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

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KYLE P. KEELY, individually and as the natural father and guardian of  
M.K. a minor,

Respondent/Plaintiff,

v.

STATE OF WASHINGTON,

Appellant/Defendant.

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**APPELLANT'S OPENING BRIEF**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ASSIGNMENT OF ERROR.....3

III. STATEMENT OF ISSUES ON APPEAL.....3

IV. STATEMENT OF THE CASE .....5

    A. The Department Did Not Receive Any Reports Alleging M.K. Was a Subject of Abuse or Neglect From the Time of His Birth Until He Was Assaulted Approximately Nine Months Later .....5

    B. Facts Prior to the Birth of M.K. ....8

    C. The June 10, 2011, Referral .....10

    D. Procedural history .....11

V. ARGUMENT .....11

    A. Standard of Review .....13

    B. Dismissal on Summary Judgment Is Warranted Because the Plaintiff Failed to Show the Department Owed M.K. a Duty When the Department Never Received a Referral Alleging M.K. Was Being Subjected to Abuse and/or Neglect .....13

        1. The duty to investigate child abuse or neglect under RCW 26.44.050 is triggered by a referral regarding the child, and no such duty was triggered regarding M.K. ....14

        2. The May 2010 and June 2011 referrals made prior to M.K.’s birth did not trigger any duty owed to M.K. ....16

    C. Plaintiff’s Arguments Below that a Duty Under RCW 26.44.050 Was Triggered in This Case are Unavailing .....20

1.	<i>Linnik</i> shows the legislative intent of RCW 26.44.050 does not create a duty here .....	20
2.	RCW 26.44.050 does not create an implied duty to all children either .....	21
3.	<i>Boone</i> does not create a duty owed to M.K.....	23
4.	<i>Lewis v. Whatcom County</i> does not establish a duty under RCW 26.44.050 being triggered in this case.....	24
5.	The Department’s duty to conduct a reasonable investigation does not include a duty to monitor a family after the completion of an investigation.....	25
	a. Department monitoring of a family after an investigation is completed would violate the family’s constitutional rights .....	26
	b. Negligent monitoring of participation in voluntary services is not cognizable under the negligent investigation cause of action .....	26
	c. Voluntary services offered to M.K.’s mother were not part of the Department’s investigation or placement determination in 2010.....	29
6.	Summary judgment is proper because a medical malpractice decision does not create a duty owed to M.K. in this case.....	30
7.	<i>In re Welfare of Frederiksen</i> also does not create a duty owed to M.K.....	31
D.	Summary Judgment Is Warranted Because No Common Law Duty was Triggered Based on the Facts of This Case .....	32
E.	Summary Judgment Is Warranted Because Plaintiff Cannot Establish Proximate Cause Under the Facts of This Case.....	35

1.	It is speculative to claim that if the Department had acted differently prior to M.K.'s birth he would not have been harmed .....	38
2.	Plaintiff's claims also fail on proximate cause because Washington's dependency statutes significantly limit the Department's ability to remove a child from his or her parents' care .....	40
a.	Summary judgment is proper because Plaintiff failed to create a question of fact regarding whether there was a factual basis to remove M.K. from the home.....	43
b.	Summary judgment is proper because there is no evidence in the record that a judicial officer would have ordered M.K. removed from the home.....	44
c.	Summary judgment remains proper even if M.K. had been removed from his mother's care.....	45
d.	Summary judgment is also proper because M.K.'s assault was not foreseeable.....	46
3.	Legal causation is lacking as well .....	46
VI.	CONCLUSION .....	48

## TABLE OF AUTHORITIES

### Cases

<i>1000 Friends of Wash. v. McFarland</i> , 159 Wn.2d 165, 149 P.3d 616 (2006).....	31
<i>Albertson v. Pierce Cty.</i> , No. 71317-5-I, 2015 WL 783169 (Wash. Ct. App. Feb. 23, 2015) .....	passim
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	23
<i>Boone v. Dep’t of Soc. &amp; Health Servs</i> , 200 Wn. App. 723, 403 P.3d 873 (2017) .....	16, 17, 19, 20, 23, 24
<i>Braegelmann v. Snohomish Cty.</i> , 53 Wn. App. 381, 766 P.2d 1137 (1989) .....	35
<i>C.L. v. Dep’t of Soc. &amp; Health Servs.</i> , 200 Wn. App. 189, 402 P.3d 346 (2017) .....	32, 34, 35
<i>Cedar River Water &amp; Sewer Dist. v. King Cty.</i> , 178 Wn.2d 763, 315 P.3d 1065 (2013).....	31
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	13
<i>Estate of Bordon v. Dep’t of Corr.</i> , 122 Wn. App. 227, 95 P.3d 764 (2004) .....	36, 39, 42
<i>Estate of Linnik v. State ex rel. Dep’t of Corr.</i> , No. 67475-7-I, 2013 WL 1342316 (Wash. Ct. App. Apr. 1, 2013) .....	17, 19, 20, 21, 24
<i>Gardner v. Seymour</i> , 27 Wn.2d 802, 180 P.2d 564 (1947).....	36
<i>Gausvik v. Abbey</i> , 126 Wn. App. 868, 107 P.3d 98 (2005) .....	42
<i>Harbeson v. Parke–Davis, Inc.</i> , 98 Wn.2d 460, 656 P.2d 483 (1983).....	30
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	35, 37, 46, 47
<i>HBH v. State</i> , 197 Wn. App. 77, 387 P.3d 1093 (2016) .....	32, 33, 34, 35
<i>In re Dependency of M.S.D.</i> , 144 Wn. App. 468, 182 P.3d 978 (2008) .....	44
<i>In re Welfare of Frederiksen</i> , 25 Wn. App. 726, 610 P.2d 371 (1979) .....	31
<i>Joyce v. State Dep’t of Corr.</i> , 155 Wn.2d 306, 119 P.3d 825 (2005).....	43

<i>Lewis v. Whatcom Cty.</i> , 136 Wn. App. 450, 149 P.3d 686 (2006) .....	24
<i>M.W. v. Dep't of Soc. &amp; Health Servs.</i> , 149 Wn.2d 589, 70 P.3d 954 (2003) .....	passim
<i>McBride v. Walla Walla Cty.</i> , 95 Wn. App. 33, 975 P.2d 1029 (1999) .....	13
<i>Petcu v. State</i> , 121 Wn. App. 36, 86 P.3d 1234 (2004) .....	14, 15, 28, 42
<i>Rasmussen v. Bendotti</i> , 107 Wn. App. 947, 29 P.3d 56 (2001) .....	36, 46, 47
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005) .....	28, 29
<i>Rodriguez v. Perez</i> , 99 Wn. App. 439, 994 P.2d 874 (2000) .....	15
<i>Stoot v. City of Everett</i> , 582 F.3d 910 (9th Cir. 2009) .....	42
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992) .....	36
<i>Tyner v. Dep't of Soc. &amp; Health Servs.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000) .....	14, 42
<i>Walker v. Transamerica Title Ins.</i> , 65 Wn. App. 399, 828 P.2d 621 (1992) .....	36
<i>Wallis v. Spencer</i> , 202 F.3d 1126 (9th Cir. 1999) .....	26, 47
<i>Walters v. Hampton</i> , 14 Wn. App. 548, 543 P.2d 648 (1975) .....	36, 37
<i>Washburn v. City of Federal Way</i> , 178 Wn.2d 732, 310 P.3d 1275 (2013) .....	46
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989) .....	13

**Statutes**

RCW 13.34.030(5)(b) .....	41
RCW 13.34.030(6)(b) .....	44
RCW 13.34.065(1)(a) (2008) .....	40
RCW 13.34.065(5) (2008) .....	41, 43
RCW 13.34.065(5)(f) (2008) .....	41
RCW 13.34.065(7)(a) (2008) .....	41
RCW 13.34.110 .....	41
RCW 13.34.136 .....	45
RCW 13.34.200 .....	45

RCW 26.44 .....	15, 21, 22, 26, 41
RCW 26.44.010 .....	22, 27
RCW 26.44.020(1).....	41
RCW 26.44.020(3) (2008) .....	27
RCW 26.44.020(17).....	42, 44
RCW 26.44.030(4).....	15
RCW 26.44.030(8) (2008) .....	27
RCW 26.44.030(10).....	15
RCW 26.44.030(11).....	15
RCW 26.44.030(14).....	15
RCW 26.44.050 .....	passim
RCW 26.44.195(1) (2008) .....	27
RCW 43.216.906 .....	1
RCW 74.13 .....	20
RCW 74.13.031(3).....	15

**Rules**

CR 50 .....	33
CR 54(b).....	11
CR 56(e).....	13
GR 14.1 .....	17, 18

**Other Authorities**

<i>Laws of 1987, ch. 450, §7</i> .....	13
<i>Restatement (Second) of Torts § 315(b)</i> .....	passim

## I. INTRODUCTION

The Department of Social and Health Services, now the Department of Children Youth and Families<sup>1</sup> (Department), has a statutory duty to investigate allegations of child abuse or neglect pursuant to RCW 26.44.050. The Department's duty to investigate is triggered upon its receipt of a referral alleging abuse and neglect regarding a particular child.

Washington courts have recognized a limited cause of action for negligent investigation where the Department conducts an incomplete or biased investigation that results in a harmful placement decision that improperly removes a child from a home, places a child in an abusive home, or leaves a child in an abusive home. The duty to investigate a referral does not create a cause of action on behalf of unknown, unidentified, or unborn children who might be at risk of being abused in the future.

Here, from the time M.K. was born until his teenage brother assaulted him approximately nine months later, the Department did not receive a single referral identifying M.K. as an alleged subject of abuse or neglect. Because there was no referral regarding M.K., no duty to investigate was triggered, nor could an allegedly negligent investigation

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<sup>1</sup>On July 1, 2018, the powers, duties, and functions of the Children's Administration, within the Department of Social and Health Services, were transferred to the newly formed Department of Children Youth and Families (DCYF). RCW 43.216.906. Accordingly, this briefing will refer to the agency as the Department or DCYF.

have resulted in a harmful placement for M.K. Thus, summary judgment is proper in this case.

The trial court also erred in denying summary judgment because the Department did not owe a duty to M.K. under the common law. The Department's duty to conduct a reasonable investigation of a Child Protective Services (CPS) referral is based on statute, and attempts to expand that duty have been repeatedly rejected. While the Court of Appeals recently held the Department owes a common law duty based on a special relationship with children in foster care, that newly recognized duty is under review by the Washington Supreme Court. And even if such a common law duty were upheld, no such duty was owed to M.K. because at no time was he in foster care. Therefore, there was no special relationship created between the Department and M.K. The trial court erred in failing to grant summary judgment on this basis.

Finally, Plaintiff cannot establish that the Department's alleged breach of duty was a proximate cause of M.K.'s injuries. Plaintiff cannot establish factual causation. It is simply too speculative to say that M.K. would not have been assaulted if the Department had acted differently. Public policy and common sense dictate that the Department should not be held liable for the abuse of a child when it never received a report about the child that would trigger an investigation. To comply with such a duty, the

Department would have to engage in unwarranted intrusion into the lives of families. That is not the law, nor should it be.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred in denying summary judgment because the duty owed under RCW 26.44.050 was not triggered in this case.

2. The trial court erred in denying summary judgment because there is no common law duty owed under the facts of this case.

3. The trial court erred in denying summary judgment because Plaintiff failed to create a genuine issue of fact to survive summary judgment regarding factual causation.

4. The trial court erred in denying summary judgment because Plaintiff cannot establish legal causation.

## **III. STATEMENT OF ISSUES ON APPEAL**

1 Under the RCW 26.44.050 negligent investigation cause of action, the Department's duty to investigate is triggered by its receipt of a report alleging child abuse or neglect of a particular child. Do Plaintiff's claims against the Department under this cause of action fail as a matter of law based on the absence of duty where the Department received no such report regarding M.K. from his birth through the time of his assault nine months later?

2. Under the RCW 26.44.050 negligent investigation cause of action, do referrals regarding other children create a duty owed to the unknown and/or the unborn?

3. The Washington Supreme Court is reviewing whether the Department owes a common law special relationship duty to protect foster children under *Restatement (Second) of Torts* § 315(b). Do Plaintiff's claims against the Department based on that common law duty fail as a matter of law where the Department could have had no such relationship with M.K. because he was never in foster care?

4. Do Plaintiff's claims against the Department fail as a matter of law based on the absence of cause-in-fact where the trier-of-fact would need to engage in impermissible speculation to conclude that M.K. would not have been injured "but for" the Department's alleged breach in investigating the May 2010 and June 2011 referrals?

5. Do Plaintiff's claims against the Department fail as a matter of law based on the absence of legal causation where holding the Department liable defies common sense and runs counter to public policy because the Department never received a referral identifying M.K. as a subject of abuse or neglect from the time he was born to the time he was assaulted nine months later?

#### IV. STATEMENT OF THE CASE

##### A. **The Department Did Not Receive Any Reports Alleging M.K. Was a Subject of Abuse or Neglect From the Time of His Birth Until He Was Assaulted Approximately Nine Months Later**

M.K. was born on February 22, 2012. Based on a 38-week gestational period, M.K.'s estimated due date was February 28, 2012. CP at 89. He was born at 37 weeks gestational age. CP at 90. The birth was normal. CP at 89. There is no indication in his medical provider notes that M.K. was born drug affected. CP at 89. The notes do not indicate that the hospital where M.K. was born had any concerns about M.K.'s welfare at the time of his birth. CP at 89.

Over the next nine months, medical providers saw M.K. multiple times for routine well-child checkups. The first well-child exam occurred on March 1, 2012 and was normal. CP at 89-92. The provider did not make a referral. CP at 89-92.

M.K. was seen again on March 2, 2012, to address a loss of weight. CP at 94-95. The doctor discussed feeding strategies with M.K.'s mother. CP at 94-95. The medical provider did not make a referral.

On March 5, 2012, M.K. had his two-week well-child checkup. CP at 97-99. His weight was back up and the doctor noted M.K. was in no acute distress and appeared well nourished and developed. CP at 97-99. The medical provider did not make a referral.

On March 12, 2012, M.K. had another routine health exam. CP at 101-03. The chart notes indicated M.K. was doing well. CP at 101-03. The physical exam noted M.K. was in no acute distress, was well nourished and well developed. CP at 101-03. The medical provider did not make a referral. CP at 89-92.

On April 15, 2012, M.K.'s mother took M.K. to the emergency room at Saint Joseph Medical Center for a cough. CP at 105-17. A doctor examined M.K. M.K. was released the same day. CP at 105-17. The medical provider did not make a referral

On April 23, 2012, the child underwent another routine well-child exam. CP at 119-21. The medical provider indicated in his report that M.K. was doing well and his cough was improving. CP at 119-21. The physical exam noted the child was in no acute distress, was well nourished and well developed. CP at 119-21. The medical provider did not make a referral.

On November 29, 2012, M.K.'s mother took him to another routine child health exam. CP at 123-27. The exam included a full review of the child. CP at 123-27. Exam notes do not indicate the child showed any signs of physical abuse or neglect. The exam notes do not mention any concerns about the mother's behavior or ability to parent the child appropriately. In sum, the exam records indicate the child was doing well. The provider did not make a referral.

Two days later on December 1, 2012, M.K.'s mother left M.K. with his 14-year-old brother C.J. She claims to have left the house to go to the neighbors. CP at 304-05. Sometime while M.K.'s 14-year-old brother C.J. was watching M.K., C.J. shook M.K. numerous times, causing M.K. to be hospitalized. CP at 304-05.

The Department was notified by the hospital of the incident and M.K. was removed from his mother's care while CPS investigated the matter along with law enforcement. CP at 296-309. During the course of the investigation, the Department learned that M.K.'s mother had relapsed. She claims she began using drugs sometime in the spring of 2011 and continued using up until the time of the assault. During this time, she would often leave her four children at home while she went out to do drugs. CP at 284-85. C.J. (approx. 14 years of age at the time) would be charged with watching his three younger siblings, including M.K. CP at 296-309.

C.J. had displayed having anger issues prior to his assault of M.K. CP at 296. He held a knife to the throat of his younger brother R.R, and had punched, choked, and hit his siblings. CP at 296. C.J. allegedly stated he hated M.K. and that he wished M.K. was dead. CP at 307. There is no indication that R.R.'s father or anyone else reported this information to law enforcement or made a CPS referral. CP at 307.

During the investigation of the December 2012 referral, Mr. Keely came forward as a potential father of M.K. Test results confirmed Mr. Keeley is the father of M.K. He was awarded full custody of M.K.

**B. Facts Prior to the Birth of M.K.**

M.K.'s mother had contact with the Department prior to M.K.'s birth. In 2010, the Department received three referrals regarding M.K.'s mother. The first referral alleged that C.J. (11 ½ years of age at the time) was falling asleep in class. CP at 42-46. C.J. told the teacher that his younger brother kept him up at night playing on the computer and he had to get up at 5:00 a.m. to get ready for school. CP at 42-46. The Department did not accept the referral for investigation. There were no allegations of abuse or neglect. CP at 42-46.

On May 28, 2010, the Department received a second referral. The referral alleged that M.K.'s mother was at Harborview Medical Center. Due to a domestic violence incident, she was treated for injuries. Her two children C.J. (11 ½) and R.R. (7) were left home alone while she was at the hospital. CP at 48-52. The Department accepted the referral for investigation by CPS. CP at 48-52.

While investigation of the May 28, 2010, referral was ongoing, the Department received a referral notifying it that M.K.'s mother had given birth to another child, S.R., on August 4, 2010. CP at 54-57. The mandatory

reporter explained there were no current concerns about the newborn. The mandatory reporter made the report because M.K.'s mother mentioned a history with CPS. CP at 54-57. The Department did not accept the referral for investigation. CP at 54-57.

While investigating the May 28th referral, M.K.'s mother admitted to using drugs. CP at 65-66. From 1992 to 1997, she had a history of various misdemeanor charges related to drug use, among other things. CP at 169-78. However, at the time of the investigation she had incurred no new charges since 1997 and held a full-time job working at Western State Hospital. CP at 64.

The social worker provided M.K.'s mother with the opportunity to engage voluntarily in domestic violence services, group therapy, and drug and alcohol treatment. CP at 67. M.K.'s mother agreed and participated in the services. CP at 67.

By December 10, 2010, the Department completed its investigation regarding the May 28, 2010, referral. CP at 59-68. In the investigative assessment drafted at the conclusion of the investigation, the social worker noted M.K.'s mother had participated in domestic violence services, group therapy, and drug and alcohol treatment. CP at 59-68. The Department's social worker determined that she was protective of her children. The investigator also concluded that she had neglected her two sons, C.J. and

R.R., by leaving them alone without a safety plan in case R.R. had an issue with his asthma. CP at 59-68. There is no evidence M.K.'s mother continued to engage in the services after the conclusion of the investigation in December 2010.

**C. The June 10, 2011, Referral**

On June 10, 2011, the Department received a referral from a person living in Texas. CP at 70-76. The referent stated that during a phone conversation, M.K.'s mother had been slurring her words, claiming to be a bad mom and on a binge. CP at 70-76. The referral had no allegations that the three children at the time (C.J., R.R., and S.R.) were being physically abused, sexually abused, emotionally abused, or abandoned by their mother. CP at 82-83.

M.K.'s mother did not know at the time that she was pregnant with M.K. and did not learn of her pregnancy until many months later. CP at 35-37. There is no evidence in the record that the referent knew that M.K.'s mother was pregnant with M.K. either.

The intake worker accepted the referral and assigned a 10-day response time. Her supervisor then overrode the decision and decided a 72-hour response was appropriate based on a baby (S.R.) being in the home. CP at 85. However, the Area Administrator determined the referral did not meet the criteria for investigation. CP at 87. Specifically, the referral did not

contain allegations of abuse or neglect, so the referral did not contain sufficient allegations to conduct an investigation regarding the particular children identified as living with the mother at the time of the referral. CP at 87.

**D. Procedural history**

M.K's father brought this lawsuit on behalf of M.K. and himself. At the conclusion of discovery, the Department moved for summary judgment. The trial court denied summary judgment. However, at the Department's request, the trial court certified the matter for appeal under CR 54(b). CP at 370-72.

**V. ARGUMENT**

Summary judgment is proper because Plaintiff cannot establish the essential elements of duty and causation. On duty, from the time M.K. was born to the time he was assaulted, the Department never received a referral identifying M.K. as a subject of abuse or neglect. Absent a referral, the Department owed no duty to M.K. under RCW 26.44.050. Attempting to craft a duty owed by the Department to M.K., Plaintiff points to a number of referrals about M.K.'s mother that occurred prior to his birth. However, such referrals do not impose a duty on the Department owed to unidentified or unborn children who might be at risk in the future.

Plaintiff also points to the common law as an alleged source of a Department duty. The Court of Appeals has recently recognized a common law duty owed by the Department to foster children based on a special relationship under *Restatement (Second) of Torts* § 315(b) (1965). The Washington State Supreme Court has granted review of that decision, and a decision is pending. However, even under the Court of Appeals' decision, no common law duty would apply here because M.K. was not in foster care.

Regarding causation, it is entirely speculative to say the actions of the Department—or any alleged failure to act—were a proximate cause of M.K.'s harm when the Department never received a report that his mother, or anyone else, was abusing or neglecting M.K. prior to the assault. Thus, Plaintiff cannot establish cause-in-fact. Similarly, it is equally speculative to claim that if the Department had acted differently prior to M.K.'s assault, the assault would not have occurred. There is no competent testimony in the record creating a question of fact on this issue.

Nor is legal causation supported. It simply lacks common sense and is bad policy to hold the Department liable for M.K.'s injuries, when the Department never received a referral regarding M.K. Therefore, summary judgment should be granted on multiple, independent grounds.

**A. Standard of Review**

On review of an order denying summary judgment, the appellate court engages in the same inquiry as the trial court. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 601, 70 P.3d 954 (2003). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(e). “An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial.” *McBride v. Walla Walla Cty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999). But “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

**B. Dismissal on Summary Judgment Is Warranted Because the Plaintiff Failed to Show the Department Owed M.K. a Duty When the Department Never Received a Referral Alleging M.K. Was Being Subjected to Abuse and/or Neglect**

A plaintiff seeking to prevail on a negligent investigation claim under RCW 26.44.050<sup>2</sup> must prove that the duty to investigate an allegation of abuse was owed to him or her, and that the Department’s investigation

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<sup>2</sup> The Department refers to the current version of RCW 26.44.050 because during all times relevant to this case, the pertinent language of the statute has remained substantively unchanged. *See* Laws of 1987, ch. 450, § 7.

was negligent, i.e., that the investigation was biased or incomplete and resulted in a harmful placement. *M.W.*, 149 Wn.2d at 591. Here, the undisputed facts show that neither element is met.

1. **The duty to investigate child abuse or neglect under RCW 26.44.050 is triggered by a referral regarding the child, and no such duty was triggered regarding M.K.**

RCW 26.44.050 imposes a mandatory duty on the Department's Child Protective Services to investigate reported allegations of child abuse or neglect. *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 71-82, 1 P.3d 1148 (2000); *M.W.*, 149 Wn.2d at 596-99. "The negligent investigation cause of action against the Department is a narrow exception that is based on, and limited to, the statutory duty [in RCW 26.44.050] . . . ." *M.W.*, 149 Wn.2d at 601. Under this limited cause of action, a plaintiff must establish that a duty for the Department to investigate was triggered, and the Department's investigation gathered incomplete or biased information which resulted in a child being removed "from a non-abusive home, being placed in an abusive home or . . . remain[ing] in an abusive home." *Id.* at 598, 602.

Thus, for a claim of a negligent CPS investigation to be actionable, there must first be a duty for the Department to conduct an investigation of a child abuse or neglect report pursuant to RCW 26.44.050. *M.W.*, 149 Wn.2d at 596-99; *Petcu v. State*, 121 Wn. App. 36, 58-59,

86 P.3d 1234 (2004). That duty arises only *after* law enforcement or the Department receives a report of child abuse or neglect. *See* RCW 26.44.050 (“Upon the receipt of a report . . . .”). *See also* RCW 26.44.030(4) (“Upon receiving a report . . . .”); RCW 26.44.030(10) (“Upon receiving reports . . . .”); RCW 26.44.030(11) (“Upon receiving a report . . . .”); RCW 26.44.030(14) (“Upon receipt of a report . . . .”); RCW 74.13.031(3) (“Investigate complaints . . . .”).

The Department’s duty to conduct a reasonable investigation of allegations of child abuse is owed to a particular, circumscribed class—children who are alleged to be abused in the referral and their parents. *Rodriguez v. Perez*, 99 Wn. App. 439, 445, 994 P.2d 874 (2000) (holding it is “children who are suspected of being abused and their parents [that] comprise a protected class under RCW 26.44 and may bring action for negligent investigation under that statute.”).

Here, summary judgment is proper because no duty owed to M.K. was triggered. The Department never received a referral regarding M.K. Medical professionals saw M.K. multiple times from the time of his birth until nine months later when his teen-age brother C.J. assaulted him. None of the medical records show M.K. was being abused or neglected by anyone.

Indeed, the medical records show just the opposite. M.K.’s mother took M.K. to well-child checkups and other medical appointments. Just two

days prior to the incident that led to this lawsuit, a medical professional saw M.K. The medical professional did not note anything was abnormal about M.K. In short, the Department never received a report of abuse or neglect concerning M.K. that would have triggered a duty to investigate.

Further, summary judgment is proper in this case because Plaintiff failed to present any evidence that the Department conducted a negligent investigation that led to M.K. remaining in an abusive home. Absent a referral alleging M.K. was being subjected to abuse, the Department had no reason to conduct any investigation related to M.K.

**2. The May 2010 and June 2011 referrals made prior to M.K.'s birth did not trigger any duty owed to M.K.**

This Court has consistently recognized the limitation on the duty owed by the Department under RCW 26.44.050. As recently as last year, this Court found the duty to investigate is not owed to yet unknown or unidentified victims. *Boone v. Dep't of Soc. & Health Servs* 200 Wn. App. 723, 403 P.3d 873 (2017).

In *Boone*, the plaintiff alleged that DSHS was liable for the sexual abuse of her children between 2004 and 2006 in a daycare because DSHS allegedly did not properly investigate allegations of abuse regarding other children in the daycare in 1992, 1997, and 2006. *Id.* at 734. Affirming dismissal of those claims on summary judgment, this Court noted that the

plaintiff's children were not the subjects of the alleged abuse that triggered the investigations, so no duty owed to them arose. *Id.*

The decision in *Boone* is consistent with the Court's decisions going back to its 2013 decision, *Estate of Linnik v. State ex rel. Dep't of Corr.*, No. 67475-7-I, 2013 WL 1342316 (Wash. Ct. App. Apr. 1, 2013) (unpublished); *cited per* GR 14.1. Terapon Adhahn murdered Zina Linnik. Zina Linnik's estate sued the Department, arguing that the Department had a duty because prior to Zina's murder, CPS received a referral regarding Adhahn. The Department sent the referral to law enforcement. *Id.* at \*5.

This Court held that the Department owed no actionable duty to Zina to investigate the CPS referral regarding Adhahn because the referral did not relate to Zina herself, but to another child. *Id.* Pointing to the "limited duty" imposed by RCW 26.44.050, the court explained, "DSHS's duty would have been to the child who was the subject of the referral, not the Linnik child." *Id.* at \*4-5. The court held that DSHS does not owe a duty to "all children abused by someone about whom a report has been submitted. Such a reading would obviate the requirement that for a public entity to be negligent, it must have a duty to a *particular person*, not to every citizen or child." *Id.* at \*6 (emphasis in original).

Three years ago, this Court again analyzed the scope of the duty owed under RCW 26.44.050 to as-yet unknown and unidentified victims in

*Albertson v. Pierce Cty.*, No. 71317-5-I, 2015 WL 783169 (Wash. Ct. App. Feb. 23, 2015) (unpublished); *cited per* GR 14.1. In *Albertson*, the plaintiffs' mother was sexually abused by her father, Finch, prior to the plaintiffs' birth. *Albertson*, 2015 WL 783169 at \*1. The allegation of abuse was referred to the county sheriff for investigation in 1996. *Id.* The sheriff's office was unable to contact the alleged victims and put the case on inactive status. In 2007, the plaintiffs were placed with Finch, their grandfather, via the foster care system. *Id.* Finch sexually abused the plaintiffs for several years. *Id.* The plaintiffs sued DSHS, arguing that the duty under RCW 26.44.050 to investigate allegations of abuse and neglect about a particular child extends to children not yet born or in existence at the time the referral of abuse or neglect was made. *Id.*

Upholding dismissal on summary judgment, this Court found that the duty owed under RCW 26.44.050 is to those children who are “*suspected of being abused.*” *Albertson*, 2015 WL 783169 at \*4 (emphasis in original). Thus, the court again rejected the request to expand the scope of the duty to unidentified/unborn children who might be at risk in the future. *Id.* at \*5.

Here, the May 2010 referral received by the Department was not about M.K. He was unknown, unidentified, and, indeed, not born at the time of the referral. Any duty that may have arisen from the referral and its

subsequent investigation was potentially owed to children who were then alive and living in the home at the time of the referral, not M.K.

Likewise, the June 2011 referral failed to trigger a duty owed to M.K. Once again, M.K. was unknown, unidentified, and unborn at the time of the referral. The 2011 referral does not even contain any allegations that the particular children identified as living in the home were being abandoned, physically abused, emotionally abused, sexually abused, or neglected. The referent's subsequent declaration drafted during this litigation does not indicate the referent reported to the Department any other facts than what were contained in the original referral. CP at 282-83.

Notwithstanding the precedent unequivocally establishing the requirements of a negligent-investigation claim under RCW 26.44.050, Plaintiff argues that the Department's contacts with the family *before M.K. was born* created a duty. No authority suggests this vast expansion of the limited cause of action previously recognized by Washington courts.

Consistent with the Court's decisions in *Boone*, *Linnik*, and *Albertson*, the fact that M.K.'s mother was named in these referrals is irrelevant to whether the Department owed a duty in the future to the unknown, unidentified, or unborn child. M.K. was not the subject of any referrals until December 2012 and so summary judgment should be granted.

**C. Plaintiff's Arguments Below that a Duty Under RCW 26.44.050 Was Triggered in This Case are Unavailing**

Plaintiffs may argue, as they did at the trial court, that the Department's duty to investigate was triggered in this case based on the legislative intent of RCW 26.44.050, and a number of other cases that are unrelated to the issues before this Court. CP at 148. These arguments should be rejected, just like previous attempts to expand the RCW 26.44.050 duty to the unborn and unknown were rejected in *Linnik*, *Albertson*, and *Boone*.

**1. *Linnik* shows the legislative intent of RCW 26.44.050 does not create a duty here**

In *Linnik*, plaintiffs attempted to expand the duty owed under RCW 26.44.050 by claiming the legislative intent of RCW 26.44.050 included children who were not the subject of a report of abuse. *Linnik*, 2013 WL 1342316 at \*4-5.

RCW 26.44.050 states:

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.

The *Linnik* court noted, "The supreme court has recognized that under this statute [RCW 26.44.050] the State has a statutorily mandated duty to investigate child abuse allegations brought to its attention." *Linnik* at \*4-5.

The *Linnik* court went on to reject plaintiffs' claim that the duty to

investigate created by RCW 26.44.050 extended to children who were not the subject of a report of abuse or neglect. *Id.* at \*6.

Here, as in *Linnik*, the Department never received a report about M.K. prior to his assault so no duty to investigate was triggered. Plaintiff has failed to show the Department owes M.K. a duty under the facts of this case. As such, summary judgment should have been granted.

2. **RCW 26.44.050 does not create an implied duty to all children either**

The legislative intent of RCW 26.44.050 does not create an implied duty owed to all children. Any attempt by Plaintiff to reassert such a claim in response to this brief is meritless. CP at 147. Such an argument is simply a rehash of the plaintiff's claim in *Albertson* that the duty under RCW 26.44.050 extends to "all children that are injured as a result of failure to carry out the obligation in RCW 26.44.050." *Albertson*, 2015 WL 783169 at \*4. This argument was rejected by the court because the legislative purpose of RCW 26.44 does not extend to the unborn and persons who are not the subject of a referral. *Id.*

In *Albertson*, the plaintiff attempted to expand the duty owed under RCW 26.44.050 by claiming, as Plaintiff does here, that the implied intent of RCW 26.44.050 creates a duty owed to children not yet born or in existence at the time of the referral, when the duty to investigate would

arise. *Albertson*, 2015 WL 783169 at \*3. But the argument fails here as it did in *Albertson*, because the intent of RCW 26.44 is outlined in RCW 26.44.010, not RCW 26.44.050. RCW 26.44.010 states:

[I]n the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of *such reports*, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of *such children*.

(Emphasis added.)

The legislative intent of RCW 26.44 is outlined in RCW 26.44.010, not in RCW 26.44.050. *Albertson*, 2015 WL 783169 at \*4. Assertions that the RCW 26.44.050 duty is owed to the entire family, including the unknown and unborn is misleading. Such an argument ignores the language “such children” that were the subject of “such reports” in RCW 26.44.010’s stated purpose. *Albertson*, 2015 WL 783169 at \*4. Nor does the legislative intent create a special or heightened duty to all children because the alleged abuser is using drugs.

Here, M.K. was not the subject of any referrals at issue in this case. Thus, it cannot reasonably be said that M.K. was “such children” that were

the subject of “such reports” that triggered any duty owed to M.K. prior to his assault.

3. ***Boone* does not create a duty owed to M.K.**

*Boone* does not create a duty owed to M.K. either. In *Boone*, the court applied the factors outlined in *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990), for finding an implied cause of action and rejected the assertion that the Department’s duty to investigate under RCW 26.44.050 extends to children who are not the subject of the reported abuse or neglect. *Boone*, 200 Wn. App. at 723.

This Court rejected as too broad the plaintiff’s arguments that the class of persons for whose benefit RCW 26.44.050 was enacted included children who are not the subject of the reported abuse or neglect. *Boone*, 200 Wn. App. at 734. “Under RCW 26.44.050, the duty to investigate with reasonable care is triggered by ‘a report concerning the possible occurrence of abuse or neglect.’” *Boone*, 200 Wn. App. at 734 (quoting RCW 26.44.050). The class of persons protected by the duty to investigate are the children who are the *subjects* of a report of possible abuse or neglect. *Id.* As such, *Boone* instructs that summary judgment is proper in this case.

4. ***Lewis v. Whatcom County* does not establish a duty under RCW 26.44.050 being triggered in this case**

Like the appellants in *Boone*, *Linnik*, and *Albertson*, Plaintiff may argue in response to this brief that *Lewis v. Whatcom County* creates a duty owed to M.K. based on the 2010 and June 2011 referrals that occurred prior to his birth. *Lewis v. Whatcom Cty.*, 136 Wn. App. 450, 452-53, 460, 149 P.3d 686 (2006). This argument fails because the exact same argument was rejected in *Linnik*, *Albertson*, and *Boone*.

In *Lewis*, the County argued “it owed no duty to Lewis because her abuser was her uncle rather than her parent.” *Lewis*, 136 Wn. App. at 453. But the *Lewis* court rejected this argument because “[n]othing in the plain language of this statute, which imposed a duty to investigate on law enforcement, limits that duty to children who have been abused by their parents or guardians [.]” *Id.* at 454.

Here, the argument that *Lewis* creates a duty in this case fails for the same reasons it failed in *Linnik*, *Albertson*, and *Boone*. *Lewis* did not address the issue of what duty is owed to children for whom no complaint was made or to children who were not yet born. *Linnik*, 2013 WL 1342316 at \*6; *Boone*, 200 Wn. App. at 734-36; *Lewis*, 136 Wn. App. at 454. Therefore, summary judgment is proper.

Plaintiff's claim to the contrary, made at summary judgment, is a tacit admission that Plaintiff cannot establish a duty owed to M.K. under RCW 26.44.050. The duty is a limited one not owed to the unknown or unborn. Plaintiff is now seeking to have this Court turn the case law on its head and adopt an unprecedented expansion of the RCW 26.44.050 duty. This Court has already rejected previous attempts to expand the duty to the unknown and unborn based on the same arguments M.K. is making.

**5. The Department's duty to conduct a reasonable investigation does not include a duty to monitor a family after the completion of an investigation**

Plaintiff may re-raise the claim that if the Department had continued to monitor M.K.'s mother's participation in treatment after it closed its investigation in December 2010, M.K. would not have been harmed two years later. But monitoring a person's participation in services after an investigation is closed is not part of the investigative process that results in placement decisions. There is no cause of action for "negligent monitoring" of a person's engagement in services after an investigation is completed. Certainly, no Washington court has ever found such a cause of action based on the narrow cause of action implied from RCW 26.44.050.

**a. Department monitoring of a family after an investigation is completed would violate the family's constitutional rights**

The suggestion that the Department has the authority to monitor a family after closing an investigation is not only incorrect, it would implicate constitutional procedural and substantive due process protections afforded to parents and children. “Parents and children have a well-elaborated constitutional right to live together without governmental interference. That right is an essential liberty interest protected by the Fourteenth Amendment’s guarantee that parents and children will not be separated by the state without due process of law except in an emergency.” *Wallis v. Spencer*, 202 F.3d 1126, 1136-37 (9th Cir. 1999) (internal citations omitted). Any claim to the contrary is an expansion of the negligent investigation cause of action that should be rejected on public policy grounds.

**b. Negligent monitoring of participation in voluntary services is not cognizable under the negligent investigation cause of action**

The Department offers voluntary services consistent with RCW 26.44’s dual goals of parent-child reunification and mitigation of conditions that may result in future abuse or neglect referrals. *See M.W.*, 149 Wn.2d at 597 (“As we have held when previously analyzing this statute [RCW 26.44.050], this statement of purpose encompasses two concerns: the

integrity of the family and the safety of the children.”); *see also* former RCW 26.44.020(3), .195(1), .030(8) (2008). But alleged negligence in monitoring a parent’s participation in voluntary services does not form the basis for a claim of negligent investigation under RCW 26.44.050.

The RCW 26.44.050 negligent investigation cause of action requires Department social workers to have conducted an incomplete or biased investigation of a report of a child abuse or neglect *that leads to a harmful placement decision*. *See M.W.*, 149 Wn.2d at 602 (holding that an inappropriate physical exam of a young child is not the kind of harm contemplated by the statute because it did not result in a harmful placement decision). In other words, the manner in which the investigation is deficient must have a causal nexus to a harmful placement decision.

Our Supreme Court has already considered—and rejected—the suggestion that RCW 26.44.010’s statement of intent referencing “protective services” that “shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children” supports a more expansive duty of care to protect children from all types of harm by Department investigators. *M.W.*, 149 Wn.2d at 598-99. Likewise, “our Supreme Court has rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper

investigative procedures.” *Petcu*, 121 Wn. App. at 59 (citing *M.W.*, 149 Wn.2d at 601–02); *see also Roberson*, 156 Wn.2d 33, 45, 123 P.3d 844 (2005) (also citing *M.W.*, 149 Wn.2d at 595) (rejecting argument that negligent investigation cause of action encompassed all physical or emotional injuries suffered by the child as a result of a negligent investigation).

The Department’s duty is limited to conducting a non-negligent investigation and providing accurate information to a court in a dependency proceeding. It does not encompass the continued monitoring of a family after an investigation is concluded to deter all future potential for parental abuse.

Further, the suggestion that the Department should face liability in cases where it simply provides voluntary services to a parent ignores the statutory framework in place to prevent Department social workers from separating families absent the required showing that a child is in imminent risk of harm. Effectively, Plaintiff’s scenario would require the Department to actively intrude into a family’s life in the absence of a referral raising allegations of abuse or neglect of the family’s child. By suggesting that the Department may be negligent for failing to monitor a parent’s participation in drug treatment after the conclusion of an investigation, Plaintiff is proposing this Court adopt a cause of action for “negligent failure to

interfere with a family.” This Court should decline to do so. As explained in *Roberson*, 156 Wn.2d at 46-47, for a negligent investigation to be actionable, it must lead to a harmful placement decision.

**c. Voluntary services offered to M.K.’s mother were not part of the Department’s investigation or placement determination in 2010**

Under Plaintiff’s rationale, the Department’s tort liability would be premised not on investigative acts that lead to harmful placement, but on the Department’s failure to monitor a family absent a legal basis to do so. This is wholly inconsistent with the Washington Supreme Court’s refusal to extend tort liability to “all physical or emotional injuries suffered by the child as a result of a negligent investigation” when the actions causing these harms are not causally connected to a placement determination. *M.W.*, 149 Wn.2d at 601-02 (Court of Appeals erred “in finding a general duty to investigate reasonably implicit in the statutory duty to investigate” because “the statute from which the tort of negligent investigation is implied does not contemplate other types of harm”—those that do not occur as a result of an “erroneous placement decision that removed the child from the home based on a biased or incomplete investigation.”).

In this case, summary judgment is proper because even if the Department’s failure to monitor M.K.’s mother’s participation in services after it closed its investigation in December 2010 amounts to general

negligence, which it does not, there was no placement decision regarding M.K. to be had. M.K. was not even born in 2010, thus no duty owed to M.K. was triggered.

6. **Summary judgment is proper because a medical malpractice decision does not create a duty owed to M.K. in this case**

Plaintiff may also attempt to fall back on his previous assertion that medical malpractice cases creating a duty owed to fetuses creates a duty owed to M.K. under the facts of this case. CP at 157. This argument is meritless here, just as it was in *Albertson*.

In *Albertson*, the plaintiff claimed that the duty owed to fetuses in medical malpractice claims creates a duty to the unknown and unborn in the context of CPS investigations. In discussing the Washington Supreme Court's decision in *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), the *Albertson* court rejected that claim because medical malpractice cases dealing with an injury are not based on the statutes at issue in a CPS investigation. *Albertson*, 2015 WL 783169 at \*5-6.

The claims in *Harbeson*, and its holding, were specifically tailored to cases considering prenatal injuries to a fetus. *Albertson*, 2015 WL 783169 at \*5-6. The *Albertson* court specifically declined to extend a duty to the unborn under RCW 26.44.050 based on the duty owed to a fetus in a medical malpractice case and noted that such a policy

choice remains the prerogative of the Legislature. *Albertson*, 2015 WL 783169, at \*5-6.

Since that time, the Legislature has not extended the duty owed under RCW 26.44.050 to the unknown and the unborn. The Legislature's silence is significant because "If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval." *Cedar River Water & Sewer Dist. v. King Cty.*, 178 Wn.2d 763, 786 n.9, 315 P.3d 1065 (2013), *as modified* (Jan. 22, 2014) (quoting *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006)).

7. ***In re Welfare of Frederiksen* also does not create a duty owed to M.K.**

Any attempt by Plaintiff to reassert his argument to the trial court that *In re Welfare of Frederiksen* creates a duty owed to M.K. is also meritless. In *Frederiksen*, the Department removed a child from the parents' care immediately at birth and placed her in foster care based on her parents previously having been determined to be unfit in connection with the parents' other two children being deemed dependent by the court. *In re Welfare of Frederiksen*, 25 Wn. App. 726, 728, 610 P.2d 371 (1979).

*Frederiksen* is factually distinguishable from this case. No court had determined M.K.'s mother to be unfit to parent at the time of M.K.'s birth,

or at any other time for that matter. No court had determined that any of M.K.'s siblings were dependent at the time of M.K.'s birth either. In addition, M.K.'s own standard of care expert does not opine that there was a sufficient basis to remove M.K. from his mother's care based on the facts of this case. CP at 248-81.

More to the point, the Court of Appeals has already instructed that nothing about *Frederiksen* creates a duty to unborn, unknown future children under RCW 26.44.050. *Albertson*, 2015 WL 783169 at \*5. Thus, summary judgment is proper in this case.

**D. Summary Judgment Is Warranted Because No Common Law Duty was Triggered Based on the Facts of This Case**

Plaintiff's claim that the Department owed M.K. a duty based on the common law should also be rejected. Below, Plaintiff relied on two recently published decisions finding common law duties owed by the Department to *children in foster care* pursuant to the Restatement (Second) of Torts § 315(b) (1965). See *HBH v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016) (*argued Feb. 22, 2018, decision pending*, No. 94529-2) and *C.L. v. Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 198, 402 P.3d 346 (2017) (*review granted and matter stayed*, No. 95184-5). However, those opinions are not applicable to the facts of this case because both *HBH* and *C.L.* focused on

the social worker's obligation to protect foster children, and M.K. was never in foster care.

The first opinion, issued by this Court, is *HBH*. In *HBH*, five foster sisters alleged they were abused by their foster parents while they were dependent, which abuse continued after they were adopted. *HBH*, 197 Wn. App. at 80-81. At trial, the court granted the Department's CR 50 motion and dismissed plaintiffs' pre-adoption claims against the Department, leaving the jury to consider only whether the Department properly investigated post-adoption referrals made regarding the home. *Id.* at 83-84. The jury returned a verdict in favor of the Department, finding no negligence in investigating the post-adoption CPS referrals. *Id.* at 84-85.

On appeal, the plaintiffs argued that the Department owed them a broader common law duty of reasonable care while they were in foster care. *Id.* at 85. The Court of Appeals agreed, finding that under the Restatement (Second) of Torts § 315(b), Department social workers have a duty to foster children to protect them from the "tortious or criminal conduct of their foster parent." *HBH*, 197 Wn. App. at 92. A duty under the Restatement (Second) of Torts § 315(b) is characterized by either (1) a duty by one party to control the conduct of a third person or (2) a right by one party to the protection of the other. *Restatement (Second) of Torts* § 315. The

Washington Supreme Court has taken review of *HBH* and a decision has not been published as of the writing of this brief.

The common law duty announced in *HBH* was applied by Division I of the Court of Appeals in *C.L.* In that case, the Department placed two dependent girls in a foster home into which they were later adopted. *C.L.*, 200 Wn. App. at 193-94. After their adoption, the sons of the adoptive parents abused both of the girls. *Id.* at 194. The Court of Appeals, again relying on § 315(b), found that “a tort duty also arises from the special relationship between the Department as a placement agency and dependent children, allowing such children to seek a tort remedy when they are damaged by the Department’s negligent failure to uncover pertinent information about their prospective adoptive home.” *Id.* at 198. The Washington Supreme Court has granted the Department’s petition for review of *C.L.*, and that review is stayed pending the court’s decision in *HBH*. CP 201

Here, the duty identified in *HBH* and *C.L.* does not apply to M.K. The duty articulated in *HBH* and *C.L.* is owed to the particularized set of children who were placed in foster care by the Department. Nothing in the special relationship analysis in *HBH* or *C.L.* recognized a common law duty owed to children not placed in foster care, much less to an unidentified child or one yet unborn. Thus, even if the Washington Supreme Court were to

hold that the Department owes a common law duty to foster children, that duty would not apply here: the Department never placed M.K. in foster care, nor did it act as an adoption placement agency for him. Indeed, M.K. was never even known to the Department because it never received a referral about M.K. As a result, under the analysis in *HBH* and *C.L.*, no special relationship duty arose in this case.

**E. Summary Judgment Is Warranted Because Plaintiff Cannot Establish Proximate Cause Under the Facts of This Case**

The lack of causation provides an entirely independent, alternative basis to grant summary judgment to the Department here. Actionable negligence requires that the breach of a duty be the proximate cause of the claimed injury. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). There are two elements of proximate cause: cause-in-fact (the “but for” test) and legal causation. *Braegelmann v. Snohomish Cty.*, 53 Wn. App. 381, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). Plaintiff cannot establish either cause-in-fact or legal causation on the facts of this case.

The unprecedented nature of Plaintiff’s claim that the Department owes a duty to unknown children and the unborn is underscored by the fact that Plaintiff cannot establish a question of fact regarding proximate cause absent impermissible speculation. Cause-in-fact is established if the plaintiff’s injury would not have occurred but for defendant’s breach of

duty; it is not established if plaintiff's injury would have occurred without defendant's breach of duty. *Walker v. Transamerica Title Ins.*, 65 Wn. App. 399, 403, 828 P.2d 621 (1992). When the connection between a defendant's conduct and the plaintiff's injury is too speculative and indirect, the cause-in-fact requirement is not met. *Taggart v. State*, 118 Wn.2d 195, 227, 822 P.2d 243 (1992) (quoting *Walters v. Hampton*, 14 Wn. App. 548, 543 P.2d 648 (1975)). Cause-in-fact "does not exist if the connection between an act and the later injury is indirect and speculative." *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

It is reversible error to deny summary judgment when speculation is required to find factual causation. *Id.*; *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). Put another way, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947).

In *Walters*, the plaintiff alleged that the Port Orchard police failed to protect him from a person with known proclivities for violence with firearms. The police had previously investigated the man who shot the

plaintiff because of several violent incidents involving firearms. Police confiscated the man's rifle once, but he was never arrested or prosecuted.

The court held this insufficient to establish factual causation, stating:

In our view, there are too many gaps in the chain of factual causation to warrant submission of that issue to the fact finder. It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would have prevented plaintiff's injuries at Hampton's hands in February 1972. Such a conclusion would require the assumption of a successful prosecution of Hampton. This in turn would require an assumption that Mrs. Hampton . . . would cooperate with the police as the only potential prosecuting witness. Finally, we would have to assume that Hampton would be incarcerated for the offense, or unable to procure another weapon in the event the one he possessed was confiscated. *Factual causation requires a sufficiently close, actual connection between the complained of conduct and the resulting injuries. Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.*

*Walters v. Hampton*, 14 Wn. App. 548, 555-56, 543 P.2d 648 (1975) (citations omitted) (emphasis added). In short, a plaintiff must offer evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred "but for" the defendant's act or omission. *Hartley*, 103 Wn.2d at 778.

1. **It is speculative to claim that if the Department had acted differently prior to M.K.'s birth he would not have been harmed**

Plaintiff cannot establish proximate cause regarding either the Department's decision to close the investigation in December 2010 or its decision to not investigate the June 2011 referral. To conclude that either decision was the proximate cause of M.K.'s harm, the jury would have to engage in a series of improper speculative assumptions. Therefore, summary judgment should be granted on this issue as well.

For example, even if one assumes that M.K.'s mother would have continued to engage in drug treatment if the Department had acted differently after December 2010, as Plaintiff suggested to the trial court, to establish proximate cause the trier of fact would still have to speculate that: (1) the treatment would have been successful; and (2) because of the treatment, 24 months later she would have so affected C.J.'s behavior that he would not have assaulted M.K. in a fit of anger. This scenario is speculative regardless of whether or not M.K.'s mother left her teenage son C.J. home alone with M.K.

Whether M.K.'s mother would have taken advantage of services if the Department had engaged with her prior to M.K.'s birth is also irrelevant. Nothing in the record shows that the services would have prevented C.J. from assaulting M.K. M.K.'s standard of care expert does not even opine

that any services offered to M.K.'s mother would have prevented the incident at issue. CP at 245-81 (Decl. of Barbara A. Stone). Nor could Ms. Stone have offered such an opinion, as she has no ability to predict whether any services provided to M.K.'s mother would have prevented C.J. from assaulting M.K. on the day in question.

Claims by Plaintiff to the trial court that if the Department had investigated the June 2011 referral and had offered therapy to the family, that would have prevented this incident are just as speculative. The trier of fact would have to assume: (1) C.J.'s alleged anger issues would have come up in therapy; (2) the therapist would have had techniques to address those issues; (3) the techniques offered would have been effective in dealing with the type of issues C.J. was dealing with; (4) C.J. and/or M.K.'s mother would have absorbed the techniques in a sufficient period of time so that C.J. would not have acted in the manner he did. In addition, the trier of fact would need to assume that M.K.'s mother would not have relapsed or would not have simply walked out of the room long enough for C.J. to assault M.K.

Furthermore, Ms. Stone's report does not opine that C.J. would not have assaulted M.K. if the Department had acted differently. Understandably, she never spoke to C.J. so she has no factual basis to form an opinion on that issue even if she were qualified to render such an opinion, which she is not. *Bordon*, 122 Wn. App at 247. It is therefore entirely

speculative to claim that any treatment might have prevented this incident, let alone prevented the incident on a more probable than not basis.

**2. Plaintiff's claims also fail on proximate cause because Washington's dependency statutes significantly limit the Department's ability to remove a child from his or her parents' care**

Plaintiff's proximate cause arguments are independently and additionally speculative because of the statutory constraints placed on the Department's authority to remove a child from his or her parents' care, even on a very temporary basis. In Washington, the only way the Department can remove a child from his or her parents' care is by obtaining a court order. The Department initiates this process by filing a dependency petition with the court prior to an initial shelter care hearing. The hearing must be held within 72 hours of a child being taken into protective custody. RCW 13.34.065(1)(a) (2008).<sup>3</sup>

At the shelter care hearing, the court is *required to return* the child to the care of his or her parent *unless* the court finds reasonable cause to believe that (a) reasonable efforts have been made to prevent or eliminate the need for removal of the child and to make it possible for the child to return home, and (b) the child has no parent or guardian to care for them,

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<sup>3</sup> While law enforcement may take a child into protective custody without a court order pursuant to RCW 26.44.050, there is no statute granting the Department such authority.

the release of the child would “present a *serious threat of substantial harm* to such child,” or the parent or guardian to whom the child could be released has been charged with the crime of custodial interference. Former RCW 13.34.065(5) (2008) (emphasis added). “Uncertainty by a parent, guardian, legal custodian, relative, or other suitable person that the alleged abuser has in fact abused the child shall not, alone, be the basis upon which a child is removed from the care of a parent[.]” Former RCW 13.34.065(5)(f) (2008). If a court orders a child into shelter care, the court must continue to review a child’s status in shelter care every 30 days to determine that the child’s separation from his or her parent continues to meet these statutory requirements. Former RCW 13.34.065(7)(a) (2008).

In a subsequent dependency proceeding, the State must establish the basis for removing the child by a preponderance of the evidence. RCW 13.34.110. RCW 13.34.030(5)(b) defines a “dependent child” as a child who has been “abused or neglected as defined in chapter 26.44 RCW by a person legally responsible for the care of the child.” RCW 26.44.020(1) defines “abuse or neglect” as

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 . . . or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.

The statute further defines “negligent treatment or maltreatment” as

an act or omission that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, or safety.

RCW 26.44.020(17).

To establish causation in a negligent child abuse investigation case, as in a negligent parole supervision case, the plaintiff must offer proof that a judicial officer would have taken a specific action—removed a child from a harmful situation or incarcerated a probationer on the date of harm. *See Tyner*, 141 Wn.2d at 84-85; *Petcu*, 121 Wn. App. at 57-58; *Bordon*, 122 Wn. App. at 242. In negligent parole supervision cases, courts also require evidence from independent decision-makers charged with determining whether to pursue judicial action that leads to an offender being in custody as of a certain date—such as a prosecutor who would have pursued a probation violation in court. *See Bordon*, 122 Wn. App. at 247 n.38 (“[T]he prosecutor's office [] makes an independent decision about whether to pursue the violation with the court. *Bordon* presented no evidence establishing that the prosecutor's office would have pursued the violation in this case.”); *Gausvik v. Abbey*, 126 Wn. App. 868, 886, 107 P.3d 98 (2005) (decision to prosecute a parent was a superseding intervening cause breaking the causal connection to a negligent CPS investigation); *Stoot v. City of Everett*, 582 F.3d 910, 926 (9th Cir. 2009) (“liability may not attach if an intervening decision of an informed, neutral

decision-maker breaks the chain of causation”) (internal quotations omitted)).

**a. Summary judgment is proper because Plaintiff failed to create a question of fact regarding whether there was a factual basis to remove M.K. from the home**

Below Plaintiff asserted that if the Department acted differently after the June 2011 referral, M.K. would not have been harmed. However, Plaintiff failed to present any evidence that the Department had the authority to remove M.K. from his mother’s care. Summary judgment therefore is proper.

Absent from the record is evidence establishing a legal or factual basis that would have given the Department the authority to remove M.K. *See Joyce v. State Dep’t of Corr.*, 155 Wn.2d 306, 320 n.3, 119 P.3d 825 (2005) (“when the *authority* to do an act does not exist, the *duty* to do the act also does not exist”) (emphasis in original).

Likewise, there is no evidence in the record suggesting that M.K.’s mother’s actions prior to C.J.’s assault on M.K. represented “a *serious threat of substantial harm*” warranting M.K. being placed in shelter care. Former RCW 13.34.065(5) (2008) (emphasis added). Nor is there evidence that her actions after M.K.’s birth amounted to “a clear and present danger”

to M.K.'s "health, welfare, and safety," as is required to establish a dependency. RCW 13.34.030(6)(b); RCW 26.44.020(17).

Prior interaction with the Department alone is insufficient to establish shelter care or a dependency. While it may be evidence of prior poor choices by the parent, it does not warrant State interference in the life of a family absent something more. *In re Dependency of M.S.D.*, 144 Wn. App. 468, 182 P.3d 978 (2008).

**b. Summary judgment is proper because there is no evidence in the record that a judicial officer would have ordered M.K. removed from the home**

Not only is the record insufficient to establish there was a basis to remove M.K. from the home, there is no evidence in the record that a judicial officer would in fact have removed M.K. from his mother's care based on the facts in this case.

Ms. Stone is not competent to offer an expert opinion regarding how a judge would have ruled if the Department had sought removal of C.J or M.K. from the home sometime after the June 2011 referral. CP at 245-81. More to the point, Ms. Stone does not opine that any of M.K.'s mother's children would have been removed from the home based on the facts of this case. CP at 245-81. Thus, Plaintiff cannot establish proximate cause absent speculation.

**c. Summary judgment remains proper even if M.K. had been removed from his mother's care**

Even putting aside the lack of admissible expert testimony regarding whether a court would have removed M.K. from his mother's care, proximate cause is still lacking because it is simply too tenuous to claim that C.J.'s assault on M.K. would not have occurred. Assuming *arguendo* that a judge would have removed M.K. based on the evidence in the record, a trier of fact would still be required to speculate that the removal would have lasted a sufficient period of time that the children would not have been in the home on the date of the injury, or that M.K.'s mother would not have had unsupervised home visits, or that during a visit C.J. would not have had access to M.K. for the moment or two it would take to assault M.K.

Not only would impermissible speculation be required for the trier of fact to assume that: (1) a dependency was established, (2) lasted long enough to cover the date of the incident, and (3) there were no unsupervised home visits, still further speculation would be required to conclude that C.J. and M.K. would be placed in different foster homes where they would have no contact. Such an assumption fails not only for the reasons discussed *supra*, but also because the Department is statutorily required to provide sibling contact. *See* RCW 13.34.136, .200.

**d. Summary judgment is also proper because M.K.'s assault was not foreseeable**

Summary judgment is additionally proper in this case because the alleged harm by C.J. was also not foreseeable. Nothing in the December 2010 closing report or the June 2011 investigation suggests C.J. had anger issues, let alone anger issues towards M.K. The Washington Supreme Court has held that criminal conduct is generally unforeseeable and that unforeseeable intervening acts “break the chain of causation” between negligence and alleged injury. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 761, 310 P.3d 1275 (2013).

Here, the assault by C.J. was criminal conduct—unforeseeable to the Department—that broke any causal chain between the Department and M.K. The Department never received a referral indicating C.J. was abusing or neglecting M.K.'s needs from the time M.K. was born up until and including the time he was assaulted. Thus, the causal chain is broken and the trial court erred in not granting summary judgment.

**3. Legal causation is lacking as well**

The second prong of proximate cause analysis, legal causation, “involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.” *Hartley*, 103 Wn.2d at 779 (emphasis in original). Legal causation “is a legal question involving logic, common sense, justice, policy, and precedent,” *Rasmussen*,

107 Wn. App. at 959. One of the policy considerations is how far should the consequences of a defendant's acts extend. *Hartley*, 103 Wn.2d at 779. Plaintiff's claim here falls short in both respects for many reasons.

In the present case, it simply is not logical, lacks common sense, and runs counter to public policy to hold the Department liable when the Department never received a referral identifying M.K. as a subject of abuse or neglect from the time of his birth until his assault nine months later. Under Plaintiff's theory of the case, CPS would be required to intrude without cause into the lives of families or risk being held liable for any harm to a child who may ultimately be abused. This runs counter to the longstanding recognition in this country that families have a "well-elaborated constitutional right to live together without governmental interference." *Wallis*, 202 F.3d at 1136-37.

Extending liability to the facts of this case would also not further the policies expressed in the child protection statutes. RCW 26.44.050 does not create an actionable duty in tort to protect all children from harm, including the unborn. Under Plaintiff's theory, the Department would be liable for any harm to a child regardless of whether the Department received any notification that the child was being abused. This unlimited liability is not the law, nor should it be.

Plaintiff cannot support the theory that, had the Department investigated the prior referrals differently, M.K. would not have been assaulted. Thus, any claimed connection between the Department's investigation of the referrals and M.K.'s alleged injuries are too remote, insubstantial, and speculative to impose legal liability in this case.

Finally, legal causation is lacking because liability in this case would render the Department the insurer for all harms that happen to children in the state. There is no indication that the Legislature intended for the Department to act in this role when it enacted RCW 26.44.050, nor have Washington's appellate courts so held when determining that the Department owed a limited duty under RCW 26.44.050. Therefore, summary judgment based on a lack of legal causation is appropriate.

## **VI. CONCLUSION**

Summary judgment is proper in this case because a duty owed to M.K. was not triggered in this case. The RCW 26.44.050 duty is triggered upon the receipt of a report alleging allegations of abuse or neglect regarding a particular child. The Department never received such a referral regarding M.K. Further, it is simply speculative to say this incident would not have occurred if the Department acted differently. Therefore, the trial court's ruling

denying Appellant/Defendant's Motion for Summary Judgment should be reversed and Appellant/Defendant's Motion for Summary Judgment should be granted.

RESPECTFULLY SUBMITTED this 29th day of August, 2018.

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CERTIFICATE OF SERVICE

I certify that on this 29th day of August 2018, I caused a true and correct copy of the Appellant's/Defendant's Opening Brief to be electronically served to the following:

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