

FILED
Court of Appeals
Division II
State of Washington
1/14/2019 1:08 PM

NO. 51639-0-II

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

STATE OF WASHINGTON,

Appellant/Defendant,

v.

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

Respondent/Plaintiff.

APPELLANT'S REPLY BRIEF

ROBERT W. FERGUSON
Attorney General
GARTH A. AHEARN
WSBA No. 29840; OID No. 91105
Assistant Attorney General
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243
GarthA@atg.wa.gov
Attorneys for Appellant/Defendant

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I. INTRODUCTION

This case involves the question of what duty a social service agency has to a child when the agency never received a report alleging abuse or neglect of the child from the time the child was born until the time the agency definitively learned the child was subjected to abuse or neglect. The RCW 26.44.050 duty is triggered upon DSHS¹ receiving an allegation of abuse or neglect of a child. It is uncontested that DSHS never received a referral concerning M.K. from the time he was born until he was assaulted.

Respondent Keely attempts to create a duty by pointing to referrals that were made prior to M.K.'s birth, which concerned other children in M.K.'s family. But recognizing such a duty would expand DSHS's duty to investigate under RCW 26.44.050 to include children completely unknown to DSHS and children as yet unborn. This runs counter to the language and legislative purpose of RCW 26.44, which does not include unknown or unborn children. Washington appellate courts, including this one, have consistently held DSHS does not owe a duty to unknown or unborn children.

The common law special relationship duty articulated in *H.B.H. v. State*, Wn.2d , 429 P.3d 484 (2018), which exists between DSHS and

¹On 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. However, consistent with earlier briefing in this matter, this brief will refer to the agency as DSHS or the Department.

dependent foster children, did not arise in this case. DSHS never had such a special relationship with M.K. because no court ordered M.K. dependent and into foster care. Nor is there admissible evidence in the record that a court would have placed M.K. into foster care for a period of time that would have encompassed the night of the incident.

Summary judgment should also properly be granted to DSHS because Keely cannot establish cause-in-fact. Keely's factual causation theory is based on pure speculation. Keely failed to present any admissible evidence that if DSHS had acted differently, M.K.'s brother would not have assaulted him. The record is devoid of any admissible expert testimony establishing that, but-for DSHS's alleged failure to act, M.K.'s brother would not have assaulted M.K.

Finally, DSHS is also not the legal cause of Keely's harm. Keely posits DSHS's liability for harm to a child even when DSHS never received a referral alleging that the child was subject to possible abuse or neglect. Likewise, Keely attempts to impose an unlimited duty for DSHS to intrude into families when it lacks legal authority to do so, or risk incurring liability for failing to make such unauthorized intrusions. Such an unlimited duty lacks common sense and is poor public policy.

For these reasons, the trial court erred and summary judgment in favor of the State is proper.

II. ARGUMENT

A. **Summary Judgment for the State is Proper Because Keely Fails To Establish DSHS Owed a Duty Where M.K. Was Never the Subject of an Allegation of Abuse or Neglect**

Although unacknowledged, Keely's arguments are premised on an expansion of the RCW 26.44.050 duty to include children unknown to DSHS, including children yet unborn. Such an unprecedented expansion of the duty directly conflicts with the legislative purpose of the RCW 26.44.050 duty, which does not extend to the unknown or the unborn. Further, it directly conflicts with a number of Court of Appeals decisions, which have consistently held that RCW 26.44.050 does not create a broad duty owed to *all* children, including the unborn. The trial court erred in failing to grant summary judgment to the State in this case.

1. **The legislative purpose of the RCW 26.44.050 duty does not extend to unknown or unborn children**

Keely claims that the RCW 26.44.050 duty extends to M.K. based on two referrals concerning M.K.'s family that were not about M.K. and were made prior to his birth. Br. of Resp't (Resp't Br.) at 16. This argument lacks merit because it ignores the language and legislative intent of RCW 26.44, which does not extend to the unknown or the unborn.

RCW 26.44.010 outlines the intent of RCW 26.44. RCW 26.44.010 describes the Legislature's intent regarding the State's responsibility to

children identified through reports of alleged abuse or neglect. Nowhere does it reference the unknown or the unborn. Nor does the RCW 26.44 definition of a “child” include the unborn or a fetus. RCW 26.44.020(2). Keely’s attempt to expand the RCW 26.44.050 duty to include the unborn is therefore not supported by the plain language of the statute.

Keely’s attempt to expand the RCW 26.44.050 duty to include the unborn is also not supported by the Court of Appeals’ treatment of statutes in other areas of Washington law. Elsewhere, the term “child” has been construed to exclude a fetus barring explicit language to the contrary. As the court in *State v. Dunn* observed:

No Washington criminal case has ever included “unborn child” or fetus in its definition of person. *When the Legislature intends to include the fetus in a class of criminal victims, it specifically writes that language into the statute. See RCW 9A.32.060(1)(b) (first degree manslaughter: intentional and unlawful killing of “an unborn quick child by inflicting any injury upon the mother of such child”); RCW 9A.36.021(1)(b) (second degree assault: intentionally and unlawfully causing substantial harm to “an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child”). Considering the Legislature’s broad, almost plenary, authority to define crimes, the fact that it did not specifically define “child” in RCW 9A.42.010(3) to include a fetus indicates it did not intend to depart from the typical definition of a child as a person from the time of birth to age 18.*

State v. Dunn, 82 Wn. App. 122, 128, 916 P.2d 952 (1996) (emphasis added).

So too in RCW 26.44. The fact that the Legislature did not define “child” in RCW 26.44.020(2) to include the fetus indicates that it did not intend “child” to mean anything other than a person from the time of birth to the age of majority. *Dunn*, 82 Wn. App. at 129; *see Reinesto v. Superior Court*, 182 Ariz. 190, 192, 894 P.2d 733, 735 (Ct. App. 1995) (if the legislature had intended to refer to an unborn child or fetus in the Arizona child abuse statute, Ariz. Rev. Stat. Ann. § 13-3623, it would have done so).

Thus, the plain language of RCW 26.44 does not support Keely’s assertion that a duty to M.K. was triggered by referrals that were not about M.K. and that were made before M.K. was even born. The trial court erred in failing to grant summary judgment.

2. Attempts to expand the RCW 26.44.050 duty to the unknown and the unborn have been repeatedly rejected

Keely claims that DSHS owed a duty to “all of R.R.’s children, including M.K.” based on referrals received by DSHS prior to M.K.’s birth. Resp’t Br. at 13. This argument fails because it requires expanding the RCW 26.44.050 duty to include “all children,” even children who are not the subject of a referral of abuse or neglect.

Courts have consistently held the duty does not extend to “all children.” For example, in 2015 the Court of Appeals Division 1 rejected a claim that RCW 26.44.050 creates a duty “to all children who may be

abused or neglected.” *Albertson v. Pierce Cty.*, No. 71317-5-I, 2015 WL 783169 (Wash. Ct. App. Feb. 23, 2015) at *3 (2015) (unpublished); *cited per* GR 14.1. Keely’s “all family” duty is similarly premised on the expansion of the current RCW 26.44.050 duty to include all children, even when DSHS never received a report about the particular child.

Similar claims have been rejected by the Court of Appeals because such a duty “would obviate the requirement that for a public entity to be negligent, it must have a duty to a *particular person . . .*” *Estate of Linnik v. State ex rel. Dep’t of Corr.*, No. 67475-7-I, 2013 WL 1342316 (Wash. Ct. App. Apr. 1, 2013) at *6 (unpublished) (emphasis added); *cited per* GR 14.1. DSHS never received a referral about M.K. Thus, no duty owed to the particular person, M.K., could arise.

Keely’s brief also ignores the plain language of the statute, which refers to “such children” that were the subject of “such reports” in RCW 26.44.010’s stated purpose. *Albertson*, 2015 WL 783169 at *4. M.K. was never “such children” that were the subject of “such reports.” Thus, no duty owed to the particular person, M.K., could arise.

In sum, the language and legislative purpose of RCW 26.44 does not extend to the unborn or the unknown. As such, the trial court erred and summary judgment in favor of the State is proper.

3. The Court of Appeals decision in *Boone v. DSHS* does not create a duty to the unborn

Keely also erroneously asserts that *Boone v. DSHS* supports the RCW 26.44.050 duty extending to as-yet unborn children like M.K., based on that decision stating the duty applies to “families.” Resp’t Br. at 18-20. It does not. Rather, in a published decision, *Boone* affirms the analysis established in *Linnik* and *Albertson*, and rejects the notion that the RCW 26.44.050 duty extends to the unknown, or the unborn. *Boone v. Dep’t of Soc. & Health Servs.*, 200 Wn. App. 723, 733-36, 403 P.3d 873 (2017).

Keely’s argument relies on a passage in *Boone* that states, “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.” Resp’t Br. at 19 (emphases in brief) (quoting *Boone*, 200 Wn. App. at 736). But Keely’s claim regarding the class of persons for whose benefit RCW 26.44.050 was enacted is far too broad. Indeed, Keely’s argument is contradicted by the limiting language in the very passage on which it relies. RCW 26.44.050 protects, and its duty applies, to children and families “who are the subject

of specific reports of child abuse or neglect.” *Boone*, 200 Wn. App.at 736.

A child who is not yet born cannot be the subject of such a specific report.

Nowhere in *Linnik*, *Albertson*, or *Boone*, has a court extended the RCW 26.44.050 duty to potential future children within a family or all children. Thus, Keely’s claim that *Boone* creates a duty owed to M.K. is meritless and the trial court erred in failing to grant summary judgment.

4. *Wrigley v. State* does not create a duty owed to the unknown or the unborn

Keely’s assertion that DSHS owed a duty to M.K. premised on this Court’s recent ruling in *Wrigley v. State*, ___ Wn. App. ___, 428 P.3d 1279 (Wash. Ct. App. 2018), is unsupported. Resp’t Br. at 25. The State respectfully submits that the Supreme Court’s analysis of RCW 26.44.050 in *H.B.H.* and the dissent in *Wrigley* properly analyze the duty owed to a child under RCW 26.44.050.

However, putting that aside, the majority opinion in *Wrigley* does not create a duty to M.K. The duty articulated in *Wrigley* arose after DSHS received a referral about a particular child allegedly being subjected to abuse, and that child was placed into court-ordered shelter care. It was then that DSHS learned that the child’s father had allegedly previously abused the mother.

Here, DSHS never received a referral about M.K. and he was never placed into court-ordered shelter care. Nor is there admissible expert testimony in the record that M.K. would have been court-ordered into shelter care.

Nowhere in *Wrigley* does the court find a duty owed to children who were not already identified to DSHS as potentially subject to abuse or neglect. Nor could it, as that issue was not before it.

In re Frederiksen does not bolster Keely's assertion that a duty is owed to M.K. *In re Welfare of Frederiksen*, 25 Wn. App. 726, 610 P.2d 371 (1980). Unlike in *Frederiksen*, here there was no ongoing dependency for older siblings at the time of M.K.'s birth, and there is no admissible expert evidence showing M.K. would have been placed into a court-ordered shelter care based on the uncontested facts. The Court of Appeals has already determined that *Frederiksen* does not create a duty to unborn, unknown future children pursuant to RCW 26.44.050. *Albertson*, 2015 WL 783169 at *5. In short, *Wrigley* is inapplicable to the facts of this case and summary judgment is proper.

5. *Lewis v. Whatcom County* does not establish that a duty under RCW 26.44.050 was triggered in this case

Keely's reliance on *Lewis* for the assertion that two referrals prior to M.K.'s birth trigger a duty owed to M.K. is misplaced. Resp't Br. at 14-15.

Almost the exact same argument was rejected in *Linnik, Albertson, and Boone*.

The court in *Lewis* held that the RCW 26.44.050 duty to investigate allegations of abuse of a child is not limited to children who have been allegedly abused by their parents or guardian. *Lewis v. Whatcom Cty.*, 136 Wn. App. 450, 454, 149 P.3d 686 (2006). *Lewis* did not raise any question as to the duty owed to children regarding whom no complaint was made nor to children who were not yet born.

Here, even assuming arguendo the June 10, 2011, referral triggered a duty to investigate under RCW 26.44.050, the duty to investigate was owed to the particular children in the home at the time of the referral. In an attempt to expand the duty to M.K., who was not born at the time of the referral, Keely engages in a series of assumptions about what would allegedly have occurred if the June 10 referral had been accepted for investigation. Resp't Br. at 17. However, a series of speculative assumptions about what would have occurred if the June 10, 2011, referral had been accepted does not create a duty owed to M.K. in December 2012.

6. The Supreme Court's decision in *H.B.H.* does not establish that a duty was owed to M.K. in this case

Keely's reliance on *H.B.H.* does not overcome the fact that summary judgment should be granted in this case. Resp't Br. at 26. Because a court

never entrusted DSHS with care of M.K., the special relationship outlined in *H.B.H.* did not arise.

a. *H.B.H.* does not support the RCW 26.44.050 duty extending to unknown or unborn children

Keely's claim that DSHS owed M.K. a duty is not supported by the Supreme Court's most recent articulation of DSHS's duty to investigate pursuant to RCW 26.44.050. In analyzing the application of a common law duty to children in foster care, the Supreme Court described the operation of RCW 26.44.050. The Court noted: "The dependency process is initiated when DSHS receives a report that a child *has been* abused, neglected, or abandoned. RCW 26.44.050." *H.B.H.*, 429 P.3d at 490 (emphasis added). Accordingly, *H.B.H.* does not support Keely's assertion that DSHS owed M.K. a duty when it never received a referral alleging that he was being abused or neglected.

b. The common law duty articulated in *H.B.H.* does not apply to M.K. on the facts of this case

Keely's reliance on *H.B.H.* in claiming DSHS owed M.K. a common law duty is not well founded. The duty articulated in *H.B.H.* is owed to a particularized set of court-ordered dependent children who were placed into foster care by DSHS. *H.B.H.*, 429 P.3d at 484. Nothing in the special relationship analysis articulated in *H.B.H.* establishes a common law

duty owed to children outside of that category, much less all children, including an unidentified child or one not yet born.

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. *Id.* at 492 (relying on *Restatement (Second) of Torts* § 315 (1965)). When a special relationship exists under Section 315, the party owing a duty must use reasonable care to protect the victim from the tortious acts of third parties. *Restatement (Second) of Torts* § 314A cmt. e (“The duty in each case is only one to exercise reasonable care under the circumstances.”); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205, 943 P.2d 286 (1997).

In *H.B.H.*, the court found that DSHS had a special relationship with foster children based on a court's ordering of a child into the legal custody of DSHS after a dependency proceeding had been initiated. *H.B.H.*, 429 P.3d at 490. If a court rules a child cannot remain in the parental home, the court may order the child to be placed with DSHS. RCW 13.34.130(1)(b)(i) (juvenile court shall “[o]rder the child to be removed from his or her home and into the custody, control, and care of . . . the department . . . for supervision of the child's placement”). It is legal entrustment of the child to

the State by court order that gives rise to a special relationship between DSHS and foster children. *H.B.H.*, 429 P.3d at 491-95.

Here, a special relationship did not arise because M.K. was not court-ordered into DSHS legal custody. Nor has Keely presented any admissible expert evidence that M.K. would have been placed in DSHS custody by a court.

At no time does Keely's standard of care expert Ms. Stone opine that a court would have placed M.K. into DSHS custody and foster care where a special relationship could arise. Equally, there is no admissible evidence in the record showing M.K., or any of his other siblings, would have been ordered into foster care by a judge for a sufficient period of time that would have included the night in question.

Keely's claim that a special relationship existed in this case based on RCW 74.15 is also unfounded. *See* Resp't Br. at 26. The purpose of RCW 74.15 refers to children and adults "receiving care away from their homes . . ." and to the licensing of the agencies providing that care. RCW 74.15.010(1). Nothing in RCW 74.15, or the Supreme Court's decision in *H.B.H.*, suggests a special relationship arises before DSHS has court-ordered legal custody of a child or simply because DSHS may have offered a parent voluntary services.

In sum: (1) there is no special relationship with unknown children; (2) M.K. was never ordered into foster care by a court; and (3) there is no admissible evidence he would have been placed into foster care by a court for a sufficient period of time that would have encompassed the incident at issue. As such, the special relationship duty owed to children in foster care is not applicable here and summary judgment is proper.

B. The Trial Court Erred Because Keely's Factual Causation Theory Is Based on a Series of Impermissible and Unsupported Factual Assumptions

Keely continues to assert that if DSHS acted differently in response to the March 28, 2010, investigation, or the June 10, 2011, referral, this incident would not have occurred. Even if Keely could overcome that neither the investigation nor the referral triggered a duty to M.K., Keely provides no admissible facts that create a question of fact to survive summary judgment on causation under the facts of this case.

1. There is no admissible evidence in the record to establish that M.K.'s brother would not have assaulted M.K. if DSHS had offered services to M.K.'s mother

Keely's assertion that if M.K.'s mother, R.R., had cooperated with services it would have prevented this incident remains wholly speculative. Resp't Br. at 31. Keely provides no admissible evidence that services would have cured R.R.'s parental deficiencies for a sufficient period of time such that M.K. would not have not been assaulted by his brother.

Keely's expert Ms. Stone asserts that this incident would have been avoided if R.R. had been required to submit to services by DSHS. CP at 252. The problem with this claim is that DSHS had no authority to require R.R. to do anything. Only a court could have ordered R.R. to submit to services and Ms. Stone never opined that a court in fact would have ordered R.R. to do anything.

In fact, the uncontested record shows the opposite. While R.R. participated in services in the past, R.R. would then revert to her behaviors. Ms. Stone has no ability to determine if R.R. would have acted differently even if she had participated in services. Ms. Stone never spoke to R.R. to determine if the services would have affected R.R. sufficiently that she would have not left M.K. alone for any period of time with C.J. *See Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 247, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005) (upholding exclusion of an expert's speculative opinion about how a person would respond to the actions of a community corrections officer when the expert did not speak to the person).

Similarly, Keely's response fails to identify any admissible evidence showing that M.K.'s brother C.J. would not have assaulted M.K. even if R.R. had participated in services. Just like Ms. Stone has no ability to predict how R.R. would have responded to services, Ms. Stone 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. Ms. Stone never spoke to C.J. either.

2. Keely's claims remain speculative because there is no admissible evidence that a court would have removed M.K. from his home

Keely alternatively asserts that if R.R. had failed to participate in services, M.K. would have been removed from R.R.'s care. Resp't Br. at 31. However, this proximate cause argument is also speculative because of the statutory constraints placed on DSHS's authority to remove a child from the care of a parent. There is no admissible expert evidence in the record that a court would have removed M.K. from his mother's care.

To establish causation in a negligent investigation of child abuse case, as in a negligent parole supervision case, the plaintiff must offer proof that a judicial officer would have taken the specific action at issue, here, removed a child from the home. *See Bordon*, 122 Wn. App. at 242. (upholding the exclusion of testimony as to how a judge *would* rule when the expert lacked the expertise to offer such an opinion). Nowhere does Ms. Stone opine that a court would have ordered into shelter care any of R.R.'s children that were born prior to the June 10, 2011, referral.

Further, even if there were evidence in the record that a court would have ordered R.R.'s other children into shelter care based on the June 10, 2011, referral, there is no admissible evidence that M.K. would have been

placed into shelter care when he was born. Ms. Stone never opines on these issues. Consequently, Keely cannot raise a question of fact to survive summary judgment for this reason as well.

Furthermore, Keely's claims fail because there is no evidence that a court-ordered dependency would have been in effect on the night in question. This is critical because even if Keely had produced admissible expert evidence that R.R. and C.J. would have responded to court-ordered services during a dependency, which Keely has not, the court would no longer have had authority to order R.R. to do anything once the dependency was completed. Therefore, it remains speculative to claim that if DSHS acted differently, this incident would not have occurred.

In short, Keely's claim that there is a material question of fact regarding proximate cause is without merit. Because Keely has presented no admissible evidence showing that if DSHS had acted differently this incident would not have occurred, summary judgment is proper.

3. Keely's claims fail based on a lack of legal causation

Keely's response fails to raise any arguments that support the imposition of legal causation under the facts of this case. Legal causation "is a legal question involving logic, common sense, justice, policy, and precedent," *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). Imposing legal causation is illogical when DSHS never received a

referral about M.K. the entire time he was alive. It is equally illogical to impose legal causation when there is no admissible evidence in the record that a court would have ordered intrusion into M.K.'s family life for a significant period of time encompassing the assault.

Keely seeks an expansion of the RCW 26.44.050 duty to include unborn and unknown children that runs contrary to legal precedent stating the duty does not extend to the unborn or the unknown. *See Boone*, 200 Wn. App. at 733-36. Such a duty would require DSHS to intrude into a family even when it lacks court authority to do so, or else risk imposition of liability. This lacks commonsense and runs counter to sound public policy against unwarranted intrusion into a family's life.

Keely's attempt to expand the RCW 26.44.050 duty to include the unknown and unborn ignores not only Washington courts, but the Legislature too, which has not expanded the duty to unknown and unborn children, despite the opportunity to do so. The Legislature has not modified RCW 26.44 to include duties to the unborn or the unknown. Given the repeated litigation of this issue, the Legislature's silence provides additional evidence that it does not intend there to be such duty. *See Cedar River Water & Sewer Dist. v. King County*, 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)).

Keely's legal causation theory remains based on a series of unsupported assumptions that are too remote, insubstantial, and speculative to impose legal liability in this case. As noted in the factual causation section, Keely has failed to submit any admissible evidence that a court would have intervened in the manner as Keely claims, or that C.J. would in fact not have assaulted M.K. regardless of any services offered to R.R.

In short, Keely's legal causation arguments lack merit because there is no indication that the Legislature intended the RCW 26.44.050 duty to extend to the unknown or the unborn. To hold otherwise would render DSHS the insurer of all harms to all children. Summary judgment therefore remains proper because such determination lacks common sense or logic.

III. CONCLUSION

Entry of summary judgment in favor of the State is proper in this case. Keely has failed to establish that a duty owed to M.K. was triggered. As articulated by the Supreme Court, the RCW 26.44.050 duty is triggered upon a report alleging that a particular child has been abused or neglected. *H.B.H.*, 429 P.3d at 490. Nor did a duty under the common law exist. Keely's arguments regarding causation are speculative and premised on an expansion of the RCW 26.44 duty based on bad public policy. The trial court's ruling is in error. It should be reversed and summary judgment in favor of the Appellant/Defendant should be granted.

RESPECTFULLY SUBMITTED this 14th day of January, 2019.

ROBERT W. FERGUSON
Attorney General

/s/ Garth A. Ahearn

GARTH A. AHEARN
WSBA No. 29840; OID No. 91105
Assistant Attorney General
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243
GarthA@atg.wa.gov
Attorneys for Appellant/Defendant

CERTIFICATE OF SERVICE

I certify that on this 14th day of January 2019, I caused a true and correct copy of the Appellant's Reply Brief to be electronically served to the following:

HESTER LAW GROUP, INC. P.S.
Casey M. Arbenz
Kathy Herbstler
1008 South Yakima Ave., Ste. 302
Tacoma, WA 98405
casey@hesterlawgroup.com
kathy@hesterlawgroup.com
Attorneys for Keely/Plaintiff

TORRONE LAW LLC
Christopher G. Torrone
Michelle Nicks
705 S. 9th St., Ste. 201
Tacoma, WA 98405-4622
chris@torronelaw.com
michelle@torronelaw.com
Attorney for Keely/Plaintiff

By: /s/ Sharon Jaramillo
Sharon Jaramillo, Legal Assistant

AGO TORTS TACOMA

January 14, 2019 - 1:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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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Sender Name: Sharon Jaramillo - Email: sharonj@atg.wa.gov

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Phone: (206) 464-5870

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