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

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M.E. and J.E., minors, through RODNEY RAY,  
as Litigation Guardian *ad Litem*;  
and JOSHUA EDDO, individually,

Appellants,

v.

CITY OF TACOMA, a political subdivision of  
the State of Washington,

Respondent.

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BRIEF OF APPELLANTS

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A. INTRODUCTION

The City of Tacoma (“City”) Police Department engaged in egregious negligence when its officers failed to properly investigate a possible child abuse situation as required by RCW 26.44.050 and the common law. The City’s distinct negligence left two young girls, J.E. and M.E. (“the children”), in the care of a convicted sex offender who then abused them.

The children sued the State’s Department of Social and Health Services (“DSHS”) for its breach of its own duties to the children, and that case settled. The children sued the City separately in the Pierce County Superior Court in this action. The trial court did not articulate its actual grounds for granting summary judgment to the City, but it is unambiguous that the City owed the children a duty of care under statutes and common law, as interpreted by Washington courts. If the basis for the trial court’s action was a notion that somehow the children were required to sue the City in the first action, that theory is misplaced under Washington law. M.E./J.E. were entitled to proceed in the present action, and the trial court erred in ruling otherwise.

This Court should reverse the trial court’s decision and remand the case to the trial court to allow the children their day in court against the City for its flagrant negligence.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying the children's motion for summary judgment and granting the City partial summary judgment on November 2, 2018.

2. The trial court erred in denying the children's motion for reconsideration as to its November 2 order on December 7, 2018.

3. The trial court erred in granting the City's motion for summary judgment on December 7, 2018.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in dismissing the children's claims of negligent investigation of potential abuse based on RCW 26.44.050 or common law principles against the City where the City police investigation violated Tacoma Police Department ("TPD") standards and were contrary to proper police practices as documented by the children's expert? (Assignments of Error Numbers 1-3)

2. To the extent that the trial court reached this issue, did the trial court err in dismissing the children's claims under CR 19 because the City was not joined as a party in the children's prior action against DSHS for such negligent investigation of their abuse? (Assignments of Error Numbers 1-3)

3. To the extent that the trial court reached this issue, did the trial court err in dismissing the children's claims under *res judicata* principles or claim splitting where DSHS and law enforcement agencies have distinct, separate duties to children in connection with the investigation of child abuse? (Assignments of Error Numbers 1-3)

C. STATEMENT OF THE CASE

On October 14, 2011, the City's Officers Jennifer Corn and Bret Terwilliger responded to a request for a child welfare check after J.E. reported to her father that she had taken some of her mother's medicine and vomited. CP 41-44. Upon arrival at the house, Corn noted that the children's bedroom was "completely destroyed. CP 43-44. There was clothing, garbage, and debris covering the floor. CP 44. There were several medication bottles both on the floor and on the dresser, and pornographic material on the floor near the foot of the bed." *Id.*<sup>1</sup>

Despite City and Pierce County policy that law enforcement should remove a child from a home if there is imminent danger to a child,<sup>2</sup>

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<sup>1</sup> The presence of such materials is an important factor in an abuse investigation according to officer Durocher. CP 54.

<sup>2</sup> The City's CR30(b)(6) witness, Detective William Muse, spoke for the City and testified:

Q: The Pierce County protocols for response to child sex abuse and physical abuse does provide, per this section, that law enforcement should take children into protective custody when there are reasonable grounds to believe the child is seriously endangered in his or her surroundings and immediate removal appears necessary to protect the child. Do you agree with that statement?

A: I do.

...

Q: Okay. So Tacoma Police Department would follow that statement in regards to protective custody?

A: Yes.

Q: Okay. And should follow it?

Corn and Terwilliger failed to remove the children from the home, even though Corn opined that the living conditions in the home were “not suitable for children.” CP 44.

In January 2012, City police received yet another report that M.E./J.E. were being neglected and possibly abused. CP 64-69, 152-53. At that time, M.E./J.E. were reporting that a “ghost” had been peeking at them when they are in the shower; she reported that the “ghost” came in the shower with her and punched her in the back and it hurt. CP 67. She also reported vaginal pain. *Id.* When asked, M.E. said the “ghost is entangled with Jason.” *Id.* Jason Karlan, a non-family member who lived in the home and often provided child care to the children, immediately became the primary suspect of the investigation. CP 68, 157-59.<sup>3</sup> After receiving this report, City Officer Cynthia Brooks conducted an investigation of the allegations of the children’s child physical and sexual abuse, but Brooks failed to follow TPD policy by not determining if Karlan had criminal history:<sup>4</sup>

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A: Yes.

CP 74.

<sup>3</sup> A social worker had also reported that the children had been acting strangely and believed Jason had special powers. CP 152-53, 163-67.

<sup>4</sup> Detective Muse specifically testified that it was TPD policy for officers investigating child physical or sexual abuse to check criminal histories of alleged abusers. CP 76-77, 674.

Q: In the course of your investigation of abuse against the Eddo children, did you ever determine if Jason Karlan had been involved in any other crimes?

A: Not that I recall, no.

CP 58. Karlan actually disclosed to Brooks that he had a prior criminal conviction for “battery,” but Brooks failed to verify the nature of this conviction:

Q: In the course of your investigation of the allegations of abuse against the Eddo children, did you ever conduct a national background check on Jason Karlan?

A: No, not that I recall.

CP 60, 158-59.<sup>5</sup> Notwithstanding this “investigation,” Karlan lied about his criminal history when he failed to disclose his true criminal past. A background check of Karlan would have revealed that he had previously been charged with molestation of a minor in California, CP 124-25, and pleaded guilty to that crime. CP 953. But M.E./J.E. were allowed to remain in the home with Karlan present because Brooks came to the erroneous conclusion that the children had not been abused and were not in danger. CP 156, 159-60, 231-36.

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<sup>5</sup> Brooks equivocated in her first declaration on the question of whether she sought Karlan’s criminal history. She *admitted* that she did not run a national check on Karlan. CP 159. She implied that she might have run a check on his criminal history in Washington, but that this was just her “normal practice.” CP 158. She had no specific recollection of doing so in Karlan’s case. *Id.*

In May 2013, another child, J.B., disclosed that Karlan was sexually molesting him in the same home when he was babysitting both M.E./J.E. as well. CP 122. Upon a CPS referral, Detective Jennifer Quilio began an investigation. CP 122, 130-36. Quilio acknowledged that M.E./J.E. were mentioned in the context of that CPS referral. CP 122. TPD issued a felony arrest warrant for Karlan. CP 138. Despite this knowledge, Quilio only advised the children's mother of this fact, and not the children's father, Joshua. CP 125-26.<sup>6</sup> Moreover, despite learning that Karlan was molesting J.B., Quilio did not re-open the investigation involving M.E./J.E. even though there was obviously new additional information that Karlan could be a serial offender. Quilio sought to justify this failure to re-open any investigation as to M.E./J.E. by asserting, incredibly, that she had not learned "any new information that would have justified re-opening the investigation into alleged abuse of M.E. or J.E." CP 123. She also claimed that it was "unclear" as to whether Karlan abused M.E. because of charges and countercharges of abuse leveled by the parents and ostensible recanting of testimony by M.E. CP 126-27.<sup>7</sup>

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<sup>6</sup> Again, it was proper practice to give such notice, according to Muse testifying on the City's behalf. CP 79.

<sup>7</sup> But Quilio's self-serving "analysis" of the matter long post-dated Karlan's initial arrest and her refusal to re-open the M.E./J.E. investigation; it is contradicted by the expert testimony of Susan Peters. As Peters stated:

When questioned regarding the need to re-open a case involving crimes against Victim A after an officer learns of crimes against Victim B by the same perpetrator, Detective Muse testified as the County's CR 30(b)(6) authority as follows:

Q: Right. If you have new information, new investigatory leads for the criminal allegation involving Victim A, that would be a basis for reopening?

A: Yes.

CP 78. Detective Quilio *admitted* that she did not re-open the investigation of Karlan's abuse of the children upon learning of his possible abuse of J.B.

Q: Okay. Is it fair to say that between mid-May, when JB disclosed the sexual abuse, until this point in time, so end of August, that you didn't take any steps to investigate allegations of sexual abuse by Karlan against the...children?

A: Correct.

CP 84.

Karlan was not arrested for molestation of J.B. until August 2013, CP 140-42, at which point he was released shortly before being arrested

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Overall, this is a situation where there was very concerning allegations of child abuse and neglect against these children, as early as October 2011, which required prompt and adequate investigation by the TPD. Tacoma Police Department's response to these allegations was well below the standard of care for a reasonable law enforcement agency and reasonable law enforcement officers. Had TPD followed its own policies, the standard of care, and exercised reasonable judgment, the children would not have been continually sexually molested by a convicted child rapist for a number of years.

CP 103.

again on November 8, 2013. CP 85-86. Karlan had continued unfettered access to M.E./J.E. during the May to November 2013 time period.

The children filed an action for negligent investigation against DSHS in the Pierce County Superior Court on November 2, 2015 for its failure to address reports of the children's abuse to its Child Protective Services ("CPS"). CP 331-35. They did not sue the City in that action. *Id.* That case settled in September 2016. CP 337-44, 1132-39.

In the course of discovery in the DSHS action, counsel for J.E./M.E. became aware of the City's possible negligence. CP 647-48. In April 2017, M.E., J.E., and Joshua Eddo, the children's father, filed a tort claim against the City arising from its officers' negligence in responding to the allegations of child abuse and neglect. CP 5, 11. The City did not settle that tort claim.

The children filed the present action against the City in August 2017, arising from the City officers' failures to remove the children from an unsafe placement, their negligent investigation of child abuse and neglect, and their overall failures to protect the children from Karlan's continued abuse, even after the officers learned that Karlan was a serial child molester. CP 1-6. The City answered. CP 7-16. The case was assigned to the Honorable Susan Serko.

The children and the City each moved for summary judgment. CP 19-37, 262-87. After continuing the motions on the City's CR 56(f) motion, CP 917-19, 921, the trial court heard argument on November 2, 2018. In that proceeding, it denied the children's motion, CP 978-79; RP (11/2/18):33, but concluded *sua sponte* that the City was entitled to summary judgment on the allegations of abuse in October 2011 and January 2012. RP (11/2/18):42. The trial court never articulated the basis for that ruling either in the hearing, or in its November 2 order. The children moved for reconsideration of that order, CP 985-90, and moved for summary judgment on the City's affirmative defenses. CP 991-1005. The City moved for judgment on all remaining claims. CP 1006-38. On December 7, 2018, the trial court granted the City's motion and denied the children's motion for reconsideration. CP 1166-67.<sup>8</sup> This timely appeal followed. CP 1168-76.

#### D. SUMMARY OF ARGUMENT

The trial court did not provide any guidance as to its rationale for granting the City's summary judgment of dismissal of the children's claim for the City's negligent investigation of their abuse.

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<sup>8</sup> As befits its cavalier treatment of the issues in this case, the trial court's orders nowhere reflect its disposition of the children's negligent training/supervision theory. They pleaded that issue. CP 5. They specifically mentioned it in responding to the City's motion for summary judgment. CP 656-57. But the trial court's orders do not address this issue.

Plainly, the City owed the children a duty under RCW 26.44.050 and the common law to conduct a reasonable investigation of their possible abuse. At a minimum, there was a fact question as to the City's breach of that duty when its officers botched an investigation of M.E./J.E.'s abuse on multiple occasions, allowing them to remain in close contact with Karlan, their abuser.

If the trial court's dismissal decision was based on a failure to join the City in the children's action against DSHS as an indispensable party under CR 19 or that prior action against DSHS, which was settled, somehow constituted *res judicata* for the present action, the trial court erred.

#### E. ARGUMENT

##### (1) Standard of Review on Summary Judgment

Summary judgment is a drastic remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law," *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would truly be "useless." *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961). As the moving party, the City bore the burden of establishing its right to judgment as a matter of law.

In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving parties, here, the children. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Where there are significant witness credibility issues present in a case, it has long been the rule in Washington that summary judgment is inappropriate. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) (“Credibility issues involving more than collateral matters may preclude summary judgment.”).

And where there are expert opinions coming to differing conclusions on a key issue at stake in the case, this Court has determined that ordinarily creates an issue of fact for the jury. *See, e.g., Chen v. City of Seattle*, 153 Wn. App. 890, 910, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010) (experts disagree over safety of crosswalk configuration); *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.3d 134 (2012) (experts in disagreement on cause of auto crash); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 295 P.3d 816 (2013) (differing opinions in medical negligence action as to cause of patient’s injury). In a case involving alleged insurer bad faith, Division I put the point succinctly:

At the summary judgment stage with which we are concerned, both appeared qualified to render opinions whether the accident caused Leahy's DM. There was a clear conflict between two experts on a central question: causation. Could this insurer, on this record, claim that there was no genuine issue of material fact on the reasonableness of its action in solely relying on its expert? We think not.

*Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018). *Accord, C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate.").

This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

(2) The City Owed the Children a Duty to Properly Investigate Their Possible Abuse

The trial court may have concluded that no duty was owed by the City to the children for a negligent investigation under RCW 26.44.050 or the common law. The City contended below that no such common law duty was owed. CP 1010-14. To the extent that the trial court concluded that the City owed no duty to the children, it erred.

Washington law, both statutory and common law, unambiguously provides that law enforcement agencies have a duty to properly investigate

reports of child abuse they receive. RCW 26.44.050, as it existed in October 2011, stated:

[U]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the *law enforcement agency* or department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probably cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

(emphasis added.) By its terms, the statute imposes a duty to investigate abuse upon *both* law enforcement and DSHS. Either may be liable if they conduct a negligent investigation that results in a harmful placement decision as to the child victim. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601-02, 70 P.3d 954 (2003).<sup>9</sup>

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<sup>9</sup> In *Wrigley v. State*, 5 Wn. App. 2d. 909, 929, 428 P.3d 1279 (2018), this Court made clear that the duty extended to harm occurring in the future as a result of the improper placement:

To honor the purpose of RCW 26.44.050 recognized by *Tyner*, and to preserve the scope of the State's duty to investigate under *M.W.*, any ambiguity in RCW 26.44.050 can be resolved in only one way: the phrase "reports concerning the possible occurrence of abuse or neglect" contemplates both reports concerning incidents that have already

That the statute provides a basis for civil liability for law enforcement agencies that fail to conduct reasonable investigations of abuse is clearly established in Washington. *E.g.*, *Rodriguez v. Perez*, 99 Wn. App. 439, 443-44, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000) (action by parents against law enforcement officer); *Thomas v. Cannon*, 289 F. Supp. 3d 1182, 1203-04 (W.D. Wash. 2018) (action against police who illegally removed child from father’s custody).

In *Lewis v. Whatcom Cty.*, 136 Wn. App. 450, 453, 149 P.3d 686 (2006), a young woman was sexually molested by her uncle, who had been providing child care. According to the plaintiff, the Whatcom County sheriff’s department knew that she was likely being molested starting in 1991 while it was investigating another girl’s sexual abuse allegations against the uncle. The sheriff’s department failed to properly investigate the allegations, and the uncle continued to molest her until he moved to Alaska in June 1992. *Id.* at 452-53. She subsequently brought suit against the County for “negligent investigation,” an implied cause of action authorized by RCW 26.44.050.

In the trial court, the County successfully argued that it owed no actionable duty to Lewis and her case was dismissed on summary judgment. Division I disagreed:

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occurred and reports suggesting a reasonable possibility of future abuse or neglect if the placement is made.

Nothing in our previous opinions limiting the rights of alleged abusers to sue for negligent investigation can or should be read to limit the duty of law enforcement to protect children from abuse. In *Yonker*, we held that RCW 26.44.050 creates a duty to children who may be abused or neglected, requiring the appropriate agency to investigate abuse allegations. No court has held that RCW 26.44.050 does not impose a duty to investigate in situations where a child is being abused by someone other than his or her parent or guardian. We hold that law enforcement did owe Lewis, a child victim of alleged sexual abuse by her uncle, a duty to reasonably investigate those allegations. Thus, the superior court made an error of law when it granted summary judgment.

*Id.* at 460. The court recognized that the plain language of RCW 26.44.050 “is a broad mandate covering any report of possible abuse or neglect.” *Id.* at 454.

Despite the City’s erroneous contention to the contrary below, CP 1010-14, the common law also establishes a duty on the part of law enforcement to protect children from their abusers. In *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018), our Supreme Court re-affirmed that where there is a special protective relationship between a public agency and child abuse victims, the agency owes the children a duty of care.<sup>10</sup> There, the Court recognized that DSHS has a special protective

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<sup>10</sup> Under the common law, in general, where police officers act, “they have a duty to act with reasonable care.” *Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686, *review denied*, 108 Wn.2d 1014 (1987) (emphasis added); *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013) (recognizing liability can attach to public entity for misfeasance under common law principles); *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) (finding liability against public entity under common law principles); *see also, Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013).

relationship with foster children that imposes a duty of care upon it to protect the children from foreseeable harm. Indeed, DSHS's duty extends to situations where it fails to properly investigate the placement of dependent children and abusive biological parent visitation is permitted. *Accord, Cox v. Dep't of Soc. & Health Servs.*, 193 F.3d 831 (9th Cir. 2019). That duty is not confined to situations of physical custody or control, but is rather predicated on principles of "entrustment and vulnerability." *H.B.H.*, 192 Wn.2d at 172.<sup>11</sup>

The Court specifically rejected the notion that a duty under RCW 26.44.050 was the exclusive duty owed by DSHS after *M.W.* The Court recognized that in *M.W.* it had acknowledged an existing common law duty of care not to negligently harm children co-existed with the RCW 26.44.050 duty of care. "Our decision in *M.W.* therefore confirms, rather

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<sup>11</sup> The *Restatement (Second) of Torts* § 314A(4) indicates that a special relationship is present as to a plaintiff and an entity that "is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection under a similar duty to the other." Illustration 7 to that section is noteworthy:

A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

Officers conducting abuse investigations effectively take "custody" of the child victims to protect them from abuse.

than rejects, common law claims based on a special relationship.” *Id.* at 178.

It is no different for the relationship between law enforcement and the child victims of abuse. Given the mandate of RCW 26.44, the common law, and TPD policy, law enforcement officers have a special protective relationship with children who are abuse victims. A common law duty arises here because there is a special protective relationship between the investigators of child abuse and the victims of that abuse. As in *H.B.H.*, in *C.L.*, Division I held that DSHS owed a common law duty to child abuse victims because the investigators, as here, had knowledge of “the general field of danger” to the victims. 200 Wn. App at 197-98. TPD assumed responsibility for the children’s safety in rendering aid to them by investigating their abuse.<sup>12</sup>

Below, the City attempted to argue that the proper standard by which to evaluate any negligence in the statutory or common law duty it owed to the children was whether the investigating officers had “probable cause” to believe that children were abuse victims. CP 10, 17-19. There

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<sup>12</sup> Persons who have a right to protection include residents in a group home, *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); a disabled adult placed with in-home caregiver, *Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001); a Boy Scout placed with caregiver in church-sponsored troop, *N.K. v. Corp. of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730, *review denied*, 179 Wn.2d 1005 (2013); a child in school, *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016).

is *no Washington authority* supporting such a truncation of the duty under RCW 26.44.050 or the common law. Indeed, Division III in *Rodriguez, supra*, *rejected* such an argument, noting that probable cause is “only what is required in order to take a child into custody and does not address the general investigative responsibility.” 99 Wn. App. at 449.<sup>13</sup> Rather, the duty owed by law enforcement is to conduct a proper investigation. Had the TPD officers done so here, it would have led to the discovery that the children were placed with a caregiver who was a convicted abuser as early as January 2012. That would have forestalled their subsequent abuse.

In sum, the City had a duty to M.E./J.E. under RCW 26.44.050 or by common law to conduct a reasonable investigation of their potential abuse.

(3) The City Breached Its Duty to the Children

Because the trial court refused to disclose the basis for its summary judgment, neither the parties nor this Court can know if the basis for that ruling was a determination as a matter of law that the City did not breach the duty it clearly owed to the children. If that was the basis for the trial court ruling, it was error. Breach is classically a *question of fact* for the jury. *Hertog ex rel. R.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979

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<sup>13</sup> Division III made clear that a law enforcement officer’s investigative duty under the statute was not limited to merely responding to an occurrence of abuse and reporting to DSHS; there are no artificial limits on the officer’s investigation. 99 Wn. App. at 448-49.

P.2d 400 (1999); *McCarthy v. County of Clark*, 193 Wn. App. 314, 330, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018 (2016) (“Whether an officer has fulfilled the duty to investigate is a question of fact.”); *Butler v. Thomsen*, \_\_ Wn. App. 2d \_\_, 2018 WL 6918832 (2018) (Division I reverses summary judgment where expert testimony raised question of fact as to breach). Ample evidence supported the children’s position that the City breached its duty to them.

As our Supreme Court noted in *Joyce v. State, Dep’t of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005), internal policy statements like TPD’s procedures manual or Pierce County’s protocol on child abuse investigations “may provide evidence of the standard of care and therefore be evidence of negligence.” *See also, Tyner v. State Dep’t of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 88, n.8, 1 P.3d 1148 (2000) (CPS manual).

Here, the TPD Procedures Manual confirmed that its officers must take a child into protective custody if there was “probable cause to indicate abuse or neglect.” CP 46. That Manual also directed that officers check criminal histories of suspects. CP 71. The Pierce County Protocol for Child Abuse Investigation echoed the TPD Manual’s direction that child abuse victims be taken into custody where abuse was present. CP 50.

The City's officers breached their duty to conduct a proper investigation of Karlan's abuse of M.E./J.E. when, in violation of City policy on the conduct of such an investigation, after receiving numerous reports that M.E./J.E. were possibly being abused and neglected, they allowed M.E./J.E. to remain in a placement where a convicted sex offender could have unfettered access to the children.

The trial court parsed the three key incidents in this case, determining to grant summary judgment to the City in connection with its negligent investigation of the October 2011 and January 2012 incidents. RP (11/2/18):42. On reconsideration, the children attempted to remind the trial court that all three incidents were interrelated, to no avail.<sup>14</sup>

In the October 2011 incident, J.E. swallowed medicine and vomited. As previously noted, the home conditions for the children were abominable, "not suitable for children," but the officers did not remove them from the home. This was a breach of the standard of care according to Sue Peters. CP 100-01.

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<sup>14</sup> Counsel argued to the trial court:

MR. ROBERTS: And our assessment of the case, Your Honor, would be that that's the final act of sort of a three-act play and that without the first two components, it wouldn't make any sense necessarily legally or factually for a jury.

RP (12/7/18):5.

The January 2012 incident had clearer overtones of sexual abuse of the children and focused on Jason Karlan. The failure to conduct a full criminal background check on Karlan at that time was a breach of the standard of care yet again according to Peters. CP 101. (“TPD’s response to the girl’s [sic] December 2011 disclosures were grossly inadequate, substandard, and violated its own policies.”) At that point, the officers *knew* Karlan had a criminal history, making the failure to secure a full criminal background check on him ever the more negligent:

Any officer interviewing a suspect who discloses a criminal history should promptly conduct a background check on that individual. A background check on Jason Karlan would have shown his 1997 conviction for lewd or lascivious conduct against a child. A reasonable detective would upon learning this, embark upon a thorough investigation, including ordering forensic interviews of the children and interviewing the suspect about the prior conviction. A background check on Karlan would have undoubtedly led to the children being protected from further molestation and abuse in any number of ways; to include, Detective Brooks taking a deeper approach in her investigation, family being alerted to Karlan’s prior conviction, a polygraph test of Karlan, and a forensic interview of the children. Significantly, if Joshua Eddo had learned that Karlan was a convicted sex offender he would have taken steps to protect the children, Jocelyn Drayton may have not allowed Karlan to babysit her children anymore, etc. A change in investigative tact [sic] would have led, on a more probable than not basis, to the children being protected from Karlan’s continued sexual molestation and abuse of the girls.

CP 102.

Subsequent to its first two botched investigations into allegations of the children's suspected abuse, both involving Jason Karlan, when yet another young child, J.B., reported in May 2013 that Karlan was sexually molesting him, the City's officers were already aware that Karlan lived with, and provided child care for, M.E./J.E. They knew that Karlan was the live-in boyfriend of M.E./J.E.'s mother, and they had investigated at least two prior reports of suspected abuse and neglect in the home. There were also aware at the time that J.E. had previously reported a "ghost in the shower" who was "entangled with Jason" peeked at her in the shower and punched her in the back. They conducted an investigation of J.E.'s report of abuse by Karlan in January 2012. In fact, J.B.'s report of abuse included an allegation that Karlan molested J.B. in the same home and while babysitting both M.E./J.E. as well.

As evidenced by applicable police policies, a reasonable City police officer, given the foregoing facts and upon learning that Karlan had molested J.B., should have taken two steps. First, a reasonable officer would immediately notify the caregivers of other children to which the alleged child rapist, Karlan, may have had access. In fact, the Pierce County Protocol for Investigation of Child Abuse requires a law enforcement officer to notify caregivers of potential additional victims upon learning that there is probable cause a suspect molested another

child. While Detective Quilio informed the children's mother, she did not so advise Joshua Eddo, the children's father. CP 85, 125-26. As Detective Muse testified, an officer should notify *all* caregivers in order to protect additional potential victims. CP 75, 79, 674.

Second, a reasonable law enforcement officer would, upon learning that Karlan had molested J.B., re-open the investigation involving M.E./J.E. because there was now new additional information that Karlan could be a serial offender. CP 102-03. The City knew this standard applied, but it is undisputed that the City's officers failed to re-open the investigation into Karlan's abuse and neglect of M.E./J.E.

Thus, the children's expert, Susan Peters, a well-qualified former King County sheriff's deputy, testified that the City breached its duty to the children when its officers failed to properly address the initial October 2011 situation, the December 2011 follow up interaction, or the new information on Karlan in May 2013. CP 100-03. She concluded that TPD failed to conduct a prompt and adequate investigation of the children's abuse meeting the appropriate standard of care for law enforcement resulting in the children's prolonged abuse. CP 103.

The City provided the belated declaration of Mary Priebe-Olson to rebut Peters' opinions. CP 830-52. Apart from the fact that Detective Priebe-Olson apparently believes that children are not at risk in a filthy

home where the caregiver leaves pornography and prescription pill bottles lying about, CP 832, her testimony only reinforces the point that there was a question of fact as to the City's breach of its duty to the children.

In any event, as noted *supra*, where there are expert opinions coming to differing conclusions on a key issue at stake in the case, that ordinarily creates a plain issue of fact for the jury.

There was clearly a question of fact on breach of duty foreclosing summary judgment on that point.

(4) The Trial Court Erred in Dismissing the Children's Complaint against the City

As noted *supra*, the trial court failed to articulate the basis for its decision, despite actually being prompted by the children's counsel to do so, stating it was adopting what it described as the "Verharen approach." RP (12/7/18):5. The City argued for summary judgment based on CR 19 and *res judicata*. CP 271-76.<sup>15</sup> In the face of the children's motion for partial summary judgment, the City argued against dismissal of its many affirmative defenses on the theory that it was an indispensable party under CR 19 to the children's action against DSHS, *res judicata* foreclosed the children's action against it, it was statutorily immune, or the children's

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<sup>15</sup> The trial court, however, made reference on the record to the fact that it was considering both CR 19 and *res judicata* when the children sought to dismiss those affirmative defenses, but it then put consideration of them over to a later date. RP (11/2/18):8-10. It did not specifically address them at the December 7, 2018 hearing.

claims were barred by the statute of limitations. CP 1077-93. None of these theories apply here, and, to the extent that the trial court based its decision on such theories (if it did), the children address them.<sup>16</sup>

(a) CR 19 – Indispensable Parties

The City contended below, albeit briefly and without extensive analysis, that it was an indispensable party in the children’s action against DSHS and it should have been joined in that action. Moreover, because it was not joined there, the present action should have been dismissed. CP 1088-90.

CR 19 is not jurisdictional, but rather is a rule founded on equitable considerations. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 503-04, 145 P.3d 1196 (2006). The test for applying CR 19 is straightforward. As our Supreme Court determined in *Automotive United Trades Organization v. State*, 175 Wn.2d 214, 221-22, 285 P.3d 52 (2012) (“*AUTO*”), a court first documents that an absent party is “necessary” for a just adjudication under CR 19(a)(2)(A). If the party is necessary, the court must then determine if the party’s joinder is feasible. If joinder is not feasible, the court must then determine whether “in equity and good conscience” the action may proceed or must be dismissed by applying the

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<sup>16</sup> The children do not address the immunity and statute of limitations that are patently inapplicable on these facts. CP 1160.

factors set forth in CR 19(b) in light of the particular interests present in each case.<sup>17</sup>

The City's burden under CR 19 was a heavy one. It must show that the trial court had no option but to dismiss this action. *Matheson v. Gregoire*, 139 Wn. App. 624, 635, 161 P.3d 486, 492 (2007), *review denied*, 163 Wn.2d 1020 (2008), *cert denied*, 129 S. Ct. 197 (2008) (“The burden of proof for establishing indispensability is on the party urging dismissal”); *Scott v. Doe*, 199 Wn. App. 1039, 2017 WL 2738761 (2017), *review denied*, 189 Wn.2d 1040 (2018) at \*1. CR 19 Dismissal is a drastic remedy that should not be ordered unless the defect could not be cured and significant prejudice to the absent party will result. *AUTO*, 175 Wn.2d at 222.

First, looking to CR 19(a), the City was not a necessary party to the children's action against DSHS.<sup>18</sup> None of the criteria in CR 19(a) are

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<sup>17</sup> The analysis of CR 19 indispensability is fact-intensive. *Gildon*, 158 Wn.2d at 495. *See also, Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) (analyzing if party is necessary “calls for determinations that are heavily influenced by the facts and circumstances of individual cases.”). Because the question of whether a party is indispensable can only be determined in the context of a particular litigation, it is necessary to examine legal and factual context of the present controversy, and cannot be done merely by looking at the pleadings. *Id.*

<sup>18</sup> A party is “necessary” only if:

- (1) in his absence complete relief cannot be accorded among those already parties, or
- (2) he claims an interest relating to the subject of the action and is so suited that the disposition of the action in his absence may (A) as a

met. As will be discussed *infra* in the context of *res judicata* in greater detail, RCW 26.44.050 created distinct duties on the part of the City and DSHS. Neither was dependent upon the other. That alone indicates the City was not a necessary party to the children’s action against DSHS.

More critically, any liability on the part of the City and DSHS is subject to fault allocation under RCW 4.22. Generally, it is longstanding law in Washington that multiple tortfeasors are neither necessary nor indispensable parties under CR 19(b).<sup>19</sup> This has been the law for over 40 years, and has remained the law since the State’s adoption of the 1986 Tort Reform Act. In *Brown v. Spokane Cty. Fire Prot. Dist.*, 21 Wn. App. 886, 894, 586 P.2d 1207 (1978), the plaintiff brought suit against the Spokane County Fire District on behalf of a woman who had been killed in an automobile collision with one of its vehicles. *Id.* at 888. The district was the only defendant, but “attempted to implead [the driver of the other vehicle] on the basis that he is ‘a party needed for a just adjudication’ within the meaning of CR 19(a).” *Id.* at 893-94. This argument was

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practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by release of his claimed interest.

CR 19(a).

<sup>19</sup> The United States Supreme Court has similarly concluded that joint tortfeasors are not indispensable parties under the federal analogue to CR 19. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990).

rejected by the Division III, which succinctly stated: “Joinder of concurrent tortfeasors is not required when liability is joint and several.” *Id.* at 894.<sup>20</sup> The *Brown* court also noted that any concern about “disproportionate liability” could be addressed through RCW 4.22:

[I]n this action the Fire District can assert the defense of contributory negligence against [the driver of the other vehicle] as a beneficiary under the wrongful death statute, RCW 4.20.020. Under our comparative negligence statutes, RCW 4.22.010, Et seq., any damages allowed are diminished in proportion to the negligence attributable to the recovering party.

*Id.* at 894-95. Here, the several liability regime of RCW 4.22.070 appropriately protects the City’s interest.

The children settled with DSHS. In this action, the City pled an affirmative defense of the State’s fault, as well as an affirmative defense seeking fault apportionment under RCW 4.22. CP 14. If the City meets its burden of proving that defense was properly pleaded under CR 12(i), *Afoa v. Port of Seattle*, 191 Wn.2d 110, 128-29, 421 P.3d 903 (2018), and that the elements of the empty chair affirmative defense are established, *Butler, supra* at \*8; *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 864 P.2d 921 (1993), then a jury will be entitled to allocate a percentage of fault to the State as an empty chair in this action.

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<sup>20</sup> *Accord, In re Johns Manville Corp.*, 99 Wn.2d 193, 198, 660 P.2d 271 (1983); *Orwick v. Fox*, 65 Wn. App. 71, 81, 828 P.2d 12, *review denied*, 120 Wn.2d 1014 (1992).

If the City's argument is simply that it had a financial interest in the action against DSHS, which it did not, a mere financial interest is not sufficient. *AUTO*, 175 Wn.2d at 223-24. Similarly, concerns about future events that may not come to pass do not qualify as a legally protected interest. *Id.*

In this case, the City demonstrated no "sufficiently weighty" protected legal interest with respect to the children's contention that DSHS did not properly investigate reports of their abuse. CR 19(a)(2); *AUTO*, 175 Wn.2d at 223-24.

Further, as required by CR 19(a)(2)(A) the trial court *nowhere* assessed, nor did the City specify, how its ability to protect its interest was adversely impacted by not being joined in the children's action against DSHS. Here, any interest of the City's "interest" is neither impaired nor impeded for purposes of CR 19(a).

Nor is there any risk of an inconsistent obligation on the City's part by its nonjoinder in the children's action against DSHS where that case settled. CR 19(a)(2)(B).

Finally, even if the City was a necessary party because its investigation tangentially related to DSHS's, this case should not have

been dismissed in equity and good conscience under CR 19(b).<sup>21</sup> The following four factors are considered and balanced under the second part of the test to determine whether a case may proceed in the absence of a required party:

- (1) the extent to which a judgment rendered in the person's absence might be prejudicial to that person or to those already parties;
- (2) the extent to which the prejudice can be lessened or avoided by protective provisions in the judgment, by shaping of relief, or other measures;
- (3) whether a judgment rendered in the person's absence will be adequate; and
- (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). The trial court did not address these “indispensability” factors, and plainly none apply.

As noted *supra*, the City is fully able to defend itself in this action and clearly has the benefit of a possible empty chair defense against DSHS. This result is clearly compelled by Division I's *Orwick* decision.

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<sup>21</sup> In numerous cases, our courts have rejected dismissal of actions involving parties who were indispensable and could not be feasibly joined. *E.g., Aungst v. Roberts Construction Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167 (1981) (case against agent of Indian tribe that threatened tribe's contracts could not be dismissed “in equity and good conscience” because the claims were for violations of the Consumer Protection Act and the Securities Act of Washington). *See also, Kelley v. Centennial Contractors Enterprises, Inc.*, 147 Wn. App. 290, 194 P.3d 292 (2008), *aff'd by* 169 Wn.2d 381 (2010) (this Court reversed a CR 19 dismissal where children's loss of parental consortium issue was joined with parents' underlying negligence claim because joinder was not feasible but also was impractical and not in the children's best interests).

There, the plaintiff initially sued certain officers for assault and violation of 42 U.S.C. § 1983 in the use of excessive force while arresting him. He also sued the City of Seattle and its police chief, but later dismissed them from the action. He subsequently filed a separate action against the City and its police chief. The trial court dismissed the first action on the plaintiff's failure to join the City and the police chief in that action. Division I reversed noting that CR 19 did not apply to parties that are potentially joint and severally liable because they are not indispensable under CR 19(b). *Id.* at 80-81.

There is no indication on this record that the trial court conducted the necessary CR 19 analysis set forth in *AUTO*. Had it done so, it is clear that the City was not an indispensable party under CR 19(b) to the children's action against DSHS. The children's settlement with DSHS does not prejudice the City; the children will not have full remedies for the City's negligent investigation if the City is dismissed. In sum, to the extent the trial court based its dismissal of the children's claims on CR 19, it erred.

(b) *Res Judicata*

The City also contended below that *res judicata* principles foreclosed the children's action because of the prior action against DSHS. CP 1078-88. If the trial court employed claim preclusion principles as a

basis for such a result, it erred. Again, there is nothing in this record evidencing the trial court's rationale on claim preclusion, if that principle was a basis for its decision.

In a traditional sense, *res judicata*, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865-66, 92 P.2d 108 (2004). A “matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competence jurisdiction, should not be permitted to be litigated again.” *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (emphasis added). This Court reviews *res judicata* decisions. *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *review denied*, 168 Wn.2d 1028 (2010).

The City bore the burden of proving the defense of *res judicata*. Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Hisle*, 151 Wn.2d at 865-66; *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005);

*Marshall v. Thurston Cty.*, 165 Wn. App. 346, 352-53, 267 P.3d 491 (2011).

But, as a threshold matter for *res judicata* to apply, the City had to prove that the prior judicial determination of the children's action against DSHS was both final and on the merits. *Hisle*, 151 Wn.2d at 865; *Ofuasia v. Smurr*, 198 Wn. App. 133, 392 P.3d 1148 (2017) (this Court concluded that decision in arbitration was not a final judgment on the merits). Here, there was no final determination on the merits in the DSHS case because M.E./J.E.'s settlement agreement with DSHS is not a final judgment on the merits. Nothing in the stipulated judgment dismissing the children's action against DSHS evidences that it was intended to resolve all of the children's claims for damages relating to their abuse or to in any way exonerate the City from its liability for the failed investigations that resulted in their abuse. CP 337-44.

It has long been the rule in Washington that a settlement is not a final judgment on the merits for purposes of *res judicata*.<sup>22</sup> The City's argument on *res judicata* fails on this basis alone.

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<sup>22</sup> See, e.g., *Marquardt v. Federal Old Line Ins. Co. (Mut.)*, 33 Wn. App. 685, 689, 658 P.2d 20 (1983): "[C]ollateral estoppel should not be applied to judgments of dismissal, even when based on settlement agreements, since the parties could settle for myriad reasons not related to the resolution of the issues they are litigating." *Accord*, *Stevenson v. Dep't of Health*, 187 Wn. App. 1037, 2015 WL 3422170, *review denied*, 184 Wn.2d 1013 (2015); *Swinger v. Vanderpol*, 197 Wn. App. 1022, 2017 WL 7470091, *review denied*, 188 Wn.2d 1010 (2017).

Even assuming that the children’s settlement with DSHS was somehow a final judgment on the merits, the City failed to establish even a single element necessary to establish claim preclusion: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made. *Each* of the above four elements of *res judicata* must be satisfied in order for it to apply. *Spokane Research & Defense*, 155 Wn.2d at 99. Of the four required elements of claim preclusion, the City only addressed one below: the identity of the City/DSHS. On that element alone, it failed because DSHS and the City are distinct parties with distinct interests.<sup>23</sup>

In certain circumstances for purposes of the identity of parties element of *res judicata*, different parties are treated as identical because they are in privity. The City and DSHS were not in “privity.” Generally, privity for the purposes of *res judicata* “is construed strictly to mean parties claiming under the same title.” *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995) (quoting *Owens v. Kuro*, 56 Wn.2d 564, 568, 342 P.2d 696 (1960)). Privity is also “established in cases where the person exercises actual control or substantially participates in the litigation.” *Id.* at 768. A party’s mere awareness of

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<sup>23</sup> The City’s silence on the other elements is telling. As noted *infra*, for example, the causes of action against the City and DSHS for negligent investigation, though similar, are distinct.

proceedings is not sufficient to place person in privity with a party to prior proceedings. *Id.* at 764. DSHS and the City were not in privity.

Illustrative of the appropriate privity analysis is a Division I case. In *Thompson v. King County*, 163 Wn. App. 184, 196, 259 P.3d 1138 (2011), Division I reversed the dismissal of a claim, on *res judicata* grounds, against King County by an inmate at the County's Jail who was raped there. The inmate sued two correctional officers individually in the first action. The court reasoned that because the plaintiff's "actions are concerned with different employees" in the two proceedings, there was not a sufficiency of identity for purposes of claim preclusion. *Id.* at 195. In other words, the plaintiff's claims in the first action involved proving two specific employees were negligent. *Id.* at 195. The second action, however, did not depend on the plaintiff proving that those same two employees were negligent. *Id.* at 195.

In this case, the identity of the defendants in the two suits are even more far removed than in *Thompson*. In the children's case against DSHS, the claims involved the conduct of several social workers, as well as DSHS's failures to train and supervise those social workers. Here, the negligent acts of the City's police officers are at issue, namely those of Detectives Brooks, Quilio, Corn, and Terwilliger. Just as in *Thompson*, M.E./J.E.'s claims against the City do not depend on proving that DSHS

social workers were negligent. As such, the City and DSHS were not in privity.

*None* of the necessary circumstances giving rise to privity exist in this case. Indeed, clearly, DSHS did not actually represent the interests of the City in prior litigation (although the general interests of the City and DSHS bore some congruency for CR 19 purposes). Nor did the City exercise actual control or substantially participate in the prior litigation.

Rather than applying the facts of this case to the well-established law of claim preclusion, the City made the novel and far-reaching argument that whenever multiple entities owe similar parallel duties, such entities are *de facto* “in privity” with one another. CP 1079-82. Put simply, that is not the law. In fact, our Supreme Court in *Afoa* rejected it when it stated: “Privity does not arise from the mere fact that persons as litigants are interested in the same question or disproving the same state [or set] of facts.” 191 Wn.2d at 131 (*quoting United States v. Deaconess Med. Ctr.*, 140 Wn.2d 104, 111, 994 P.2d 830 (2000)).<sup>24</sup> The City did not

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<sup>24</sup> The *Afoa* court rejected an argument that the Port of Seattle and various airline lessees were in privity even though they had a common insurer and the Port controlled federal court litigation brought by *Afoa* against the airlines; the Court concluded that the Port did not control the airlines’ defense. 191 Wn.2d at 132.

cite a single Washington case as authority for this assertion.<sup>25</sup> If the trial court adopted this extreme theory, it erred.

Under RCW 26.44, by law, the Legislature did not make DSHS and law enforcement agencies, in effect, a single entity. Rather, each had *distinct responsibilities*. Mandatory reporters may report abuse *either* to DSHS or law enforcement. RCW 26.44.030(1)(a). Non-mandatory reporters may also report to either. RCW 26.44.030(3). Certain reports must be made to law enforcement alone. RCW 26.44.030(1)(b). Law enforcement and DSHS must notify each other of their efforts. RCW 26.44.030(4)-(5); RCW 26.44.035-.040. Critically, law enforcement officers, but not CPS caseworkers, have the authority to immediately take children into protective custody. CP 73-74.

In practice, the City's police in this case owed a duty to exercise ordinary care of a *law enforcement agency* in the investigations of abuse and neglect of M.E./J.E. They also had a duty to follow the TPD's own policies, regulations, and Pierce County protocols for child abuse investigations. Again, in practice, DSHS owed a distinct duty to exercise ordinary care of a *social services agency*. This includes following

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<sup>25</sup> Washington law has long recognized the principle that where a party fails to cite authority in support of a proposition, that the appellate court may assume that the party's counsel, after a diligent search, found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *Aiken, St. Louis & Siljeg, P.S. v. Linth*, 195 Wn. App. 10, 19-20, 380 P.3d 565 (2016).

protocols, policies, and the standard of care for social workers. These two entities serve different functions, protect different jurisdictions, owe different duties, have different standards of care, and are comprised of differently trained individuals.

By way of specific example:

<b>Tacoma Police Department</b>	<b>State of Washington, Department of Social and Health Services</b>
<b>Jurisdiction:</b> City of Tacoma	<b>Jurisdiction:</b> Statewide
<b>Vocation:</b> Law Enforcement	<b>Vocation:</b> Social Work
<b>Powers/Duties:</b> <ul style="list-style-type: none"> <li>• Only entity that can remove a child from an abusive or neglectful home absent a court order. RCW 26.44.050</li> <li>• Possess powers of arrest if there is probable cause a crime has been committed</li> <li>• Primary responsibility to interview suspects in investigation</li> <li>• Primary responsibility to interview witnesses in investigation</li> <li>• Must locate suspect of crime if probable cause to arrest</li> </ul>	<b>Powers/Duties:</b> <ul style="list-style-type: none"> <li>• CPS intake answers calls from both mandated and non-mandated reporters alleging abuse or neglect of children.</li> <li>• Determine whether referrals are accepted for investigation or not, and the response time required by CPS investigators.</li> <li>• Assess immediate safety threats</li> <li>• Initiate safety planning when indicated</li> </ul>
<b>Limitations:</b> <ul style="list-style-type: none"> <li>• Does not provide dependency services</li> <li>• Does not implement safety plans to guard against ongoing defects in the child’s environment</li> </ul>	<b>Limitations:</b> <ul style="list-style-type: none"> <li>• Employees do not have the authority to remove children from an abusive or neglectful home</li> <li>• Cannot arrest.</li> </ul>

CP 997. Simply put, DSHS and the City were not in privity.

Again, because the trial court declined to offer the parties any clue as to its reasoning in dismissing the children’s action against the City, it is possible that it may have done so on the principle of claim splitting, an issue the City raised tangentially. CP 1082-83 (acknowledging that there was no claim-splitting here “in a conventional sense.”). *Res judicata* precludes “claim splitting.” *Ensley*, 152 Wn. App. at 899. Claim splitting occurs when a party files two separate lawsuits based on the same events against the *same defendant*. *Id.* *Res judicata* rests upon the ground that “a matter [that] has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Id.* The general rule is that if an action is brought for part of a claim, it must be brought for the whole claim, and a judgment obtained in the first action precludes the plaintiff from bringing successful actions for the residue of the claim. *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274, *review denied*, 139 Wn.2d 1006 (1999). But that principle is inapplicable here.

For the reasons articulated *supra*, the City and DSHS are not the same defendant or “in privity.” While, as in *Ensley*, the employment relationship may cause the interests of an employee and a vicariously

liable employer to be in privity, no such similar relationship is present here where the City and DSHS have discrete duties to the children arising out of different investigations each conducted. Indeed, Washington law has long recognized that the claim splitting principle is inapplicable to multiple tortfeasors, for reasons analogous to those pertinent to determining that multiple tortfeasors are not indispensable parties under CR 19.

The trial court erred in dismissing the children's action against the City if it did so on a theory of *res judicata*.

#### F. CONCLUSION

If the trial court granted summary judgment to the City on duty grounds, it erred. The City owed the children a duty of care. If the court based its decision on breach, it erred. That was a jury question. The record here documents that the children needlessly suffered abuse at Karlan's hands because the City's law enforcement personnel failed to conduct a proper investigation of Karlan's activities. Had the City's investigation not been so superficial, the children would have been removed from harm's way as early as 2011, instead of continuing to be abused until Karlan's arrest in November 2013.

If the trial court's decision was predicated upon CR 19 or claim preclusion, and the record is devoid of the court's actual reasoning for its

decision so neither the parties nor this Court can know with any certainty, it erred under well-established authority.

This Court should reverse the trial court's summary rejection of the children's claims and remand the case to the trial court to allow the children their day in court. Costs on appeal should be awarded to the children.

DATED this 12<sup>th</sup> day of March, 2019.

Respectfully submitted,



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(206) 574-6661

Nathan P. Roberts, WSBA #40457  
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Tacoma, WA 98403  
(253) 593-5100

Attorneys for Appellants

# APPENDIX

CR 19:

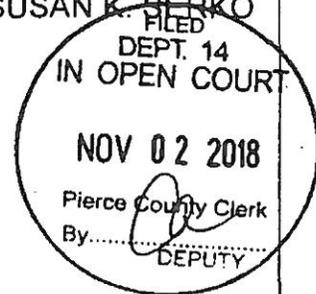
(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.



17-2-10556-8 52314477 OR 11-06-18

HON. SUSAN K. SERKO



6027 11/6/2018 00253

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

M.E. and J.E., minors, through  
MICHAEL MCKASY, as Litigation  
Guardian ad Litem, and JOSHUA  
EDDO, individually,

Plaintiffs,

v.

CITY OF TACOMA, a political  
subdivision of the State of  
Washington.

Defendant.

NO. 17-2-10556-8

ORDER ON DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT AND  
PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT

THIS MATTER having come before the Court on Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment in the above referenced cause; the City of Tacoma appearing by and through its attorney of record, Jean P. Homan, Deputy City Attorney, and plaintiffs, M.E. and J.E., minors, through Michael McKasy, as Litigation Guardian *ad Litem*, and Joshua Eddo, appearing through their attorneys of record, Nathan P. Roberts and Meaghan Driscoll, and the Court having reviewed the records and files herein, including the following documents:

1. Defendant's Motion and Memorandum in Support of Summary Judgment;

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2. Affidavit of Jean P. Homan in Support of Defendant's Motion for Summary Judgment;
3. Declaration of Jennifer Corn in Support of Defendant's Motion for Summary Judgment;
4. Declaration of Cynthia Brooks in Support of Defendant's Motion for Summary Judgment;
5. Declaration of Bret Terwilliger in Support of Defendant's Motion for Summary Judgment;
6. Declaration of Jennifer Quilio in Support of Defendant's Motion for Summary Judgment
7. Plaintiff's Response on Opposition to Defendant's Motion for Summary Judgment;
8. Supplemental Declaration of Meaghan M. Driscoll in Opposition to Defendant's Motion for Summary Judgment;
9. Reply in Support of Defendant's Motion for Summary Judgment;
10. Plaintiffs' Motion for Partial Summary Judgment;
11. Declaration of Meaghan M. Driscoll in Support of Plaintiffs' Motion for Partial Summary Judgment;
12. Declaration of Susan M. Peters
13. Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment;
14. Affidavit of Jean P. Homan in Support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment;
15. Declaration of Marylisa Priebe-Olson in Support of Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment;
16. Plaintiffs' Reply in Support of Motion for Partial Summary Judgment;
17. Declaration of Meaghan M. Driscoll in Reply to Response to Plaintiffs' Motion for Partial Summary Judgment;

6027 11/6/2018 00255

1 plus all attachments and exhibits thereto; and being fully advised in the premises, it is  
2 hereby

*mmd*

3 ORDERED, ADJUDGED and DECREED that the defendant City of Tacoma's  
4 *Granted as to the 2011 and 2012 incidents and*  
Motion for Summary Judgment is DENIED WITHOUT PREJUDICE; it is further

*JPA  
JDS*

5 ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Partial  
6 *as to the 2013 incident*  
Summary Judgment is DENIED; it is further

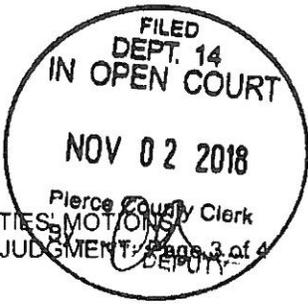
7 ORDERED, ADJUDGED and DECREED that the City of Tacoma may note a  
8 motion for summary judgment on plaintiffs' claims as related to the 2013 investigation  
9 into the disclosure of abuse by J.B.; it is further

10 ORDERED, ADJUDGED and DECREED that Plaintiffs may file a motion for  
11 summary judgment on the City's affirmative defenses; it is further

12 ORDERED, ADJUDGED and DECREED that the Court's consideration of the  
13 City's Motion for Summary Judgment on the issue of res judicata and failure to join an  
14 indispensable party and the Court's consideration of Plaintiffs' Motion Summary  
15 Judgment on the issue of the City's affirmative defense for the fault of a third party shall  
16 be done in conjunction with the motions for summary judgment referenced above; it is  
17 further  
18 further

19 ORDERED, ADJUDGED and DECREED that all of the remaining motions for  
20 summary judgment shall be noted for a date *December 7, 2018* after November 30, 2018. *mmd JPA JDS*

21 DONE IN OPEN COURT this 2 day of November, 2018.



*Susan K. Serko*  
HONORABLE SUSAN K. SERKO

6027 11/6/2018 00256

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Presented by:

WILLIAM C. FOSBRE, City Attorney

By: 

JEAN P. HOMAN, WSB #27084  
Deputy City Attorney  
Attorney for Def. City of Tacoma

Approved as to form,  
Notice of presentment waived:

CONNELLY LAW OFFICES, PLLC

By: 

NATHAN P. ROBERTS, #40457  
MEAGHAN DRISCOLL, #49863  
Attorneys for Plaintiffs



17-2-10556-8 52493982 ORGSJ 12-10-18

HON. SUSAN K. SERKO



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

M.E. and J.E., minors, through  
MICHAEL MCKASY, as Litigation  
Guardian ad Litem, and JOSHUA  
EDDO, individually,

Plaintiffs,

v.

CITY OF TACOMA, a political  
subdivision of the State of  
Washington.

Defendant.

NO. 17-2-10556-8

ORDER GRANTING DEFENDANT'S  
RENEWED MOTION FOR  
SUMMARY JUDGMENT

*and  
Denying motion for  
Reconsideration* [Signature]

THIS MATTER having come before the Court on Defendant's Renewed Motion for Summary Judgment; the City of Tacoma appearing by and through its attorney of record, Jean P. Homan, Deputy City Attorney, and plaintiffs, M.E. and J.E., minors, through Michael McKasy, as Litigation Guardian *ad* Litem, and Joshua Eddo, appearing through their attorneys of record, Nathan P. Roberts and Meaghan Driscoll, and the Court having reviewed the records and files herein, including the following documents:

1. Defendant's Renewed Motion and Memorandum in Support of Summary Judgment;
2. Supplemental Declaration of Jennifer Quilio in Support of Defendant's Renewed Motion for Summary Judgment;

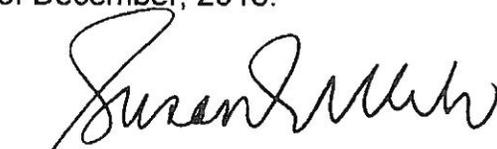
1 3. Plaintiffs' Response in Opposition to Defendant's Second Motion for  
Partial Summary Judgment;

2 4. Reply in Support of Defendant's Renewed Motion for Summary  
3 Judgment;

4 ORDERED, ADJUDGED and DECREED that the defendant City of Tacoma's  
5 Renewed Motion for Summary Judgment is GRANTED; it is further

6 ORDERED, ADJUDGED and DECREED that all remaining claims are  
7 DISMISSED in their entirety and with prejudice. ~~\*\*~~

8 DONE IN OPEN COURT this 7th day of December, 2018.

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10   
11 HONORABLE SUSAN K. SERKO

12 Presented by:

13 WILLIAM C. FOSBRE, City Attorney

14 By: 

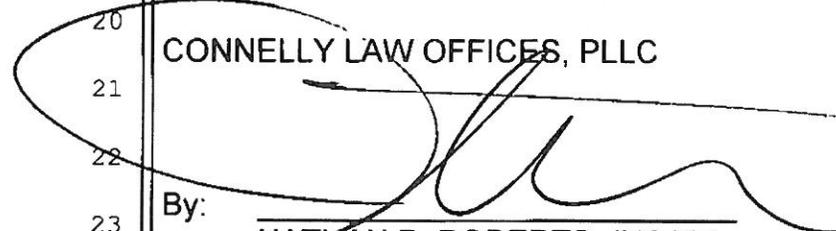
15 JEAN P. HOMAN, WSB #27084  
16 Deputy City Attorney  
17 Attorney for Def. City of Tacoma



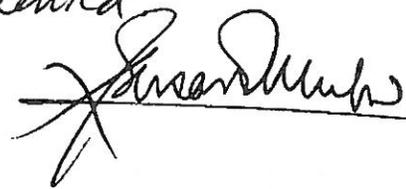
18 Approved as to form,  
19 Notice of presentment waived:

*\*\* Further, plaintiffs' motion for reconsideration is denied* 

20 CONNELLY LAW OFFICES, PLLC

21   
22 By:

23 NATHAN P. ROBERTS, #40457  
24 MEAGHAN DRISCOLL, #49863  
25 Attorneys for Plaintiffs



DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellants* in Court of Appeals, Division II Cause No. 53011-2-II to the following parties:

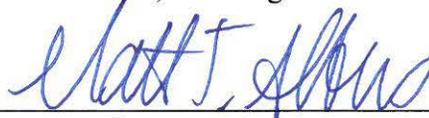
Nathan Roberts, WSBA #40457  
Meaghan Driscoll, WSBA #49863  
Connelly Law Offices, PLLC  
2301 North 30th Street  
Tacoma, WA 98403

Jean P. Homan, WSBA #27084  
Deputy City Attorney  
Tacoma City Attorney  
747 Market Street, Room 1120  
Tacoma, WA 98402-3767

Original E-filed with:  
Court of Appeals, Division II  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 12, 2019 at Seattle, Washington.



---

Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

**March 12, 2019 - 3:14 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53011-2  
**Appellate Court Case Title:** M.E. & J.E., et al. v. City of Tacoma  
**Superior Court Case Number:** 17-2-10556-8

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Briefs - Appellants  
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- matt@tal-fitzlaw.com
- mdriscoll@connelly-law.com
- nroberts@connelly-law.com
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- sblack@cityoftacoma.org

**Comments:**

Brief of Appellants

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**Filing on Behalf of:** Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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