

FILED
Court of Appeals
Division II
State of Washington
9/13/2018 4:16 PM

NO. 51545-8-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CARLOS MENDOZA, individual, and as guardian of Landon, his minor
child,

Plaintiff/Appellant,

vs.

CITY OF VANCOUVER, a Municipality; VANCOUVER POLICE
DEPARTMENT, an agent of the City of Vancouver; MONICA
HERNANDEZ and “JOHN DOE” HERNANDEZ, husband and wife,
individually and the marital community thereof; BARBARA KIPP and
“JOHN DOE” KIPP, husband and wife and the marital community
thereof;

Defendants/Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

All four of then-one-year-old Landon Mendoza's¹ limbs were broken in April 2014 by his mother, Tara Mendoza. Monica Hernandez, a Vancouver Police Detective, investigated the case, which eventually resulted in Tara² pleading guilty to third degree assault of a child. While Tara was facing charges, Defendant/Respondent Barbara Kipp, a sergeant of the City of Vancouver Police Department and supervisor of the multi-agency Children's Justice Center (CJC), undisputedly received information from other government officials indicating that Plaintiff/Appellant Carlos Mendoza, while in custody of Landon, lied about his location at a time he was charged with crimes of dishonesty committed to protect Tara. The agency tasked with locating Tara was unable to do so, giving rise to a real concern that Carlos would do as he expressed days earlier: "facilitate reunification" between Tara and Landon. CP 297.

Kipp attempted to obtain judicial authorization to take the child into protective custody, but ran out of time when Carlos drove off with Landon, heading toward Portland. Concerned that Carlos was taking

¹ Respondents note that Plaintiff-Appellant used Landon's initials throughout his brief. Whereas initials for minors were once required, that rule was repealed over a decade ago. *In re Dependency of G.A.R.*, 137 Wn. App. 1, 11, 150 P.3d 643 (2007) (citing Former GR 31(e)(1)(B)). Respondents therefore refer to Landon by his name.

² Because Tara, Carlos, and Landon all share the surname Mendoza, first names will be used herein. No disrespect is intended.

Landon to see Tara, Kipp invoked her authority under RCW 26.44.050 and, while cooperating with the Portland Police Bureau (PPB) pursuant to a mutual law enforcement assistance agreement, took Landon into protective custody and transferred his care to the State. Landon remained in the State's custody while the Clark County Superior Court held a shelter care hearing, at which Commissioner Carin Schienberg heard the same arguments Carlos advances here and found that returning Landon to Carlos care would subject Landon to an imminent risk of harm.

Carlos sued Kipp and the City because Kipp viewed information the same way as Commissioner Schienberg did. As directed by the legislature, Kipp and the City cannot be held liable absent proof that Kipp acted with gross negligence. Former RCW 4.24.595(1) (2012), *amended by LAWS OF 2017, 3d Spec. Sess., ch. 6, § 301.*³ Carlos attempts to sidestep this public policy by contending that Kipp should be liable under ordinary principles of negligence. He is wrong. What's worse is that he resorts to what can only be described as a sexist attack against Kipp, accusing her without any basis in the record of "allowing her own emotions to drive her actions." Br. of Appellants at 16. Such distasteful disparagements should not be tolerated in society, let alone a court of law.

³ The 2017 bill amended references to the DSHS in the RCW to its current designation of the Department of Children, Youth, and Families without any substantive change. Respondents cite the current version herein.

The legislature, as “the body [entrusted] to make the policy decisions” for the State of Washington, *Buchanan v. Int’l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980), announced Washington’s public policy is to “limit[]” “the liability of government entities, and their officers, agents, employees, and volunteers, to parents, custodians or guardians accused of abuse or neglect.” RCW 26.44.280. The trial court properly declined Carlos’s invitation to disregard this legislative mandate. This Court should do the same and affirm.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondents reject Carlos’s statement of the issues and present the following in lieu thereof:

1. Whether Carlos’s unabandoned claims, which all arose out of an emergent placement investigation, are barred by the immunity afforded under RCW 4.24.595 because undisputed evidence demonstrates as a matter of law that Sgt. Kipp acted with slight care.

2. Whether the Court should apply Washington law, including RCW 4.24.595, given that no party—Carlos included—has provided a convincing choice-of-law analysis to overcome the presumption that Washington law applies.

3. To the extent contractual interpretation is needed to resolve Carlos’s false imprisonment claim, whether Kipp was a member of a

“special law enforcement unit” as contractually defined entitled to take “law enforcement action” in Oregon under the circumstances here.

III. STATEMENT OF THE CASE

To properly analyze Carlos’s claims, it is necessary to understand the factual backdrop in the context of Landon being brutally abused by Tara in conjunction with the information provided to Kipp before she took Landon into protective custody on December 10, 2014.

A. Carlos is investigated, arrested, and charged with crimes of dishonesty related to protecting his son’s abuser long before Kipp ever interacts with him.

Working in the Clark County Children’s Justice Center, a multi-disciplinary justice center for children, Detective Hernandez was assigned on April 22, 2014, to investigate suspicious injuries sustained by Landon, then only one year-old. CP 207, 285. Earlier that day, Landon had been taken into protective custody by Child Protective Services (CPS). CP 101. CPS initially investigated an April 9 referral from a physician who had noted a fractured femur, CP 97, but multiple newer fractures on three other limbs were discovered after Landon was taken into protective custody. CP 101. Several physicians noted the injuries and concluded that they were non-accidental. *Id.*

Landon’s mother, Tara Mendoza, emerged as the primary suspect. She provided multiple inconsistent explanations for the injuries, and no

other person had custody of Landon during the time when the new injuries occurred. CP 207, 213-15, 226-27. Detective Hernandez arrested Tara on April 30, 2014. CP 215-16.

Carlos, having enlisted in the Marine Corps the previous October, was stationed in Mississippi around the time Landon was taken into protective custody. CP 403. He arranged for two days of leave to return to the Vancouver area “for the purpose of addressing [his] family issue.” *Id.* He arrived in Vancouver on May 1, 2014. *Id.*

1. Two witnesses sign sworn statements attesting to Carlos’s efforts to hide evidence in an effort to protect Landon’s abuser, Tara.

The same day that Carlos arrived (May 1), Tara spoke from jail to Katherine Ruggiero, the godmother of Landon’s babysitter. CP 215. During that call—which was recorded and later heard by Hernandez—Tara instructed Ruggiero to obtain her iPad and cell phone. *Id.* This led Hernandez to believe it was necessary to retrieve the devices “to confirm or refute” Tara’s asserted timeline. CP 215, 227.

Hernandez learned the following morning (May 2) that the jail had released the devices already to Ruggiero. CP 215. Hernandez called her, and Ruggiero said that she had given the phone to Carlos earlier that day. *Id.* This prompted Hernandez to obtain search warrants to search for and

seize, among other things, Tara's iPad and cell phone. CP 193, 221-30. A judge issued the warrants around 5:00 p.m. CP 232-41.

Still on May 2, while executing the second warrant, Hernandez learned that Carlos had obtained the iPad earlier in the day. CP 215-16. That evening at approximately 9:00 p.m., Hernandez located Carlos at the jail, obtained Carlos's consent to search his vehicle, CP 243, and seized the iPad, CP 216. Carlos denied knowing where Tara's phone was located, but according to Hernandez, admitted to lying about other pertinent details. *Id.* Carlos denies this admission, CP 402, but it is undisputed that Kipp was not present when Hernandez spoke to Carlos on May 2.

Hernandez still needed to serve one more warrant, so she advised Carlos not to contact anyone else involved in the case for three hours. CP 216. Carlos agreed. *Id.* But while Hernandez was executing the last warrant to search the house of Landon's babysitter at approximately 10:20 p.m., Ruggiero arrived and "said she was there because she had met Carlos" approximately 30 minutes earlier who "asked her to get [a] hold of [the] phone" that Hernandez was attempting to locate and seize. *Id.* Again, though Carlos disputes Ruggiero's account, CP 406-07, he does not dispute that Ruggiero told Hernandez what she did. Additionally, it is undisputed that Kipp was not present when Hernandez executed the

warrant and when Ruggiero supplied Hernandez with information of Carlos's dishonesty.

Both Ruggiero and another witness signed sworn statements attesting to Carlos's efforts to protect Tara by misleading the police. CP 194 (¶ 9), 218, 264-68. Those sworn statements allege that Carlos took possession of Tara's phone prior to when Carlos denied seeing the phone, and that Carlos instructed one of the two "not to hand over Tara's phone to [the] police." CP 266-68.

2. Based on independent witness accounts, Carlos is arrested twice for crimes of deception related to protecting his son's abuser from prosecution.

According to Clark County Deputy Sheriff Scott Pilakowski, the supervising jail sergeant, Carlos arrived at the jail on May 2 in "full military uniform" and "wanted to visit his wife (Tara Mendoza) who was currently in custody" (this was a few hours prior to Hernandez searching the vehicle). CP 340. Normally, Carlos would not have been allowed to visit Tara because she had been incarcerated fewer than 72 hours. *See* CP 288. According to Pilakowski, Carlos told him that "he had to return back to North Carolina and that he was attempting to get an extension through the United States Marine Corps office in Portland, but his request was not granted." CP 340. Pilakowski believed Carlos and based on what Carlos

had said, “authorized him to visit Ms. Mendoza in deviation from standard inmate visitation policy.” *Id.*

For his part, Carlos provides a different account of his interaction with Sgt. Pilakowski and another deputy. CP 23-24, 403-05. Carlos alleges that he “explained the uncertainty of my situation, that I had only two days of leave, that I had left my paperwork in North Carolina, that I was going to try to get attached to the Portland unit but that I had not spoken to them yet.” CP 403-04. Carlos claims “[i]t appears that [the jail deputies] misunderstood what I said.” CP 404. In any event, it is undisputed that neither Hernandez nor Kipp were present when Carlos spoke with Pilakowski. Equally undisputed is that Pilakowski relayed *his* version of what transpired to Hernandez and Kipp. CP 217, 288, 340.

Hernandez also spoke with Carlos’s supervisor in the Marines, who confirmed that contrary to what Pilakowski said he was told, the Marines told Carlos that he would be allowed to remain in the Vancouver-Portland area throughout his son’s dependency. CP 271. Carlos was not present when Hernandez spoke to the Marines supervisor, and given that he offered no evidence from the Marines supervisor, Carlos does not and cannot dispute Hernandez’s account of what the supervisor told her.

Based on the information provided from Pilakowski, the other jail deputy, and the Marines supervisor, Hernandez arrested Carlos on May 6,

2014, for making a false or misleading statement to a public servant. *See* RCW 9A.76.175. The jail released him immediately on his own recognizance. CP 217. But after Ruggiero and another witness signed their sworn statements describing Carlos's efforts to hide Tara's cell phone, CP 266-68, Hernandez arrested Carlos again on May 8, 2014, for criminal conspiracy, *see* RCW 9A.28.040, tampering with physical evidence, *see* RCW 9A.72.150, and obstructing a law enforcement officer, RCW 9A.76.020. CP 219.

Every one of these charges remained pending until June 2015, when Carlos pled guilty to a lesser charge as part of a "global resolution." CP 42-57. In his written statement to the court, he wrote:

I plead guilty to the crime(s) of Disorderly Conduct by *Alford/Newton*⁴ plea. I do not believe I am guilty of the crime charged but plead guilty to take advantage of the Prosecutor's offer because I recognize a jury could find me guilty if they believed the State's witnesses and not me.

CP 43. In other words, Carlos admitted that sufficient evidence existed to believe he had committed crimes of dishonesty. And it is undisputed that Carlos was still facing these charges of dishonesty when Sgt. Kipp took Landon into protective custody on December 10, 2014.

⁴ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

B. The dependency terminates on the shared belief that Carlos and Landon were immediately leaving the State.

Landon remained in foster care as 2014 moved toward late fall. CP 28-30, 96-102. On November 25, 2014, Carlos filed a motion to dismiss the dependency and obtain custody. CP 30, 108-36. To support his motion, he signed a declaration that stated in relevant part:

There is a no-contact order in the criminal case (14-1-00877-5), preventing the mother from having contact with Landon. There is a no-contact order in a protection order matter that I filed (14-2-07709-6), preventing the mother from contacting me or Landon. There is a no-contact order preventing her from having contact with me in the domestic violence assault case against the mother (14-1-01578-0),⁵ and a no visitation clause in the temporary parenting plan I obtained on September 17, 2014 (14-3-01748-8).

....

I understand the Department [of Social & Health Services] and CASA [Court-Appointed Special Advocate] are not opposed to a dismissal under these circumstances, as my son is and shall remain protected under my care.

CP 109-10. Attached to the filing were copies of no-contact orders and the parenting plan referenced in the declaration. CP 111-36.

The court heard Carlos's motion to dismiss on December 4, 2014. ER 138-39. According to DSHS, Carlos had "informed the Department that he was to leave Washington for his new duty station on December 5th." CP 149. DSHS's attorney would later explain why the State agreed

⁵ On July 26, 2014, a few months before Carlos sought dismissal of the dependency, Tara attempted to assault him with a vehicle. CP 59-72. Tara pleaded guilty to that crime on October 23, 2014. CP 59-67.

to dismiss: “there is a parenting plan in place that gives Carlos full custody and doesn’t allow mother visitation with Landon. Landon has been released to Carlos *and my understanding is that they are both in California* [as of December 9], as that is where Carlos *is now* stationed.” CP 295 (emphasis added). The dependency court had the same impression based upon what Carlos said in court when it dismissed the dependency:

[One of] the reasons for the dismissal of the original dependency ... was because he told us at -- *told us when we were dismissing that he was going to California, he had to leave immediately*, and that’s where he was going to be stationed, and *he was leaving like the next day or the day after* [December 5 or 6].

CP 163 (emphasis added). Once again, Carlos provides a different account, stating that “there was some confusion as to whether I would be returning to North Carolina or to San Diego.” CP 407. Despite Carlos’s different recollection, it is undisputed that both the court and DSHS believed that Carlos was to leave Washington State with Landon either one or two days after the December 4 hearing. CP 149, 163, 295. And it is further undisputed that Kipp was not present when the first dependency was dismissed based upon Carlos’s representations.

To be sure, it is undisputed that Carlos had no interaction or communication with Kipp prior to December 10, 2014, which included the December 4 hearing on the motion to dismiss the dependency.

C. Kipp, as the supervising sergeant of the Children's Justice Center, receives information corroborating Carlos's pattern of deception and desire to bring Landon and Tara together.

Based on the motion and Carlos's representations that he was leaving the area immediately, the court dismissed the dependency action on December 4, 2014. CP 138-39. But four days later, Carlos backtracked from his declared vow to protect Landon from Tara. On December 8, 2014, he filed a petition to vacate one of the protection orders, stating:

CPS dismissed their action against my wife & I as relates to our son Landon. Based upon all information I have received to date I intend to *facilitate reunification* of the relationships damaged *by what appear to be untrue allegations*. As to this incident I acknowledge it occurred but have no fear of her & *want her in our son's life*.

CP 297. That language was handwritten by Carlos's lawyer, CP 408, but Carlos undisputedly signed it, CP 297. The next day, December 9, Carlos prepared and filed a motion to terminate a separate no-contact order, using the same justification: that he believed the child abuse allegations against Tara were "untrue" and that he "intend[ed] to facilitate reunification of the relationships damaged by what appear to be untrue allegations." CP 38. Carlos admits that the language used in the motions was "pretty poorly worded," CP 481, and that he regrets filing them, CP 409.

Concerns over Carlos wrongfully exposing Landon to Tara did not arise out of a vacuum. On May 30, 2014, Carlos video-conferenced with Tara during his supervised visit with Landon. CP 195 (¶ 10), 281. 524.

Carlos claimed that DSHS/CPS worker Tia Stevens “said I could call Tara on the phone because the no contact order was adjusted.” CP 280. Conversely, Stevens says that she “very specifically told [Carlos] no and explained that the no contact order was still in place. I told him that he could take photos of Landon and share them with Tara but he was not allowed to Face Time her.” CP 524. Regardless of which version is accurate, it is undisputed that Kipp was not present on May 30, 2014, and therefore could rely only on what colleagues told her about the incident.

The following day (December 10), the lead county prosecutor advised the Assistant Attorney General and CPS of the December 8 motion, writing, “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 Landon again.*” CP 295 (emphasis added). The prosecutor forwarded that email to Kipp and Hernandez shortly before 10:00 a.m. *Id.* Just after noon, the DSHS/CPS victim’s advocate wrote to the Assistant Attorney General to state she “really think[s] we need to bring this back to court.” CP 300.

At approximately 1:30 p.m., the prosecutor emailed Kipp again to advise that Landon’s victim advocate, Cheri Hoffman, “just spoke with Carlos in an effort to have him sign a HIPPA release,” but contrary to the shared belief that Carlos was in California, Carlos had told Cheri that he

was “in North Carolina.” CP 300. Kipp then “located Cheri and asked her what had happened.” CP 291.⁶

Hoffman told Kipp that she contacted Carlos to obtain a medical release for Landon and that when she spoke with him, “he told her that he was in North Carolina and asked that she send the release by email because he was unable to come into the office due to his location.” *Id.* Hoffman then provided Kipp with the number she used to call Carlos. *Id.* Hoffman filed a declaration with the trial court reaffirming her account of the conversation, documented by her notes, that she did not misunderstand Carlos and that he definitively told her that he was already on the east coast. CP 345-46, 348. Regardless of Carlos’s claim that Hoffman misunderstood him, Hoffman undisputedly relayed to Kipp that Carlos said he was in North Carolina, not California or Vancouver. CP 346.

D. Carlos drives off with Landon while law enforcement is preparing a warrant, which results in Kipp pursuing Carlos and taking Landon into protective custody.

At this point, Kipp became “very concerned ... that Mr. Mendoza was planning to expose Landon to Tara Mendoza,” who had fractured eight of the infant’s bones earlier in the year. CP 284, 291. Tara had been

⁶ Mendoza attempts to portray Kipp as dishonest when two dates appear in her report adjacent to Hoffman’s name. *See* Br. of Appellants at 13. A plain reading of the passage in question confirms what Kipp articulated in her report: that she “asked [Hoffman] what had happened” on December 10, and then re-interviewed her “in detail” for a more in-depth account two days later. CP 291.

released from custody weeks earlier, CP 283, 348, and CPS—the agency responsible for locating Tara—“was unable to confirm Tara Mendoza’s whereabouts at any time on December 10, 2014.” CP 284.

By 3:00 p.m., Kipp and the other personnel at CJC believed that Landon was in imminent danger. *Id.* Hernandez was off duty at this time and could no longer assist in the investigation. CP 197. The information that was presented to Kipp led her to believe that Carlos “wished to have the family reunited,” and that Carlos “was lying about his location, having told CPS that he was going to California the previous week and this week he told Cheri [Hoffman] he was actually in North Carolina.” CP 291. And as stated above, the whereabouts of Tara—Landon’s abuser—could not be located or confirmed. Although Carlos complains that someone “could have” called Tara’s aunt and uncle or had White Salmon police drive by a last known address, *see* Br. of Appellant at 14, the record is devoid of any evidence or testimony that either action would have located Tara.

Kipp then reached out to Vancouver Police Sgt. Joe Graaff of the Digital Evidence Cybercrime Unit to “request[] a geolocator ‘ping’ of Carlos’ cell phone.” CP 292; *see also* CP 342. Graaff used the same number Carlos had used to communicate with Cheri Hoffman earlier in the day and confirmed that the phone was in Vancouver, Washington—which obviously was neither California nor North Carolina. ER 220-21.

Graaff and two other detectives then traveled to the area and located Carlos's vehicle parked near a residence. CP 342-43.

Kipp then tasked Clark County Deputy Sheriff Brendan McCarthy with preparing the paperwork to obtain a warrant to take Landon back into protective custody, CP 350, "to ensure that [Landon] would not end up in Tara Mendoza's presence," CP 284. McCarthy began drafting the affidavit but did not have enough time to finish, let alone clarify the accuracy of the statements made in the draft. CP 350-53. This was because police observed Carlos get into his car and drive away. CP 284, 292, 343, 350. McCarthy stopped working on the warrant, and began to pursue a vehicle that turned out to be the wrong car, leaving him unable to follow Carlos. CP 350. Graaff followed as Carlos began driving south toward Portland, but Graaff was rear-ended by a truck when the cars exited from one interstate to another. CP 343. This left Kipp as the sole officer attempting to follow Carlos.

The time was approximately 6:00 p.m. and traffic was heavy. CP 292. Kipp proceeded westbound on Interstate 84 in Portland, but was "several miles" behind Graaff at the time of his accident. CP 292. Kipp caught up to Carlos's car; due to the heavy traffic, she inadvertently pulled up next to him. CP 292. It was then that Kipp first realized that Landon was in the back seat. CP 284, 292. Kipp backed off and pulled in three

vehicles behind Carlos. CP 292. The two cars then exited to southbound on Interstate 5, during which Kipp continued calling out her location to the law enforcement agency of jurisdiction, Portland Police Bureau. CP 292.

According to Kipp, “[g]iven that we had already run out of time to get a warrant” and her belief that “there was probable cause ... to believe that Landon was in imminent danger,” CP 284, she requested Portland Police to execute a traffic stop, which was accomplished in south Portland along the interstate, CP 292. Kipp arrived, explained to Portland Police that “Carlos was not under arrest and that I was just there to take the baby from him.” CP 292. Portland Police asked Carlos to exit his vehicle and he complied. CP 292.

Kipp then spoke with Carlos. CP 292. Although Carlos took issue with Kipp’s description of the encounter in her report, he testified that he “d[id] not recall the words [he] used” when speaking with Kipp, but maintained that it “would have accurately reflected [his] conversation with Ms. Hoffman.” CP 409. At deposition, he testified that he was not traveling to see Tara, but rather was driving to visit his new girlfriend, who was allegedly having labor pains. CP 475-76. Carlos’s evidence, however, does not suggest that Carlos told Kipp where he was heading. CP 292-93, 409-10. According to Kipp’s report, Carlos said he had “‘mis-spoke’” when he talked with Hoffman (which led to Hoffman’s belief that

he claimed to be North Carolina), and that it “was a misunderstanding” with DSHS the previous week (which led to that agency’s belief that Carlos was in California). CP 292. Kipp then took Landon into protective custody and transferred custody to DSHS/CPS just south of the Washington-Oregon border. CP 284-85, 293. It is undisputed that Kipp had no contact with Landon or Carlos after that point. CP 285.

E. Considering the same evidence with which Kipp was presented, in addition to Carlos’s testimony, a dependency court finds that Landon would be in imminent risk if left with Carlos.

A shelter care hearing took place the following Monday, December 15, 2014, CP 152-54, which was within the timeline permitted by law. *See* RCW 13.34.065(1)(a). Contemporaneously, the State filed a second dependency petition. CP 142-49. The petition recounted the earlier history involving Tara’s assault that caused eight fractures in Landon’s limbs, and also described that in July 2014 Carlos “was no longer going to protect” Tara and that Carlos’s actions immediately thereafter “supported his statements.” CP 148-49. But the petition further noted reports that Tara had successfully contacted Landon shortly before the dependency’s dismissal, CP 149, and that the December 8 motion filed by Carlos was “in stark contrast to the statements previously made by Mr. Mendoza to the assigned social worker prompting recommendation for dismissal of the

prior dependency petition,” CP 144. The dependency court held several shelter care hearings, including taking testimony from Carlos and other involved individuals. CP 152-54, 182-83.

After hearing testimony from all parties, including Carlos, the dependency court held there was reasonable cause to keep Landon out of Carlos’s care because, in its view, “[t]he child is in imminent risk if placed with [Carlos] because of what has gone on.” CP 176. The court reasoned that Carlos was facing criminal charges that called his integrity and credibility into question, CP 161-62, and that through Carlos’s testimony, he “lies by omission” and “lies by telling half the story and he lies by telling half-truths,” CP 163. The court then cited examples of what it dubbed “[l]ying] by omission.” CP 164-66.

Significantly, when interpreting the same December 8 petition that was part of what led Kipp to believe Landon was in imminent danger, the dependency court expressed its findings as follows:

And the real[i]ty is if you read it in its entirety the plain language of the declaration states that *the purpose of the motion was for reunification between all parties and specifically to enable the alleged perpetrator of the assault to have access to that child.* That’s what it says....

CP 168 (emphasis added). That court’s written order confirmed that Landon would be in imminent danger if placed back into Carlos’s custody because—even though other no contact orders still existed—Carlos did

not appreciate the threat Tara posed. CP 187. And although the dependency court said “[w]hy law enforcement chooses to remove a child is not an issue in a shelter care hearing,” CP 158, the record confirms that the threat Carlos posed to Landon in February 2015 had not changed since December 10, 2014, when Landon was in Carlos’s custody.

F. Procedural history

Carlos, on behalf of Landon and himself, filed a complaint in Clark County Superior Court on July 8, 2016, against the City, Kipp, Hernandez, and their spouses. CP 1-12. Defendants timely removed the action to federal court. *Mendoza v. City of Vancouver*, 269 F. Supp. 3d 1087, 1100 (W.D. Wash. 2017); *see also* CP 570-79. The action proceeded through discovery in that forum, and on August 29, 2017, the federal court granted summary judgment to the City Defendants on all federal claims. *Mendoza*, 269 F. Supp. 3d at 1111. The federal court declined supplemental jurisdiction over the state law claims and remanded what was left of the case back to state court on September 11, 2017. CP 564-69.

After remand, the Defendants moved for summary judgment on all remaining claims. CP 376-400. In response, Carlos advised the trial court that “Plaintiffs [we]re no longer pursuing claims against Det. Hernandez, as well as the claims of Mr. Mendoza against Sgt. Kipp for negligent infliction of emotional distress, malicious prosecution and false

imprisonment.” CP 417. After hearing argument, CP 586, the trial court issued a ruling granting the motion, reasoning:

Because RCW 4.24.595 provides Sgt. Kipp immunity the burden shifts to Plaintiff to prove her acts constituted gross negligence. To survive the motion for summary judgment, Plaintiff had the burden to prove gross negligence. None of the statements in Plaintiff’s sworn declarations raise a reasonable inference of acts to support a jury finding of negligence substantially and appreciably greater than ordinary negligence.

CP 553-54. The trial court reduced the ruling to a RAP 9.12 written order on January 31, 2018. CP 547-49. Carlos then timely appealed. CP 550.

IV. ARGUMENT

The trial court properly followed RCW 4.24.595 and held Carlos to the statutorily mandated burden to produce evidence that Kipp acted with gross negligence. CP 560. The trial court also correctly concluded that “[n]one of the statements in Plaintiff’s sworn declarations raise a reasonable inference of acts to support a jury finding of negligence *substantially and appreciably greater than ordinary negligence.*” CP 560-61 (emphasis added). Finally, the trial court correctly found that Carlos’s failure to advance evidence of gross negligence “resolv[ed] all pending causes of action.” CP 561. This Court should adopt that logic and affirm.

An order granting summary judgment is reviewed de novo. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Summary judgment exists to “avoid a useless trial when no genuine issue of material

fact remains to be decided.” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). It should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All reasonable inferences are drawn in the nonmoving party’s favor; however, such inferences are drawn solely from evidence that would be admissible at trial. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Parties opposing summary judgment cannot rely on the allegations in their complaint, speculative assertions, conclusory statements, or inadmissible evidence to create a genuine issue of fact. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 122 (2003); *White*, 131 Wn.2d at 9. To this end, it is imperative to note that the lone facts pertinent to summary judgment—material facts—are those on which the outcome of the litigation depends. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Thus, factual disputes having no impact on the outcome of the litigation are irrelevant for purposes of summary judgment. *Id.*

Carlos raises four primary arguments in his effort to salvage the only three causes of action that he did not abandon: (1) outrage, (2) false imprisonment of Landon, and (3) negligent investigation.⁷ First, he

⁷ When the federal court remanded the action back to the superior court, five causes of action remained as it related to Hernandez arresting Carlos and the subsequent prosecution thereof: (1) outrage, (2) negligent infliction of emotional distress (“NIED”),

primarily argues that RCW 26.44.050 enables him to proceed under traditional negligence principles, and the lack of negligence could not be determined as a matter of law on this record. Br. of Appellant at 25-39. Second, he argues that a jury should decide gross negligence. *Id.* at 40. Third, he claims that Kipp could not take Landon into protective custody once Carlos crossed the state line, thus paving the way for his false imprisonment claim. *Id.* at 41-51. Finally, he argues there is sufficient evidence to sustain an outrage claim. *Id.* at 52.

His arguments are unpersuasive and should be rejected. The trial court's summary judgment dismissal should be affirmed in its entirety.

A. Under legislative mandate, the City and Kipp are statutorily immune from all liability because there is insufficient evidence as a matter of law to sustain a finding of gross negligence.

The main focus of Carlos's appeal is his claim that Kipp and the City are liable for negligent investigation. Br. of Appellant at 25-39. This

(3) malicious prosecution, (4) false arrest, and (5) false imprisonment. CP at 7-9, 386; *Mendoza*, 269 F. Supp. 3d at 1100. In regards to Kipp taking Landon into protective custody, only the following claims remained: (1) outrage, (2) interference with family relations, (3) false imprisonment, and (4) negligent investigation. CP at 7, 9-10, 386; *Mendoza*, 269 F. Supp. 3d at 1100. In response to the summary judgment motion, Mendoza explicitly abandoned all "claims against Det. Hernandez" as well as "the claims of Mr. Mendoza against Sgt. Kipp for negligent infliction of emotional distress, malicious prosecution and false imprisonment." CP at 417. Mendoza's abandonment of those causes of action below coupled with his failure to address them at all in his opening brief means they are waived. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). In addition, Mendoza never once discussed his cause of action for intentional interference of family relations, either before the trial court, CP 412-33, or this Court, see Br. of Appellant. Under precedent, that claim too is waived. *State v. Noah*, 103 Wn. App. 29, 41 n.3, 9 P.3d 858 (2000).

argument ignores Washington's public policy to absolve Kipp and the City of all liability in the very context presented here, namely emergent placement investigations, absent proof of gross negligence. The evidence falls far short of that threshold, meaning there is no tort liability here.

1. Carlos assumes that ordinary negligence principles govern, but as a matter of legislative mandate, they do not.

The legislature has the power to determine when, and under what circumstances, a government entity or official can face liability. *Compare* RCW 4.96.010 (abolishing sovereign immunity) *to* *Lawson v. City of Seattle*, 6 Wash. 184, 185, 33 P. 347 (1893) (holding, prior to RCW 4.96.010, city is not liable for negligence of employee). Conversely, the legislature is equally empowered to limit liability of government agencies and their officers. *E.g.*, RCW 4.92.180 (overruling *Rahman v. State*, 170 Wn.2d 810, 824-25, 246 P.3d 182 (2011) on doctrine of vicarious liability). Thus, the legislature has the power to abolish or limit causes of action against government officials, which it has done in a wide variety of contexts. *E.g.*, RCW 4.24.210 (immunity to landowners of recreational land); RCW 4.24.410 (police dog handler); RCW 4.24.510 (anti-SLAPP); The legislature did just that in 2012 when it passed Engrossed Substitute Senate Bill (ESSB) 6555, section 13 of which states:

Governmental entities, and their officers, agents, employees, and volunteers, *are not liable in tort* for any of

their acts or omissions *in emergent placement investigations of child abuse or neglect* under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, *unless the act or omission constitutes gross negligence*. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

LAWS OF 2012, ch. 259, § 13, *codified at* RCW 4.24.595(1) (emphasis added). When the meaning of a statute is at issue, the court’s goal is to give effect to the legislature’s intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The primary means of doing so is to examine the statute’s text. *Id.* If the text is plain, the inquiry ends because the Court “presume[s] the legislature says what it means and means what it says,” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) (citations omitted). Whether the statute applies is a question of law reserved for the court, not a jury. *Osborn*, 157 Wn.2d at 22-23.

Under RCW 4.24.595(1), the City and Kipp “are not liable in tort for any of their acts or omissions” so long as two elements are present: (1) Kipp’s “act or omission [occurred] in [an] emergent placement investigation[] of child abuse or neglect under chapter 26.44 RCW,” and (2) Kipp’s “act or omission [does not] constitute[] gross negligence.” RCW 4.24.595(1). The words “not liable in tort” are plain: all theories of liability other than “gross negligence” are abolished. Thus, so long as the “act[] or omission[]” occurred in the context of an “emergent placement

investigation[] of child abuse or neglect under chapter 26.44 RCW,” any theory of liability permitting recovery upon proof of something other than gross negligence has been statutorily abolished. RCW 4.24.595(1). By statute, “[e]mergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.” RCW 4.24.595(1). Carlos has never disputed that a shelter care hearing took place December 15, 2014, three business days after Kipp took Landon into protective custody. *See* CP 152. Thus, as a matter of law, all of Kipp’s actions about which Carlos complained occurred in the context of an “emergent placement investigation[]” as that term is used in RCW 4.95.595.

Consequently, RCW 4.24.595(1) governs, which Carlos seemingly concedes: “Sgt. Kipp is accorded qualified immunity under ... RCW 4.24.595, which states *she should not be liable in tort absence ‘gross negligence.’*” Br. of Appellant at 40 (emphasis added). Of course, a plain reading of RCW 4.24.595(1) extends that immunity not only to Kipp, but also “[g]overnmental entities” like the City. RCW 4.24.595(1). Yet puzzlingly, Carlos precedes this concession with his main argument: Kipp and the City are liable under ordinary negligence law. *See* Br. of Appellant at 25-39. For support, Carlos relies on RCW 26.44.050, which this Court held to impose an actionable duty on law enforcement to reasonably investigate allegations of child abuse, and from which liability arises if a

harmful placement decision occurs as a result thereof. *McCarthy v. Clark County*, 193 Wn. App. 314, 328, 376 P.3d 1127 (2016). While *McCarthy* embraced the duty to reasonably investigate charges of child abuse and neglect as found in RCW 26.44.050, the facts of that case took place in the mid-2000s, long before the legislature passed ESSB 6555 in 2012. *See McCarthy*, 193 Wn. App. at 319-27. As such, the *McCarthy* court had no reason to consider RCW 4.24.595, leaving no surprise that the statute was not cited anywhere in the opinion.

Consequently, the entire premise underlying the majority of Carlos’s appeal—that proof of ordinary negligence is sufficient to overturn summary judgment—collapses and must be rejected. Rather, as a matter of legislative directive, Kipp and the City “are not liable in tort for any of their acts or omissions” so long as the “act or omission [is not] gross negligence.” RCW 4.24.595(1). When that standard is properly understood in the context of emergent placement investigations and in conjunction with Washington’s public policy as announced in corresponding statutes, it becomes clear that Kipp exercised the minimum amount of care needed to invoke the statutory immunity.

2. As directed by the legislature, the standard of care in emergent placement investigations must err on the side of protecting the child's safety over conflicting interests of parents.

The term “gross negligence” is undefined in RCW 4.24.595. Carlos accurately quotes *Nist v. Tudor*, 67 Wn.2d 322, 407 P.2d 798 (1965), as setting forth Washington’s common law definition, which is the “failure to exercise slight care,” or “negligence substantially or appreciably greater than ordinary negligence.” *Id.* at 330-31. He then argues based on *Nist* and *Brewer v. Copeland*, 86 Wn.2d 58, 542 P.2d 445 (1975), that the same acts and/or omissions he contends were simple negligence are sufficient to allow “a jury [to] find Kipp was grossly negligent.” Br. of Appellant at 40. Carlos is wrong, as confirmed by the very case he cites for support. *Brewer*, 86 Wn.2d at 72 (affirming trial court’s conclusion that defendant committed ordinary negligence, but that the same evidence was insufficient to prove gross negligence). Simply put, ordinary negligence is patently insufficient to prove gross negligence.

Contrary to Carlos’s attempt to equate ordinary negligence and gross negligence, *Nist* instructed that gross negligence is lacking absent “substantial evidence of serious negligence” that must “be directly related to the hazards of the occasion in which it is invoked.” *Nist*, 67 Wn.2d at 330, 332. *Nist* provided an example: a playful shove at ground level might be viewed as negligent, but that same shove done high atop a skyscraper

under construction “becomes an act of the grossest negligence.” *Accord id.* at 330-31.

To this end, what the legislature wrote in the same bill when it enacted RCW 4.24.595 is instructive:

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

LAWS OF 2012, ch. 259, § 14, *codified at* RCW 26.44.280 (emphasis added). Because RCW 4.24.595 and RCW 26.44.280 “relate to the same ... thing,” they “should be read together as constituting one law.” *Champion v. Shoreline Sch. Dist.*, 81 Wn.2d 672, 674, 504 P.2d 304 (1972). This means the court cannot read RCW 4.24.595 divorced from the legislature’s declared public policy that “the child’s health and safety interests prevail over conflicting legal interests of a parent.” RCW 26.44.280. *Accord State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts presume all words in a statute have meaning).

Applied here, RCW 26.44.280 becomes the lens through which the question of gross negligence must be viewed in relation to *Nist’s* instruction to “look to the hazards of the situation confronting the actor” whenever deciding gross negligence. *Nist*, 67 Wn.2d at 331. In other

words, RCW 26.44.280 clarifies that “the hazards of the situation confronting the actor,” *Nist*, 67 Wn.2d at 331, are greater when one places the “legal interests of a parent” above “the child’s health and safety,” RCW 26.44.280. Therefore, the official conducting the emergent placement investigation must necessarily resolve doubts in favor of the protecting the child’s safety, even if it means going against “conflicting legal interests of a parent.” RCW 26.44.280. When Kipp’s actions are viewed through this lens, her actions come nowhere near gross negligence.

3. Proper application of the gross negligence standard confirms statutory immunity here.

Significantly, this Court has already examined allegations of gross negligence in the context of police investigation and concluded that a “failure to more thoroughly investigate” an alleged incident “falls short of ‘negligence substantially and appreciably greater than ordinary negligence.’” *Kelley v. Dep’t of Corr.*, 104 Wn. App. 328, 336, 17 P.3d 1189 (2000) (emphasis added) (quoting *Nist*, 67 Wn.2d at 331). In *Kelley* an offender (Ingalls) was released from prison to community custody status after serving time on a rape conviction. *Id.* at 330. Part of the conditions of release required that Ingalls “be home between 11:00 P.M. and 7:00 A.M.” *Id.* Two incidents occurred while Ingalls was on community custody status that were raised by the plaintiff in *Kelley*, but the more notable incident occurred when Ingalls was arrested “for entering

an occupied motel room” and then subsequently “attempt[ing] to escape from the police car.” *Id.* at 330-31. The motel incident occurred shortly before 1:00 A.M., which meant Ingalls had violated curfew. *Id.* at 331. The community corrections officer (CCO) did not believe he was able to take action against Ingalls because when he called the local police to inquire about the incident, he was told it occurred “Sunday morning.” *Id.* The officer conducted no further follow up, and one month later, Ingalls assaulted and attempted to rape the plaintiff. *Id.*

Citing DOC’s identical statutory immunity absent proof of gross negligence, *see* RCW 9.95.204(4), this Court affirmed summary judgment for the State. *Id.* at 332, 337-38. This Court noted that “[c]ertainly, [the CCO] *could have more carefully investigated* the motel incident” besides simply “call[ing] the [local] police and then ask[ing] a DOC hearings officer whether Ingalls’ crimes violated his community custody status.” *Id.* at 335-36 (emphasis added). Noting that “a jury could easily find that [the CCO] was negligent in failing to discover the actual time of the motel incident, which would have provided grounds for arrest,” the State was still immune because the CCO’s “*failure to more thoroughly investigate the motel incident falls short of ‘negligence substantially and appreciably greater than ordinary negligence.’*” *Id.* at 336 (emphasis added) (quoting *Nist*, 67 Wn.2d at 331); *accord O’Connell v. Scott Paper Co.*, 77 Wn.2d

186, 189, 460 P.2d 282 (1969) (holding a jury could find defendant's actions to be negligent, but that "the record fails to disclose sufficient direct or inferred evidence to support a jury finding of negligence substantially and appreciably greater than ordinary negligence").

A similar result was reached in *Whitehall v. King County*, 140 Wn. App. 761, 167 P.3d 1184 (2007). In *Whitehall* the offender was on probation for theft when, in an effort to please his girlfriend, he set an explosive on the plaintiff's doorknob, which blew up in the plaintiff's hand after she picked it up. *Whitehall*, 140 Wn. App. at 764-65. The offender was arrested, and subsequently his house was searched during which police "found the remains of a marijuana grow operation and a number of guns," all of which violated the offender's probation. *Id.* at 765. The plaintiff sued the County, but this Court affirmed summary judgment for the County. *Id.* at 765, 769-70. Noting that a duty to refrain from gross negligence did not require periodic searches of the offender's property, which would have resulted in a probation violation and prevented the plaintiff's injury, the court agreed that the failure to more fully investigate and supervise the offender fell short of the gross negligence needed to overcome immunity. *Id.* at 769-70.

Kipp's investigation was more thorough than those in *Kelley* and *Whitehall*. To this end, nothing in the record disputes what Kipp was told

before she concluded that Landon was in imminent danger. Kipp was told by fellow law enforcement and/or government officials that (a) Carlos lied to CCSO deputies to visit Tara (CP 270-71, 287-88, 340), (b) witnesses signed sworn statements accusing Carlos of intentionally concealing evidence detrimental to Tara's defense (CP 245-48); (c) Carlos had previously disobeyed a directive from DSHS/CPS to not allow Tara to communicate with Landon (CP 524); (d) Carlos told the Court one day that he would protect Landon from Tara (CP 109-10, 138-39) only to reverse course a few days later and declare that he "want[ed] her in our son's life" (CP 38, 295-97); and (e) Carlos lied on December 10 saying he was in North Carolina when he was actually in Vancouver (CP 300, 345-48). It is also undisputed that DSHS took the lead in attempting to locate Tara (as was customary), but was unable to do so. CP 284, 305.

On this information, Kipp had probable cause to believe that Carlos was neglecting Landon such that Landon could be injured if he was not taken into custody.⁸ Carlos argues, however, that Kipp should have

⁸ Carlos suggests that he could not have committed neglect because he was not Landon's abuser. *See* Br. of Appellant at 26, 30. Such an argument is unsupported by Washington law. Neglect of a child includes, among other things, "the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child." RCW 26.44.020(1). The Supreme Court held that courts may consider a parent's willingness to maintain a relationship with and expose a child to a known abuser as evidence of whether the child can be safely placed with the parent. *In re Dependency of D.L.B.*, 186 Wn.2d 103, 124-25, 376 P.3d 1099 (2016). In *D.L.B.*, the challenged evidence concerned the mother's willingness to expose the child to domestic abusers, where there was no evidence that they had abused the child. The Court noted that although being a domestic

more thoroughly investigated prior before taking Landon into custody. *Whitehall* and *Kelley* confirm that such an argument falls short of gross negligence. Examining Carlos's specific arguments confirms as much.

First, Carlos claims that Kipp engaged in "speculation" that could have been dispelled had she spoken to Carlos and believed him. *See* Br. of Appellant at 32-34. But critically, he does not dispute *that* Kipp was told what she was told, only the *veracity* of what Kipp was told. Thus, in Carlos's view, a jury should decide whether what Kipp was told was true, namely that he intended to expose Landon to Tara, whether he was lying when he spoke to Hoffman, and whether Tara was near the destination where Carlos was allegedly heading when Kipp took Landon into custody on December 10, 2014. But whether Carlos' post hoc explanations are more believable than the witnesses who supplied information to Kipp is not the salient question. Rather, the proper inquiry is whether Kipp acted grossly negligent by believing the information with which she was provided. On this point, the law does not agree with Carlos. Police investigation revolves around the concept of probable cause, which by its

violence victim is not evidence of parental deficiency, *see* RCW 26.44.020(17), evidence of the willingness to expose the child to a known abuser can be considered when assessing the child's welfare. *Id.* at 124-25; *accord Burke v. Alameda County*, 586 F.3d 725, 731-33 (9th Cir. 2009) (officer acted reasonably in removing minor from mother's custody when mother repeatedly denied sexual abuse by father). Far more concerning than the facts in *D.L.B.*, Kipp faced a situation in which there was probable cause to believe Carlos was going to expose Landon to a woman who had *already* abused the boy by breaking all four of his limbs.

very nature “does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports” the existence of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 121, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), *quoted and followed in State v. K.K.H.*, 75 Wn. App. 529, 535, 878 P.2d 1255 (1994). Further, law enforcement officers are entitled to rely on what fellow officers and government witnesses tell them in developing cause to take police action. *State v. Maesse*, 29 Wn. App. 642, 646-48, 629 P.2d 1349 (1981). And as the United States Supreme Court recently confirmed, an officer is not obligated to believe a suspect’s account over conflicting evidence—even in the context of summary judgment. *Dist. of Columbia v. Wesby*, 583 U.S. , 138 S. Ct. 577, 588, 199 L. Ed. 2d 453 (2018) (courts must refrain from any “divide-and-conquer analysis” when assessing reasonableness of police action) (citation and internal quotation marks omitted). Consequently, whether Carlos actually intended put Landon in Tara’s presence would not affect the outcome of this litigation, thereby rendering it immaterial for purposes of summary judgment. *Thun v. City of Bonney Lake*, 3 Wn. App. 2d 453, 459, 416 P.3d 743 (2018). Rather, the dispositive question is whether Kipp was grossly negligent by relying on

what her colleagues told her over what Carlos *would have* told her. The answer to that question is a resounding “no.”

Courts from other jurisdictions that have considered similar qualified immunity statutes have consistently granted the immunity when an official relies on information from a known informant over the plaintiff’s allegations. *E.g.*, *Doe v. Russell County Sch. Bd.*, 292 F. Supp. 3d 690, 716 (W.D. Va. 2018) (rejecting claim of gross negligence when teacher “undertook some degree of care, however slight”); *Estate of Hammerly v. Wis. County Mut. Ins. Corp.*, 811 N.W.2d 878, 885-86 (Wis. Ct. App. 2012) (upholding summary judgment in lawsuit against social worker alleged to have deficiently investigated man’s schizophrenia who later murdered plaintiff’s mother and nephew, concluding “failure to learn additional details” was insufficient as a matter of law to amount to gross negligence); *Brownell v. LeClaire*, 948 N.Y.S.2d 168, 170-71 (N.Y. App. Div. 2012) (no gross negligence when police relied on evidence corroborating plaintiff’s guilt over evidence negating it); *Cullison v. City of Peoria*, 584 P.2d 1156, 1158-59 (Ariz. 1978) (upholding summary judgment for city because allegations that officer should have believed plaintiff over victim fell short of gross negligence). In short, the law does not permit a finding of gross negligence when an officer believes known witnesses over a person charged with crimes of dishonesty.

Carlos's other arguments are equally unavailing. He speculates that Kipp could "have attempted to have White Salmon police contact Tara" or "called the telephone number of Tara's aunt and uncle." Br. of Appellant at 20. But Carlos failed to offer any evidence to dispute Kipp's statement in her declaration that "CPS was to take the lead in attempting to locate Tara Mendoza," and "DSHS/CPS was unable to confirm Tara Mendoza's whereabouts at any time on December 10, 2014." CP 284. More fundamentally, it is just that—speculation—that contacting White Salmon police and calling Tara's aunt and uncle would have confirmed Tara's whereabouts at a location far away from where Carlos was driving. Speculation cannot preclude summary judgment. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012).

Carlos also claims gross negligence exists because he accuses Kipp of providing "false statements to [Deputy] McCarthy." Br. of Appellant at 40. This ignores the fact that the affidavit was undisputedly a "draft" and "[in]complete" because McCarthy stopped preparing it when Carlos "got in his car and dr[o]ve away." CP 350. McCarthy even points out that he never had the opportunity to verify the accuracy of what he had written. *Id.* The draft affidavit exists in the record solely to document that there was insufficient time to complete the process of obtaining judicial approval in advance. It is not evidence of gross negligence.

Finally, Carlos argues that Kipp “should have continued her investigation” once she noticed that Tara Mendoza was not in Carlos’s vehicle when she pulled up alongside him on Interstate 84. Br. of Appellant at 33-34. In essence, Carlos contends that because Tara was not inside Carlos’s vehicle at that exact moment, Kipp should have concluded that there was no way that Carlos could have put Landon in Tara’s presence. This argument ignores the simple reality that vehicles are mobile, capable of transporting humans distances much longer than what would be possible without them. In other words, whether a child abuser sits inside of a vehicle with her victim or whether the vehicle is transporting that victim to the child abuser at a different location, the risk of imminent danger remains the same. And as a matter of law, criticizing Kipp for failing to take additional investigative steps is the exact argument both *Kelley* and *Whitehall* found to be insufficient to raise a genuine issue as to gross negligence. *Whitehall*, 140 Wn. App. at 769-70; *Kelley*, 104 Wn. App. at 336.

Additionally, federal standards rebuke Carlos’s claim entirely:

The key point is that once the decision to remove the child has been made, the action should be carried out expeditiously.

....

Debating the situation with the parent or caretaker only raises the emotional level of the child. Such arguments may

cause the child to become more nervous, upset, distraught, and emotionally unstable.

U.S. DEP'T OF JUSTICE, *Law Enforcement Response to Child Abuse*, at 15 (March 2001), available at <https://www.ncjrs.gov/pdffiles/162425.pdf>; see also *id.* at 13 (“[I]f a mistake is to be made, it is better to err in the attempt to safeguard the physical well-being of the child.”). Thus, Kipp’s actions were fully consistent with national standards because they preserved Landon’s physical well-being, while enabling DSHS to more thoroughly investigate while Landon was in shelter care. The federal standard is consistent with Washington’s policy to protect the child’s safety over conflicting interests of the parents. RCW 26.44.280. Kipp cannot be grossly negligent for acting exactly how national standards dictate.

And finally, wholly undermining Carlos’s arguments is the fact that Commissioner Schienberg *agreed* with Kipp’s conclusion that Carlos posed an imminent risk to Landon. CP 187. Even *after* Carlos was afforded an opportunity to tell his side of the story, Commissioner Schienberg concluded that Carlos “pose[d] an imminent risk to the child.” *Id.*; see also CP 176 (“The child is in imminent risk if placed with [Carlos] because of what has gone on. In terms of the safety plan I don’t believe he will keep this child safe.”). It is undisputed that Landon was outside Carlos’s care between December 10, 2014, and Commissioner Schienberg’s oral ruling on February 17, 2015, which was memorialized

on March 16, 2015. If Carlos posed an imminent risk to Landon as of February 17, 2015, after Landon had been outside his care for two months, then he most certainly posed the exact same risk two months earlier when Landon was in Carlos's care. As a matter of law, Kipp cannot be deemed "grossly negligent" for taking action consistent with a judge's ultimate conclusion.⁹

At best, Carlos has advanced only "allegation[s], supported by nothing more substantial than argument"; as a matter of law, such is "insufficient" to overcome summary judgment when gross negligence is required to sustain liability. *Boyce v. West*, 71 Wn. App. 657, 666, 862 P.2d 592 (1993); *see also Youngblood v. Schireman*, 53 Wn. App. 95, 109-10, 765 P.2d 1312 (1988) (delay in transporting plaintiff to hospital not

⁹ Mendoza also resurrects an argument of semantics, stressing that there is a marked difference between wanting to "reunite the family" and "facilitate reunifications of the relationships," meaning that Kipp was deceptive by claiming Carlos wanted to reunite Landon and Tara. *See* Br. of Appellant at 14, 30. This argument is without merit. Carlos ignores that Kipp *did* provide a full quote of the December 8 motion in her report. CP 291. More fundamentally, as Commissioner Schienberg rightly concluded in rejecting this same attempt at creative linguistics, it is a distinction without a difference:

[T]he plain language of the declaration states that the purpose of the motion was for reunification between all parties and *specifically to enable the alleged perpetrator of the assault to have access to that child.... That's what it says. I don't care where you put the period.* You can dissect it any way you want, certainly ... counsel [for Carlos] did, but that's what it said and that's what was admitted into evidence and that's what he signed.

CP 168 (emphasis added). In any event, Kipp cannot be deemed grossly negligent for interpreting the phrase "facilitate reunification of the relationships" in the way she did given that a sitting judicial officer viewed the language the same way.

gross negligence). This means, as a matter of statutory law, Kipp and the City “are not liable in tort.” RCW 4.24.595(1). That ends this case.

B. Any attempt to negate Washington law in favor of Oregon law disregards proper choice of law principles and should be rejected.

Perhaps recognizing his inability to prove gross negligence, Carlos argues that RCW 4.24.595 is unavailable because Kipp was in Oregon when she took Landon into protective custody. Significantly, Carlos never attempted any choice of law analysis either to the trial court or here. If Oregon law governed (as Carlos suggests), Carlos would not be able to sue Kipp individually at all, OR. REV. STAT. [ORS] § 30.265(2), and Carlos’s claims against the City would be subject to immediate dismissal because no tort claim was filed within 180 days of the incident, ORS § 30.275(2)(b); *Edwards v. State*, 175 P.3d 490, 495-96 (Or. Ct. App. 2007); *see also* CP 355-56 (noting tort claim was not filed until May 9, 2016). Stated more succinctly, if Oregon law controls, Carlos’s claim “is barred by the notice and statute of limitations provisions of the OTCA.” *Edwards*, 175 P.3d at 496.

But a choice of law analysis is necessary to deviate from the presumption that Washington law applies in full. *See Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007). And a proper analysis would lead to the conclusion that Washington law still controls

because it has the “most significant relationship” to the underlying events. *Seizer v. Sessions*, 132 Wn.2d 642, 650, 940 P.2d 161 (1997). The majority of Kipp’s acts and omissions about which Carlos complains—reviewing the motions filed by Carlos, communicating with Hoffman, and attempting to get a warrant—all undisputedly occurred in Washington, and RCW 4.24.595 extends to “any ... act[] or omission[] in emergent placement investigations of child abuse or neglect.” RCW 4.24.595(1).

Apparently, Carlos desires to proceed under an amalgamation of the most beneficial components of Washington and Oregon law while discarding those portions not favorable to his position. No authority supports such a protocol, and Carlos cites none, meaning “the court ... may assume that counsel, after diligent search, has found none.” *De Heer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

As such, absent a convincing choice of law analysis as to why Oregon law controls (which Carlos does not attempt), Washington law—including RCW 4.24.595(1)—governs.

C. To the extent analyzing the mutual assistance interlocal agreement is necessary to decide the false imprisonment claim, it authorized Kipp’s actions as a matter of law.

As stated, RCW 4.24.595 absolves Kipp and the City of any tort liability for “any ... act[] or omission[]” absent gross negligence, which negates the need to analyze the elements of the causes of action alleged.

(Emphasis added). Thus, it is not necessary to consider Carlos's alternative argument: that Kipp was powerless to take Landon into protective custody once Carlos crossed into Oregon, and as such committed the tort of false imprisonment when she did so.

But if the Court is inclined to consider the merits of Carlos's argument, it would look to the language of the interlocal agreement (ILA). CP 309-38. When a contract's language is unambiguous, the court decides its meaning as a matter of law. *Dice v. City of Montesano*, 131 Wn. App. 675, 687, 128 P.3d 1253 (2006).

The pertinent contractual language states:

The parties agree to cross-commission or specially commission each other's full time, fully compensated peace or police officers who (i)(a) *are assigned to special law enforcement units*, as defined in paragraph 1(o), or (b) are assigned to patrol units and engaged in fresh pursuit, as defined in paragraph 1(f), (ii); are eligible for cross-commissioning or special commissioning under applicable laws; (iii) meet or exceed all training and education standards or requirements of the Oregon Department of Public Safety Standards and Training or the Washington Criminal Justice Training Commission; and (iv) are in good standing with their employing agency.

CP 314. "[S]pecial law enforcement units" are defined to include "specialized investigative or enforcement units [which] includes: detective units or divisions." CP 311. Section 2(d)(iii) then specifies what Washington specialty officers must do when performing law enforcement activities in the jurisdiction of an Oregon city member to the agreement:

Officers who are cross-commissioned or specially commissioned under the agreement, in addition to abiding by any limitations or satisfying any additional training requirements of the agency with primary geographic or territorial jurisdiction, shall:

- Abide by all state, federal and local law applicable to the agency with primary geographic or territorial jurisdiction;
- Exercise law enforcement powers under their commissions and on behalf of the agency with primary or territorial jurisdiction only when on duty with their employing agency and not when off duty or privately employed;

....

- Report their presence, in person or by radio or by telephone, to the authorized representative of the agency with primary geographic or territorial jurisdiction;
- Immediately report any arrest, search, seizure or use of force in person to the authorized representative of the agency with primary geographic or territorial jurisdiction.

CP 315. Much of Carlos's brief is a strawman, identifying as many provisions of the agreement as possible that do not specifically apply to Kipp's actions. *See* Br. of Appellant at 42-49. For example, Carlos ignores the foregoing substantive provisions of the agreement in favor of parsing words from the introductory clause stating the Agreement's purpose. *Id.* at 42. The law does not condone reading clauses in isolation, but rather demands that all provisions be considered as a whole. *Stender v. Twin City*

Foods, 82 Wn.2d 250, 254, 510 P.2d 221 (1973). Despite Carlos’s arguments to the contrary, so long as Kipp was a member of a “specialty law enforcement unit” and followed all four of the requirements set forth above, she was authorized to take law enforcement action in Portland.

Building off the mistaken belief that Kipp needed to be employed by both Vancouver and Portland simultaneously, Carlos argues, without citation, that “[t]here is no claim by Sgt. Kipp that on December 10, 2014 she was designated by PBB¹⁰ [sic] or acting *in Oregon* as a special deputy assigned to a ‘special law enforcement unit’ *in Oregon*.” Br. of Appellant at 42. The Court should reject Carlos’s attempt to inject the word “Oregon” into Section 2(d), because “[c]ourts do not have the power, under the guise of interpretation, to rewrite contracts.” *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955). The ILA does not say that Kipp had to be assigned to an *Oregon* special law enforcement unit. Rather, so long as Kipp was in a *Vancouver* special law enforcement unit, she could invoke Section 2(d). She was. Kipp further made clear in her unrefuted declaration that detectives and sergeants at the Children’s Justice Center fit the definition of a special law enforcement unit. CP 285. Not one piece of evidence proffered by Carlos conflicts with Kipp’s declaration, meaning Kipp’s testimony on this point is “considered to have been

¹⁰ Mendoza presumably intends to use the acronym for the Portland Police Bureau (PPB).

established.” *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). As a matter of law, Kipp was a member of a “special law enforcement unit.”

Thus, she was entitled to “[e]xercise law enforcement powers” in Portland. CP 315. Kipp was certainly “on duty” on December 10, 2014, and the record is devoid of anything suggesting that Kipp violated Oregon law. Additionally, Kipp undisputedly announced her presence through radio communication with PPB and reported to the Portland officers on scene that she was taking Landon into protective custody, as Carlos’s evidence confirms. CP 442. In addition, PPB officers assisted Kipp in taking Landon into protective custody. CP 445-46. In short, Kipp complied with every condition specified in the ILA.

Carlos’s tries to circumvent the foregoing by pointing to a segment of Kipp’s deposition in which Kipp denied that her actions were done “under the authority of [her] commission through Multnomah County.” Br. of Appellant at 45-46. This effort fails for two reasons. First, Kipp testified that her authority originated from “Washington working jointly with our interlocal agency with the authorities in the state of Oregon” as a result of a “mutual aid” agreement. CP 537-38. Given Vancouver’s proximity to Oregon, it is not surprising that Kipp had acted pursuant to this agreement multiple times before. CP 541, 544. Thus, Kipp’s reference

to the ILA was accurate—as a detective-sergeant with the CJC, she could take law enforcement action related to investigating child abuse while across the river in Portland.

Second, and more fundamentally, Washington courts (and all others, for that matter) have long held an officer’s subjective reasons for taking law enforcement action are irrelevant; what matters is whether the actions are objectively justified. *State v. Morse*, 156 Wn.2d 1, 5, 123 P.3d 832 (2005). A lone exception is Washington’s prohibition of pretextual stops, which are prohibited under article I, section 7 of the State Constitution. *E.g.*, *State v. Chacon Arreola*, 176 Wn.2d 284, 296-97, 290 P.3d 983 (2012). This exception has no relevance here because (a) Washington does not recognize a free-standing cause of action under the state constitution, *Blinka v. WSBA*, 109 Wn. App. 575, 590-91, 36 P.3d 1094 (2001), and (b) even if such a cause of action did exist, Carlos never alleged one, let alone that Kipp’s stop was pretextual. *See* CP 1-12. Thus, Kipp’s belief as to where her authority originated from is irrelevant.

Because Kipp was “acting pursuant to a mutual law enforcement assistance agreement,” Oregon law therefore entitled her to exercise “any authority” vested by her Washington commission “throughout the territorial bounds of Oregon.” OR. REV. STAT. § 190.472. One such “authority” is her ability under RCW 26.44.050 to take a neglected child

into protective custody. *See State v. G.A.H.*, 133 Wn. App. 567, 578, 137 P.3d 66 (2006). And because Kipp’s “commission vests” her with that authority, Oregon law enabled her to do so “throughout the territorial bounds of Oregon” provided that she “[wa]s acting pursuant to a mutual law enforcement assistance agreement,” OR. REV. STAT. § 190.472. As shown above, she was as a matter of law.

Carlos argues, however, that because the ILA does not specifically cite RCW 26.44.050, Kipp could not utilize that statute in Oregon to take Landon into protective custody. Br. of Appellant at 48. Carlos cites no authority for this proposition, which means the court can assume Carlos and his counsel found no such authority “after diligent search.” *De Heer*, 60 Wn.2d at 126. Further, this argument ignores the broad language that was used for specialty law enforcement units, which included detectives, to “[e]xercise *law enforcement powers under their commissions.*” CP 303 (emphasis added).

In sum, Kipp was authorized by the ILA, and consequently Oregon law, to take Landon into protective custody. Because Kipp had “authority of law” to take Landon into protective custody, the false imprisonment claim collapses and fails.

D. The outrage claim cannot exist independently of RCW 4.24.595, but even so, it still fails here.

Finally, Carlos claims the outrage claim survives dismissal. Br. of Appellant at 52. Outrage requires evidence of severe emotional distress. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 872-74, 324 P.3d 763 (2014). The City and Kipp shifted the burden to Carlos to produce evidence of that essential element. CP 389; *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). Nothing Carlos filed suggested that he suffered severe emotional distress. *See* CP 401-11. Thus, even if RCW 4.24.595 did not abolish the tort, Carlos still had insufficient evidence to establish outrage. *Sutton*, 180 Wn. App. at 872-74.

V. CONCLUSION

RCW 4.24.595(1) precludes Carlos's lawsuit from advancing past summary judgment absent proof of gross negligence. His failure to adduce sufficient evidence meeting that threshold means that the City and Kipp "are not liable in tort." *Id.*

The trial court should be affirmed in its entirety.

CERTIFICATE OF SERVICE

The undersigned declares that on or before the date below, I electronically filed the foregoing document via the Washington Courts Appellate e-Filing system, which will send notification to each and every attorney of record herein, as identified below:

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DATED on September 13, 2018.

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APPENDIX A – WASHINGTON STATUTES

Former RCW 4.24.595, amended by LAWS OF 2017, ch. 6, § 301 -- Liability immunity—Emergent placement investigations of child abuse or neglect—Shelter care and other dependency orders.

(1) Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

(2) The department of social and health services and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of social and health services are entitled to the same witness immunity as would be provided to any other witness

RCW 26.44.050—Abuse or neglect of child—Duty of law enforcement agency or department of children, youth, and families—Taking child into custody without court order, when

Except as provided in RCW 26.44.030(11), upon 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, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child

RCW 26.44.280 – Liability limited.

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

APPENDIX B – OREGON STATUTES

OR. REV. STAT. § 30.265(2) – Scope of liability of public body, officers, employees and agents; liability in nuclear incident.

(2) The sole cause of action for a tort committed by officers, employees or agents of a public body acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287 is an action under ORS 30.260 to 30.300. The remedy provided by ORS 30.260 to 30.300 is exclusive of any other action against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action. No other form of civil action is permitted.

OR. REV. STAT. § 30.275(2)(b) – Notice of claim; time of notice; time of action.

(1) No action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300 shall be maintained unless notice of claim is given as required by this section.

(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

(a) For wrongful death, within one year after the alleged loss or injury.

(b) For all other claims, within 180 days after the alleged loss or injury.

OR. REV. STAT. § 190.472 – Mutual interstate law enforcement assistance agreements.

A full-time, fully compensated police officer commissioned by the State of Washington, Idaho or California or any full-time, fully compensated police officer commissioned by a unit of local government of the State of Washington, Idaho or California may exercise any authority that the officer's commission vests in the officer throughout the territorial bounds of Oregon 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.

VANCOUVER CITY ATTORNEY'S OFFICE

September 13, 2018 - 4:16 PM

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