

FILED
Court of Appeals
Division II
State of Washington
7/17/2018 3:21 PM
NO. 51545-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CARLOS MENDOZA, et al

Appellants

v.

CITY OF VANCOUVER, et al,

Respondents.

BRIEF OF APPELLANTS

GARY A. PREBLE, WSB #14758
Attorney for Appellants,
Carlos Mendoza and LM

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

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR and ISSUES 1
 Assignments of Error 1
 Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

C. SUMMARY OF ARGUMENT 23

D. ARGUMENT 24

 I. STANDARD OF REVIEW 24

 II. DEFENDANT BARBARA KIPP BREACHED HER DUTY TO INVESTIGATE CARLOS MENDOZA FOR POSSIBLE ABUSE OR NEGLECT IN A COMPLETE AND UNBIASED MANNER, AND SHE IS THEREFORE LIABLE FOR NEGLIGENT INVESTIGATION 25

 A. Kipp’s duty to investigate is found in RCW 26.44.050. 25

 B. Abuse or neglect in this case means negligent treatment or maltreatment as defined in former RCW 26.44.020(16). 26

 C. Parents and children have a cause of action when police conduct a negligent investigation, one that is biased and incomplete and that results in a harmful placement decision. 27

 D. Genuine issues of material fact exist as to whether Barbara Kipp breached her RCW 26.44.050 duty to investigate Mr. Mendoza 29

 1. There was no report concerning the possible occurrence of abuse and neglect. RCW 26.44.050. 30

 2. Kipp shades the truth to suit her purposes and she speculates without substantial information 31

 a. Prior to locating Mr. Mendoza, Kipp was concerned he and LM were with Tara, but she later minimized evidence of her speculation. 31

 b. Kipp’s speculation was enabled by a rush to judgment 32

c.	After beginning the chase of Mr. Mendoza into Oregon, Kipp speculated LM was elsewhere with Tara, but denied in her 2017 deposition she said that in her 2014 report	33
d.	Kipp’s speculation was enabled by her wilful ignorance of and misreading of Mr. Mendoza’s motion	34
e.	Kipp’s ignorance of the court process, coupled with her bias, caused her to overlook the fact that Mr. Mendoza was working appropriately within the judicial process	37
f.	Kipp’s bias, coupled with her arrogant ignorance, caused her to overlook the very language of the “petition”	37
g.	Kipp’s bias, coupled with her “fear” and “concern,” led her to omit attempting to contact Tara or her relatives	38
3.	Kipp not only did not do a complete or unbiased investigation, she wasted time with the wrong procedure to obtaining a search warrant, when RCW 26.44.050 required an order pursuant to RCW 13.34.050 and when there was no legal basis for a warrant	39
III.	GROSS NEGLIGENCE IS A MATTER FOR THE JURY	40
IV.	FALSE IMPRISONMENT OF LM—THE INTERLOCAL AGREEMENT DID NOT GRANT KIPP AUTHORITY TO SEIZE LM.	41
A.	Sgt. Kipp lacked legal authority under the master Interlocal mutual law enforcement assistance agreement to take LM into “protective” custody on December 10, 2014.	41
1.	Stopping and seizing LM was not a “major incident”.	43
2.	Kipp was not engaging in administrative and investigative activity in Oregon when she seized LM.	44

3.	Kipp was not acting as specially commissioned personnel to enforce applicable traffic and criminal laws within Oregon when she had Mr. Mendoza stopped and took LM?	45
4.	Kipp was not acting pursuant to a subsequent mutual law enforcement assistance agreement calling for specific combined operations with Oregon when she had Mr. Mendoza stopped and she seized LM?	46
B.	Sgt. Kipp claimed a non-existent authority to seize LM . . .	46
1.	There was no preexisting mutual aid agreement	46
2.	There is no subsequent mutual LE assistance agreement.	47
3.	The WHEREAS clauses on page one of the Agreement do not confer authority.	48
a.	ORS 190.472.	48
b.	RCW 39.34.030	48
c.	RCW 10.93.130	48
d.	RCW 10.93.070	48
e.	RCW 10.93.090	49
4.	VPD Policy 12.15.00	49
5.	Sgt. Kipp' s claim of authority begs the question.	49
C.	Without legal authority, Kipp was a private Citizen when she seized LM	49
D.	Sgt. Kipp relied on a defective policy that did not fully state the standard	51
V.	KIPP'S ACTIONS WERE OUTRAGEOUS	52
E.	CONCLUSION	52
F.	APPENDIX	
	Analysis of definition of "abuse and neglect".	Appendix A

TABLE OF AUTHORITIES
Washington Cases

City of Wenatchee v. Durham, 43 Wn. App. 547,
718 P.2d 819 (1986) 41

Adkisson v. City of Seattle, 42 Wn.2d 676, 258 P.2d 461 (1953). 27

Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983) 41

Brewer v. Copeland, 86 Wn.2d 58, 542 P.2d 445 (1975). 40

Brown v. Dep't of Soc. & Health Servs., 190 Wn. App. 572,
360 P.3d 875 (2015) 26–27, 40, 41

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000). 27

In re Gibson, 4 Wn. App. 372, 483 P.2d 131 (1971) 52

In re Luscier's Welfare, 84 Wn.2d 135, 524 P.2d 906 (1974) 52

Kloepfel v. Bokor, 149 Wn.2d 192, 66 P.3d 630 (2003). 52

M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589,
70 P.3d 954 (2003) 28, 29

Matter of Dependency of Lee, 200 Wn. App. 414,
404 P.3d 575 (Div I 2017) 26

McCarthy v. Cty. of Clark, 193 Wn. App. 314,
376 P.3d 1127 (2016) 24–25, 28, 29

Morris v. McNicol, 83 Wn.2d 491, 519 P.2d 7 (1974). 25

Nist v. Tudor, 67 Wn.2d 322, 407 P.2d 798 (1965) 40

Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000) 28, 29

State v. Hendrickson, 98 Wn. App. 238, 989 P.2d 1210 (1999). 51

State v. Plaggemeier, 93 Wn. App. 472, 969 P.2d 519 (1999). 41

State v. Rasmussen, 70 Wn. App. 853, 855 P.2d 1206 (1993) 41

Tyner v. Dep't of Soc. & Health Servs., 141 Wn.2d 68
1 P.3d 1148 (2000) 28, 29

Yonker v. Dep't of Soc. & Health Servs.
85 Wn. App. 71, 930 P.2d 958 (1997) 29

Federal Cases

Sandberg v. McDonald, 248 U.S. 185, 39 S.Ct. 84,
63 L.Ed. 200 (1918) 50

Oregon Cases

Deardorf v. Idaho Nat. Harvester Co., 90 Or. 425,
177 P. 33 (1918) 50

State ex re: Juv. Dept. v. Casteel, 18 Or. App. 70,
523 P.2d 1039 (1974) 50

State v. Meyer, 183 Or. App. 536, 53 P.3d 940 (2002). 50

Swift & Co, and Armour & Co. v. Peterson, 192 Or. 97,
233 P.2d 216 (1951) 50

Washington Court Rules

CrR 2.3 39

CrR 2.3(b)(4). 17, 39

Washington Statutes

RCW 10.93.070 48

RCW 10.93.090 48

RCW 10.93.130 48

RCW 13.34.050 17, 25, 39, 51

RCW 26.44.010 28

RCW 26.44.020 26

RCW 26.44.020(1) 26

RCW 26.44.020(16) (former) 26, 27, 35

RCW 26.44.050 1, 17, 23, 25, 26, 27, 29-30, 39, 40, 45, 48-51

RCW 26.44.100 28

RCW 26.44.280	40
RCW 39.34.030	48
RCW 4.24.595	1, 40, 50
RCW 74.13	25

Oregon Statutes

ORS 190.472.....	48
ORS 190.474.....	46
ORS 419B.020(5).....	51

Washington Constitution

Article I, Section 7	41
----------------------------	----

Federal Constitution

First Amendment	27
Fourth Amendment.....	41

Other Authorities

Master Interlocal Mutual Law Enforcement Assistance Agreement.....	1, 2, 21-24, 41-43, 45-48, 50, 51
The Wayback Machine, https://waybackmachine.org/	38
VPD 12.15.00	22, 49
VPD 17.15.02A.....	21
VPD 17.15.02C.....	51
Webster’s Third New International Dictionary 1360 (1993)	27

A. ASSIGNMENTS OF ERROR and ISSUES

Assignments of Error

1. The trial court erred in granting summary judgment when there existed genuine issues of material fact for the jury, including whether the acts of Sgt. Kipp constituted gross negligence.
2. The trial court erred in not recognizing Sgt. Kipp was not lawfully conducting official duties in the State of Oregon.
3. The trial court erred to the degree it found subsequent events relevant to Kipp's negligence on December 10, 2014.
4. The trial court erred in holding on summary judgment that RCW 4.24.595 shifts the burden to the non-moving party to prove Sgt. Kipp's acts constituted gross negligence.
5. The trial court erred holding the Master Interlocal Mutual Law Enforcement Agreement authorized Kipp to take LM into custody in Oregon.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in dismissing Plaintiffs' former RCW 26.44.050¹ negligent investigation claim on summary judgment when Plaintiffs provided sufficient evidence that Defendant Kipp's investigation of alleged abuse/neglect by Plaintiff Carlos Mendoza was incomplete and/or biased and resulted in the harmful placement of LM?
2. Whether the trial court erred in dismissing Plaintiffs' RCW 26.44.050 negligent investigation claim on summary judgment when Washington law holds that the following issues of Defendants' breach of the duty to investigate are fact questions which should not be resolved at Summary Judgment as a matter of law:
 - a. Whether Sgt. Kipp fulfilled the duty to investigate?
 - b. Whether Sgt. Kipp breached the duty by an incomplete and biased investigation?

¹ As of July 1, 2018, the department of social and health services was changed and is now called the department of children, youth, and families, requiring that many statutes be amended to reflect that change, including RCW 26.44.050. The statute relevant to this case is thus former RCW 26.44.050. There was no material change in the statute, however, and this note will be the only indication this case deals with the now former statute.

- c. Whether Kipp's breach was the proximate cause of the injuries of Mr. Mendoza and LM?
3. Whether the trial court erred in ruling as a matter of law that Plaintiffs failed to prove that Defendant Kipp's investigation of abuse/neglect was conducted in a grossly negligent manner when under Washington law issues of gross negligence present fact questions for the jury?
4. Whether the trial court erred in ruling defendants had qualified immunity when Kipp acted outside the authority of Master Interlocal Mutual Law Enforcement Agreement in pursuing and seizing LM in Oregon?
5. Whether the trial court erred in dismissing Plaintiffs' claims for outrage and false imprisonment?

B. STATEMENT OF THE CASE

Background: Early May 2014

Plaintiff Carlos Mendoza was in the United States Marines and in training in Mississippi when he learned in April 2014 that his then wife Tara had been accused of abusing their son, LM. Mr. Mendoza obtained permission from his command in North Carolina for two days leave to come to Vancouver, Washington in order to address his family issue, and he intended to attach temporarily to the Portland command at Swan Island for that purpose. He arrived in Portland on the night of May 1, 2014. Having mistakenly left his paperwork in North Carolina, Mr. Mendoza did not know if he would be able to attach to Swan Island and thought he might need to return to North Carolina. CP 403.

Based upon events that occurred on May 2, Mr. Mendoza was charged with several crimes, including making a false/misleading statement to a public officer. CP 39–57. Sgt. Kipp was involved in the investigation. CP 287.

In June, 2015, Mr. Mendoza ultimately made an Alford plea to Disorderly Conduct (blocking traffic) with a fine and costs, all jail time suspended and no probation;² the other charges were dismissed with prejudice.³

Mr. Mendoza testified he did not lie or commit the crimes of which he was accused, but that he took an Alford plea to be done with the defendants' "harassment" that had hindered his career with the US Marine Corps. CP 402–407; *see also*, CP 23–25. Mr. Mendoza also believed the defendants "had it out for" Tara and were upset with him because he did not immediately turn on her as well. CP 401–402. He also believed Det. Monica Hernandez' aggressive approach to him, including misstatements and taking his words out of context, were motivated by the fact that if Mr. Mendoza got custody and took LM back to North Carolina, the police would have a more difficult time obtaining a conviction against Tara.⁴ *Id.*

² Plaintiffs' reference to the defendants' documents regarding events occurring after December 10, 2014 is intended for convenience of understanding the background in this matter and is not intended to waive an objection to relevance for the defendants' case of any such subsequent events, specifically CP 39–86 and CP 141–191, as well as other documents relevant only for background, CP 95–106.

³ The Orders of Dismissal, CP 53 and CP 57 are somewhat ambiguous. The title of each states "Motion and Order for Dismissal Without Prejudice" where the judge or prosecutor apparently made them "with prejudice". The text of the orders, however, were not changed and state "without prejudice". On summary judgment, they would be with prejudice.

⁴ Tara pled guilty in November 2015 to 3rd Degree Assault of a Child. CP 75.

Tara and Carlos' Relationship

Mr. Mendoza's experience with Tara was that she had been a good mother, so one of his concerns was to find the facts of the allegations against her.⁵ He expressed concern the state had resisted doing further medical testing on bone issues until later in 2014 when LM's condition was no longer the same as at the time of injury and would not be likely to provide relevant information. He also expressed concern that there had been spoliation of evidence because the blood sample had been destroyed. CP 402; CP 472. Though he was initially supportive of Tara, Mr. Mendoza's relationship with Tara deteriorated in July 2014 as a result of several things. CP 148.

Tara assaulted Mr. Mendoza with her car, and she pled guilty to 3rd Degree Assault-DV in Cause No. 14-1-01578-0, *id.*, CP 117. A 5-year no contact order was entered against her on October 23, 2014, protecting Mr. Mendoza. CP 121 and 124; CP 407-408. LM was not a protected person under that no-contact order. It was Mr. Mendoza's motion to rescind this order that became defendant Kipp's focus and led to the case now on appeal.

Shortly after Tara's assault in July, Mr. Mendoza at the suggestion of CPS had also obtained a Domestic Violence Protection Order (DVPO) on August 5, Cause No. 14-2-07709-6, which also ordered no contact with Mr.

⁵ At deposition in April 2017, after having read the report of Tara's expert, Mr. Mendoza was still uncertain as to what had happened. CP 33.

Mendoza. CP 113–116. Though Mr. Mendoza had requested that the order protect LM as well, the court held it had no jurisdiction in light of the existing dependency to order no contact, though it did order no harm, harassment, etc. CP 115; CP 407–408.

Around the same time as Tara assaulted him in July 2014, Mr. Mendoza learned that Tara was still married to another man when she married him. He then filed for, and subsequently obtained in 2015, an annulment. CP 25. A temporary Parenting Plan was entered September 17, 2014, which also granted Tara no contact with LM. CP 109, CP 130–136.

In addition, Mr. Mendoza began developing a relationship with Yesenia in September, CP 474–475, whom he had known since fourth grade. (They were married in February 2015, CP 408, and they moved to Mr. Mendoza’s North Carolina duty station shortly after April 27, 2015.⁶ CP 410.)

Dismissal of the Dependency: December 4, 2014

When LM was removed from Tara in April 2014, while Mr. Mendoza was still in Mississippi, the DSHS filed a dependency in Clark County Juvenile Court. Though Mr. Mendoza obviously had nothing to do with LM’s injuries, the dependency was not dismissed. On November 25, 2014,

⁶ Though not relevant to the actions of Barbara Kipp on December 10, 2014, her removal of LM from Mr. Mendoza resulted in a second dependency. That dependency was also dismissed without fact finding on or about April 28, 2015, the day after LM was returned to Mr. Mendoza. CP 410.

therefore, Mr. Mendoza filed a Motion to Dismiss the Dependency in which he identified the various restraining orders, including the criminal order in Cause No. 14-1-00877-5 regarding Tara assaulting LM.⁷ CP 109. Mr. Mendoza also stated in his supporting declaration to the Motion to Dismiss that the Marine Corps had assigned him to a “duty station out of state,” though he did not identify the state.

The Order Dismissing Dependency, which precluded a trial, identified (apparently for the purpose of stating the reason for the dismissal) the two orders denying Tara contact with LM—the criminal no-contact order of Cause No. 14-1-00877-5 (State v. Tara Mendoza), and the temporary Parenting Plan of Cause No. 14-3-01748-8. CP 138–140. The Order Dismissing Dependency did not, however, mention the two no-contact orders protecting Mr. Mendoza from Tara. Nor did the Order Dismissing Dependency indicate where Mr. Mendoza was to be stationed or that Mr. Mendoza being out of state was a basis for the dismissal. AAG Yamin stated the dependency was “dropped because the Department didn’t have a basis to further pursue a dependency against Carlos.” CP 295.

⁷ Mr. Mendoza’s declaration in support of the Motion to Dismiss Dependency mistakenly stated that the DVPO prevented Tara from having contact with him *or LM*. He clarified that was a mistake and that the DVPO, CP 114, only restrained Tara from harming, harassing, etc. LM. CP 408. This mistake is immaterial for present purposes because the record does not indicate Kipp was even aware of the DVPO on December 10, 2014.

Mr. Mendoza Decides on Duty Station

Though Mr. Mendoza was stationed in North Carolina, and he intended to return there, his North Carolina command suggested San Diego might be a better duty station because he had relatives there who could help care for LM. CP 407. He believed, but was not certain, that his command's suggestion came after the dependency was dismissed on December 4. *Id.* When he learned, however, that going to San Diego for humanitarian reasons would negatively impact his career, Mr. Mendoza decided on December 8 that he would not go to San Diego but would return to North Carolina. He planned to leave Vancouver on December 11. *Id.*

Mr. Mendoza Files Motions

In addition, Mr. Mendoza on December 8 decided to have the no-contact orders dismissed that protected him from Tara (neither of which protected LM). The orders would be unnecessary with him across the country and he was also not afraid of Tara. However, he saw the no-contact orders as an impediment to communication with Tara regarding LM in the event she was acquitted, and Mr. Mendoza wanted to avoid having to return to Washington in such event in order to have the orders dismissed. Rather than seeking the advice of his dependency attorney or his family law attorney, Mr. Mendoza contacted his criminal defense attorney, Todd Pascoe, to assist him

in drafting and filing motions to dismiss the orders. CP 408. Pascoe drafted the following as the reason for the motion:

Based on all information I have received to date I intend to facilitate reunification of the relationships damaged by what appear to be untrue allegations.

CP 297. Mr. Mendoza signed what his attorney had written. He also submitted a change of address form with the court, listing it as in care of Mr. Pascoe's office. CP 298. It was the foregoing language of the motion that led Sgt. Kipp into speculations resulting in her setting her sights on taking LM into custody. Mr. Mendoza acknowledges that the motion could have been better written. CP 480-481.

While the hearing date set for the Motion to Modify/Rescind is not in the record, the Motion is clear on its face that the motion itself did not change the order but was dependent on the court to do so:

I understand that if the court grants my motion to modify, the court will issue a new Domestic Violence No-Contact Order that will replace the order I want to modify.

The court never heard the motion or entered an order modifying or rescinding the Domestic Violence No-Contact Order. *Cf.* CP 409, 442.

December 10, 2014: Kipp investigates

At 9:53 a.m., December 10, 2014, Defendant Sgt Barbara Kipp of the Vancouver Police Department (VPD) received an email chain from Clark County Deputy Prosecutor Colin Hayes. Information provided in the emails

was that the Mendoza case was dismissed in dependency court on Thursday, December 4, 2014. CP 295.

In the email chain Kipp received, Assistant Attorney General Sarra Yamin (reflecting the Order Dismissing Dependency, CP 138) said there was “the criminal no contact order” as well as a parenting plan, 130–136, giving custody of LM to Mr. Mendoza and which allowed no visitation to Tara Mendoza. CP 295. Ms. Yamin said LM had been released to Mr. Mendoza. Ms. Yamin also said it was her understanding Mr. Mendoza and LM were presently in California where Mr. Mendoza was stationed in the Marines. *Id.* Ms. Yamin said nothing about an agreement but said “the Department didn’t have a basis to further pursue a dependency against Carlos.” *Id.*

The next to last email in the chain had been sent at 9:52 a.m. by Mr. Hayes to Ms. Yamin and the Department social worker. *Id.* Referring to Mr. Mendoza’s Motion to Modify/Rescind Domestic Violence No-Contact Order,” CP 297,⁸ attached to his email, CP 295, Mr. Hayes stated:

FYI. This is Carlos asking to drop the DV protection order in the criminal case (with Carlos as the victim) that restrains Tara from contacting Carlos. Apparently, Carlos wants Tara to see [LM] again.

⁸ Mr. Mendoza at the same time signed a Motion to Modify/Terminate Order for Protection—the DVPO—in Cause No. 14-2-07709-8, CP 408, 38. As noted, *supra* at 5, that order *also* did not limit Tara’s contact with LM. *Id.* The Motion to Modify/Terminate hearing was set for December 23, 2014, CP 38; however it is immaterial to this case because nothing in the record indicates Kipp was aware on December 10 of that motion.

Id. A minute later, Hayes sent the email chain to Kipp and Hernandez. *Id.*

Kipp acknowledged receiving the email and attached document from deputy prosecutor Hayes, CP 283, though when she quoted Hayes' comment regarding Mr. Mendoza's intentions, she omitted the word "apparently". *Id.* She also failed to recognize Mr. Hayes' clarification in his 9:52 email that Mr. Mendoza was the protected person in the no contact order which he sought to modify/terminate. CP 295, 124. Rather, Kipp falsely believed the order also protected LM from Tara and that Mr. Mendoza was also seeking to remove that protection from LM. CP 441.⁹ She reiterated that false belief in deposition in 2017: "According to my report, the no-contact order was between Tara and [LM]." CP 487. She claimed she was given that information by the prosecutor's office, either Mr. Hayes or Cheri Hoffman. *Id.*

It appears Kipp misread the email chain. At 1:37 on December 9, Mr. Hayes had asked AAG Sarra Yamin by email: "Is Tara otherwise allowed to see Landon now?" CP 296. Ms. Yamin responded that same afternoon at 4:31 p.m.: "In addition to the criminal no contact order, there is a parenting plan in place that gives Carlos full custody and doesn't allow mother

⁹ Kipp's report, CP 290–293, was also submitted by Plaintiffs, CP 440–443. Font type and point are different, as well as the form used, pagination and identification of the time and personnel of the printing. Though the narrative portion appears to be identical as to the actual text written, it is somewhat disconcerting that defendants would produce a different document in 2017 than was provided to DCFS December 16, 2014. CP 440. The Plaintiffs' version, CP 440-443, will therefore be used herein.

visitation with [LM].” *Id.* Coming as it did in response to Mr. Hayes’ email question, Ms. Yamin’s reference to “the” criminal no contact order was obviously a reference to the order restraining Tara entered in the criminal case against Tara for assaulting LM, 14-1-00877-5—as indicated in the Order Dismissing Dependency Ms. Yamin had drafted five days earlier. CP 63–64. Mr. Hayes then responded to Ms. Yamin at 9:52 a.m. on December 10, attaching Mr. Mendoza’s Motion to Modify/Rescind in 14-1-01578-0, CP 295, 297, stating “This is Carlos asking to drop the DV protection order in *the criminal case . . .*” (Emphasis added.) The email chain began with the criminal order protecting LM, but it ended with the criminal order protecting Mr. Mendoza—without any clarification or recognition that Mr. Hayes and Ms. Yamin had each apparently meant a different order.

Kipp said, “On Wednesday, December 10th, I was contacted by the prosecutor’s office that Carlos had made this petition [sic]. I obtained a copy of the petition [sic] and confirmed its contents.” CP 441. By “petition” Kipp meant the Motion to Rescind/Modify. CP 297, 486.

Kipp claimed she had been told by the prosecutor’s office that the no-contact order was between Tara *and LM*, CP 487, even though Colin Hayes had explicitly said the order Mr. Mendoza sought to have rescinded protected *Carlos* from Tara, CP 295. At deposition in 2017, after being shown the felony judgment and sentence in the vehicle assault case, 14-1-01578-0, CP

485–494, Kipp was forced to acknowledge the order in that case protected Mr. Mendoza. When then asked if she had any reason to believe LM was a protected person in that case—the case under which Mr. Mendoza filed his Motion to Rescind/Modify—Kipp changed her story, claiming, “ I did not know that at the time.” CP 494.¹⁰

Kipp also acknowledged she did not recall seeing the order which Mr. Mendoza sought to rescind or modify, did not inquire about the order, did not ask to see the order and did not think the order was relevant to establish probable cause. CP 486–488, 494. Nor is there any evidence she contacted the prosecutor for an explanation of the legal effect of any existing orders. Nor did she contact Todd Pascoe, whom she knew to be Mr. Mendoza’s lawyer, CP 491, or Mr. Mendoza himself to ask why he had filed the motion.

At 1:29 p.m. on December 10, Kipp was one of the people who received an email from Colin Hayes stating:

Cheri Hoffman just spoke with Carlos in an effort to have him sign a HIPPA [sic] release for us. Carlos told Cheri that he is in North Carolina. He gave the following contact info:
[address, email omitted]

CP 300. Cheri Hoffman was a volunteer victim advocate with the

¹⁰ At deposition, Kipp was either uncooperative, passive-aggressive or was unable to understand and/or respond to questions. *See*, generally, CP 485–496, 537–540. Thus, it is unclear from the context whether the antecedent of the “that” which she “did not know . . . at the time” was that Mr. Mendoza was the protected person under the order *or* that LM was not.

prosecutor's office, but none of the emails that day were either from or to her. *Cf.* CP 295–96, 300–01, 303, 305–07. Hoffman, relying on her December 10, 2014 notes, was adamant in her 2017 declaration, CP 346, that Mr. Mendoza told her “he was in N. Carolina.” CP 345, 348. But Hoffman’s notes may not be reliable. For example, Hoffman wrote on December 10, “PA [prosecuting attorney] pinging his cell to see if he is in N.C.” Yet her declaration almost three years later seems to be more consistent with Kipp as to who did the “pinging”. Kipp clearly explained how she—with no mention of the prosecuting attorney—initiated the “pinging, CP 442;” and Hoffman implies the same in 2017, CP 346, unlike her 2014 notes. CP 348.

As another example, Kipp’s report seems to suggest she spoke with Ms. Hoffman on December 10, CP 441, but Hoffman’s notes state Kipp interviewed her on Friday, December 12, after LM had been taken. CP 348. However, Hoffman’s declaration almost three years later, contrary to her December 10 and 12, 2014 notes, CP 348, states that she gave her information to Kipp on December 10, 2014. CP 346, 345. Kipp’s 2014 report indicates she interviewed Hoffman on December 12, CP 441, and Kipp’s declaration does not say she spoke to Hoffman on December 10. CP 283.

At 2:02 p.m. on December 10, Kipp emailed a Department employee that she would try to find Tara’s address. CP 303. At 2:25, presumably while Kipp was still trying to find Tara’s address, Colin Hayes emailed Kipp and

Hernandez, giving Tara's address in White Salmon, Washington with a phone number for her aunt and uncle. Kipp claims not to recall having seen Hayes' email. CP 284. Kipp did not even begin having Graaf ping Mr. Mendoza's phone for at least another 35 minutes after Hayes sent her Tara's contact information. (Hernandez says she left work at 3 p.m. before Kipp contacted Graaf.) CP 197, CP 284.

Kipp does not indicate in her report , CP 440–443, or declaration, CP 283– 285, that she conferred with anyone else regarding her decision that probable cause existed to pick up LM. CP 284.

Though Mr. Mendoza signed his lawyer's writing that he "intend[ed] to *facilitate reunification of the relationships damaged* by what appear to be untrue allegations," CP 297 (emphasis added), Kipp wrote in her report, "It was clear from his petition that he *wished to have the family reunited.*" (Emphasis added.) CP 442. Perhaps not wanting to back down in deposition on her misreading of Mr. Mendoza's motion, Defendant Kipp repeatedly used the term "reunite his family" even when doing so appeared to be a refusal to answer deposition questions fairly . CP 485, 493. *See*, note 10.

Deputy prosecuting attorney Colin Hayes had not read the motion as Kipp did, saying only what was obvious and yet leaving room for uncertainty: "Apparently, Carlos wants Tara to see [LM] again." CP 295. Kipp provides no basis for her conclusion, though it differs from Hayes' interpretation; and

she apparently didn't even consider important what Todd Pascoe would say. CP 491. Kipp also materially misquotes Hayes' interpretation by omitting the word "apparently" when she states that Mr. Mendoza "(according to Mr. Hayes) 'want[ed] Tara to see [LM] again.'" CP 283.

Kipp also stated: "It was also clear that he was lying about his location, having told CPS that he was going to California the previous week and this week he told Cheri he was actually in North Carolina." CP 442. But AAG Yamin's email, CP 295, does not say Mr. Mendoza *told* CPS he was going to California, only that it was Ms. Yamin's "understanding" that he and LM were in California. Kipp believed Mr. Mendoza had lied seven months earlier regarding visiting Tara at jail. CP 286. And she believed he was lying now to Cheri Hoffman. She also believed he had lied about moving to California when the dependency was dismissed. But apart from Ms. Yamin's email statement, CP 295, *cf.* CP 441, nothing in the record indicates Kipp knew anything more about California.

Kipp's department policy required "[a] complete inquiry and investigation" when receiving an allegation of abuse or neglect. CP 501. There had been no allegation Mr. Mendoza abused or neglected LM. Kipp had no evidence on December 10 that Mr. Mendoza had ever violated a court order or that he had previously been abusive to or neglectful of LM. Nor did Kipp appear to be aware that there were two criminal no-contact orders.

Rather, allowing her own emotions to drive her actions, it appears she became more and more frantic in her speculation. She said “time was of the essence,” CP 284, and “I was fearful he was seeing Tara with [LM].” CP 442.

Kipp knew Mr. Mendoza was a Marine and subject to his command. She knew Hernandez had called his command seven months earlier and spoken with Major Hailey, for Kipp was the “approving officer” who approved Hernandez’ report. CP 219. Since Mr. Mendoza could only do what his command allowed, a call to his command could have cleared up what Kipp had concluded was Mr. Mendoza lying about his duty station.

After concluding Mr. Mendoza wanted to “reunite his family” and that he was “clear[ly] . . . lying,” Kipp approached Graaf to geolocate Mr. Mendoza. After locating him, Kipp had Sgt. Graaf and Det. Mills “set up” in Mr. Mendoza’s location. CP 442. She then contacted Deputy Brendan McCarthy to prepare a search warrant to take LM into protective custody. *Id.*, CP 284, 350. Kipp also parked nearby Mr. Mendoza’s location. CP 442.

Deputy McCarthy began writing an affidavit for a search warrant with the information he received from Kipp. CP 352. Kipp told him, as she also stated in deposition, CP 487, that Mr. Mendoza wanted to have the order rescinded that protected LM from Tara. CP 352, 441. Kipp also told McCarthy that Mr. Mendoza said “the allegations against Tara were untrue,” CP 353, though Mr. Mendoza (actually Todd Pascoe) had only written they

“appear” to be untrue. CP 297. Kipp told McCarthy, “Carlos requested to be reunited with his family.” CP 353. *See, supra*, at 14. Kipp also told McCarthy the following false statements:¹¹ “Based upon the petition, the judge lifted the no contact order between Carlos and Tara,” and “Everything outlined in Carlos’ petition to the court was untrue.” CP 353. In reality, no order of rescission or modification had been entered; and the statements in the motion, though artfully drafted, were all true.

Neither Kipp, CP 284, 442, nor McCarthy, CP 350, nor the search warrant being drafted by McCarthy, CP 352–353, made any claim that they intended to arrest Mr. Mendoza, CP 489, *cf.* CP 442, or that LM was “unlawfully restrained” by Mr. Mendoza, as required in order to obtain a warrant. CrR 2.3(b)(4).

It is unclear why Kipp sought a search warrant, which is a criminal law procedure. CrR 2.3. In the first place, an order is unnecessary for law enforcement to pick up a child under circumstances specified in RCW 26.44.050. Graaf and Mills could have exercised that authority to take LM into protective custody had circumstances so justified. But if an order is sought, RCW 26.44.050 requires it be issued by juvenile court under RCW 13.34.050, CP 490, both of which statutes are civil statutes.

¹¹ It is rather ironic that Kipp herself appears to have indulged in what she held so strongly against Mr. Mendoza—the crime of giving a false or misleading statement to a public official, Deputy McCarthy.

It is also not clear why Kipp did not do a “knock and talk,” since she, Graaf and Mills were at or near Mr. Mendoza’s location. CP 342–343, 442. Had they contacted Mr. Mendoza for a well-child check, they could have had Kipp’s questions answered and her fears calmed.

Mr. Mendoza denies that, from the beginning of the court hearing which dismissed the dependency on December 4, 2014 through the pickup of LM on December 10, he lied to anyone regarding his duty station or his whereabouts,¹² CP 466–470, 483 or that he ever allowed, or intended in the future to allow, Tara to have contact with LM in violation of any court order. CP 480. Moreover, he denies seeking to renew his marital relationship with Tara after she assaulted him with her vehicle. Rather, he was pursuing a relationship with his future wife, Yesenia. CP 408.

December 10, 2014: The chase and the seizure

While McCarthy was drafting his search warrant on December 10, 2014 based on Sgt. Kipp’s statements, CP 350, Mr. Mendoza received a call from Yesenia requesting he come to Newburg, Oregon to assist her. CP 476–478. Mr. Mendoza placed LM in his carseat, *cf.* 343, 442, and drove toward Newburg, driving into Oregon on I-205, turning west on I-84 and then turning south on 1-5. CP 442.

¹² Though not relevant to the issues, he also denied lying to a public servant for which he was charged seven months earlier. CP 402.

Kipp's explanation of motive for her taking LM changed over time. Before Mr. Mendoza was geolocated, Kipp "was very concerned that [Mr. Mendoza] was with Tara and exposing [LM] to harm from being around Tara." CP 442. After Mr. Mendoza was located, CP 442, and he had left for Yesenia's in Oregon, CP 410, Kipp believed LM was *already* with Tara; for her report stated, "Myself and Sgt. Graaf followed [Mr. Mendoza's Impala] hoping it would lead us to where [LM] and Tara were located." CP 442.

But 2 ½ years later on March 30, 2017, Kipp changed her statements, apparently to avoid her 2014 speculation LM and Tara were already together. When asked in deposition that she didn't even think LM was in Mr. Mendoza's car, Kipp said, "I was not sure. That's why I was following him." CP 491–492. Then when asked that she thought LM was already with Tara, contrary to her 2014 report Kipp testified, "No." CP 492, 442. And by her October 2017 declaration when seeking summary judgment, Kipp was saying that by 3:00 p.m. on December 10, before Mr. Mendoza had been geolocated, "[W]e began to take steps to taken [sic] [LM] into protective custody to ensure that he would not end up in Tara Mendoza's presence." CP 284.

When Mr. Mendoza left for Yesenia's home, Kipp, Graaf and McCarthy all set out after him in separate vehicles. CP 442, 350. Mr. Mendoza drove south on I-205 and turned west on I-84 in Oregon to southbound I-5. CP 442. Kipp and Graaf followed Mr. Mendoza into

Oregon, though Graaf ceased the chase after being involved in an accident. *Id.* Kipp continued following Mr. Mendoza, noting that he drove with the flow of traffic, signaled lane changes and was unaware he was being followed. *Id.* At one point Kipp pulled alongside Mr. Mendoza's car and saw that LM was in the back seat in his carseat. *Id.*, CP 284. Nor was Tara in the Impala with them. CP 442.

Though Sgt. Kipp indicates she had learned of Tara's address in White Salmon,¹³ CP 305, Kipp makes no claim that she attempted to have White Salmon police contact Tara at that address. Nor does Kipp make any claim she called the telephone number of Tara's aunt and uncle that had been provided to her. *Id.* Nor after Mr. Mendoza had been stopped on I-5 did Kipp ask him if he had Tara's number that she might call her to ascertain her location. (Asking for the number would have been consistent with Kipp's speculation that Mr. Mendoza and Tara had been in contact.) Kipp did not ask Mr. Mendoza where he was going, nor did she make any attempt to verify where he was going (by calling Yesenia). CP 442-443, 283-285. Kipp did not ask him why he was not in California. Nor did Kipp inquire as to Mr. Mendoza's duty station. Had she done so, she would have learned he was leaving for North Carolina the next day.

¹³ Judicial notice: White Salmon, Washington is around 60 driving miles east of the I-205 and I-84 junction.

At deposition in 2017, Kipp said she took LM from Mr. Mendoza because she believed LM was “in imminent risk” for three reasons:

Because Tara Mendoza was considered a danger to him, Carlos Mendoza had petitioned the court to reunite family, and he had lied about his location on two separate occasions.

CP 461. When she actually seized LM she said nothing to Mr. Mendoza about lying about his location but only “that based on that petition I was taking his son.” CP 442. Kipp had opportunity by the side of the road to do a “complete inquiry and investigation” as required by VPD policy, CP 501.

Sgt. Kipp never alleged LM had actually been harmed in the care of Mr. Mendoza since the time the dependency had been dismissed on December 4, nor did anyone ever provide evidence that Mr. Mendoza had allowed Tara to have any contact with LM during that time. Nor did anyone present any evidence that LM’s condition or surroundings appeared to be, or were, such as to jeopardize LM’s welfare.

December 10, 2014: Kipp’s claim of authority

Sgt. Kipp claimed in deposition she had authority to pick up LM in Oregon under the Master Interlocal Mutual Law Enforcement Assistance Agreement (“the Agreement”) between Vancouver and Portland, among others. CP 309, 285. The purpose of the Agreement relevant to this case was:

To commission or specially commission Personnel in each party’s specialized law enforcement units to enforce applicable *traffic* and *criminal* laws within the primary or geographic territory of other parties[.]

(Emphasis added.) Sgt. Kipp, however had not followed the policies of the Vancouver Police Department in either her investigation or the Agreement in taking LM into custody. VPD Policy 12.15.00, CP 498–99, stated in part:

Members assigned to activities which take them outside the state of Washington shall not engage in any police activities unless lawfully authorized by the other State or Federal government to act in the capacity of a peace officer.

The Agreement required Kipp to “Abide by all state, federal and local law applicable to the agency with primary geographic or territorial jurisdiction.” CP 315. Kipp presented no facts that she complied with Oregon law in taking LM in Oregon. Kipp was also had to report her presence to the “authorized representative” in Portland. *Id.* The Agreement defines authorized representative as “the ranking on-duty supervisor empowered by his/her chief law enforcement officer to act under this intergovernmental agreement.” CP 310. Kipp had contact with unnamed Portland Police Bureau (PBB) patrol officers, but presented no evidence of the name of the authorized representative or that she or anyone on her behalf reported her presence in Portland to the “authorized representative”. The Agreement required Kipp to “[i]mmediately report” any seizure to the authorized representative. CP 315. Kipp presented no facts to show she made such report after seizing LM.

Kipp acknowledged RCW 26.44.050 was her authority to take LM. CP 458–459, 501. Kipp could not recall if she was an Oregon commissioned

officer in December 2014, nor could she recall if in December 2014 she had a card allowing her to arrest people in Multnomah County, Oregon for crimes committed in Washington. CP 451. But she was emphatic she did not take LM into protective custody by authority granted her by Multnomah County. CP 537. Kipp now believes she was, in December 2014 a member of a “special law enforcement unit” as defined in the Agreement. CP 311, 285.

Procedure

Defendants filed a Motion for Summary Judgment, which was granted and the case was dismissed. Plaintiffs now appeal.

C. SUMMARY OF ARGUMENT

Genuine issues of material fact exist that preclude a summary judgment for negligent investigation, false imprisonment and outrage, and such facts should be determined by a jury.

VPD Sgt. Barbara Kipp received a copy of a motion filed by Carlos Mendoza to terminate a no-contact order protecting him from his wife, Tara Mendoza, as a result of her having assaulted him. Several months earlier, Tara had also been charged with felony assault of their child, LM. Sgt. Kipp speculated wrongly that the order Mr. Mendoza sought to terminate protected LM and therefore that Mr. Mendoza had abused or neglected his son by allowing Tara to have contact with LM in violation of a no-contact order.

Kipp conducted a biased and incomplete investigation, relying upon

speculation and bias to determine her actions rather than to merely direct her inquiry. In so doing, Kipp failed to obtain available information that would have shown her speculation to be incorrect. Relying on speculation and disregarding available facts led Kipp to head up a posse to chase down Mr. Mendoza into the state of Oregon. She then took LM from his custody without probable cause or a court order. Kipp acted with gross negligence in her biased and incomplete investigation.

In taking LM in Oregon, Kipp acted without legal authority because the Interlocal Agreement did not authorize civil actions in another state and Kipp did not follow the requirements of the Agreement. Kipp is therefore not able to avail herself of existing statutory protection for acts in Washington because her unauthorized actions in Oregon were only those of a citizen, not of a law enforcement officer. Kipp went rogue. She and VPD are liable to Mr. Mendoza and LM.

D. ARGUMENT

I. STANDARD OF REVIEW.

This is the appeal of the trial court granting summary judgment and dismissing all state claims against Defendants Kipp and City of Vancouver.

We review a trial court's order granting summary judgment *de novo*. We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment

as a matter of law. CR 56(c). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment.

McCarthy v. Cty. of Clark, 193 Wn. App. 314, 327–28, 376 P.3d 1127 (2016) (citations omitted). “A ‘material fact’ is a fact upon which the outcome of the litigation depends, in whole or in part.” *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). In the present case there are genuine issues of material fact that should have been left for the jury.

II. DEFENDANT BARBARA KIPP BREACHED HER DUTY TO INVESTIGATE CARLOS MENDOZA FOR POSSIBLE ABUSE OR NEGLIGENCE IN A COMPLETE AND UNBIASED MANNER, AND SHE IS THEREFORE LIABLE FOR NEGLIGENT INVESTIGATION.

A. Kipp’s duty to investigate is found in RCW 26.44.050.

RCW 26.44.050, which Kipp acknowledged was her authority to seize LM, CP 458–459, mandates law enforcement to investigate a report of the possible occurrence of abuse or neglect. It 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 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 . . . 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. . . .

B. Abuse or neglect in this case means negligent treatment or maltreatment as defined in former RCW 26.44.020(16).

The definitions applicable to RCW 26.44.050 are found in RCW 26.44.020. Subparagraph (1) defines “abuse or neglect” as what is normally thought of as abuse, but also includes “negligent treatment or maltreatment,” separately defined in relevant part in former RCW 26.44.020(16) as follows:

. . . 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 . . .

Since Mr. Mendoza was not alleged to have abused LM, it is this latter definition that is relevant here, in which the statute defines neglect.¹⁴ Former RCW 26.44.020(16) has received thorough analysis in the fairly recent Division Three case of *Brown v. Dep’t of Soc. & Health Servs.*, 190 Wn. App. 572, 360 P.3d 875 (2015), which has also been followed in *Matter of Dependency of Lee*, 200 Wn. App. 414, 404 P.3d 575 (Div I 2017), noting:

Brown simply confirmed that a determination of abuse or neglect cannot be based on a finding of common law negligence. This is consistent with the legislature’s desire to avoid sanctioning parents for simple negligence—a standard that would “place every Washington parent in jeopardy.” *Brown*, 190 Wn. App. at 593, 360 P.3d 875.

200 Wn. App. at 437. The *Brown* court addressed three aspects of “negligent treatment or maltreatment.” As to “serious disregard” it stated:

¹⁴ See Appendix A, Analysis of definition of “abuse and neglect”.

An actor's conduct is in "reckless disregard" of the safety of another if he or she intentionally does an act or fails to do an act which it is his or her duty to the other to do, knowing or having reason to know of facts that would lead a reasonable person to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him or her. *Adkisson v. City of Seattle*, 42 Wn.2d 676, 685, 258 P.2d 461 (1953). We see no difference between "serious disregard" and "reckless disregard." Reckless and serious disregard signifies a higher degree of culpability than acting unreasonably or affording "negligent treatment."

Brown, 190 Wn. App. 590. Secondly, as to "such magnitude" it stated:

[The] conduct must be "a serious disregard of consequences of such magnitude." The word "magnitude" is defined in part as "greatness of size or extent." Webster's Third New International Dictionary 1360 (1993). The legislature's use of the word "magnitude" implies [the] misconduct must be of a greater level of fault than negligence.

Id. And third, after explaining that the expression "clear and present danger" originated in a case regarding government limits on First Amendment freedoms, the *Brown* court, *id.* at 591, stated:

Under Washington law, speech will be protected unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000). Therefore, use of the idiom "clear and present danger" in [former] RCW 26.44.020(16) further suggests more serious misconduct than mere negligence.

C. Parents and children have a cause of action when police conduct a negligent investigation, one that is biased and incomplete and that results in a harmful placement decision.

[Former] RCW 26.44.050 provides that law enforcement and DSHS must investigate reports of abuse or neglect of a child . . . Based on

this statutory duty, parents and children have an implied cause of action against law enforcement and DSHS for negligent investigation under certain circumstances. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). This cause of action extends to parents who are suspected of abusing their children. *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000).

McCarthy, 193 Wn. App. at 328. Another court has stated:

Protecting the welfare of the child includes avoiding unnecessary disruption of the parent-child relationship. The Legislature has emphasized the importance of protecting the relationship between parent and child and interfering with that relationship only when the child's health and safety are endangered.

The bond between a child and his or her parent ... is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent[.]

RCW 26.44.010.

The legislature reaffirms that all citizens, including parents, shall be afforded due process, that protection of children remains the priority of the legislature, and that this protection includes protecting the family unit from unnecessary disruption.

RCW 26.44.100.

Rodriguez v. Perez, 99 Wn. App. 439, 444, 994 P.2d 874 (2000).

The negligent investigation cause of action based on RCW 26.44.050 is a "narrow exception" to the rule that there is no general tort claim for negligent investigation. *M.W.*, 149 Wn.2d at 601, 70 P.3d 954. A negligent investigation claim is available only when law enforcement or DSHS conducts an *incomplete or biased investigation* that "resulted in a harmful placement decision." *Id.*

McCarthy, id. at 328–29 (emphasis added). A "harmful placement decision"

can occur in three ways: removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home.

M.W., 149 Wn.2d at 602. In the present case there was a harmful placement decision because LM was removed by Sgt Kipp from the nonabusive home of his father, Mr. Mendoza.

D. Genuine issues of material fact exist as to whether Barbara Kipp breached her RCW 26.44.050 duty to investigate Mr. Mendoza.

RCW 26.44.050 describes a law enforcement officer's duty to investigate with broad language and does not "limit the officer's required response to certain specified acts or time periods, but provides a general mandatory duty to investigate." *Rodriguez v. Perez*, 99 Wn. App. 439, 448, 994 P.2d 874 (2000). Whether an officer has fulfilled the duty to investigate is a question of fact. See *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 76, 930 P.2d 958 (1997) ("Once a duty is established, whether the defendant breached the duty and whether that breach was a proximate cause of the plaintiff's injuries are normally questions of fact.").

McCarthy, *id.* at 330. As noted above in *Tyner*, 141 Wn.2d at 82, Sgt. Kipp's duty was not just to LM but also to Mr. Mendoza.

In *McCarthy*, *id.* at 331, the officer failed to inquire of persons who were readily available. And though the officer spoke with the alleged abuser, there was evidence the officer was dismissive and refused to listen to his explanations. Plaintiffs' expert stated the officer showed "a predisposition toward arrest that was not warranted under the circumstances." *Id.* In the same way, Kipp's bias against Mr. Mendoza, based on her prior dealings with him seven months earlier, precluded her from a complete investigation, such that she failed to obtain information available to her that would have shown LM was not neglected. Kipp's predisposition toward believing the worst about Mr. Mendoza resulted in the unwarranted seizing of LM.

In addition to speculation, failure to investigate what little information she had, and disregard of contrary facts, Kipp also shaded facts and misread documents. She continues to shade facts to the present.

1. There was no report concerning the possible occurrence of abuse and neglect. RCW 26.44.050.

Kipp received an email from Colin Hayes at 9:53 a.m. December 10, 2014 that at most raised the question: What was Mr. Mendoza doing in filing the Motion to Rescind stating he “intend[ed] to facilitate reunification of the relationships damaged by what appear to be untrue allegations . . . and I want [Tara] in our son’s life”? CP 295–98. There was no report that Mr. Mendoza was abusing or neglecting LM as stated in RCW 26.44.050. There was no explanation of what he meant by “facilitate reunification of the relationships.” And more importantly, there was no indication *when* it was to occur.

Kipp and Hernandez received a second email from Hayes at 1:29 p.m., CP 300–01, that Mr. Mendoza had told Cheri Hoffman he was in North Carolina. The only significant facts Kipp had as of that time regarding Mr. Mendoza were his motion, CP 297, that his address was in care of his attorney, Todd Pascoe, CP 298, that AAG Yamin thought he was in California, CP 295, and that Cheri Hoffman said he told her he was in North Carolina. Kipp also knew from AAG Yamin’s email that the dependency was dismissed, that there was a criminal no contact order and that Mr.

Mendoza had a parenting plan that allowed Tara no visitation. CP 295. Kipp also believed Mr. Mendoza had committed the crime of providing false or misleading information to a public official seven months earlier. And though Kipp may not have accorded Mr. Mendoza the presumption in her own mind, she knew Mr. Mendoza was still presumed innocent of that crime because there had yet been no trial. Nevertheless, as of 1:29 p.m. there was still no report concerning abuse or neglect of LM.

2. Kipp shades the truth to suit her purposes and she speculates without substantial information.

a. Prior to locating Mr. Mendoza, Kipp was concerned he and LM were with Tara, but she later minimized evidence of her speculation by shading her declaration.

One of the defendants' primary problems in the case is that Kipp relied on speculation rather than facts. As of 1:29 p.m., "Based on [Hoffman's] information, [Kipp] was very concerned that Carlos was with Tara and exposing LM to harm from being around Tara." CP 442. An example of Kipp shading the truth is seen in her 2017 declaration on the same topic. Apparently wishing to soften the fact that she had acted on speculation in 2014, rather than speculating in 2017 that Mr. Mendoza and LM were with Tara, she merely says that after receiving Hayes' 1:29 p.m. email regarding Hoffman, "As stated in my report, I became very concerned at this point that Mr. Mendoza was planning to expose Landon to Tara Mendoza". CP 284.

Not so. Kipp's wild speculation in 2014 began with concern Mr. Mendoza and LM were "with" Tara, not that he was "planning to expose" LM to Tara.

b. Kipp's speculation was enabled by a rush to judgment.

Based on two forwarded emails from Mr. Hayes, from AAG Yamin's "understanding" from six days earlier was that Mr. Mendoza was in California, CP 295, and from Hoffman who wrote that Mr. Mendoza told her he was in North Carolina, CP 300, Kipp concluded "it was clear" Mr. Mendoza was lying as to his location. CP 442. Perhaps this is why Kipp saw no need to have her posse, already in place at Mr. Mendoza's location, go up to the door to inquire of LM's location and to see if Tara was there. Had they done so, they would have learned Mr. Mendoza was going to see Yesenia.

Construing the facts most favorably to Mr. Mendoza, Kipp did not speak to Cheri Hoffman December 10; her only information was Hayes' 1:29 email. CP 300. Kipp does not claim in support of her summary judgment motion that she spoke to Hoffman on December 10. CP 283–85. Hoffman's notes in 2014 indicate Kipp spoke with her two days later. CP 348. And while Kipp's report indicates she spoke to Hoffman December 12, 2014, CP 441–43, the report is ambiguous as to whether she spoke to her on December 10. *Supra*, at page 13. A reasonable inference is that Kipp received Mr. Mendoza's cell number from Hernandez, the one who provided it to Hoffman, CP 441; who had received the same emails Kipp received that day

from Hayes; and who did not leave work until 3:00 p.m. on December 10 when Kipp began the process of pinging the phone number. CP 197.

And when Kipp caught up with Mr. Mendoza in Oregon, she did not ask him to explain why Yamin thought he was in California and Hoffman thought he was in North Carolina. And Kipp did not call Mr. Mendoza's command to verify. Kipp did not ask where he was going. Kipp did not call Yesenia. Kipp did not call Tara or her aunt and uncle. Kipp did not request a courtesy check of Tara by the White Salmon police. Kipp obviously saw no need of further inquiry as to location—it was already “clear” to Kipp he was lying.

c. After beginning the chase of Mr. Mendoza into Oregon, Kipp speculated LM was elsewhere with Tara, but denied in her 2017 deposition she said that in her 2014 report.

After Kipp and her posse were on Mr. Mendoza's trail, Kipp's speculation ratcheted up from “concern” that Mr. Mendoza and LM were with Tara to an affirmative belief LM was already with Tara. Kipp wrote: “Myself and Sgt. Graaf followed the vehicle hoping it would lead us to where [LM] and Tara were located.” CP 442. Have crossed the line from speculation to belief (likely due to her increasingly frantic concern as she drove that Mr. Mendoza would escape and LM would surely be harmed), contrary facts were no longer useful for Kipp and did not even register cognitive dissonance. She was past the need to investigate, even when she pulled alongside Mr. Mendoza and saw LM in his carseat—thus disproving

her wild and frantic speculation. She had already determined to take LM, and facts would not change her course. This explains her lack of any real investigation when she had Mr. Mendoza by the side of I-5. The investigation was complete in her mind—unaware as she was that her fears had led her to replace her duty to investigate with her perceived need to act.

Truth was still not important to Kipp at her deposition in 2014 as she again minimized her 2014 actions. When asked regarding when she had been following Mr. Mendoza, “[Y]ou thought LM was already with Tara, didn’t you?” Kipp said, “No.” CP 492. *Cf.* 442 (Mr. Mendoza “would lead us to where [LM] and Tara were located.”)

d. Kipp’s speculation was enabled by her wilful ignorance of and misreading of Mr. Mendoza’s motion.

Mr. Mendoza said he wanted to “facilitate reunification of the relationships damaged by what appear to be untrue allegations.” After receipt of Mr. Hayes’ 1:29 email, Kipp said. “It was clear from his petition that he wished to have the family reunited.” CP 442. While the meaning of Mr. Mendoza’s language is not clear, what is clear is that it does not necessarily mean “reunite his family” as Kipp’s mantra stated. At the least, Kipp should have asked someone what it meant. Mr. Hayes was right at hand and he could have advised her. He had already emailed, “Apparently Carlos wants Tara to see [LM] again.” CP 295. Kipp also misread Hayes’ comment to suit her

purposes, by leaving off the word “apparently”. CP 283. Hayes was more cautious in interpreting the language of Mr. Mendoza’s motion.

In the first place Kipp was not familiar with orders, nor was she interested in the order underlying Mr. Mendoza’s motion. CP 485–487. She exhibited a wilful ignorance as to the effect of Mr. Mendoza’s motion. Besides calling it a “petition”, she disregarded or was unaware of the fact that a motion must be heard by the court before its request is granted. This error led her to the false conclusion harm to LM was imminent (or, to use the language of former RCW 26.44.020(16), “clear and present”). Even worse, perhaps—and as further evidence of either her disregard of motion procedure or of her frantic imagination—Kipp’s skewed view of reality was, as she told Deputy McCarthy, that the court had *already* granted Mr. Mendoza’s “petition” and lifted the no contact order. CP 352–53.

Second, Kipp misread the “petition” in a way that can only have been intentional. This can be seen or reasonably inferred from her arrogant or passive-aggressive manner in deposition when she refused to cooperate in answering questions. CP 485–487, 495–496. Further evidence of her arrogance is that, though she was not familiar with motion procedure, CP 485, Kipp also disregarded her own deputy prosecuting attorney who said the order had to do with protecting *Mr. Mendoza* from Tara. CP 295. More than that, Kipp does not hesitate to blame Hayes or Hoffman for her ignorance as

having informed her that the no contact order in Mr. Mendoza's "petition" was between Tara and LM. CP 487.

"Blame" is probably not the correct word because it implies recognition of error. At her deposition in 2017, Kipp was apparently still ignorant of the fact that the order Mr. Mendoza sought to have lifted was *not* between Tara and LM, CP 487—at least until she was educated in the matter. CP 492–494. Once educated, after being shown she had been wrong in 2014 when her "report [said] the no-contact order was between Tara and [LM]," Kipp finally had to admit that she "did not know at that time [2014]" whether LM was a protected person under the order Mr. Mendoza sought to have lifted. CP 494.

Third, Kipp did not avail herself of what assistance was readily available. It can be reasonably inferred she did not ask deputy prosecutor Hayes for any guidance as to the court file or procedure regarding Mr. Mendoza's "petition". She just went off on her own, inventing the fact that the order protecting LM from Tara, CP 487, lines 1–2, 13–18, had already been lifted by the court. CP 353. Knowing that she was unfamiliar with court files, Kipp failed to exercise slight care when she did not ask Hayes for guidance. Nor did she ask Todd Pascoe for an explanation of the motion, the procedure or whether the no-contact order had already been lifted. And, as already noted, she failed to find out from Mr. Mendoza when she had him in Oregon what was actually going on.

- e. *Kipp's ignorance of the court process, coupled with her bias, caused her to overlook the fact that Mr. Mendoza was working appropriately within the judicial process.*

Here again are many genuine issues of material fact showing that Mr. Mendoza was acting appropriately. Unlike Kipp, Mr. Mendoza was not going rogue. Rather, he was using the court to make decisions regarding LM and Tara. The Motion he filed said, "I request the court . . ." and "[I]f the court grants my motion . . .". CP 295. Even Hayes said : "This is Carlos asking to drop . . ." CP 295. In other words, Mr. Mendoza was waiting on the court. Any contact between Tara and LM was thus not imminent. Mr. Mendoza had sought a Parenting Plan from family court that was in place and allowed no contact between Tara and LM. CP 297. 88-94. As Mr. Mendoza logically asked, why would he even bother to file a motion if he was going to allow Tara contact with LM anyway? CP 410.

In fact, in light of Kipp's comments to McCarthy, CP 352, it can be reasonably inferred that Kipp was not even aware Mr. Mendoza's request to lift the no-contact order, CP 297, dealt with a different no-contact order than that which protected LM from Tara. CP 111-112. *See*, CP 295; *supra* at 11.

- f. *Kipp's bias, coupled with her arrogant ignorance, caused her to overlook the very language of the "petition".*

Mr. Mendoza asked to rescind the Domestic Violence No-Contact Order signed 10-23-2014, which slight care would have learned was the assault against Mr. Mendoza. This was explicitly stated in the motion: "I, Carlos

Mendoza, am the person protected in a Domestic Violence No-Contact Order issued against the defendant.” CP 297. Hayes conveyed to Kipp that Mr. Mendoza was the victim and the order protected him. CP 295. Kipp’s bias and emotional involvement, however, blinded her to the facts.

g. *Kipp’s bias, coupled with her “fear” and “concern,” led her to omit attempting to contact Tara or her relatives.*

At 1:55 p.m. on December 10, 2014, Kipp received an email that DSHS did not know Tara’s release address. CP 303. At 2:25 p.m., she and Hernandez received their third email from Hayes giving Tara’s address in White Salmon, Washington, as well as the names and phone number of her “aunt and uncle Debra and Stoner Belle”.¹⁵ CP 305. Nothing in the record shows Kipp, in fulfilling Kipp’s duty to Mr. Mendoza and LM to do a complete investigation, indicates Kipp attempted to contact Tara through a White Salmon police courtesy check or by calling her relatives on the phone. Had she done that, Kipp stood to resolve the whole matter by possibly learning that Mr. Mendoza was driving *away* from, not towards, Tara. Since Tara’s location was *the* central fact, this specific failure to inquire shows Kipp’s failure to exercise slight care. Though Kipp told CPS she would see

¹⁵ Judicial notice: The Wayback Machine, <https://waybackmachine.org/> provides a website capture on December 4, 2014 of Bell Design Company website <http://www.belldesigncompany.com> showing Stoner Bell, PE, one of the principals of the company founded in 1994.

about contacting Tara, CP 303, she again minimizes the incompleteness of her investigation by again blaming someone else. Though it was her duty under RCW 26.44.050 to investigate, Kipp now says CPS was supposed to take the lead in locating Tara. CP 284. But by 3:00 p.m., as Hernandez went off shift, CP 197, Kipp believed LM was in imminent danger. CP 284.

In addition, when Mr. Mendoza turned westbound on I-84, with White Salmon being an hour's drive to the east, why didn't Kipp moderate her previous speculation and speculate Mr. Mendoza was *not* going to see Tara,?

- 3. Kipp not only did not do a complete or unbiased investigation, she wasted time with the wrong procedure to obtain a search warrant, when RCW 26.44.050 required an order pursuant to RCW 13.34.050 and when there was no legal basis for a warrant.**

Though Kipp instructed McCarthy to draft a search warrant, CP 284, 350, there was no legal basis to pick up LM with a warrant. (Nor was there a basis to, nor did Kipp intend to, arrest Mr. Mendoza with a warrant. CP 442, *cf.* 284.) A warrant is available to seize any "person for whose arrest there is probable cause, or who is unlawfully restrained." CrR 2.3(b)(4). There is nothing in the record LM was unlawfully restrained by Mr. Mendoza (or that there was probable cause to arrest Mr. Mendoza). The fact that Kipp used an unauthorized procedure shows absence of slight care, as well as incompetence. The only order by which LM could have been taken into custody was an order under RCW 13.34.050.

III. GROSS NEGLIGENCE IS A MATTER FOR THE JURY.

Sgt. Kipp is accorded qualified immunity under RCW 26.44.280 and RCW 4.24.595, which states she should not be liable in tort absent “gross negligence,” which is undefined in the context of defending a negligent investigation claim under RCW 26.44.050. Gross negligence is defined as

negligence substantially and appreciably greater than ordinary negligence. Its correlative, failure to exercise slight care, means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence. In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor.

Nist v. Tudor, 67 Wn.2d 322, 331, 407 P.2d 798 (1965) Gross negligence is a question for the jury; the trial judge erred finding its absence as a matter of law. *Id.* at 326–30; *Brewer v. Copeland*, 86 Wn.2d 58, 72, 542 P.2d 445 (1975). Kipp’s speculation, ignorance of the law, ignorance of the order sought to be lifted, false statements to McCarthy, her current attempts to minimize or deny her prior actions and statements, and other problems listed above are sufficient bases upon which to find absence of slight care such that a jury could find Kipp was grossly negligent. As *Nist* pointed out, factors which the jury must consider include the state of mind of the actor and the context of the event, or situation of the parties. *Nist, id.* at 330–31.

Another factor would be that Kipp’s investigation had to find reckless disregard by Mr. Mendoza of consequences of such magnitude as to be a clear and present danger to LM. See *Brown, supra* at page 27. Even if she

had exercised “slight care”—which she did not—of Mr. Mendoza’s actions, she did not exercise slight care so as to conclude neglect as defined in *Brown*.

IV. FALSE IMPRISONMENT OF LM—THE INTERLOCAL AGREEMENT DID NOT GRANT KIPP AUTHORITY TO SEIZE LM.

The Fourth Amendment and Article I, Section 7 of the Washington State Constitution require a police officer to act under lawful authority. *City of Wenatchee v. Durham*, 43 Wn. App. 547, 549–50, 718 P.2d 819 (1986). An arrest made beyond an arresting officer’s jurisdiction is equivalent to an arrest without probable cause. *State v. Rasmussen*, 70 Wn. App. 853, 855, 855 P.2d 1206 (1993); *Durham*, 43 Wn. App. at 550, 718 P.2d 819.

State v. Plaggemeier, 93 Wn. App. 472, 476, 969 P.2d 519 (1999).

The gist of an action for false arrest or false imprisonment is the unlawful violation of a person’s right of personal liberty or the restraint of that person without legal authority:

A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used. One acting under the apparent authority—or color of authority as it is sometimes described—or ostensibly having and claiming to have the authority and powers of a police officer, acts under promise of force in making an arrest and effecting an imprisonment.

Bender v. City of Seattle, 99 Wn.2d 582, 591, 664 P.2d 492, 499 (1983).

A. Sgt. Kipp lacked legal authority under the Master Interlocal Mutual Law Enforcement Assistance Agreement to take LM into “protective” custody on December 10, 2014.

When Sgt. Kipp seized LM in Oregon, CP 442, she believed and now claims that she had authority to do so pursuant to the Master Interlocal Mutual Law Enforcement Assistance Agreement. CP 309. However, the

Agreement did not authorize Kipp to take LM, and the trial court misconstrued the Agreement in justifying Kipp's action. Supp CP 4.

The purpose of the Agreement is stated as follows:

THIS MASTER MUTUAL LAW ENFORCEMENT ASSISTANCE AGREEMENT ("MASTER AGREEMENT") is entered into by and between, the undersigned parties for the purpose of securing to each the benefits of mutual law enforcement assistance within their respective territorial jurisdictions, to express the consent of each party to the enforcement within their territorial jurisdiction by other parties of applicable traffic and criminal laws, and, in certain cases, *to designate certain personnel of other parties* who are assigned to special law enforcement units as special deputies.

(Emphasis added.) Vancouver and Portland are parties to the Agreement.

Kipp asserts now in her Motion for Summary Judgment that, "to [her] knowledge", the CJC of which she is a part, is a "special law enforcement unit" as defined in the Agreement. CP 285, 311. Without any apparent analysis of the Agreement, the trial court found Kipp's claim to be determinative. Supp CP 4. However, being a member in such specialized unit is not what gives a person authority under the Agreement. As the foregoing purpose states, such authority existed only if Portland Police Bureau had designated Kipp as a special deputy.

There is no claim by Sgt. Kipp that on December 10, 2014 she was designated by PBB or acting in Oregon as a special deputy assigned to a "special law enforcement unit" in Oregon. Nor does she claim to have been

enforcing “applicable traffic and criminal laws” in Portland. She also doesn’t claim here that she engaged in mutual law enforcement assistance. While at one point she claims she took the child, CP 442, at another she tried to claim the Portland Police took the child and she assisted them. *Id.*, CP 445-446.

The purpose of the Agreement is again stated with additional detail and explanatory provisions, CP 312–315:

2. Purpose and Function. The purpose of this agreement is: (1) To provide for combined use of personnel during major incidents; (2) To permit the personnel of each party to engage in administrative and investigative activity within the primary or geographic territory of other parties; (3) To commission or specially commission Personnel in each party’s specialized law enforcement units to enforce applicable traffic and criminal laws within the primary or geographic territory of other parties; and (4) To encourage subsequent mutual law enforcement assistance agreements calling for specific combined operations whenever tactically and fiscally practical and efficient.

So the question must be asked of Kipp’s seizing LM whether it falls within one of the stated purposes of the Agreement. The paragraphs following the “Purpose and Function” clause address the four stated purposes.

1. Stopping and seizing LM was not a “major incident”?

Major incident means any crime or crimes, a natural disaster, extreme civil disorder, *or similar event* causing or having potential to cause injury, death, or substantial property damage.

CP311 at par. 1i) (emphasis added). It should be clear that the taking of LM into protective custody alongside I-5 was not a major incident. It did not deal with a crime or crimes. Sgt. Kipp told the Portland police officers that Mr.

Mendoza was not under arrest, nor *did* she arrest him for driving his son to Oregon on the way to help Yesenia. CP 442. Nor was it an event “similar” to a natural disaster or extreme civil disorder. In fact, Sgt. Kipp told the Oregon officers that it would not be a high-risk stop. *Id.* Moreover, the section on “Major Incidents”, CP 312–313, appears to apply to those situations where one jurisdiction calls officers to come from another jurisdiction to assist and where there will be an “incident commander” as defined. CP 310. Here, Kipp went to Oregon on her own; Oregon officers did not request assistance.

2. Kipp was not engaging in administrative and investigative activity in Oregon when she seized LM?

Sgt. Kipp had already determined she was going to take LM, stating to the Oregon officers when she got out of her vehicle, “I was just there to take the baby from [Mr. Mendoza].” CP 442. As far as she was concerned there was no need for investigation at that point. The closest thing to investigation by Sgt. Kipp in Oregon was when she investigated her hunch that if she followed Mr. Mendoza in his vehicle, “it would lead us to where [LM] and Tara were located.” *Id.* As she followed Mr. Mendoza, she pulled alongside him on I-84 and saw that LM was in the baby seat in the back seat of the vehicle. *Id.*; CP 284. Since her hunch had been proved wrong, the fact that she intended to pick up LM nevertheless shows she had in fact stopped investigating the moment she saw LM in his father’s car. In fact, it is likely

she had stopped investigating before she even crossed the border, which explains her plowing on even after her wild hunch was dispelled by the facts.

The Interlocal Agreement placed no restriction on “investigative activity” in Oregon, but it did come with the express proviso that Sgt. Kipp would contact the “authorized representative” of, in this case, the Portland Police Bureau, CP 313 at par. 2b), the “ranking on-duty supervisor empowered by his/her chief law enforcement officer to act under this intergovernmental agreement.” *Id.* at par. 1b). While Kipp did say PBB was notified, there is no evidence the “authorized representative” was notified, which would have only been for the purpose of investigation anyway under the Agreement. At any rate, she was not there to investigate but to take LM.

3. Kipp was not acting as specially commissioned personnel to enforce applicable traffic and criminal laws within Oregon when she had Mr. Mendoza stopped and took LM.

Kipp was not enforcing Oregon law, but claiming authority under a civil Washington statute, RCW 26.44.050, to seize LM. CP 449. She was not enforcing traffic criminal laws. In fact, she said in her report that “Based on Carlos’ driving, I was certain he had no idea he was being followed. He was signaling his lane changes and was driving with the flow of traffic.” CP 442. And she was not in “fresh pursuit”, CP 310 at par. 1f), which deals only with felonies or traffic offenses. She said herself in her deposition on March 30, 2017 that she was not operating under a special commission:

I did not take [LM] into protective custody under the authority of my commission through Multnomah County, . . . [But t]hrough my authority through the state of Washington working jointly with our interlocal agency with the authorities in the state of Oregon.

CP 451. And even if she thought her Oregon Commission had given her authority to take LM, it does not appear from her report that she even complied with the its requirement to immediately report the seizure of LM to the Portland “authorized representative”.¹⁶ CP 314–315. Nor does it appear she submitted the report to the Portland Police Bureau as required by ORS 190.474. *Id.* As such, these apparent administrative failures confirm her claim she was not operating under her Oregon commission, if indeed she had one on December 10, 2014.

4. Kipp was not acting pursuant to a subsequent mutual law enforcement assistance agreement calling for specific combined operations with Oregon when she had Mr. Mendoza stopped and she seized LM.

Her answer above in her deposition, as well as in her Declaration, CP 285, 309, make it clear she relied on the authority of the original Agreement.

B. Sgt. Kipp claimed a non-existent authority to seize LM.

1. There was no preexisting mutual aid agreement.

Sgt. Kipp claimed in her deposition that she did not have the jurisdiction

¹⁶ In light of the statement in the first paragraph of the Agreement that one of its purposes was to “express the consent of each party to the enforcement within their territorial jurisdiction by other parties of applicable traffic and criminal laws,” it is questionable whether a Washington law enforcement officer would ever have authority under the Agreement to make a civil pickup of a child not related to a criminal act.

to stop Mr. Mendoza but had to work in conjunction with the Portland police. Conversely, she claimed that she and not the Oregon officers had the authority to take LM. CP 456–459. She appears to be claiming some amorphous fellow-officer type of mutual assistance that—as the above discussion indicates—is not found in the stated purposes and functions of the Agreement, on which she relies. Thus, the following language of the Agreement would not be applicable:

Non-Emergency Assistance means mutual aid provided by the parties in any circumstance, including a major incident, that is governed by a preexisting mutual aid agreement between the affected parties.

CP 311 at par. 1j). Sgt. Kipp emphatically indicates the Agreement itself, and not some other preexisting mutual aid agreement, was her authority on December 10, 2014 near the Tigard-Highway 99 exit on the side of I-5. Moreover, the “non-emergency assistance” appears only used in the Agreement to address payment of expenses. CP 313, 317. This provision would thus not grant her authority.

2. There is no subsequent mutual LE assistance agreement.

The present Agreement is a mutual law enforcement assistance agreement, but its purposes, as seen above, do not include the ability of a Washington law enforcement officer to exercise their authority under RCW 26.44.050 to remove a child from its parent when the child and parent are in Oregon, Nor is there a subsequent agreement that would allow it.

3. The WHEREAS clauses on page one of the Agreement do not confer authority.

a. ORS 190.472. ORS 190.472 is inapplicable to provide such authority. A commissioned officer may exercise in Oregon any authority granted by the officer's Washington commission only "if the officer is acting pursuant to a mutual law enforcement assistance agreement between a law enforcement agency of the neighboring state and a law enforcement agency of Oregon," Since the Agreement grants no authority for Sgt. Kipp to have exercised RCW 26.44.050 power in Oregon, and since there is no subsequent such agreement, ORS 190.472 is ineffective for that purpose.

b. RCW 39.34.030. Likewise, RCW 39.34.030 grants authority pursuant to an agreement, but subsection (3)(c) requires that such agreement must state its "purpose or purposes". The Agreement does state its purposes; RCW 26.44.050 pickup of children is not one of those purposes.

c. RCW 10.93.130. RCW 10.93.130 merely recognizes the authority to make an interlocal agreement.

d. RCW 10.93.070. RCW 10.93.070 applies only to Washington officers being able to operate through the state of Washington in certain circumstances, but only when enforcing "traffic and criminal laws".

e. RCW 10.93.090. And finally, RCW 10.93.090 applies only to Washington officers acting within Washington.

4. VPD Policy 12.15.00.

Sgt. Kipp was also precluded from engaging in police activities outside the state “unless lawfully authorized by the other state [Oregon] or Federal government to act in the capacity of a peace officer.” CP 498–499. Because Oregon did not authorize Sgt. Kipp to take a child into protective custody in Oregon, Kipp was in violation of her Department policy as well. In fact, it appears Oregon is the reverse of Washington in picking up children. Kipp testified Oregon CPS can pick up children without an order but Oregon law enforcement cannot do so without CPS. CP 543.

5. Sgt. Kipp’s claim of authority begs the question.

Sgt. Kipp’s claim that she had authority to take LM by the side of I-5 in Oregon, once Mr. Mendoza was stopped by Portland police officers, is an example of the logical fallacy of begging the question—that is, an argument takes for granted what it is intends to prove. Kipp’s claim presumes for its validity that she had the authority to enforce RCW 26.44.050 in Oregon. In actuality, her unfounded claim of authority led the Portland police to make an unconstitutional stop of Mr. Mendoza and LM.

C. Without Legal Authority, Kipp Was a Private Citizen When She seized LM.

1. As VPD 12.15.00 stated, Kipp was not authorized to conduct police activities in Oregon unless lawfully authorized by Oregon. She was thus a private citizen when she seized LM.

2. Sgt. Kipp could not claim protection of the Privileges and Immunities clause of the Agreement. CP 319 at par 10, set forth below. The condition for Kipp to avail herself of the qualified immunities of Washington law are that she “exercise[d] authority under this agreement”. As shown above, her taking of LM was not done under authority of the Agreement, therefore the Agreement does not entitle her to the immunities of Washington law, especially the protection of RCW 4.24.595 and RCW 26.44.050.

10. **Privileges and Immunities.** All of the privileges and immunities from liability, exemption from laws, ordinances and rules, and all pension relief, disability, workers’ compensation insurance and other benefits that apply to the activities of law enforcement personnel when performing their duties within the territorial limits of their employing agencies apply to them and to their employing agencies to the same degree and extent while the officers exercise authority under this agreement.

Oregon law also makes this clear.

[It is a] well-established principle that the legislative acts of a state ordinarily are not operative outside the territorial boundaries of the enacting state. *See State ex re: Juv. Dept. v. Casteel*, 18 Or. App. 70, 75, 523 P.2d 1039 (1974) (“It is axiomatic that the laws of a state have no extraterritorial effect.”) (citing *Deardorf v. Idaho Nat. Harvester Co.*, 90 Or. 425, 433, 177 P. 33 (1918)); see also *Swift & Co, and Armour & Co. v. Peterson*, 192 Or. 97, 121,233 P.2d 216 (1951) (“No legislation is presumed to be intended to operate outside of the jurisdiction of the state enacting it. In fact, a contrary presumption prevails and statutes are generally so construed.”) (citing *Sandberg v. McDonald*, 248 U.S. 185, 39 S.Ct. 84, 63 L.Ed. 200 (1918)).

State v. Meyer, 183 Or. App. 536, 544–45, 53 P.3d 940, 944 (2002), Thus, Oregon would not acknowledge that RCW 26.44.050 was legitimate law in

the state of Oregon. Nor does the Agreement make it viable in Oregon.

The case of *State v. Hendrickson*, 98 Wn. App. 238, 989 P.2d 1210 (1999), as amended (Dec. 17, 1999), raises a similar issue. There a WSP officer on disabled status was convicted on a guilty plea of using unlawful force because he had no authority to act as a law enforcement officer on disabled status. “Having concluded that Hendrickson was not exercising lawful authority as a police officer, we turn to whether he was exercising lawful authority as a private citizen.” *Id.* at 244. Thus, Kipp attempting to act in Oregon without authority and pursuant to Washington law acted only as a private citizen. As such, she had no authority to pick up LM because that is the province of police and DHS social workers. ORS 419B.020(5).

D. Sgt. Kipp Relied on a Defective Policy That Did Not Fully State the Standard.

Policy 17.15.02C Protective Custody is deficient because it omits any reference to the second prong of RCW 26.44.050:

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.*

(Emphasis added.) While Kipp and McCarthy talked about a warrant—something from a criminal court—the statute talks about a dependency order. Sgt. Kipp apparently first heard about Mr. Mendoza’s motion to rescind the no-contact order by an email at 9:53 a.m. on Dec 10,

2014, CP 295. She didn't pick up LM until around 6:15 p.m, CP 442, which would have been adequate time to have gotten an order. Moreover, Kipp's incomplete and biased investigation gave virtually no basis to say LM would be abused or neglect if left with his father.

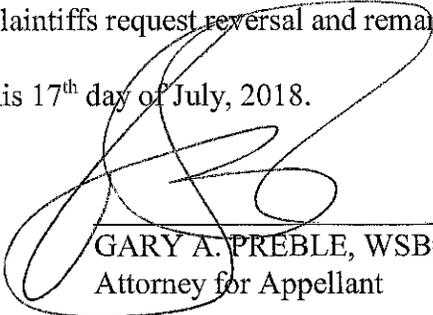
V. KIPP'S ACTIONS WERE OUTRAGEOUS.

The tort of outrage requires (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). A normal citizen would find it outrageous that a police officer would cross state lines to pick up a child without any court or statutory authorization based only on speculation. "[T]he right of a parent to their child as 'more precious to many people than the right of life itself.' *In re Gibson*, 4 Wn.App. 372, 379, 483 P.2d 131, 135 (1971)." *In re Luscier's Welfare*, 84 Wn.2d 135, 137, 524 P.2d 906, 908 (1974). Removal of the child from his father certainly meets the harm outrage was designed to remedy for both of them. This is a question for the jury.

E. CONCLUSION

Based on the foregoing, Plaintiffs request reversal and remand for trial.

Respectfully submitted this 17th day of July, 2018.



GARY A. PREBLE, WSB# 14758
Attorney for Appellant

Analysis of definition of “abuse and neglect”

A child is dependent under RCW 13.34.030(6)(b) if the child “[i]s abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child.” We therefore turn to RCW 26.44.020(1)¹⁷ for the definition:

(1) “Abuse or neglect” means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; *or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.*

(Emphasis added.) Though RCW 13.34.030(6)(b) and 26.44.020(1) both refer to “abuse” and “neglect” in the disjunctive (“abuse or neglect”), the final sentence of the foregoing definition somewhat tautologically defines an “abused child” as one subjected to “abuse or neglect”. (Throughout chapter 26.44 RCW “abuse or neglect” also appears to be used almost interchangeably with “abuse and neglect”. *See, e.g.*, RCW 26.44.010.) In other words, a neglected child is by that definition an abused child. There is some question if there is a separate statutory definition of neglect.

As a practical matter, the definition that a neglected child is an abused child is seldom if ever addressed in dependency cases. Rather, “negligent treatment or maltreatment,” RCW 26.44.020(17),¹⁸ is considered to be the definition of neglect:

¹⁷ Statutes that have been amended since December 2014 will only be identified as such if there were material changes or renumbering.

¹⁸ This was previously numbered RCW 26.44.020(16) in December 2014.

“Negligent treatment or maltreatment” means 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, including but not limited to conduct prohibited under RCW 9A.42.100. 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. The fact that siblings share a bedroom is not, in and of itself, negligent treatment or maltreatment. Poverty, homelessness, or exposure 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.

There are in fact a number of instances where “neglect” or “neglected” is used alone or separately: RCW 13.34.300; RCW 26.44.010, .020(19),¹⁹ .030(8), .037(1), .040(4), .063(3), laws 2005, c 512 § 11 (note following .100) and .195(4).

It appear the legislature itself has cleared up the question of whether neglect is distinct from abuse, for RCW 26.44.195(4) states:

. . . the department may initiate a dependency proceeding under chapter 13.34 RCW on the basis that the negligent treatment or maltreatment by the parent, guardian, or legal custodian constitutes neglect.

Thus, though the final sentence of RCW 26.44.020(1) remains in the statute, the legislature has made it explicit that “negligent treatment or maltreatment,” as stated in RCW 26.44.020(17) is neglect.

¹⁹ This was previously numbered RCW 26.44.020(18) in December 2014.

PREBLE LAW FIRM, P.S.

July 17, 2018 - 3:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51545-8
Appellate Court Case Title: Carlos Mendoza, Appellant v. City of Vancouver, et al, Respondents
Superior Court Case Number: 16-2-05451-3

The following documents have been uploaded:

- 515458_Affidavit_Declaration_20180717151435D2912377_0762.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Certificate of Service.pdf
- 515458_Briefs_20180717151435D2912377_9687.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Brief.pdf

A copy of the uploaded files will be sent to:

- dan.lloyd@cityofvancouver.us
- deborah.hartsoch@cityofvancouver.us

Comments:

Sender Name: Gary Preble - Email: gary@preblelaw.com
Address:
2120 STATE AVE NE
OLYMPIA, WA, 98506-6500
Phone: 360-943-6960

Note: The Filing Id is 20180717151435D2912377

FILED
Court of Appeals
Division II
State of Washington
7/17/2018 3:21 PM
WASHINGTON STATE COURT OF APPEALS
AT TACOMA DIVISION II

CARLOS MENDOZA, et.al.,

Appellant,

and

CITY OF VANCOUVER, et al.,

Appellees.

NO. 51545-8-II

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of July, 2018, he caused a copy of the below identified document, to be served on the party listed below by the methods indicated:

Document: Brief of Appellant

Counsel/Party	Contact Information	Method of Service
Dan Lloyd City Attorney's Office Attorney for Respondents	P.O. Box 1995 Vancouver, WA 98668-1995 Tel: (360) 487-8520 Fax: (360) 487-8501 Dan.Lloyd@cityofvancouver.us	Online Court of Appeals Portal

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed this 17th day of July, 2018, at Olympia, Washington.



DANIEL PREBLE, Paralegal

PREBLE LAW FIRM, P.S.

July 17, 2018 - 3:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51545-8
Appellate Court Case Title: Carlos Mendoza, Appellant v. City of Vancouver, et al, Respondents
Superior Court Case Number: 16-2-05451-3

The following documents have been uploaded:

- 515458_Affidavit_Declaration_20180717151435D2912377_0762.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Certificate of Service.pdf
- 515458_Briefs_20180717151435D2912377_9687.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Brief.pdf

A copy of the uploaded files will be sent to:

- dan.lloyd@cityofvancouver.us
- deborah.hartsoch@cityofvancouver.us

Comments:

Sender Name: Gary Preble - Email: gary@preblelaw.com
Address:
2120 STATE AVE NE
OLYMPIA, WA, 98506-6500
Phone: 360-943-6960

Note: The Filing Id is 20180717151435D2912377