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Court of Appeals
Division II
State of Washington
11/13/2018 4:29 PM

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

KYLE P. KEELY, individually and as the natural father and
guardian of MICHAEL G. KEELY, a minor,

Respondent,

vs.

STATE OF WASHINGTON,

Petitioner.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 16-2-05028-5

BRIEF OF RESPONDENT

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I. INTRODUCTION

On December 2, 2012, respondent Michael Keely's mother, R.R.¹ left her four children alone while on a multiple-day drug binge. Michael's 14 year-old brother, C.J. – who had exhibited a pattern of dangerous behavior – was left to care for his three younger siblings, including nine-month-old Michael. When Michael wouldn't stop crying, C.J. violently shook him – causing permanent injuries that will require a lifetime of care.

Appellant motioned the trial court for summary judgment, arguing (1) Child Protective Services (CPS) owed no duty to Michael and (2) that CPS's failure to investigate a known referral and common law negligence was not the cause of Michael's injuries. CP 17-34. Where ample material facts established appellant had been made aware, on multiple occasions, that Michael Keely's mother was a drug addict prone to leaving her children alone for days on end – and where it failed to appropriately respond and investigate – its clear duty to Michael was breached and his injuries were undoubtedly caused by its failures. Summary judgment was appropriately denied. CP 370-72. At appellant's request, the trial court certified the matter for appeal under CR 54(b). Id.

Recently, both this Court and the Supreme Court have rejected many of the arguments appellant raises in this appeal. Specifically, in Wrigley v. State, 49612-7-II (Filed October 30, 2018), this Court outlined DSHS's statutory duty under RCW 26.44.050, emphasized that the primary purpose of that statute is to protect children and preserve the integrity of the family and

¹Non-parties are being referred to by their initials due to the previously entered protective order. This change has been made even within quoted material.

that “to achieve those ends, ‘RCW 26.44.050 places an affirmative duty of investigation on the state.’”

Similarly, in H.B.H. v. State, 94529-2 (Filed November 1, 2018) our Supreme Court thoroughly analyzed the statutory schemes outlining DSHS’s paramount interest in protecting the physical, mental and emotional health of children within our state. The Court held the cause of action under RCW 26.44.050 is based on and limited to, the statutory duty (duty to investigate) and legislative purpose of the statute (to protect children). The Supreme Court also affirmed the common law duty to protect children when a “special relationship” exists. Finally, our Supreme Court held that causation is “a difficult issue in many tort cases” and that it is generally a fact question “for juries to decide.” For those reasons and the many reasons set forth below, this Court should affirm the trial court’s decision to deny the motion for summary judgment.

II. STATEMENT OF THE CASE

A. Procedural History

This case was filed on January 29, 2016. CP 1-8. On February 22, 2018, petitioner moved for summary judgment arguing respondents could not show the existence of a duty owed nor causation. CP 17-34. On March 22, 2018, the trial court denied the motion for summary judgment but did however, at petitioner’s request, certify the matter for appeal under CR 54(b). CP 370-72.

B. Facts

R.R., the mother of Michael Keely, had more than 20 prior arrests for crimes related to drugs, alcohol and prostitution by April of 2010. CP 168-179.

On April 30, 2010, CPS created an intake report related to R.R. CP 180-181. According to that report, the referring party had concerns about R.R. neglecting her two children, C.J. and Ra.R. The referring party, one of C.J.'s teachers, was concerned about C.J. falling asleep in class almost every day that week. The referral indicates C.J. was taking new medication for ADHD and fell asleep in class and it took some time to wake him up. The teacher called R.R. and she did not answer or return the call. The case was screened out and CPS did not investigate. Id.

On May 28, 2010 CPS created another intake report related to R.R. CP 182-188. The referring party, a social services professional stated that R.R. had been admitted to Harborview Hospital following a domestic dispute with her boyfriend, A.H. Id. The report stated:

According to referrer's information last night around 10:00 PM R.R. drove A.H. to Seattle in her car to pick some of his stuff. Once in Seattle A.H. became "scary and more aggressive," he was unwilling to let mother go back to her place. He started to hit her at some point and hit her over 30 times. Mother reported that during the beating she thought she may black out and he wants to kill her. Mother presents with multiple bruising all over her face, head and body. She is pregnant with his child.

Mother told referrer that she left her 2 boys; C.J. (11) and Ra.R. (7) with a roommate, Zack last night. She became very worried about them at the hospital. Referrer called R.R.'s home and C.J. answered the phone. Referrer asked if any adult is in the home and he say, no one is home just him and his brother. Referrer advised boys to close doors and windows and not to open door to anyone. Children were fearful. Referrer called police and Seattle PD responded, referrer was told that Spanaway PD knows A.H. as well.

Referrer was able to contact boys' bio-father who went to the home and pick them up. He met LE at the mother's home.

Referrer is very concerned about the children who were left home alone and exposed and placed at risk of harm. Referrer is of opinion that the family desperately needs services and help.

Id.

Within that intake report it was noted that the boys were 7 and 11 at the time and that the mother was "pregnant with A.H.'s child..." Id.

In addressing Social/Economic factors, the intake report noted the prior intake from April, 2010. CP 185. The report found additional risk factors to be: "Boys 11 and 7 were left home alone for extensive period of time, violent boyfriend allowed to stay in the home. Mother lost her house to foreclosure, is 6 months pregnant and in the middle of the divorce." Id. at 01020198. That intake was screened in with a response time of 72 hours and an investigation commenced. Id.

The investigation into the May 28, 2010 incident lasted six months and ultimately led to a CPS finding of "founded" against R.R. for negligent treatment/maltreatment, "risk level mod high/high," associated with her actions in leaving her children unattended while binging on drugs with her boyfriend, A.H. CP 189-198.

The Investigative Assessment, completed on December 10, 2010 discussed the circumstances that lead to the incident. Id. In particular, the assessment noted an interview with R.R. on June 3, 2010 where the following was observed:

On 060310 Mom came to office. She is pregnant but slim. She was wearing large dark glasses and her nose and lips were swollen. When she took off her glasses she had bruising covering both eyes that was black. She had scratches on her neck, arms and face. She had some light bruising on her cheek and her forehead. Mom appeared sober. Mom said that she is not going to lie that she has left them alone a few times through the night. She said that she realizes how wrong that was and is just trying to get her life back ...

SW asked her if she was using as well and told her that SW would be seeking her medical records because a tox screen was taken when she came into the ER. At first she denied using anything then she said she wanted to be honest and that the tests may show up with some cocaine in it because she was using with A.H. in the last few weeks. She said that she used to be on the street in LA and used drugs and got in trouble with the law, but when she found out she was pregnant with C.J. she got into a 6 month program and stopped. She said that she has not used for more than 12 years. She said that she drank sometimes but that was all. SW asked her what she used and she said that she used to use crack cocaine.

CP 195-96 (some spelling and grammar corrected)(emphasis added).

As it related to R.R.'s pregnancy, within that same assessment exist notes from June 10, 2010 wherein social worker Jason noted that "Mother is making all her appts to the OBGYN." CP 197. Multiple other notes referenced R.R.'s pregnancy, the medical appointments surrounding it and the newborn S.H.'s "return" to R.R.'s home. CP 199-204. Additionally, because it was observed that R.R. was pregnant ("with child") she was provided the brochure "Safe Sleep For Your Baby." CP 211. Such actions were consistent with CPS policy where pregnant mothers and their unborn children were protected and offered services by CPS if there were other children in the home.

That policy was discussed with CPS Area Administrator Cheryl Rich during her deposition:

Question: Okay. Do you ever provide services to people who are pregnant?

Answer: We do, through – if we were providing services for the children that are in the home.

Question: Right.

Answer: Then obviously we would be providing services for the mom, who is pregnant. But for the unborn child, we do not intervene until the child is born.

CP 216.

Intake Supervisor Marykaye Sieverson stated the same in her deposition:

Question: Why would an intake specialist mention that somebody's pregnant?

Answer: Because it would be no surprise when the worker went out on this. You know, they arrive and mom's seven months pregnant. Plus the fact, if the concerns listed from the caller is mom's using any drugs or alcohol, we would want to know if she was pregnant so we could offer services. If the worker went out and mom had a big sweater on and didn't notice mom was pregnant, they may not offer those services –

Question: Okay.

Answer: - to her. So it's – it's always good to mention it. Even though, if the other two children were in the home – wait. Excuse me – were not in the home, we couldn't screen it in just because she's pregnant, even if she's using drugs or alcohol. But because there's other kids in the home, we would screen it in –

Question: Right.

Answer: -- and just mention she's pregnant with another child.

CP 220-21.

The social workers assigned to the May, 2010 case indicated their concerns for R.R.'s family in their file. For example, two separate safety assessments were conducted. The first, a Children's Administration "Safety Assessment" occurred on May 28, 2010 and asked whether there existed a "pattern of neglect/incidents/injuries involving any child in the family which is escalating in severity." The answer to that question was "yes." It also asked whether there had "been an incident of severe domestic violence in the last 90 days." Such conduct was "Indicated." CP 222-223. Similarly, a Children's Administration Division of Children and Family Services Structured Decision Making Risk Assessment was conducted. It found the risk for child abuse and neglect of R.R.'s children to be "high." CP 236-239.

Another referral associated with R.R. was received on August 4, 2010 when R.R. gave birth to her third child, S.H. CP 240-244. R.R.'s case from May 28, 2010 was still open and being investigated. According to respondent's expert, Barbara Stone, the referral associated with S.H.'s birth was properly "screened out," but, "by practice and policy a copy of that referral should have been forwarded to the ongoing social worker for consideration in their service plan."

CP 249.

Case notes from Social Worker Parker from *September 8, 2010* stated:

I met with R.R. to go over her D/A Assessment recommendations. I told her that although she has been attending outpatient treatment on her own

that's good, but now that her recommendations are known, we need to follow them. She was not too happy about that due to part of the recommendations says, "Intensive outpatient," which will increase her groups weekly.

Treatment Recommendations:

1. Level I.0 – Successful completion of Continuing Care: 1.5 hour sessions, 1x per week for approximately 6 months depending on client's need.
2. Individual counseling sessions.
3. Self-help support groups with a minimum of 3 per week for duration of treatment.
4. Continuous total abstinence from alcohol and other addictive drugs.
5. Random UA's.
6. Follow all treatment recommendations deemed necessary by counselor.

CP 200.

Roughly one month after being prescribed a six-month drug treatment plan, and with only minimal evidence of compliance in the CPS file, case notes from October 15, 2010 stated R.R.'s case was almost ready to be closed:

This case is going well and getting close to closing. FAST was in the home and helped out. The mother needs to get involved with DV services and support groups. Mother is involved with D/A treatment and in compliance with those services.

CP 202.

The case was then closed on December 10, 2010:

This case was transferred to SW Parker FVS in July. On 120810 this SW spoke with SW Parker who indicated she will be closing MO's case. MO has followed through w/all services, namely DV services as well as groups, D/A treatment and FAST had been involved with the family. MO continues to be protective of her children; No Contact Order continues to be in place. A.H. is still incarcerated. SW Parker indicated no concerns.

This investigation is completed, founded for negligent treatment/maltreatment, risk level mod high/high. This finding is based on MO leaving her children C.J., 12 yrs and Ra.R., 8 yrs. Although in the state of WA there is no law designated age at which a parent may leave their children alone; Ra.R. had been diagnosed with asthma and he is autistic. MO did not provide a safety plan for her children in the event of

Ra.R. needing medical care or who to contact if there was a problem in the home. The children were provided with inadequate supervision, thus posing a risk to their health, safety and welfare.

CP 197.

Upon review of the records pertaining to the May 28, 2010 referral and subsequent CPS investigation, respondent's expert Barbara Stone opined that "necessary services and follow-thru were not completed on this referral." CP 249. In particular, Ms. Stone noted that "[t]he final report indicates the mother appears to minimize aspects and extent of her own drug use, leaving her children unattended overnight and the impact of domestic violence upon her children," and that "[s]ix months of sobriety for this mother is not sufficient reason to close the case and especially without any evaluation/treatment. The mother reported childhood sexual abuse that has not been addressed, she has quit her job to be a stay-at-home mother with three young children; and is in midst of a divorce. These are all stressors that will affect her continued sobriety. Necessary services and follow-thru were not completed on this referral." Id.

Roughly six months after the investigation into the May 28, 2010 referral was closed, on June 10, 2011 R.R.'s sister, A.S. spoke with R.R. on the phone. CP 283. A.S. was aware of her sister's lengthy struggle with drug addiction as well as her history with CPS. Id. During the call, A.S. observed that R.R. was slurring her words, admitted going on drug binges and stated that she was not a good mother. Id. R.R. recalled the conversation with her sister when she stated:

Sometime between May 2011 and June, 10, 2011 I conversed with my sister, A.S. I informed her that I had relapsed and was again binging on drugs. I informed her I was not a good mother. This was a cry for help as I was very deep into drug abuse and desperately wanted treatment but felt it was impossible given my status as a single, working mother.

CP 284-86.

A.S. was so concerned following her phone call with R.R. that upon hanging up she immediately called the CPS intake hotline in Washington. CP 282-83. She gave her full name

and left her phone number. Id. She never received a return call. Id. At the time of the June 10, 2011 referral, R.R. was pregnant with Michael. CP 284-86, 287.

A.S.'s CPS referral is well documented. CP 288-92. According to CPS documents, A.S. initially spoke with intake specialist Alissa Slack. Ms. Slack noted the observations and input from A.S. and "screened in" the referral with a 10-day response time.

The intake supervisor, Marykaye Sieverson increased the response time to 72 hours. She noted that there was an increased need to respond given the presence of a baby in the home (ten-month-old, S.H.), concerns about R.R.'s history with substance abuse issues and R.R.'s recent "founded" CPS referral relating to her older children. Id.

In regard to the June 10, 2011 referral, R.R. has stated:

I have subsequently learned that CPS received a referral from A.S. on June 10, 2011 – informing CPS that I was slurring my words, using drugs and acknowledging I was not a good mother. Nobody from CPS made contact with me in response to that referral. Had I been contacted, I would have cooperated – as I had in my previous contacts with CPS. If my children had been removed I would have taken advantage of all available services and gotten off drugs. Instead, my drug use and binging continued.

CP 284-86.

Despite the "screen in" decision by intake specialist Alissa Slack and her supervisor's decision to actually increase the "risktag" to a 72 hour response time, nobody checked on pregnant R.R. or her children. Id. Area administrator Cheryl Rich, who by her own admission believes "intake is not really my area of expertise" chose to summarily "screen out" the referral. CP 217-18. According to the document, it was an "administrative override." CP 288-92. The reason given, i.e. her "Investigation Disposition" stated: "Unable to Complete Investigation – Screening Decision Override/Screen Out." Where prompted to "Explain" she stated only "there is no allegation of how this is affecting the children, caller doesn't know mother is using again."

As stated, the referring party, A.S.'s phone number was listed on the referral – but nobody from CPS ever called her to follow up. CP 282-83.

In assessing the decision to “screen out” the June 10, 2011 referral, Respondent’s expert Barbara Stone opined:

In June 2011 a new report is made to CPS by a relative. The referent expresses concern for C.J. (11), Ra.R. (8) and S.H. (10 months). The referent states the children may be at risk of neglect by their mother because of her heroin addiction. The mother was heard slurring her words. The referral is inappropriately screened out for intervention. Practice and Policy (2220 A (1)) require an intake worker to do a person search on all person mentioned in the home and review the agency history with this parent. The history would have indicated the mother does have a drug addiction that has clearly affected the safety of her children in the past. Policy and practice also allow the intake worker to screen in a case as a “risk only” case if there is reasonable cause to believe that risk or safety exist that place the child/children at imminent risk of harm. The history of risk warrants that this case be accepted for investigation and protection of the children involved. This referral was originally screened in by the intake social worker and supervisor and then later screened out by the Area Administrator (AA).

The AA stated during her deposition that she did not document any check on the case history which is a policy requirement (policy 2220 A (1) and policy 13000, Operation Manual). This referral was also called in by a relative who could have easily been contacted if the AA had questions. This is the third referral citing concern about drug addiction and care of three small children. A declaration by the referent on this referral states the mother was slurring her words and admitted to going on drug binges. If the intake staff or the AA had called the relative back, they could ask for further specific information. The screening out of this referral placed these children and an unborn baby at continued increased risk.

CP 249-50.

Respondent Michael Keely was born on February 22, 2012. CP 293-94. DSHS was informed of Michael’s birth on March 1, 2012 as R.R. was seeking services for Michael. Id.; CP 295. R.R. was still going on drug binges and leaving the kids unsupervised. CP 284-86.

On December 2, 2012 Michael was left alone with his siblings while his mother went on another multiple-day drug binge. While his mother was gone, Michael’s older brother C.J.

couldn't get Michael to stop crying. C.J., who had a history of anger issues, and who "hate[d] Michael" violently shook Michael causing massive, permanent injuries that will require a lifetime of pain, needless suffering and substantial medical care. CP 296-310, 311-34, 335-48.

In response to Michael's injuries, CPS removed R.R.'s children and began a dependency action. CP 349-55. Investigation into the incident revealed what CPS already knew but had ignored: R.R.'s history of leaving the children unattended while she went on multiple-day drug binges. Id. What CPS would have learned had it responded appropriately to previous referrals: C.J.'s dangerous behavior towards his siblings. For example, during a forensic interview, Michael's brother Ra.R. revealed:

Ra.R. disclosed that he has observed C.J. hit Michael with a closed fist on Michael's head and face. C.J. has also punched S.H. in the stomach. C.J. has also choked Ra.R. several times to the point where Ra.R. could not breathe. C.J. also held a knife to Ra.R.'s chest. Ra.R. further disclosed that C.J. has hit their mom, R.R. Ra.R. stated that his mother, R.R. is usually not home.

Id.

Following her review of the relevant CPS records associated with R.R. and her children, Respondents' expert Barb Stone's concluded:

This case represents a failure by the Department of Social and Health Services to appropriately assess and serve this family. The result is a tragic permanent injury to a young child because of the neglect of his parent. This is a form of neglect that the Department had determined the mother had demonstrated regarding the care/lack of care of her children. If the Department had followed through with assessments and services in the May 2010 referral, risk could have been substantially reduced for these young children. If the Department had followed their own policy and procedures and accepted the June 2011 report and served the mother, they would have seen that she continued to abuse drugs and neglect her children. They would also have discovered that this mother was pregnant and placing her unborn child at risk with abuse of drugs. Any assessment should have included a look at the impacts already on the children. During the 2005 Washington State Legislative session the definition of neglect was modified and expanded the definition of imminent harm. The change

to the definition took effect on January 1, 2007. The change in definition which is found in RCW 26.44.020(16) states:

"Negligent treatment or maltreatment means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight." All Children's Administration staff were trained in this change and the importance of cumulative effects on children in these circumstances. This change in statute does speak to the issues in this case.

A declaration signed by the referent of the June 2011 referral (A.S.) states that when she spoke with the mother she had admitted to going on drug binges and she was slurring her words. She called CPS because she was concerned about the children. She told the intake worker that the mother has a CPS history, was using drugs, was slurring her words and admitted to her that she was not a good mother. The worker or the AA had the referent's phone number but did not contact her for any further information.

During a 2012 interview with R.R. by the Women's Recovery Center, she reported that she has regularly used Cocaine over the last 24 years. She completed an inpatient program 16 years ago (1996) and was abstinent for 12 years. This would indicate that she started using again in 2008 and was using during all DSHS involvement. If a thorough drug/alcohol assessment and treatment had been completed future risk for all the children would have been minimized.

Research shows that more children die from the effects of neglect than any other form of maltreatment. This is verified in data released by the Administration for Children Youth and Families (ACYF) on a regular basis. A copy of the report issued in 2015 indicates that 72.9 % of children who died from child maltreatment suffered neglect either alone or in combination with another form of maltreatment. This should be known by social workers who are responding to the families who have histories of neglect.

The egregious injuries to Michael did not need to occur. The Department was aware of the risk that this mother posed to her children with her continued drug abuse and tendency to leave them unsupervised. The number of referrals and concerns that were expressed serve as proof of the risk. The failure of the Department to require the mother to complete services in 2010, and then to not accept the referral in 2011 provided the opportunity for the family circumstances to get out of control. This case

represents a clear failure to investigate and serve as required by RCW 26.44, agency policies and procedures, and basic social work practice. Without a doubt this represents a failure to meet Standard of Care.

CP 251-52.

III. ARGUMENT

Standard of Review

Review of a trial court decision on summary judgment is reviewed *de novo*. M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 595, 70 P.3d 954 (2003). This Court is to engage in the same inquiry as the trial court and consider all facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party – in this case, the respondents. Rekhter v. Dep't of Soc. & Health Servs., 180 Wn.2d 102, 145, 323 P.3d 1036 (2014).

Here, review of the material facts suggests the appellant totally failed Michael Keely. Appellant had a duty to make sure R.R. followed through with services stemming from the May 28, 2010 investigation, but rather, it closed the file early. Then, six months later, upon receiving strong evidence that R.R. was again using drugs and leaving her children alone, the department did not even send a social worker to investigate. Had appellant responded it would have discovered R.R. was 1.) using drugs, 2.) leaving her children to fend for themselves and 3.) pregnant. By not responding, the question was not “if” one of R.R.’s children would be injured - it was “when.”

A. DSHS OWED ALL OF R.R.’S CHILDREN A DUTY, INCLUDING MICHAEL

The scope of the appellant’s duty to conduct reasonable investigations into allegations of child abuse or neglect is explained in RCW 26.44.050 as follows:

[U]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and

health services must investigate and provide the protective services section with a report.

RCW 26.44.050 (emphasis added).

Recently, in *H.B.H.*, the Supreme Court stated:

Balancing the interests of parents, children, and the State, the legislature has created a comprehensive statutory framework to govern the State's role as *parens patriae* in the child welfare system. See chs. 13.34 (Juvenile Court Act), 26.44 RCW (Child Abuse and Neglect Act), 74.13 RCW (child welfare services), 74.15 RCW (care of children, expectant mothers, persons with developmental disabilities). The purpose of Washington's statutory scheme is to safeguard, protect, and contribute to the welfare of the children of the state. RCW 74.13.010. Consistent with this purpose, the guiding principal of our child welfare system is that the child's health and safety shall be the paramount concern. RCW 13.34.020.

H.B.H. v. State, 94529-2 at 2 (Filed November 1, 2018)(internal quotations omitted).

The Supreme Court went on to say that the "negligent investigation" cause of action under RCW 26.44.050 "is a narrow exception that is based on, and limited to, the statutory duty (duty to investigate) and legislative purpose of the statute (protect children)." *H.B.H.* at 9.

Division I of the Court of Appeals has stated: "[RCW 26.44.050] is a broad mandate covering any report of possible abuse or neglect." *Lewis v. Whatcom County*, 136 Wn.App. 450, 454, 149 P.3d 686 (2006)(emphasis added).

In *Lewis*, the *duty owed to the respondent* was triggered when the Whatcom County Sheriff's Department learned that Lewis was likely being molested in December 1991 while it was investigating another girl's sexual abuse allegation against Lewis' uncle, Charles Goldsbury. *Lewis*, 136 Wn.App. at 452. Despite the information, the sheriff's department did not investigate, and Lewis continued to be molested by Goldsbury. Under those facts, Division One

held that a duty was owed to Lewis – an individual never named in any referral – under RCW 26.44.050. Id.

Similarly, this Court has recently addressed this issue, stating:

The primary purpose of [RCW 26.44.050] is to protect children and preserve the integrity of the family. In cases of conflict, the interests of the children prevail. To achieve those ends, RCW 26.44.050 places an affirmative duty of investigation on the state.

Wrigley v. State, 49612-7-II at 18 (Filed October 30, 2018).

In rejecting DSHS’s argument to limit the duty owed, this Court stated:

If the phrase, “the possible occurrence of abuse or neglect,” is read to refer only to past abuse, then DSHS would have no duty to investigate when reports showed that a proposed placement would be dangerous for a child, although no abuse had yet occurred. Waiting until tragedy has already descended does nothing to protect the child. Thus, legislative intent is ill served by confining former RCW 26.44.050 only to reports of past abuse or neglect.

Id.

Similarly, here, limiting the duty owed to only the children named in a referral, as appellant argues, would “ill serve” the legislative intent to protect children. In other words, where there was a legitimate referral, as there was in this case, only fulfillment of the “duty to investigate” could serve the legislative purpose of protecting children.

1. Here, as in Lewis, Appellant owed Michael Keely a duty under RCW 26.44.050

Appellant relies heavily on three cases, two of which are unpublished, in support of its position that no duty was owed to Michael Keely. For the reasons set forth below, the unpublished cases are unpersuasive and the published case, Boone v. Dep’t of Social & Health Servs., 200 Wn.App. 723, 403 P.3d 873 (2017), actually suggests Michael, as a member of R.R.’s family, was well within the class of individuals RCW 26.44.050 was created to protect.

Appellant cites the unpublished Estate of Linnik v. State, No. 67475-7-I, 2013 WL 1342316 (Wash. Ct. App., Division I, April 1, 2013) (unpublished). That case involved a convicted sex offender, Terapon Adhahn, who raped and murdered twelve-year-old Zina Linnik in 2007. Three years before the murder, CPS received an anonymous report that an “unnamed man” was living with a young girl that he had purchased or traded for furniture. It was later determined that Adhahn was the subject of that report. The Pierce County Sheriff sent a deputy to investigate, but the officer did not find a girl at the stated address. Two weeks later, CPS received another call about Adhahn but that referral apparently never made it to law enforcement. Three years later, Adhan kidnapped and murdered Linnik. In analyzing the case, Division I found no duty was owed to Linnik.

Linnik is easily distinguishable for several reasons. First, Division I pointed out that the case was not intended to set meaningful precedent when it stated: “no duty [was owed] to the Linnik child *under the circumstances of this case.*” Second, the “breach” in Linnik occurred roughly three years before the victim was abducted and murdered. Third, there was no evidence in the record Linnik was known to Adhahn (or vice versa) nor was he someone who could have been discovered and protected by way of a competent investigation into the referral.

On the other hand, in this case, CPS failed R.R.’s children by, as Barbara Stone stated, closing the file too early and not requiring R.R. to follow through with the recommended services in response to the May 28, 2010 referral. CPS again failed R.R.’s family when it screened out the June 10, 2011 referral instead of sending a social worker out to meet with the family and assess whether R.R. was still using drugs, going on binges, etc. - as she has admitted she was.

Further, had CPS responded to the June 10, 2011 referral, material facts suggest it would have taken R.R.'s children and/or required her to get into treatment. It would have discovered R.R. was pregnant (likely following her first urinalysis) and offered her services just as it had a year earlier when it responded to the May 28th referral and discovered R.R. was pregnant with S.H. It would have learned about C.J.'s anger issues and his violent tendencies towards his siblings by way of the same "risk assessments" it had required of the family in response to the May 28, 2010 referral. Such issues would have also been learned of and addressed during interviews and family counseling sessions. Had CPS responded and offered services to R.R.'s family as it had before, and as it was required to do under RCW 26.44.050, this tragedy would have been prevented. This case and Linnik share nothing in common.

Appellant also cites Albertson v. Pierce County, No. 71317-5-I, 2015 WL 783169 (Wash. Ct. App., Division I, Feb. 23, 2015 (unpublished)). In Albertson, two granddaughters were placed by CPS with their grandfather in 2007 and abused by him. The girls, who had been born in 1999 and 2000, sued Pierce County for failing to properly investigate a referral concerning their grandfather in 1996. Thus, the issue in that case was whether a duty under RCW 26.44.050 is owed to "any child who might become at risk of abuse from the alleged abuser in the future ... [including] children not yet born or in existence at the time of the negligent investigation."

Like Linnik, Albertson is also unpublished. Further, the circumstances of Albertson suggest a substantial gap in time between the failure to investigate and the injuries – eleven years. Moreover, the victims were born three and four years after the failure to investigate – as opposed to Michael, who was conceived less than six months after the premature closure of the May 28, 2010 case, and who was *in utero* when the June 10, 2011 referral was submitted to CPS.

Additionally, Albertson dealt with the Public Duty Doctrine, which states that a respondent must show a duty owed to the individual rather than the public at large. Application of that analysis in this case fails for two reasons: first, appellant has not argued the Public Duty Doctrine provides it immunity here, and second, it is absurd to conclude that Michael Keely was not within the class of children RCW 26.44.050 was intended to protect – and was nothing more than a member of the public at large. See H.B.H., 94529-2 at 2; Rodriguez v. Perez, 99 Wn.App. 439, 444, 994, P.2d 874 (2000); Lewis, 136 Wn.App. at 452.

Lastly, appellant relies heavily on this Court's decision in Boone v. Dep't of Social & Health Servs., 200 Wn.App. 723, 403 P.3d 873 (2017). However, Boone actually illustrates why a duty was owed to Michael under RCW 26.44.050. Boone, was a published decision by this Court, and unlike Linnik and Albertson, it provides important analysis of the Bennett factors which set forth the framework for analyzing whether a duty is owed.

In Boone, the respondents were allegedly abused at a day care facility in 2006. The respondents contended DSHS failed to properly investigate referrals from 1992 and 1997 relating to sexual abuse (both allegations were investigated and declared unfounded) as well as an additional referral in 2006 relating to another child that was investigated and declared "inconclusive." Nonetheless, the day care facility's owner lost her license to operate the business based on failures to appropriately disclose her husband's prior criminal record of non-sex offenses as well as the fact that her son lived at the facility's location. Id. Importantly, no referrals were made to DSHS during the time that the Boone children attended Smith's daycare. Id. at 729.

This Court noted the analytical framework necessary to determine whether the Boone children were owed a duty required consideration of the Bennett factors:

(1) [W]hether the respondent is within the class of persons for whose benefit the statute was enacted; (2) whether the legislative intent supports creating a remedy; and (3) whether the underlying purpose of the legislation is consistent with inferring a remedy.

M.W., 149 Wn.2d at 596, 70 P.3d 954 (citing Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)). Upon applying the Bennett factors in Boone, this Court found the respondents were unable to meet the first and third requirements. In addressing the first requirement, this Court stated:

Here, the Boones are not within the class of persons for whose benefit RCW 26.44.050 was enacted because they were not the subject of the 1992, 1997, and January 2006 reports of abuse that they allege the Department negligently investigated. RCW 26.44.050 was enacted for the benefit of children or families who are the subject of a report of alleged abuse or neglect, and the statute protects those children and families by imposing a duty to investigate, with reasonable care, specific reports of child abuse or neglect. Accordingly, the duty to investigate is a duty to the children or families who are the subject of the reported abuse or neglect because those are the persons for whose benefit RCW 26.44.050 was enacted.

Boone, supra at 736.

In addressing the underlying purpose of RCW 26.44.050, this Court stated:

RCW 26.44.050 addresses “the abuse of children within the home and unnecessary interference with the integrity of the family.” Specifically, the legislature has stated that “[i]t 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.” RCW 26.44.010.

Based on the stated legislative purpose, RCW 26.44.050 does not encompass a remedy for the facts presented here. RCW 26.44.050 is meant to respond to reports of child abuse or neglect and to provide protection for children when there is reason for the Department or law enforcement to believe a child is being abused or neglected. The duty to investigate reasonably is not meant to protect all children from all harm ...

Under RCW 26.44.050, the Department’s duty to investigate with reasonable care is triggered by a report of child abuse or neglect. Once a report is made, the Department has a duty to the particular child and

family to investigate with reasonable care. The Department's duty to investigate a report of child abuse or neglect with reasonable care does not extend to all children and their families. Accordingly, we decline to expand the duty to investigate with reasonable care under RCW 26.44.050 to the Boones.

Id. at 736-37.

Thorough review of Boone reveals that it fully supports respondents' position that RCW 26.44.050 was created with the intent to protect R.R.'s children, i.e. her "family." This Court could not have been clearer that allegations of abuse or neglect about a specific child triggers a duty to investigate and protect all members of the family. Under the circumstances here, where Michael was a member of R.R.'s immediate family during the window of time any reasonable investigation and services would have spanned, he was undoubtedly within the class of persons RCW 26.44.050 was created to protect.

This Court's conclusion is on point with the Supreme Court's recent analysis in H.B.H. where it addressed the "comprehensive statutory framework to govern the State's role as *parens patriae* in the child welfare system." H.B.H., 94529-2 at 2 (Filed November 1, 2018). The Supreme Court specifically included both RCW's 26.44 and RCW 74.15 (care of children, expectant mothers and persons with developmental disabilities) as part of the comprehensive statutory framework's primary purpose of protecting children. The Supreme Court noted the obvious: children *in utero* are particularly vulnerable and their subsequent vulnerability as infant children necessitates the need to investigate reports or allegations that the mother is abusing or neglecting her children. Appellant's failure to fulfill the duty to investigate was a failure in its duty to protect Michael Keely.

2. *The duty owed is heightened when substance abuse is a contributing factor*

Our legislature has heightened the duty owed to all children where allegations of abuse or neglect stem from parental substance abuse issues. See RCW 26.44.195. That statute states in pertinent part:

(1) If the department, upon investigation of a report that a child has been abused or neglected as defined in this chapter, determines that the child has been subject to negligent treatment or maltreatment, the department may offer services to the child's parents, guardians, or legal custodians to:

- (a) Ameliorate the conditions that endangered the welfare of the child; or
- (b) address or treat the effects of mistreatment or neglect upon the child.

(2) When evaluating whether the child has been subject to negligent treatment or maltreatment, evidence of a parent's substance abuse as a contributing factor to a parent's failure to provide for a child's basic health, welfare, or safety shall be given great weight.

(3) If the child's parents, guardians, or legal custodians are available and willing to participate on a voluntary basis in in-home services, and the department determines that in-home services on a voluntary basis are appropriate for the family, the department may offer such services.

(4) In cases where the department has offered appropriate and reasonable services under subsection (1) of this section, and the parents, guardians, or legal custodians refuse to accept or fail to obtain available and appropriate treatment or services, or are unable or unwilling to participate in or successfully and substantially complete the treatment or services identified by the department, the department may initiate a dependency proceeding under chapter 13.34 RCW on the basis that the negligent treatment or maltreatment by the parent, guardian, or legal custodian constitutes neglect. When evaluating whether to initiate a dependency proceeding on this basis, the evidence of a parent's substance abuse as a contributing factor to the negligent treatment or maltreatment shall be given great weight.

RCW 26.44.195 (emphasis added).

Application of RCW 26.44.195 to this case illuminates the clear duty owed to R.R.'s children. The May 28, 2010 referral indicated R.R. was a drug addict – prone to leaving her children unattended while going on drug binges lasting multiple days; she also worked as a

prostitute to support her drug habit – an inherently risky “occupation” can obviously cause a woman to become pregnant. The services offered by the Department, and accepted by R.R., were seemingly appropriate while her case was investigated. Those services, however, were not properly completed. Social Worker Parker’s case notes from September 8, 2010 reflect that R.R. was “not too happy” to learn she still needed six months of Continuing Care drug treatment. CP 199-204. That R.R.’s CPS file was closed three months later, on December 10, 2010 (CP 189-198), serves as the basis of Barbara Stone’s opinion that “[n]ecessary services and follow-thru were not completed on this referral.” CP 249.

Barbara Stone has further opined that the May 28, 2010 case should not have been closed in December 2010 because at that point R.R. still had far too many issues that needed to be addressed for her to maintain her sobriety and stop binging on drugs, such as: minimizing her drug abuse, the impact of domestic violence on her family and the additional stressors of having suffered childhood sexual abuse, joblessness, being a single mother and going through a divorce². Id.

The June 10, 2011 referral, which was received six short months after appellant concluded R.R. no longer needed services – suggested just the opposite: R.R. had serious substance abuse issues that were endangering her children. R.R. was calling out for help when she spoke with her sister, A.S. and her plea for help went unanswered as appellant ignored the referral – declining to even call A.S. back at the number she’d left to see if more information could be obtained.

Appellant dubiously argues that referral “does not even contain any allegations that the particular children identified as living in the home were being abandoned, physically abused,

² Expert Stone’s report erroneously stated the file was closed in November, 2010 rather than December, 2010. Her conclusions remain unchanged.

emotionally abused, sexually abused, or neglected.” See Brief of Appellant at 19. Respectfully, such an assertion is absurd in light of RCW 26.44.195 - as the referral indicated R.R. was a drug addict, had CPS history, was slurring her words and claiming to be a bad mother. Her history of abuse and neglect of her children occurred because of her drug abuse. Where “great weight” was to be given to concerns about substance abuse in investigating abuse or neglect – and in servicing families where substance abuse contributed to the abuse and neglect – appellant simply cannot reasonably claim no duty was owed to R.R. and her family.

The most troubling aspect of appellant’s claim that A.S.’s referral was inadequate is that the response time or “risktag” was actually increased from 10 days to 72 hours based on the intake supervisor’s observation that R.R. had a record of *substance abuse issues* as well as a recent “founded” for abuse and neglect. The intake supervisor appeared to understand the heightened duty under RCW 26.44.195(2), yet her supervisor, the “Area Administrator”– who admitted during her deposition that “intake is not really my area of expertise” – declined to look into R.R.’s history or even call back the referring party. She then summarily “screened out” the referral administratively. The Area Administrator did not give “great weight” to the obvious substance abuse issues involved in this case, as was mandated by RCW 26.44.195(2), and such action served as a massive breach of her duty to R.R.’s family.

3. *Even in utero, where Michael’s siblings were owed a duty, he was owed a duty*

Appellant’s assertion that no duty was owed to Michael because he was unborn or *in utero* fails for several reasons. As outlined above, our Supreme Court in H.B.H. recently addressed the roles of RCW’s 26.44 and 74.15 within the “comprehensive statutory framework” governing the state’s guiding principal to protect the “health and safety” of children. RCW 74.15

outlines services that are intended “[t]o safeguard the health, safety, and well-being of children [or] expectant mothers...” RCW 74.15.010; see also RCW 74.15 generally.

In a manner consistent with the mandates of RCW 74.15, in investigating the May 28, 2010 referral where R.R. left her children alone to go on a drug binge, it was discovered she was pregnant with S.H. and multiple observations about R.R.’s pregnancy were made and services offered by appellant. The assigned social worker investigated whether R.R. was seeing her OBGYN. The social worker provided R.R. the “Safe Sleep For Your Baby” pamphlet. There was obvious concern that S.H. would be harmed by R.R.’s drug use or born drug addicted – as R.R.’s criminal history was replete with drug and prostitution convictions. When new evidence surfaced that she was still using drugs in 2011 there was more than reasonable grounds to believe she, as one with a history of supporting her addiction through prostitution, might also be pregnant again. To claim now that no duty was owed to Michael because he was *in utero* is nonsensical.

Further, as was discussed during the depositions of CPS Area Administrator Cheryl Rich and Intake Supervisor Marykaye Sieverson, according to CPS policy, a pregnant mother will receive services if she already has other children. It is undisputed that R.R. was pregnant with Michael in June of 2011 when the referral from A.S. was processed. At that point, Michael was owed as much of a duty as any of the other children in the family. Where R.R. had three other children toward the end of 2010 and all of 2011 (and was using drugs throughout 2010, 2011, and 2012) a duty was owed to all of them, including Michael, and according to respondent’s expert Barbara Stone, CPS breached that duty.

Finally, appellant’s argument is preposterous in light of cases where CPS removes newborn children from their mother’s care before the children leave the hospital after birth. Obviously such cases are necessitated by way of information obtained prior to the birth of the

child. See e.g. In re Welfare of Frederiksen, 25 Wn.App. 726, 610 P.2d 371 (1979) (DSHS authorized to remove children immediately at birth to prevent future harm). As such, it is nonsensical to say that CPS has no duty to children in neglectful or abusive families until they are actually born or actually injured. Nothing within RCW 26.44 “suggests that the Department of Social and Health Services must stay its hand until actual damage to the endangered child has resulted. Indeed, the expressed intent of the legislature is directly to the contrary.” Frederiksen, 25 Wn.App. at 733-34. This Court made practically the same statement in Wrigley when it stated: “Waiting until tragedy has already descended does nothing to protect the child.” Wrigley, 49612-7-II at 18.

The Department owed a duty to protect all of R.R.’s children, including Michael. As will be discussed below, breach of that duty was totally foreseeable and resulted in tremendous injuries.

4. Michael and his siblings were owed a common law duty

The existence of a legal duty owed to the plaintiff by the defendant is an essential element in any negligence action. Petersen v. State, 100 Wn.2d 421, 425-26, 671 P.2d 230 (1983). Generally, there is no duty to come to the aid of a stranger or to protect others from the criminal acts of third persons. Estate of Davis v. State, Dept. of Corrections, 127 Wash. App. 833, 113 P.3d 487 (2005). However, a duty may be owed where one person is entrusted with the care of another³ such as where a school is entrusted with the safety of its pupils⁴ or where a special relationship exists⁵, such as that between a therapist and a patient⁶, between a landlord

³Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997).

⁴Travis v. Bohannon, 128 Wn. App. 231, 115 P.3d 342 (2005).

⁵C.J.C. v. Corporation of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999)

⁶Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983)

and tenant⁷ or between one charged by law with the supervision of dangerous persons⁸. Further, even in the absence of a general duty to rescue, a duty of care is imposed upon one who voluntarily takes steps to assist a person in need and then acts negligently in rendering such assistance. Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998).

- a. A special relationship existed between DSHS and C.J. as well as between DSHS and Michael Keely.

While there is generally no duty to prevent a third person from intentionally harming another, a duty arises when “a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct.” Niece v. Elmview Grp. Home, 131 Wn.2d 39, 43, 929 P.2d 420 (1997)(internal quotation marks omitted)(quoting Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)). “A special relationship, and the accompanying duty to protect, arises where (1) the defendant has a special relationship with the third person that imposes a duty to control that person’s conduct or (2) the defendant has a special relationship with the victim that gives the victim a right to protection.” H.B.H. v. State, 94529-2 at 4 (Filed November 1, 2018), Hutchins, 116 Wn.2d at 227 (quoting Petersen, 100 Wn.2d at 426 (quoting Restatement of Torts § 315)). When a special relationship exists under § 315, the party owing a duty must use reasonable care to protect the victim from the tortious acts of third parties. Restatement of Torts § 314A cmt. E (“The duty in each case is only one to exercise reasonable care under the circumstances.”); H.B.H. v. State, 94529-2 at 5 (Filed November 1, 2018).

In this case, material facts suggest appellant had a duty to Michael under multiple common law theories in addition to both manners of “special relationship”: First, it was

⁷Griffin v. West RS, Inc., 97 Wn.App. 557, 984 P.2d 1070 (1999)

⁸Joyce v. State, Dept. of Corrections, 155 Wn.2d 306, 119 P.3d 825 (2005)

providing services to Michael's brother, C.J. up until it closed the file too early. Second, it had a special relationship with Michael, as the child of an "expectant mother" pursuant to RCW 74.15.

Upon receiving the May 28, 2010 referral, CPS screened the matter in and offered R.R. services. A special relationship was created. In monitoring R.R.'s compliance with those services, appellant assumed a special duty to R.R.'s two sons and her unborn daughter, S.H., to ensure that they were not subjected to neglect and abuse in the future. Importantly, however, as part of the duty to protect the children from R.R., there was an associated special relationship with C.J. and a duty to make sure he was not left alone to supervise his younger siblings. By closing the file too early, not monitoring R.R.'s progress and not ensuring her completion of appropriate drug, alcohol, domestic violence and mental health counseling, appellant breached its ongoing duty to R.R. as well as its duty to appropriately monitor C.J. Appellant is therefore liable for breaching its special duty to monitor C.J.

Additionally, when R.R. became pregnant with Michael, appellant's duty to him was established – as she was an "expectant mother" who should have been receiving ongoing monitoring pursuant to the 2010 case. The duty became stronger when the June 10, 2011 referral was made – and that duty was unquestionably owed to Michael for the reasons set forth above. The appellant was well aware of R.R. and the dangers her lifestyle presented to her born and unborn children. Had it properly investigated and monitored the family situation, it would have discovered C.J.'s dangerous tendencies and the obvious risks associated with Michael being left alone with C.J. as his caretaker.

As such, material facts suggest the appellant owed and breached its duty to (1) monitor C.J. and (2) protect Michael. This Court should find the existence of a common law duty in this case. After all, in H.B.H. v. State, 94529-2 (Filed November 1, 2018), our Supreme Court stated:

Recognizing DSHS's legal duty under the principles of § 315(b) furthers the overarching purpose of Washington's child welfare laws to safeguard, protect, and contribute to the welfare of the children of the state. RCW 74.13.010. Accountability through tort liability ... may be the only way of assuring a certain standard of performance from governmental entities.

Id. at 10 (internal quotations omitted).

- b. By offering services as part of the 2010 investigation, then failing to monitor and see them through and closing the file early, appellant created and breached its duty to assist the family.

As stated above, a duty of care is imposed upon one who voluntarily takes steps to assist a person in need and then acts negligently in rendering such assistance. Folsom v. Burger King, 135 Wn.2d 658, 958 P.2d 301 (1998). Here, DSHS was investigating the 2010 domestic violence assault and R.R.'s propensity to leave her children unattended when it summarily decided to close the file early despite substantial evidence services should continue.

Social Worker Parker's case notes from September 8, 2010 reflect that R.R. was "not too happy" to learn she still needed six months of Continuing Care drug treatment. CP 199-204. That R.R.'s CPS file was closed three months later, on December 10, 2010 (CP 189-198), serves as the basis of Barbara Stone's opinion that "[n]ecessary services and follow-thru were not completed on this referral." CP 249.

Barbara Stone has further opined that the May 28, 2010 case should not have been closed in December 2010 because at that point R.R. still had far too many issues that needed to be addressed for her to maintain her sobriety and stop binging on drugs, such as: minimizing her drug abuse, the impact of domestic violence on her family and the additional stressors of having suffered childhood sexual abuse, joblessness, being a single mother and going through a divorce⁹. Id.

⁹ Expert Stone's report erroneously stated the file was closed in November, 2010 rather than December, 2010. Her conclusions remain unchanged.

The early closure of the 2010 investigation, in addition to being a breach of RCW 26.44.050, amounted to abandonment of services and protection that were being offered and seemingly monitored by DSHS. As such, a common law duty was owed and subsequently breached.

B. CAUSATION IS A QUESTION OF FACT FOR THE JURY

Appellant raises several new and somewhat repetitive/confusing arguments associated with its argument that respondents cannot show proximate cause¹⁰. Under RAP 2.5 this Court should not review those issues that were not raised in appellant's motion for summary judgment. As it relates to the issues properly preserved, where Michael's injuries would not have happened but for appellant's negligence, and where his injuries were totally foreseeable, appellant's arguments fail.

Proximate cause is an essential element of any negligence theory; it consists of two elements: (1) factual or "but for" causation and (2) legal causation. Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 727 P.2d 655 (1986). Our Supreme Court has consistently held that:

The question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.

Mathers v. Stephens, 22 Wn.2d 364, 370, 156 P.2d 227 (1945); accord Bordynoski v. Bergner, 97 Wn.2d 335, 341, 644 P.2d 1173 (1982); Bernethy v. Walt Failor's, Inc. 97 Wn.2d 929, 935,

¹⁰ None of the arguments beginning with section 2 on page 40 and ending after subsection d. on page 46 were raised in the motion for summary judgment at the trial court. Additionally, it appears some of the arguments may have been "cut and pasted" from other briefs as there are confusing references to arguments by the "plaintiff," etc. For example, on page 40, appellant references "Plaintiff's proximate cause arguments." On page 43, appellant states "Below Plaintiff asserted..." Obviously, this brief is Respondent's first opportunity to respond. As such, respondents have done their best to provide a concise response to the issues properly raised and request leave to supplement their briefing if this Court determines any issues are not properly addressed.

653 P.2d 280 (1982); H.B.H. v. State, 94529-2 at 11 (Filed November 1, 2018) (“[C]ourts generally leave questions of reach and causation for juries to decide.”); Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)(“Breach and proximate cause are generally fact questions for the trier of fact.”).

1. Respondents can show factual causation

Factual causation is established between a appellant’s act and a subsequent injury only where it can be said the injury would not have occurred “but for” the appellant’s act. W. Keeton, D. Dobbs, R Keeton, and D. Owen, Restatement of Torts § 42, at 273 **1184 (5th ed. 1984). As noted in Baughn, 107 Wn.2d at 142, 727 P.2d 655: “Cause in fact refers to the ... physical connection between an act and an injury.”

Appellant’s argument as it relates to factual causation and its citation to Walters v. Hampton, 14 Wn. App. 548, 543 P.2d 648 (1975) should not be well taken. That case involved an allegation of a negligent investigation into Gordon Hampton, who had allegedly pointed his gun at his wife on several occasions. The respondent was then shot by Mr. Hampton two years later. His theory was that the City of Port Orchard should have prosecuted Mr. Hampton, ensured conviction and then sought a lengthy jail or prison sentence so as to protect future potential victims. Id. That scenario is a far cry from the facts in this case.

Here, appellant was on notice of R.R.’s propensity to leave her children and go on drug binges and had previously been involved in her and her children’s lives to hopefully correct this problem. When she left her children on May 28, 2010 to smoke crack in Seattle, a severe domestic violence incident occurred and she ended up in the hospital. R.R. admitted that was not the first time she left her kids alone.

On June 10, 2011 another referral came in alleging nearly identical behavior: R.R. was “slurring her words,” “on a binge” and stating she was “not a good mother.” CP 288-92. The first two individuals who screened the referral recognized that an investigation should occur. Initially, it was a ten-day investigation, but upon being reviewed by a supervisor, changed it to a 72-hour investigation. The intake workers understood the significance of the referral based upon R.R.’s history. For an entirely unknown and unsupported reason, the Area Administrator called off the investigation. Her “Investigation Disposition” stated: “Unable to Complete Investigation – Screening Decision Override/Screen Out.” Where prompted to “Explain” the document stated only “there is no allegation of how this is affecting the children, caller doesn’t know mother is using again.” Id. For a multitude of reasons, the Area Administrator’s decision was unfathomable – at the very least she should have called the referral source, A.S. back for more information – as she had her phone number. A thirty second phone call likely would have given the Area Administrator plenty of information about the peril R.R.’s children were in.

Substantial material facts suggest DSHS’s negligence was the cause of Michael’s injuries. According to R.R.’s declaration, she was going on drug binges throughout 2011 and 2012 – during the time she was pregnant with Michael and when he was a newborn. Additionally, according to R.R., had CPS contacted her *she would have cooperated with services*. R.R. would have been subjected to UA’s, offered drug treatment and prenatal care – just as she had been in response to the May 2010 referral. Had she not cooperated, pursuant to RCW 26.44.195, her kids would have been removed, including Michael, upon his birth. Family risk assessments would have occurred – as they had previously and as they were after Michael’s injury – and C.J.’s violence could have been addressed, in particular, the fact that he had been observed hitting Michael with a closed fist on the head and face, had punched S.H. in the

stomach, hit his mom, held a knife to Ra.R.'s chest and choked Ra.R. to the point where Ra.R. could not breath. The odds that C.J. would have been left unsupervised to care for Michael on December 2, 2012 would have been almost nonexistent.

That a severe domestic violence incident did occur on December 2, 2012 when R.R. was on a drug binge was very clearly caused by appellant's failure to appropriately fulfill the many duties set forth above and was therefore, totally foreseeable. Respondent's expert Barbara Stone could not have been clearer when she stated:

The egregious injuries to Michael did not need to occur. The Department was aware of the risk that this mother posed to her children with her continued drug abuse and tendency to leave them unsupervised. The number of referrals and concerns that were expressed serve as proof of the risk. The failure of the Department to require the mother to complete services in 2010, and then to not accept the referral in 2011 provided the opportunity for the family circumstances to get out of control. This case represents a clear failure to investigate and serve as required by RCW 26.44, agency policies and procedures, and basic social work practice. Without a doubt this represents a failure to meet Standard of Care.

CP 252.

Taken in the light most favorable to Respondents the material facts show factual causation exists.

2. Respondents can show legal causation

For many of the same reasons factual causation is shown, respondents can also show legal causation. Legal causation is a "fluid concept" that is analyzed by considering "logic, common sense, justice, policy, and precedent." Tyner v. Dept. of Soc. & Health Servs., 1 P.3d 1148, 141 Wn.2d 68, 82 (2000).

The facts in this case support the conclusion that the question was not "if" one of R.R.'s children would be seriously injured, but "when." Upon responding to the May 28, 2010 referral and contacting R.R. and her children, the appellant learned that R.R. was pregnant with S.H. and

that the family required services which included significant drug treatment for R.R. R.R. also required services to address her propensity for leaving her children unattended. The appellant was on notice that R.R. was a dangerous mother with a lengthy history of addiction issues.

The appellant was again put on notice in June of 2011 that R.R. was a ticking time bomb. Had appellant responded to that referral, as it initially planned to do, appellant would have learned Mom was again using drugs and going on binges, basically repeating her long-standing drug use history. It also would have learned R.R. was pregnant with Michael and that C.J. was dangerous. Appellant would have been mandated to provide and monitor services to address those issues, and if R.R. was not compliant, it would have removed R.R.'s children, including Michael upon his birth.

The injuries Michael suffered were totally foreseeable and avoidable. Logic, common sense, justice, policy and precedent all support affirming the trial court's denial of appellant's motion for summary judgment and letting a jury decide this case. Waiting for a child to be severely injured before accepting a duty to act is patently absurd.

IV. CONCLUSION

Material facts suggest appellant breached its duties to respondent, Michael Keely and that such actions caused his substantial injuries. As such, the trial court's denial of summary judgment should be affirmed.

DATED THIS 13th day of November, 2018.

HESTER LAW GROUP, INC., P.S.
Attorneys for Respondent



By: _____

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of the document to which this certificate is attached to be served on the following in the manner indicated below:

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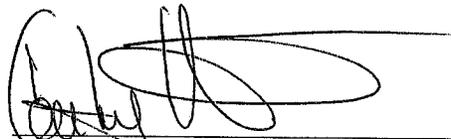
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November 13, 2018 - 4:29 PM

Transmittal Information

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Appellate Court Case Number: 51639-0
Appellate Court Case Title: State of Washington, Appellant v Kyle P. Keely, Respondent
Superior Court Case Number: 16-2-05028-5

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