with other minor children” CP 367. But DSHS, the juvenile court, and all other parties were well aware that Walter Johnson continued to reside with Donna Johnson and her children, including L.M. and K.C. CP 703-04. The surviving motion, affidavit, and order of appointment of court counsel for the father

document this fact. CP 703-04. There are no remaining court records, or any other records, that document the full extent of DSHS's monitoring of Walter Johnson during this third dependency. There are only a few surviving records regarding Jacqueline's initial allegations, her recantation, and the resulting parent-child conflict between her and Walter. Plaintiffs, therefore, rely on speculation to support their assertion that "nothing was done to prevent harm to the other younger and more vulnerable [children in the home]." CP 368; Opening Br. at 8-9. But an expert's affidavit must be more than mere speculation and unsupported assertions. *See Hash*, 49 Wn. App. at 135. Because this affidavit is not, the court properly granted summary judgment.

c. K.C. And L.M. Cannot Show That DSHS Conducted A Biased Or Incomplete Investigation Into The 1990 Referrals Alleging Sexual Abuse By Johnson

K.C. and L.M. then allege that DSHS conducted a biased and incomplete investigation of Elaine Miller's November 16, 1990, CPS referral. The plaintiffs, however, cannot identify any specific information available to DSHS that it failed to discover in response to this referral. Thus, they cannot establish that DSHS breached its duty to investigate.

Surviving records establish that a social worker talked to L.M. at school, in response to Elaine Miller's referral. CP 109. Law enforcement

then interviewed L.M. CP 261-64. During the law enforcement interview, L.M. insisted that Walter Johnson had never touched her. CP 266. Nor did L.M. remember ever telling Elaine Miller that Mr. Johnson had been touching her. CP 266. L.M. did admit to law enforcement that she might have said this because she was mad. CP 266.

Social worker Ann Kaluzny also discussed matters with Donna Johnson as part of her crisis intervention services to the family. CP 289-90. Donna reported that she was unaware of any sexual abuse occurring within the family. CP 109. She said she felt that L.M. had been sexually abused by an acquaintance of the family, but admitted that L.M. had denied this. CP 109.

Social worker Kaluzny also interviewed K.C. CP 116, 290. K.C. did not report that she was the victim of any sexual abuse by Walter. CP 116, 290. When law enforcement subsequently interviewed her, K.C. admitted that she had complained because Walter Johnson was always mean to her. CP 267. When asked multiple times by the law enforcement interviewer if Mr. Johnson had ever touched her, K.C. was insistent that Walter had never touched her. CP 267. K.C. and L.M. fail to demonstrate how any aspect of this DSHS investigation, based on the surviving records, was either biased or incomplete.

In response to this investigation, in which all available remaining evidence establishes that L.M. and K.C. denied Walter had ever touched them, plaintiffs' expert contends that CPS should have filed a dependency petition and removed K.C. and L.M. from the care of their mother. Opening Br. at 9-11, CP 368. Plaintiff's expert Barbara Stone speculates that the referrals "should have promoted Child Protective Services to simply read the file and understand the history." CP 368. She further alleges that "Child Protective Services failed to act." CP 369. But, the affidavit does not point to any facts to support these assertions. The non-moving party to a summary judgement motion cannot simply present some metaphysical doubt. *Matsushita*. 475 U.S. at 586. Instead, if the factual basis for an expert's opinion is not present, the court should not consider the opinion in the summary judgment context. *See Hash*, 49 Wn. App. at 135.

d. Plaintiffs Cannot Demonstrate That DSHS Conducted A Biased Or Incomplete Investigation Into The 1991 Referral As To Ken, The Brother Of K.C. And L.M.

K.C. and L.M. next allege that DSHS conducted an incomplete or biased investigation in response to Elaine Miller's May 29, 1991, CPS referral regarding their teenage brother, Ken. CP 368. Because DSHS investigated this referral, and because the plaintiffs cannot identify any

specific information available to DSHS that it failed to discover in response to this referral, summary judgement is required.

The limited records remaining establish that DSHS investigated Miller's second CPS referral concerning Ken. CP 120-26. Although Donna Johnson had put a lock on L.M.'s door to keep Ken out, K.C. woke up and found Ken in her room. CP 124. The existing records of this referral contain only historical information as to Walter Johnson. CP 124. DSHS screened in this referral for investigation under the 72-hour response. CP 120. However, it is undisputed that three days after this May 29, 1991 referral, Donna and Walter separated. CP 91-93. Mr. Johnson left the home on June 1, 1991, and Donna filed for dissolution. CP 91-93. In her 2014 deposition, K.C. testified that, after Walter moved out, she had no further contact with him. CP 244.

In response, plaintiffs' expert contends that DSHS should have filed dependency petitions and removed K.C. and L.M. from the care of their mother. Opening Br. at 11; CP 370. Barbara Stone again speculates that this referral "should have promoted Child Protective Services to simply read the file and understand the history." CP 370. The affidavit does not point to any facts to support this assertion. Nor does the affidavit point to any facts demonstrating the need for a dependency petition when

it is undisputed that Walter had already moved out of the home. CP 91-93. K.C. and L.M. cannot establish that DSHS breached its duty to investigate.

e. Plaintiffs Cannot Establish That DSHS Conducted A Biased Or Incomplete Investigation Of Mary Kralik's Referrals Alleging That Walter Was Still Having Contact With L.M. After Moving Out

The surviving records demonstrate DSHS investigated Mary Kralik's two CPS referrals regarding Mr. Johnson having on-going contact with L.M. after he had moved out. K.C. and L.M., however, cannot identify any specific information that was available to DSHS that it failed to discover in response to these referrals. Thus, they cannot establish that DSHS breached its duty to investigate these reports of child abuse.

Mary Kralik made an initial CPS referral in November 1991, alleging Walter Johnson had molested L.M. in the past and that he was still having unsupervised contact with L.M. CP 131. Although he had moved out, the referral alleged that he still drove L.M. to hospital, and fondled her while doing so. CP 131. K.C., meanwhile, was no longer having any contact with Walter. CP 244.

CPS screened in this referral for investigation, noting that Walter no longer resided in the home.⁶ CP 128, 274-76. Law enforcement

⁶ Plaintiff's expert inaccurately claims that DSHS did not even screen in this referral for investigation. CP 371. Evidence of the screening is at CP 128, 274-76.

confirmed the fact that he no longer lived in the home. CP 285. Law enforcement interviewed L.M., asking “if [Walter] has given her any touches in the year he has been back with her mom. L.M. said no, he just says things she doesn’t like.” CP 288.

Mary Kralik made a second CPS referral, in February 1992, that Mr. Johnson was at the family home for L.M.’s birthday party. CP 135-40. CPS again screened this referral in for investigation under the 72-hour response, noting that he no longer resided there. CP 135-37. Significantly, there were no current allegations of abuse in this referral. CP 135-40. K.C. and L.M. cannot point to any specific information available to DSHS that it failed to discover in response to these referrals.

Even though the evidence shows that L.M. denied any sexual abuse was occurring, K.C. had no further contact with Walter, and Walter no longer resided with Donna Johnson and the children, plaintiffs’ expert, Barbara Stone, contends that CPS still should have filed a dependency petition and removed K.C. and L.M. from the care of their mother. CP 370. Stone again speculates that this referral “should have promoted Child Protective Services to simply read the file and understand the history.” CP 371. The affidavit does not point to any facts to support this assertion. As a result, K.C. and L.M. cannot establish that DSHS breached its duty to investigate these referrals.

2. Plaintiffs Cannot Establish Cause In Fact For Their Injuries Without Resorting To Speculation.

K.C. and L.M. cannot establish, without resorting to speculation, that any alleged breach of DSHS's duty to investigate was the cause in fact of their injuries. A cause is proximate only if it is both a cause in fact and a legal cause. *Tyner*, 141 Wn.2d at 82. Cause in fact does not exist if the connection between the act and the later injury is indirect and speculative. *Estate of Bordon v. Dep't of Corrs.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). There must be substantial evidence that an act or omission by the defendant produced the injury to the plaintiff in an unbroken sequence "but for" the defendant's act or omission. *Tyner*, 141 Wn.2d at 82. Speculation is not sufficient to establish proximate cause. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). It is reversible error to deny summary judgment when speculation is required to establish factual causation. *Id.* Furthermore, where the plaintiff's claim arises in a situation where a trial court takes action and did so with all of the material evidence before it, the causal chain is severed as a matter of law. *Hungerford*, 135 Wn. App at 251.

a. Plaintiffs Cannot Establish Cause-In-Fact Regarding The Early 1980s Allegations Because Court Orders Allowed Walter To Reside With K.C. And L.M. And Placed Jacqueline In The Home

K.C. and L.M. cannot point to any material fact that was not presented to either the criminal court or the juvenile court in the actions authorizing Walter and Jacqueline to reside in the home with L.M. and K.C. Since the plaintiffs cannot establish cause-in-fact without relying on impermissible speculation, summary judgment is appropriate.

First, the criminal court authorized Walter Johnson to reside with Donna Johnson and her children in early 1982, three and a half years before Mr. Johnson's criminal probation period ended. CP 521-22. Probation officer Kevin Davis asked the criminal court to rule on this specific question in late 1981, after the first dependency on Jacqueline had already been dismissed. CP 524-25. He presented the criminal court with comprehensive information, including statements from Peter Coleman of CPS regarding his on-going opposition to Mr. Johnson residing with Donna and her children, from prior probation officers involved with Mr. Johnson, and from Mr. Johnson's prior and current treatment providers. CP 521-22, 524-25. Judge Morrison nevertheless authorized Mr. Johnson to reside with Donna Johnson and her children, even though

Walter still had three and half years remaining in his criminal probation.
CP 521-22.

Walter continued to reside there, with the criminal court's apparent approval, while CPS, the juvenile court, and probation performed "vigorous investigations" into sexual abuse claims made by Mr. Melby, allegations that were determined to be untrue. CP 521-22. CPS and probation also continuously monitored the situation and the family received counseling. CP 521-22. In response, the plaintiffs cannot point to any material evidence that the criminal court was deprived of, either in authorizing Walter Johnson to initially move into the home, or to remain there. The criminal court action, therefore, is a superseding cause that precludes DSHS liability. *Petcu*, 121 Wn. App. at 56.

Second, the juvenile court's placement of Jacqueline Johnson with Walter Johnson in June 1983, during his still on-going supervised criminal probation, is an additional superseding cause, precluding liability. *Petcu*, 121 Wn. App. at 56. This additional court placement action also breaks the causal chain as plaintiffs can point to no material evidence that was not presented to the court authorizing the placement of Jacqueline with Walter, Donna, and her children. *Id.*; *Tyner*, 141 Wn.2d at 88.

The unsupported assertion by Barbara Stone, plaintiffs' expert, that the juvenile court should have instead removed L.M. and K.C., after the

criminal court authorized Walter Johnson to reside in this home and before the juvenile court itself placed Jacqueline Johnson in the home, is not sufficient to defeat summary judgment on cause-in-fact. Stone's affidavit does not offer evidence of any material fact that DSHS could have presented to either court that would have changed either court's decision. Stone's mere speculation is insufficient to establish proximate cause.

Even if L.M. and K.C. had been removed from the home initially, the plaintiffs essentially concede that the juvenile court's placement of Jacqueline in the home in June 1983 would also have ended any basis for L.M. and K.C. to remain out of the home. In her affidavit, Stone admits that "in September [sic] 1983, the Juvenile Court returned Jacqueline Johnson to the custody of Walter Johnson, with conditions, and back into the Johnson home."⁷ CP 365. Where a plaintiff fails to make a showing sufficient to establish any essential element, such as cause-in-fact, the court should dismiss the action. *See Young*, 112 Wn.2d at 225.

b. Plaintiffs' Argument That DSHS Should Have Removed K.C. And L.M. From Their Home During Jacqueline's 1986 Dependency Is Both Factually And Legally Flawed

To establish cause-in-fact, K.C. and L.M. must present substantial evidence that "but for" an act or omission by DSHS, they would not have

⁷ Barbara Stone erred. The Juvenile court placed Jacqueline in the home with her father in June 1983. CP 799-800.

been injured. *Tyner*, 141 Wn.2d at 82. They allege that DSHS caused their harm by failing to remove them from their mother's home in 1986, after DSHS "removed Jacqueline Johnson from the home premised upon the indecent liberties." Opening Br. at 17. Their argument is factually unsupported and legally insufficient to survive summary judgment on cause-in-fact.

First, Jacqueline was removed due to parent-child conflict with her father. CP 716-17. Jaqueline Johnson had recanted her allegations of abuse and admitted that she only said them to get out of the house. CP 285. Jacqueline was unwilling to reside in the custody of her father, and he was unwilling to take custody of teenaged Jacqueline. CP 681-84. Therefore, due to this on-going parent-child conflict, the juvenile court ordered, in the agreed order of dependency, a single rehabilitative service for Walter Johnson, that "father and child to participate in family counseling prior to consideration of [the] child being returned to father's home." CP 683. The juvenile court also directed Mr. Johnson "to demonstrate [the] ability to meet the child's emotional [and] psychological . . . needs." CP 683.

Plaintiffs' expert, Barbara Stone, opines that, based on the removal of Jacqueline, DSHS should have also removed K.C. and L.M. from the home of their mother. CP 367. Stone further speculates that "any investigation, or by just asking Jaqueline, [sic] would have led [CPS] to

the understanding that Walter Johnson was living in a home with other minor children that were likely to be abused.” CP 367.

However, the juvenile court, DSHS, and all other parties were aware that Walter Johnson continued to reside with Donna Johnson and her children, including L.M. and K.C. CP 703-04. Furthermore, the juvenile court established this dependency as to Walter Johnson under a “no parent capable” basis, due to the on-going parent-child conflict, and not on an abuse or neglect basis. CP 682.

The plaintiffs cannot point to facts demonstrating Donna Johnson was not a parent capable of caring for her children such that DSHS must file dependency petitions on them as well. Nor can the plaintiffs establish that the parental deficit Walter needed to remedy—the ability to meet Jacqueline’s emotional and psychological needs through the court-ordered family counseling—has any factual or legal connection to Donna Johnson’s ability, or inability, to meet the emotional and psychological needs of her own children such that DSHS would have to file dependency petitions on all of them as well. The surviving records from both DSHS’s intervention and the dependency court action contain no factual support for such contentions. Instead, the plaintiffs rely on impermissible speculation and unsupported argumentative assertions to support their

claim that because Donna Johnson was not a capable parent as to her own children, DSHS should have removed them from her home as well.

Plaintiffs cannot establish an unbroken sequence that “but for” DSHS’s supposed failure to remove L.M. and K.C. from their mother’s care, as a result of parent-child conflict between Walter Johnson and Jacqueline Johnson, an act or omission by DSHS produced the injury to the plaintiffs. Their reliance on impermissible speculation is insufficient to establish causation. *Rasmussen*, 107 Wn. App. at 959. The court properly granted summary judgment.

c. Plaintiffs Cannot Establish That “But For” A Deficiency In DSHS’s Investigations, They Would Have Been Removed From Their Home Following The 1990 Referrals

K.C. and L.M. argue that DSHS caused their harm by failing to file a dependency petitions and obtain court orders removing them from their mother’s home in response to Elaine Miller’s November 16, 1990 referral. Opening Br. at 9-11; CP 368. However, K.C. and L.M cannot establish that any act or omission by DSHS produced their injury in an unbroken sequence “but for” DSHS’s act or omission. *Tyner*, 141 Wn.2d at 82.

Upon receiving the referral, DSHS and law enforcement interviewed L.M. CP 109, 261-64. L.M. insisted that Walter had never touched her and did not remember ever telling Elaine Miller that he had

been touching her. CP 266. Donna Johnson maintained she was unaware of any sexual abuse occurring within the family. CP 109. K.C. did not tell social worker Kaluzny that she was the victim of sexual abuse. CP 116, 290. K.C. also denied to law enforcement that Walter Johnson had ever touched her. CP 267.

K.C. and L.M. cannot point to any evidence DSHS failed to uncover through this investigation that (1) would have been sufficient to support a dependency petition and (2) had it been presented to the court, would have resulted in the children's removal from the home. Any opinion plaintiffs' expert, Barbara Stone, might have on the issue of a judicial officer entering an order removing the children from the care of Donna Johnson, or remaining out of her care, is purely speculative. *See Bordon*, 122 Wn. App. at 246. As a matter of law, cause in fact does not exist if the connection between the act and the later injury is indirect and speculative. *Id.* at 240. Such is the case here.

d. Plaintiffs Cannot Establish Causation Regarding DSHS Investigating Abuse Referrals After Walter Johnson Moved Out

K.C. and L.M. also cannot establish cause-in-fact regarding any DSHS investigations after Walter Johnson moved out of the home. There is no act or omission by DSHS that produced an injury to either of them in an unbroken sequence of events.

First, Walter Johnson moved out of the home three days after Elaine Miller's second CPS referral, involving allegations against K.C.'s and L.M.'s brother, Ken. CP 91-93, 120-26. K.C. testified that, after Mr. Johnson moved out, she no longer had any contact with him. CP 244.

Second, Walter Johnson continued to reside outside the home when Mary Kralik made her two CPS referrals regarding L.M. only. CP 128-30, 135-37, 285. When interviewed by law enforcement, L.M. denied any abuse was occurring. CP 288. She said only that Walter was saying things she did not like. CP 288.

Even though the surviving evidence shows that L.M. denied any sexual abuse was occurring, K.C. had no further contact with Walter Johnson, and Walter no longer resided with K.C. and L.M., plaintiffs' expert contends that CPS still should have filed a dependency petition and removed K.C. and L.M. from the care of their mother, Donna Johnson. CP 370. But the plaintiffs cannot point to any evidence that DSHS gathered incomplete or biased information that resulted in a harmful placement decision. *See M.W.*, 149 Wn.2d at 602. Cause in fact does not exist if the connection between the act and the later injury is indirect and speculative. *Bordon*, 122 Wn. App. at 240. Because speculation is insufficient to defeat summary judgment, the court properly granted the motion.

3. Plaintiffs' Claims Should Be Dismissed Because Legal Causation Is Lacking

Even if the plaintiffs could establish factual causation without improper reliance on speculation, legal causation is lacking. Legal causation “requires a determination of whether liability should attach as a matter of law given the existence of cause in fact.” *Braegelmann v. Cty. Of Snohomish*, 53 Wn. App. 381, 384, 766 P.2d 1137 (1989). Legal causation is grounded in policy determinations and focuses on whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote to establish liability. *Tyner*, 141 Wn. 2d at 82. The inquiry depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Id.*

Here, logic, common sense, justice, policy, and precedent all establish that DSHS social workers were not the legal cause for plaintiffs' damages as a result of Walter Johnson's acts. First, common sense and policy preclude liability as to DSHS because there is no evidence, apart from speculation, to support the plaintiff's claims. The limited surviving records and witnesses establish that DSHS conducted multiple investigations over the years. Plaintiffs can point to no evidence that any investigation was biased or incomplete. Furthermore, the surviving

evidence establishes that CPS and probation continuously monitored the family in both the dependency and criminal proceedings. CP 521-22.

Second, logic, justice, and precedent also preclude liability as to DSHS. Criminal and juvenile court orders directed where both Walter and Jacqueline were permitted to reside. Furthermore, CPS and probation officers conducted “vigorous investigations” into sexual abuse allegations by Mr. Melby, allegations that were determined to not be true. CP 521-22. To accept the plaintiffs’ arguments would require the Court to accept their speculation about what was or was not done by, or said to, social workers, therapists, probation officers, teachers, and other individuals. Allowing liability to be based on speculation effectively would establish a form of strict liability—all the plaintiffs would have to show is that DSHS was involved with Walter Johnson and that the plaintiffs were injured. All else would be the product of speculation. That is not the legal standard for negligent investigation claims under RCW 26.44.050.

In essence, the plaintiffs’ expert engages in a series of “what if” hypotheses. “If Child Protective Services had acted diligently with regards to the referrals from 1981 . . . or from 1986 . . . , then there would not have been any referrals from the 1990s.” CP 371. This speculation ignores the records that still exist; the superseding court actions by both the criminal and juvenile courts authorizing placements; the vigorous investigations by

DSHS in response to referrals; the on-going judicial involvement from 1980 through 1987; and the rehabilitative nature of the very dependency proceeding plaintiffs' expert argues should have occurred for K.C. and L.M. as well. *See In re Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992) (dependency is a remedial, non-adversarial proceeding). Legal causation cannot be established by speculating that some event or series of events might have happened or could have happened that might have prevented an injury. *Bordon*, 122 Wn. App. at 240.

C. The Doctrine Of Laches Bars Plaintiffs From Raising Claims

Laches is an equitable defense that recognizes an implied waiver of a known claim when there is an unreasonable delay and harm to the defendant in bringing a cause of action. *Carillo v. City of Ocean Shores*, 122 Wn. App. 592, 609, 94 P.3d 961 (2004). Laches is intended to prevent injustice and hardship to the party harmed by the unreasonable delay in bringing the action. *Id.* As DSHS argued in its briefing to the trial court, laches provides an additional, independent basis for dismissal of the claims by K.C. and L.M. CP 37, 886.

In order to assert laches, a defendant must show: (1) the plaintiff had knowledge or a reasonable opportunity to discover the facts constituting the cause of action; (2) there was an unreasonable delay by the plaintiff in commencing that cause of action; and (3) there is damage

to the defendant resulting from the unreasonable delay. *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978); *Carillo*, 122 Wn. App. at 609. All three parts of the test are met here.

First, plaintiffs had knowledge or a reasonable opportunity to discover the facts constituting their cause of action. They filed suit in 2013, more than twenty years after CPS and law enforcement conducted investigations that specifically involved K.C. and L.M. in the very issues they now raise in their claims. Law enforcement and CPS repeatedly interviewed K.C. and L.M. about the same contentions they now raise.

Second, there was an unreasonable delay in commencing this action. K.C. testified that she has been impacted all of her life by the abuse caused by Walter Johnson and has had symptoms of her PTSD diagnosis her whole adult life. CP 245-48, 249. L.M. testified that she ran away in 1992 to get away from the abuse by Walter Johnson. CP 256. This suit, however, occurred more than 30 years after both the criminal and juvenile court involvement that they maintain is central to their negligent investigation claims. The second prong of the doctrine is established.

Finally, there is damage to the defendant as a result of this delay because witnesses and evidence have become unavailable. Walter Johnson died in 1992, two weeks after L.M. ran away. CP 256. Other witnesses, including judicial officers, have also passed away. (*See*, RP 09/26/12 at 6).

Detailed records regarding court cases and DSHS investigations no longer exist. Even the plaintiffs must seek to defeat summary judgment through speculation and unsupported argumentative assertions that factual issues remain. The equitable doctrine of laches applies and bars their claims.

D. The Statute Of Limitations Bars K.C.’s Complaint

Statute of limitations is based on practical and policy considerations grounded in the notion that stale claims generally rely on untrustworthy evidence and may be spurious. *Matter of Estates of Hibbard*, 118 Wn.2d 737, 745, 826 P.2d 690 (1992). With the passage of time, witnesses die and documentary evidence is destroyed pursuant to regular record retention policies. This has certainly occurred in this case.

Against this backdrop, the Legislature has enacted a special statute of limitations for claims of childhood sexual abuse, RCW 4.16.340(1). Under section (c) of the statute, the claim shall be commenced “within three years of the time the victim discovered that the act caused the injury for which the claim is brought.” RCW 4.16.340(1)(c). A plaintiff can demonstrate compliance with RCW 4.16.340(1)(c) in one of two ways: by showing that the evidence of the harm being sued upon is qualitatively different than the other harms previously connected to the abuse; or by showing that the plaintiff had not previously connected the recent harm to the abuse. *Carollo v. Dahl*, 157 Wn. App. 796, 801, 240 P.3d 1172 (2010).

This case is on point with the *Carollo* decision. In *Carollo*, the plaintiff did not allege a newly discovered connection but rather asserted his condition was worse. Such a worsening of a condition is not a new or qualitatively different condition. *Id.* at 802. The plaintiff had been sexually abused as a sixteen-year-old student by a teacher over several years. *Id.* at 798. Around the same time, he sought counseling to deal with the issues arising from those assaults. Ten years later, when he was well past age 21, *Carollo* was diagnosed with PTSD. Finally, when the PTSD worsened, *Carollo* filed suit. *Id.* at 798-99. His claims were barred by the statute of limitations.

Here, K.C. testified that she attributes her PTSD diagnosis to her childhood sexual abuse. CP 245. She stated that she has had trouble coping with every-day life, ongoing suicidal thoughts throughout her adult life, and depression and anxiety as part of her PTSD diagnosis. CP 245-48, 249. She stated that these symptoms have been present her whole adult life. CP 249. K.C. has not suffered a qualitatively different injury within the statute of limitations period. Thus, her claim is barred.

E. Issues Waived On Appeal

Before the trial court, K.C. and L.M. maintained that they had presented evidence establishing negligent probation supervision of Walter Johnson from 1980 to 1985. Opening Br. at 18. On appeal, they state

clearly that they “are not even arguing the negligent probation at this phase of these proceedings.” Opening Br. at 18. Issues not raised on appeal are deemed waived. *Hall v. Feigenbaum*, 178 Wn. App. 811, 817-18, 319 P.3d 61 (2014). Nor is DSHS arguing the issue of bankruptcy by L.M. on appeal, and this issue is also waived. *Id.*

VI. CONCLUSION

K.C. and L.M. rely on impermissible speculation and unsupported argumentative assertions to establish the essential elements of breach and causation in their negligence claims regarding CPS investigations dating back to the early 1980s. Their speculation and assertions are insufficient to defeat a motion for summary judgment. Furthermore, actions by the criminal court and the juvenile court constitute superseding causes that preclude liability against DSHS. The plaintiffs are unable to demonstrate that either of these courts were deprived of any material fact due to a faulty investigation. Indeed, the available records show that CPS and law enforcement conducted multiple vigorous investigations with regard to Walter Johnson, K.C., and L.M. More detailed records no longer exist and witnesses have passed away in the decades since the alleged conduct occurred. Accordingly, the doctrine of laches, thorough equity, and the applicable statute of limitations, also bar this action by K.C. and L.M.

RESPECTFULLY SUBMITTED this 9th day of July, 2018.

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