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NO. 53011-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Plaintiff/Appellants,

v.

CITY OF TACOMA

Defendant/Respondent.

RESPONDENT'S RESPONSE BRIEF

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b. There is insufficient evidence to establish that the investigation into the CPS referral concerning the “ghost in the shower” was faulty, biased or resulted in a harmful placement decision;	
c. The disclosures made by J.B. about Jason Karlan did not constitute “a report concerning the possible occurrence of abuse of neglect” involving M.E. or J.E., and therefore, the City did not owe a duty to open an investigation of possible abuse of M.E. and J.E. in 2013.	
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There is no question that law enforcement agencies have a duty, under RCW 26.44.050, to investigate allegations of possible abuse or neglect of children. As the Supreme Court has made clear, however, this cause of action only arises when the alleged negligent investigation results in a harmful placement decision. In this case, the undisputed facts establish that the officers did not have probable cause to believe that M.E. and J.E. were in imminent danger, and consequently, the officers did not make a harmful placement decision. Indeed, absent probable cause, the police are powerless to make any placement decision at all.

Moreover, Plaintiffs urge this Court to significantly expand Washington law. Plaintiffs' theory of liability would make law enforcement liable for negligent investigation under RCW 26.44.050 any time the police investigated an allegation of child abuse or neglect, but were unable to develop probable cause. Further, plaintiffs ask this Court to recognize a common law duty for law enforcement that the Supreme Court has previously rejected. As outlined herein, the superior court correctly refused to expand the scope of negligent investigation claims under RCW 26.44.050, and correctly refuse to recognize a new, common law duty, owed by law enforcement in this context.

The procedural history of this case is complicated, which has resulted in some confusion as to what occurred in the trial court. As outlined more fully in the procedural history (Section II.B, *infra*), the

superior court's grant of summary judgment for the City was based on the substantive merits of plaintiffs' RCW 26.44.050 negligent investigation claims. The trial court did not reach the issues of res judicata, failure to join an indispensable party, or plaintiff's motion for partial summary judgment on the City's other affirmative defenses. Nevertheless, because the issues of failure to join an indispensable party and res judicata are addressed in plaintiffs' opening brief, the City addresses these issues as well.

I. ISSUES ON APPEAL

1. Whether the trial court correctly dismissed plaintiffs' claims for negligent investigation pursuant to RCW 26.44.050 where:
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 - b. There is insufficient evidence to establish that the investigation into the CPS referral concerning the "ghost in the shower" was faulty, biased or resulted in a harmful placement decision;
 - c. The disclosures made by J.B. about Jason Karlan did not constitute "a report concerning the possible occurrence of abuse of neglect" involving M.E. or J.E., and therefore, the City did not owe a duty to open an investigation of possible abuse of M.E. and J.E. in 2013.

2. Whether the trial court correctly rejected plaintiffs' attempt to impose a common law duty on law enforcement in this context, where Washington courts have consistently rejected a common law cause of action for negligent investigation against law enforcement and where there is no recognized exception to the public duty doctrine.
3. Whether plaintiffs' claims for negligent hiring, training and supervision should be dismissed as the officers were, at all times relevant, acting within the course and scope of their employment.
4. In the alternative, whether the superior court's grant of summary judgment should be affirmed on the basis of res judicata and plaintiffs' failure to join an indispensable party.

II. STATEMENT OF THE CASE

A. Statement of Facts

This case stems from two contacts that Tacoma Police had with M.E. and J.E. in late 2011 and early 2012 – the first a request for a welfare check on a child that may have taken some of her mom's medication and the second involving the investigation of a CPS referral of a “ghost in the shower.” To put this case into context, at the time of these events, M.E. was 5 years old; J.E. was 3 years old. They lived with their mother, Jocelyn Eddo. Their father, Joshua Eddo, a plaintiff in this action¹, was

¹ Joshua Eddo's claim in this case is loss of consortium and is therefore derivative of the girls' claims. Consequently, Joshua's claims are not addressed separately herein, although the City moved for summary judgment on all claims. If the girls' claims fail, Joshua's necessary fail as well. Further, in the interests of clarity, the City refers to the involved individuals by their first names. No disrespect is intended.

permitted only supervised visitation. Exhibit 1 to Affidavit of Jean P.

Homan (hereinafter Homan Affidavit).

At the time, Jocelyn's boyfriend was Jason Karlan. In 2013, Jason Karlan was charged with child rape of another child, J.B., and with child rape of M.E. Exhibits 2 and 3 to Homan Affidavit. In 2014, Karlan pled guilty to molesting J.B. Exhibit 4 to Homan Affidavit. The charges against Karlan stemming from the alleged assault of M.E. were dismissed by the prosecutor with prejudice as newly discovered evidence² raised a reasonable doubt as to whether Karlan had committed the crimes charged. Exhibit 5 to Homan Affidavit.

Karlan was never charged for molesting J.E.

The October 14, 2011 Welfare Check:

On October 14, 2011, Joshua Eddo called 911 and requested a welfare check on his children. CP 327-329. As documented in the Computer Aided Dispatch (CAD) log, Joshua told the 911 operator that he had supervised visitation with his children and that during his visit, his 5-year-old had said that the 3-year-old had taken some of mommy's "medicine." Id. Joshua also reported that he thought his daughter was

² M.E. first disclosed that Karlan had molested her, but later recanted and claimed that her father, Joshua Eddo had been the person to molest her. See Declaration of Jennifer Quilio (hereinafter Quilio Declaration).

being drugged by mom's boyfriend (no name, no description), that there are two other men in the house, that Joshua and his ex were in a "heated custody battle" and that he (Joshua) had a restraining order against him. Id. Prior to officers being dispatched, a Tacoma Police Sergeant contacted Joshua and discussed the basis for his concerns. CP 112, para. 4.

Officers Corn and Terwilliger responded to the children's home and contacted the babysitter, Rikki Buttelo. CP 112, para. 5. Buttelo told the officers that J.E. had vomited earlier in the day and he had been concerned she may have ingested medicine (because the vomit was pink), but he later determined that her vomit was pink because she had eaten strawberry yogurt. CP 113, para. 8. Buttelo also told the officers that J.E. had been feeling sick and running a fever. Id. Officers Corn and Terwilliger asked to see the girls and were shown to the master bedroom, where both girls were on the bed, sound asleep. CP 112, para. 6. The officers examined the children while they slept and did not note any signs of injuries on their legs, arms or trunks. Id. The officers chose not to wake the girls because of the late hour and to avoid unnecessarily frightening them. CP 114, para. 12.

When checking on the girls, the officers noted that the house was very cluttered and dirty, both upstairs and downstairs, although the bedroom that apparently belonged to the girls was in slightly better shape.

CP 112-13. Further, the officers noted a pornographic magazine or video on the floor of the master bedroom. CP 112, para. 6. The officers also checked the pantry and refrigerator to confirm that there was food in the house. CP 113, para. 9.

After the officers checked the girls and confirmed that they appeared to be uninjured and sleeping peacefully, Officer Corn called Joshua Eddo and told him what they found. CP113-14, paras. 11-12. Officer Corn also advised Joshua that the house was very dirty and unhygienic and that she would forward a report to CPS, documenting his concerns and her observations as to the conditions in the house. Id.

Based on the information developed during the welfare check, the officers determined that there was no probable cause to take the children into protective custody – there were no visible injuries to the children; there was food in the house; there an adult there to take care of the children; and a reasonable explanation was given for the pink vomit. CP 114. Further, the fact that the house was dirty or that there was pornography in the master bedroom did not give the officers probable cause to believe that the children were in imminent danger. Id. Thus, the officers documented the call in an incident report and referred the matter to CPS for follow up on the conditions in the home. Id. See also CP 257-261.

The “ghost in the shower”:

On January 3, 2012, Tacoma Police Detective Cynthia Brooks was assigned investigation of CPS referral number 2551025. CP 152; CP 163-167. This referral was made by the woman who supervised Joshua’s visitation with M.E. and J.E., Sarah Kier. Id. The referral indicated that the girls said that there was a ghost peeking at them in the shower and that the day before, the ghost had punched J.E. in the back and it hurt. Id. Further, the referral indicated that J.E. had stated that the ghost was “entangled” with Jason. Id. Finally, the referral stated that J.E. had said that her vagina hurt and she was grabbing at it. Id. An interview later with Sarah Kier clarified that J.E. had not said that her vagina hurt; rather, *Sarah Kier* had noticed that J.E. was grabbing at her vagina, was urinating frequently and J.E.’s urine had an odor. CP 153-54.

By the time the matter was assigned to Det. Brooks, it had already been assigned to CPS Social Worker Rocky Stephenson. CP 153. Det. Brooks and Mr. Stephenson conferred and developed an investigatory plan. Id. As M.E. was enrolled in full time kindergarten, Det. Brooks and Mr. Stephenson went to M.E.’s school and conducted a safety interview. CP 155. During the safety interview, M.E. made no disclosures of physical or sexual abuse and reported no concerns about her home life. Id. She did tell the investigators that her mom’s boyfriend, Jason Karlan, had “Jedi

mind powers” because he could make the car windows go up and down with his mind powers. Id.

Following the safety interview of M.E., the investigators went to the family home to contact Jocelyn, the girls’ mother; Jocelyn was not home, but Jason Karlan and J.E. were. CP 155-56. The investigators spoke to Jason for a few minutes, while waiting for Jocelyn to come home. Id. See also CP 231-236. When Jocelyn came home, the investigators advised her of the referral and asked for her consent to have the girls taken to the Child Advocacy Center (CAC) at Mary Bridge Hospital for medical evaluations. Id. Jocelyn consented and they made arrangements for her to bring the girls to the CAC that afternoon. Id.

At the CAC, the investigators interviewed Jocelyn and then conducted a safety interview of J.E.³. CP 156-57. The girls then both underwent sexual abuse consultation examinations. CP 157. Both medical examinations were normal and neither child made any disclosures of physical or sexual abuse during the examinations. Id. See also CP 238-249. The medical examination of J.E. revealed that she had a bladder issue that accounted for the frequent and odorous urination. Id.

³ Under the protocols that govern the investigation of child sexual abuse in Pierce County, there was insufficient information to conduct a forensic interview with either girl. CP 154, para. 10; CP 188-89.

While at the CAC, Det. Brooks learned that Jason Karlan was outside in the parking lot, waiting to take Jocelyn and the children home. CP 157-58. Det. Brooks contacted Karlan and indicated that she wanted to interview him; Karlan indicated that he wanted to do the interview at that time, in the parking lot, and so the interview was concluded at that time. Id.

Based on all of the information gathered during the investigation, the investigators determined that there was no probable cause to proceed further. There were no disclosures by M.E. or J.E. of any physical or sexual abuse; the children's medical examinations were normal, and J.E.'s vaginal pain was explained by a medical condition. CP 158-60. Further, there was no probable cause to believe that the girls were in imminent danger, and thus, no basis for taking the girls into protective custody. Id.

The 2013 arrest of Karlan:

In 2013, CPS received a referral stating that a 6-year-old child, J.B., had made a clear disclosure of sexual abuse by Jason Karlan; this referral was assigned to Tacoma Detective Jennifer Quilio for investigation. CP 122; CP 130-36. Detective Quilio investigated the allegations concerning J.B. and developed probable cause for Karlan's arrest. CP 122-23. The investigation into the allegations concerning J.B.,

however, did not include any new allegations involving M.E. or J.E. CP 123; CP 1041-42.

Ultimately, an arrest warrant was issued for Karlan and he was taken into custody. CP 123-24; CP 138. While interviewing Karlan, he disclosed that he had been accused of a sex crime against a child when he was a minor, in California. CP 124-25. Based on this disclosure, Det. Quilio ran a national background on Karlan (known as a “Triple I”) and learned that he had been arrested at the age of 15 for some type of inappropriate sexual contact with a minor. Id. The Triple I did not include the disposition for that arrest. Id.

In October 2013, M.E. went to a school counselor and disclosed, for the first time, that Jason Karlan had molested her as well. CP 126; CP 144-150. This CPS referral was also assigned to Det. Quillo, who arranged for a forensic interview of M.E. at the CAC. Id. During the forensic interview, M.E. made a clear disclosure of abuse. Id.

Karlan was charged with rape of child for the alleged molestation of J.B. and for the alleged molestation of M.E. CP 300-306. M.E. subsequently recanted her allegations concerning Karlan and instead, disclosed that she had been abused by her father, Joshua Eddo. CP 126. Thereafter, M.E. repeatedly changed her account of the abuse, depending upon which parent had been talking to her last. Id. Ultimately, the

prosecutor dismissed the charges relating to M.E., as there was reasonable doubt as to whether Karlan had actually molested her. CP 324-25.

B. Procedural History

In August of 2017, plaintiffs commenced this action in the Pierce County Superior Court under Cause No. 17-2-10556-8, against the City of Tacoma. CP 1-6. In this matter, the plaintiffs asserted 1) that the City of Tacoma was negligent in the investigation of the police contacts that Tacoma police had with M.E. and J.E.; and 2) that the City of Tacoma had negligently hired, trained, supervised and monitored its personnel. CP 5.

The case against the City of Tacoma was the second lawsuit brought by plaintiffs based on the contacts that Tacoma police had M.E. and J.E.. In 2014, plaintiffs commenced Pierce County Superior Court Cause No. 14-2-07426-9 to petition the superior court for the appointment of a litigation GAL to explore the pursuit of tort claims on behalf of M.E. and J.E. CP 507. Plaintiffs subsequently commenced Pierce County Superior Court Cause No. 15-2-13434-1 against the State of Washington, asserting negligent investigation claims against the State pursuant to RCW 26.44.050⁴. CP 331-35. In February 2017, plaintiffs settled their claims

⁴ Plaintiffs took the deposition of Det. Brooks in the context of the 15-2-13434-1 case, the M.E. v. State of Washington matter (also referred to as the Albertson matter, as Dan Albertson was the litigation GAL appointed to act on behalf of the girls), and questioned her about her investigation of CPS referral number 2551025. CP 346-52.

against the State of Washington for \$2,650,000. CP 337-43. A few months later, plaintiffs filed the lawsuit against the City of Tacoma. CP 1-6.

On October 4, 2018, the City filed a motion for summary judgment on all claims. CP 262-287 (Motion & Memorandum); CP 288-44 (Homan Affidavit); CP 111-120 (Corn Declaration); CP 257-261 (Terwilliger Declaration); CP 121-150 (Quilio Declaration); CP 151-256 (Brooks Declaration). The City's motion for summary judgment addressed plaintiffs' negligent investigation claims pursuant to RCW 26.44.050; plaintiffs' contention that there was a common law duty that would support a negligence claim against the City for the officers' actions; plaintiffs' claims for negligent hiring, training and supervision; and the City's affirmative defenses of failure to join an indispensable party and res judicata (based on plaintiffs' prior suit against the State of Washington based on the same incidents). CP 270. The City's motion for summary judgment was noted for hearing on November 2, 2018⁵. CP 262.

On October 4, 2018, plaintiffs also filed a motion for partial summary judgment, seeking summary judgment on the issues of negligence and proximate cause. CP 19-37 (Motion & Memorandum); CP

⁵ For the court's convenience, a copy of the court docket from the trial court is attached hereto in the Appendix.

38-97 (Driscoll Declaration); CP 98-110 (Peters Declaration). In their motion, plaintiffs also sought dismissal of all affirmative defenses asserted by the City, including the fault of a non-party (the State of Washington). Plaintiff's motion for partial summary judgment was also noted for hearing on November 2, 2018.

On October 17, 2018 (before the hearing on the cross motions for summary judgment), the City of Tacoma filed a number of discovery and procedural motions⁶ with the court, including a motion for a CR 56(f) continuance of plaintiffs' motion for summary judgment on the City's affirmative defense of the fault of a non-party. CP 468-473 (Motion for CR 56(f) Continuance); CP 474-638 (Homan Affidavit). These motions were heard by the superior court on October 26, 2018, and on that date, the superior court granted the City's motion for a CR 56(f) continuance of plaintiffs' motion for partial summary judgment on the City's defense of fault of a third party. CP 917-919. See also RP 10/26/18, p 22:13 – p. 23:3. All other issues raised in plaintiffs' motion for summary judgment proceeded as originally noted.

On November 2, 2018, the parties argued their cross motions for summary judgment. At the outset of the hearing, the trial court noted that

⁶ In addition to the Motion for a CR 56(f) continuance, the City also filed a Motion to Amend Protective Order (CP 451-460) and a Motion to Compel Expert's Complete File & For Leave to Take Depositions after the Discovery Cutoff (CP 461-467).

plaintiffs had not briefed any of the defendants' affirmative defenses in their opening brief, other than the fault of a third party (the issue which was continued under 56(f)), and indicated that because the plaintiffs did not brief the other affirmative defenses in their opening brief, the court was not prepared to address those issues. RP 11/2/18, p. 5:10 – 6:21. The trial court also noted that the CR 19 issue was connected with the issue of the fault of a third party, and the court decided to hear the CR 19/res judicata issue at the same time as the fault of a third party issue. RP 11/2/18, p 8:14-10:15; p. 38:17-39:23; p. 42:18-43:7. In light of these preliminary decisions by the trial court, at the November 2, 2018, hearing, the court heard oral argument on the City's motion for summary judgment and on plaintiffs' motion for partial summary judgment on the issue of negligence only.

At the November 2, 2018, hearing, the trial court granted the City of Tacoma's motion for summary judgment on both the October 14, 2011, welfare check and on the "ghost in the shower" investigation⁷. Plaintiffs' contentions notwithstanding, the trial court's exchanges with counsel made clear the basis of the court's ruling on these two contacts:

THE COURT: And what's interesting about your argument is that in 13 years of looking at search warrants, I don't

⁷ In its oral ruling, the trial court stated: "I also believe clearly, Ms. Driscoll, that the Court could not grant plaintiffs' motion for partial summary judgment. That, absolutely I am denying."

think I've ever been asked to take -- to determine probable cause for law enforcement to take children into custody. But in my dependency court role, on a daily basis I was asked whether there was substantial reason to believe that a child was in imminent danger, thus allowing the Child Protective Services folks to go to a home and pull a child. And that's a very different standard.

MS. HOMAN: Yes.

THE COURT: So as you're continually arguing the probable cause standard, I'm in my own mind thinking of substantial reason to believe, which of course isn't the standard that law enforcement would have. *But even if I apply the substantial reason to believe, I'm not sure -- certainly that the first contact doesn't meet that. So, you know, then the only question in my own mind becomes whether or not the 2012 contact or the 2013 contact meets that standard. So -- and then that's not the standard for law enforcement anyway, it's probable cause, so --*

MS. HOMAN: And it's probable cause to believe that the child has been the victim of abuse or neglect.

THE COURT: Yes.

MS. HOMAN: And so that is a very particular standard and that is the scope of law enforcement's jurisdiction. ...

(emphasis added) RP 11.2.18, p.17:6-18:6. The trial court later then reiterated:

“And I appreciate what your argument is, I appreciate the condition of the house, I appreciate the – whatever it was, the pornographic material in the room where they were sleeping, but I disagree that that’s a – that at that point there was a clear responsibility to pull those children. I don’t think that there was.”

Id. at p. 23:16-24:16.

As to the last incident at issue (the arrest of Karlan following J.B.'s disclosure of abuse), the trial court indicated that it needed additional briefing on whether that incident could support a cause of action. RP 11/2/18, p. 32:22-34:6. Therefore, the trial court granted the City's motion as to the October 14, 2011, welfare check and the "ghost in the shower" investigation. CP 979. As to the 2013 arrest of Karlan following J.B.'s disclosure of abuse, the trial court denied the motion without prejudice and granted leave for the City to refile on that incident. Id. In that same order, the trial court granted plaintiffs leave to refile a motion for summary judgment on the City's affirmative defenses. Id.

Pursuant to the trial court's order, on November 9, 2018, the City renewed its motion for summary judgment on the 2013 investigation into J.B.'s disclosure of abuse, and noted its motion for hearing on December 7, 2018. CP 1006-38 (Motion & Memorandum); CP 1039-64 (Supplemental Quilio Declaration). On that same date, plaintiffs file a motion for reconsideration of the trial court's November 2, 2018, order and file a motion for partial summary judgment on the City's affirmative defenses, including defense of a third party. CP 985-90 (Motion for Reconsideration); CP 991-05 (Motion & Memorandum). Plaintiffs' motions were also noted for hearing on December 7, 2018.

At the hearing on December 7, 2018, once plaintiffs' counsel confirmed with the trial court that the court would not reconsider the November 2, 2018, grant of summary judgment, plaintiffs' counsel conceded that – in light of the court's prior ruling - summary judgment on the 2013 investigation into the abuse of J.B. would be appropriate as well. RP 12/7/18, p. 4:6-7:5.

Following entry of the December 7, 2018, order, plaintiffs timely filed a notice of appeal. CP 1168-76.

III. ARGUMENT

A. **The trial court correctly dismissed plaintiffs' RCW 26.44.050 negligent investigation claims.**

As with any negligence action, a plaintiff asserting a negligent investigation claim under RCW 26.44.050⁸ must prove the elements of negligence: duty, breach, proximate cause and damages. This claim is a “narrow exception” to the rule that Washington does not recognize a general tort claim for negligent investigation. M.W. v. Dep't of Soc. & Health Svcs., 149 Wn.2d 589, 601, 70 P.3d 954 (2003). “A claim of negligent investigation is available only when law enforcement or DSHS

⁸ RCW 26.44.050 provides, in pertinent part, as follows: “upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report...”

conducts an incomplete or biased investigation that ‘resulted in a harmful placement decision.’” McCarthy v. Clark County, 193 Wn. App. 314, 328-29, 376 P.3d 1127 (2016) (citing M.W., 149 Wn.2d at 602). “A harmful placement decision includes ‘removing a child from a nonabusive home, placing a child in an abusive home or letting a child remain in an abusive home.’” Id.

To prevail on a negligent investigation claim, the claimant must prove that the faulty investigation was a proximate cause of the harmful placement. Proximate cause has two elements: cause in fact and legal causation. Cause in fact exists when “but for” the defendant’s actions, the claimant would not have been injured. Cause in fact generally is a jury question. Legal causation involves a policy determination as to how far the consequences of an act should extend and generally is a legal question.

Id. (internal citations omitted)⁹. In light of this standard, as outlined herein, the trial court correctly determined that all of plaintiffs’ negligent investigation claims fail, as a matter of law.

1. The October 14, 2011, welfare check is not a “report of possible abuse or neglect” and cannot serve as a basis for this claim.

⁹ In developing the standard outlined above, the Supreme Court relied upon and adopted the analysis outlined by Judge Morgan in a lengthy dissenting opinion in M.W. v. Dep’t of Soc. & Health Svcs, 110 Wn. App. 233, 39 P.3d 993 (2002). M.W., 110 Wn. App. at 256 (Morgan, J., dissenting) In his dissent, Judge Morgan articulated the standard that applies to this cause of action: “...the ill-defined tort of ‘negligent investigation’ requires proof that DSHS based a child-placement decision (i.e., a decision to place, leave or remove a child from a home) on a body of information that was unreasonably incomplete or skewed.” Id.

To begin, the October 2011 welfare check by Officers Corn and Terwilliger does not fall within the scope RCW 26.44.050 – it was not a report of a possible occurrence of neglect or abuse¹⁰, as defined by the statute. The officers were simply fulfilling their community caretaking function and checking on the health and welfare of a single child who was reported to maybe have ingested some adult medication on a single occasion. There was no allegation made, or evidence developed, to suggest that the possible ingestion of medication was anything other than an accident. Moreover, upon contact with the person caring for the children, the officers learned that the child not ingested medicine, but instead, was sick (running a fever) and had vomited strawberry yogurt. And while the house was dirty, unhygienic, and in the officer’s opinion, “not suitable for small children,” the conditions present in the house did not create probable cause to allow the officers to take enforcement action. During the course of the welfare check, the officers did not develop

¹⁰ “Abuse or neglect” is defined, for purposes of the statute as “sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety...or negligent treatment or maltreatment of a child by a person responsible for or providing care to the child.” RCW 26.44.020(1) (2018). Further, “negligent treatment or maltreatment” means an act or failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of the consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare or safety...” RCW 26.44.020(16) (2018).

probable cause¹¹ to believe that a crime had occurred and did not have probable cause to take the children into protective custody¹². A sergeant and the responding officers both spoke with Joshua, as the reporting party. The officers made contact with the person caring for the children and developed a sufficient basis to conclude, on a more probable than not basis, that J.E. had not ingested any medication. The officers examined the girls, who were sleeping peacefully, and found no sign of injury or distress. The officers checked and confirmed that there was food in the house. While a dirty house and possession of adult pornography are not crimes, the officers carefully documented the call and routed the report to CPS for follow up. Under these undisputed facts, reasonable minds could reach only one conclusion – the officer’s response to the welfare check was reasonable and thorough and under the law, the officers had no legal

¹¹ Plaintiffs have offered an opinion from a police procedures expert, Susan Peters, on the police contacts in this case. CP 437-439. This case, however, is not one requiring expert testimony given the issues presented. Resolution of the issues presented herein will require this court to assess whether the officers had probable cause to take enforcement action under the undisputed facts, and for this inquiry, the court does not require expert testimony. The superior court bench is uniquely qualified to assess factual patterns and determine whether the facts give rise to probable cause. Thus, Ms. Peters’ opinions do not create a material question of fact precluding summary judgment.

¹² RCW 26.44.050 allows an officer to take a child into protective custody, without a court order, only when “there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order[.]” (emphasis added) RCW 26.44.050 (2018).

authority to do anything further¹³. As a matter of law, under these facts, any claim based on the October 2011 welfare check fails, and the trial court did not err in so finding.

2. Det. Brooks' January 2012, investigation into the "ghost in the shower" was not biased or faulty, and given the lack of probable cause, was not the proximate cause of a harmful placement decision.

As outlined above, in response to the CPS referral concerning the "ghost in the shower," Det. Brooks thoroughly investigated the allegations, exhausting all investigatory leads, but her investigation did not develop facts sufficient to establish probable cause to believe that a crime had occurred. Det. Brooks interviewed the Sarah Kier, the person who made the CPS referral. She then conducted a safety interview of M.E., in accordance with the Child Sexual Abuse Investigation Protocols for Pierce County Washington¹⁴. She sought and obtained consent from the

¹³ Plaintiffs reliance on their expert's opinions to create a material question of fact that would preclude summary judgment is misplaced. The issue of whether the undisputed facts gave rise to probable cause is a question of law, a question that the superior court is uniquely qualified to answer.

¹⁴ The Protocols are developed by a multi-disciplinary team which includes members of the law enforcement community (including the Tacoma Police Department), members of the medical community, various school districts, child welfare agencies, the Pierce County Prosecutor's Office, and the Attorney General's Office. These Protocols are reviewed and updated every two years to ensure that we are using current, best practices in these investigations. The Protocols govern investigations into allegations of child sexual abuse and negligent done by law enforcement agencies in Pierce County, including the Tacoma Police Department. As outlined in Det. Brooks' declaration, there was insufficient evidence to seek a forensic interview of M.E. or J.E. under the standards established by the Protocols. CP 154, para. 9-10.

custodial parent for a medical evaluation of both girls at the CAC, evaluations that resulted in completely normal medical findings¹⁵ and no disclosures of physical or sexual abuse. Det. Brooks interviewed Jocelyn and Karlan, the caregivers in the home, and conducted a safety interview of J.E. at the CAC, again, in conformance with the Protocols. The result of all of these investigatory steps was no disclosures of abuse and no evidence of abuse. In light of these undisputed facts, there is no evidence to establish that the investigation was faulty or biased. Accord Roe v. State, 2017 Wash. App. LEXIS 146, 2017 WL 359822 (Div. II Jan. 24, 2017) (summary judgment proper where the evidence established that the investigation pursued all available avenues, and therefore was not incomplete, and where there was no evidence of bias).

Further, once the investigatory avenues were depleted and probable cause had not been established, the detective had no legal authority to take any enforcement action (either arrest of a suspect or removal of the children from the home). Absent legal authority to take enforcement action, it cannot be said that Det. Brooks made a “placement decision.” To hold that she did under these circumstances would be to grossly expand

¹⁵ Additionally, the medical examination of J.E. revealed a medical reason for the urination issues and the grabbing of her vagina, a medical reason that militates against concluding that such behavior was the result of sexual abuse.

the scope of liability under RCW 26.44.050 in a way that has already been rejected by the appellate courts. See Yonker v. Dep't of Soc. & Health Svcs., 85 Wn. App. 71, 81, 930 P.2d 958 (1997)(RCW 26.44.050 does not create duty to prevent every case of child abuse).

The primary fact that plaintiffs identify as evidence of a “faulty” investigation is the fact that Det. Brooks did not run a national background check on Jason Karlan, but instead, ran only a local criminal history check. Brief of Appellants, p. 4; p. 21. Plaintiffs’ argue that TPD’s policies required Det. Brooks to run a complete background check on Karlan, but a careful examination of the record shows that this is not so. In support of this contention, plaintiffs point to the testimony of Det. William Muse, the City’s CR 30(b)(6) designee. Det. Muse’s testimony, however, unequivocally establishes that Det. Brooks did not violate TPD policy¹⁶ by not running a national criminal history on Karlan:

Q Okay. Is there a policy in the Tacoma Police Department that requires a detective to run a criminal history on a suspect in every case?

A There is no policy for that, no.

CP 757. Further, plaintiffs argue that had Det. Brooks known of Karlan’s arrest in California as a minor, the investigation might have taken a

¹⁶ In fact, Det. Muse’s testimony makes clear that the document upon which plaintiffs rely is a *procedure*, and not a policy. CP 575. See also CP 764.

different tact or Jocelyn would have done something different to protect her children. Brief of Appellants, p. 21. These contentions are speculative and wholly insufficient to create a material question of fact in this case. Knowledge of Karlan's prior arrest would not have created proximate cause to believe Karlan committed a crime against M.E. or J.E.. Consequently, there is no basis for concluding that this alleged deficiency¹⁷ was the proximate cause of a placement decision.

3. The May 2013 investigation into the alleged abuse of J.B. did not include reports of possible abuse of M.E. or J.E., and therefore, cannot serve as the basis of a negligent investigation claim as to the plaintiffs.

Despite clear authority to the contrary, plaintiffs argue that RCW 26.44.050 imposes a duty on law enforcement to investigate reports of possible abuse or neglect pertaining not only to the child who is the subject of the report, but to other possible victims as well. Brief of Appellant, p. 23. This construction of the duty imposed by RCW

¹⁷ As outlined above, there is no requirement, either in TPD policy or in the Pierce County Protocols, that a detective run a national criminal history check on every person in the home, as Ms. Peters asserts should have been done. Ms. Peters' opinion is cut from whole cloth, and based on the hindsight knowledge that Karlan did abuse J.B. (although there is insufficient evidence to establish that Karlan abused either M.E. or J.E.). As such, it is insufficient to create a material question. See Thun v. Bonney Lake, 164 Wn. App. 755, 265 P.3d 207 (2011) (an expert's unsupported conclusions do not create an issue of fact on summary judgment). See also Woodward v. Lopez, 174 Wn. App. 460, 468, 300 P.3d 417 (2013) ("A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from support or opinion.") (citing Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 1988)).

26.44.050 has already been considered – and rejected – by Washington courts.

This Court has previously addressed the very argument that plaintiffs make in the instant case¹⁸. See M.M.S. v. Dep't of Soc. & Health Servs., Child Protective Servs., 1 Wn. App. 2d 320, 404 P.3d 1163 (2017), rev. denied, 190 Wn.2d 1009 (2018). The M.M.S. case involved claims against DSHS under both the common law and RCW 26.44.050. The case was brought by Crystal Armstrong, on her own behalf and on behalf of her minor daughter, M.M.S. The case stemmed from the placement of Crystal's stepson, J.A., in the home after J.A. was removed from his mother's care. While in Crystal's home, J.A. grabbed M.M.S.'s hair, pushed her down, wrapped his legs around her, and kissed her on the lips. M.M.S., 1 Wn. App. 2d at 324. Approximately a week later, Crystal and J.A.'s biological father (Crystal's husband) asked that J.A. be removed from the home. Id. After J.A. was removed from Crystal's home, she learned that J.A. had a reported history of highly sexualized behavior, including incidents of inappropriate touching with his half-sister. Crystal sued DSHS, alleging that DSHS had a common law duty to disclose J.A.'s prior sexualized behavior and a duty under RCW 26.44.050 to investigate J.A.'s history before placing him in

¹⁸ See also Division I's unpublished opinion in Estate of Linnik v. State, 2013 Wash. App. LEXIS 709, *13-14 (Ct. App., April 1, 2013).

the Armstrong home. The superior court granted DSHS's motion for summary judgment and dismissed the case. Armstrong appealed and Division II affirmed, finding that DSHS did not owe the plaintiffs a duty under the circumstances. Id. at 322.

With regard to Crystal's claim that RCW 26.44.050 created a duty owed to Crystal and M.M.S., this Court soundly rejected this argument:

Under the plain language of RCW 26.44.050, neither Crystal nor M.M.S. is within the class of persons for whose benefit RCW 26.44.050 was enacted. RCW 26.44.050 imposes a duty to investigate "upon the receipt of a report concerning the possible occurrence of abuse or neglect . . ." Based on this language, RCW 26.44.050 was enacted to benefit children *who are subjects of reports concerning possible abuse or neglect.*

Id. at 331.

Similarly, in Boone v. Dep't of Soc. & Health Servs., 200 Wn. App 723, 403 P.3d 873 (2017), the Boone plaintiffs made the same argument, based on the same authority, as the plaintiffs in the instant case, and the argument was again rejected:

As it relates to the investigations done in 1992, 1997, and January 2006, the Boone children are not within the class of persons for whose benefit RCW 26.44.050 was enacted. The Boones allege that they are within the class of persons because RCW 26.44.050 was enacted to protect all abused children. Br. of Appellant at 19-20. But, the Boones' reading of the class of persons for whose benefit RCW 26.44.050 was enacted is too broad. Under RCW 26.44.050, the duty to investigate with

reasonable care is triggered by “a report concerning the possible occurrence of abuse or neglect.” Therefore, the class of persons protected by the duty to investigate are the children *who are the subjects* of a report of possible abuse or neglect. Insofar as the Boones rely on the investigations into the abuse of other children in the day care in 1992, 1997, and January 2006, the Boones are not within the class of persons for whose benefit RCW 26.44.050 was enacted because the Boone children were not the subjects of the reports of alleged abuse that triggered those investigations.

The Boones cite to two cases, *Lewis v. Whatcom County*, 136 Wn. App. 450, 149 P.3d 686 (2006) and *Yonker v. Department of Social & Health Services*, 85 Wn. App. 71, 930 P.2d 958 (1997). However, neither case supports the conclusion that children and families who were not the subject of the report triggering the investigation are within the class of persons for whose benefit RCW 26.44.050 was enacted.

(emphasis added) *Id.* at 734.

The courts’ holdings in M.M.S., and Boone are dispositive of plaintiffs’ RCW 26.44.050 claims based on the April 29, 2013, CPS referral concerning J.B. This referral did not give rise to a duty owed to M.E. or J.E. as they were not the subject of this referral and therefore, not within the class of persons for whose benefit the statute was enacted. Moreover, the investigation into the abuse of J.B. did not result in any information or evidence to suggest the possible abuse or neglect of either M.E. or J.E..

It is important to remember, however, that upon receipt of the referral concerning J.B., Detective Quilio did take specific steps for the protection of M.E. and J.E.. Supplemental Declaration of Jennifer Quilio

in Support of Defendant's Renewed Motion for Summary Judgment (hereinafter Quilio Supplemental Declaration). First, although the referral concerning J.B. referenced the earlier "ghost in the shower" referral and identified it as unfounded, Detective Quilio did not simply accept that at face value. Instead, she pulled Detective Brooks' investigative report and confirmed for herself that the appropriate ancillary interviews and safety interviews had occurred, that the children had been taken to the CAC and that the investigation revealed no disclosures or evidence of abuse.

Second, just one day after Karlan was taken into custody and interviewed by Detective Quilio, she made it a point to contact M.E.'s and J.E.'s parents – both mother and father – to inquire as to whether the girls had made any disclosures and to encourage the parents to continue talking to the girls and to report any disclosures or new information immediately.

Given that there was literally no information or evidence to suggest that Karlan had committed any criminal acts against M.E. and J.E. at that point, there was nothing more for the detective to do. Consequently, there was no harmful placement decision made for M.E. or J.E., as a result of the disclosure of abuse by J.B.

B. Any common law negligent investigation claim fails due to the lack of an actionable duty.

It is not clear exactly what argument plaintiffs are making concerning a common law duty owed in this context, as plaintiffs' briefing references a variety of distinct, and largely unrelated, legal doctrines.

For example, plaintiffs cite to Coffel v. Clallam County, 58 Wn. App. 517, 794 P.2d 513 (1990), for the proposition that “[u]nder the common law, in general, where police officers act, ‘they have a duty to act with reasonable care.’” Brief of Appellant, p. 15 n.10. This is not a correct statement of the law, nor a reasonable representation of Coffel, as Coffel is a public duty doctrine case. In Coffel, “the gist of plaintiffs’ claim was that defendant officers stood by while plaintiffs’ building was being destroyed by Caldwell and others, and prevented plaintiffs from doing anything about the destruction even though the officers knew of plaintiff Coffel’s claim of ownership and plaintiff Knodel’s claim of possession.” Coffel, 58 Wn. App. at 519. The County asserted, *inter alia*, the public duty doctrine as a defense, and the Coffel court concluded that while the doctrine did apply, under the Supreme Court’s analysis in Bailey v. Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987), the “failure to enforce” exception to the doctrine also applied.

In support of this same misstatement of the law – that “in general, where police officers act, they have a duty to act with reasonable care” – plaintiffs also cite to a number of cases decided under Restatement (Second) of Torts §302B. See Washburn v. City of Federal Way, 178 Wn.2d 732, 310 P.3d 1275 (2013); Robb v. City of Seattle, 176 Wn.2d 427, 295 P.3d 212 (2013); Parrilla v. King County, 138 Wn. App. 427, 157 P.3d 879 (2007). Plaintiff’s reliance on these cases is misplaced, as § 302B has no application to the instant case.

Washington courts have adopted §302B of the Restatement (Second) of Torts to create a duty “*in limited circumstances*,” to guard another against the criminal conduct of a third party. (emphasis added) Washburn, 178 Wn.2d at 757-58. This duty “can arise ‘where the actor’s own affirmative act has created or exposed the other to a recognizably high degree of risk of harm’ from the criminal acts of a third party. Id. For example, in Robb, the Court reasoned that “absent some kind of special relationship between the plaintiff and defendant under Restatement § 302B, only misfeasance, not nonfeasance, could create a duty to act reasonably to prevent foreseeable criminal conduct.” Robb, 176 Wn.2 at 758. Because the police had no special relationship with the plaintiff and their conduct did not create a new risk to the plaintiff (but rather simply failed to ameliorate an existing risk by picking up the shotgun shells), §

302B did not operate to create a duty. Id. at 758-59. In contrast, in Washburn, the court concluded that the officer had a statutory duty to serve the anti-harassment order and by his affirmative conduct, the officer created a new risk to the decedent. Consequently, § 302B operated to create a duty, imposed on the officer, to guard the decedent against the criminal acts of her boyfriend. Washburn, 178 Wn.2d at 759-60.

The facts of this case do not support an application of §302B. There is no evidence that by their affirmative acts, the police who had contact with M.E. and J.E. did anything that created a new risk to them. Similarly, the duty articulated by the Supreme Court in H.B.H. v. State of Washington, 192 Wn.2d 154, 429 P.3d 484 (2018), is equally unavailing in the instant case. See Brief of Appellants, p. 15-17.

Plaintiffs attempt to import the duty imposed on DSHS and explained by the court in H.B.H. to cases involving law enforcement, but the analytical underpinnings of the duty in H.B.H. easily demonstrates why this duty can have no application to law enforcement. The common law duty at issue in H.B.H. was a “duty to protect dependent foster children from foreseeable harm based on the special relationship between DSHS and such children.” Id. at 159. As the H.B.H. court pointed out, while there is generally no duty to prevent a third person from harming the plaintiff, “a duty arises when ‘a special relationship exists between the

defendant and either the third party or the foreseeable victim of the third party's conduct.” Id. at 168 (citing Niece v. Elmview Group Home, 131 Wn.2d 39, 43, 929 P.2d 420 (1997)). “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 169-70. The H.B.H. court concluded that a special relationship exists between DSHS and children in foster care because “‘as custodian and caretaker of foster children,’ the State is required to ‘provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child.’” Id. at 164. “[E]ntrustment and vulnerability...are at the heart of the special protective relationship[.]” Id. at 172.

Plaintiffs' reliance on H.B.H. for the application of a common law duty on Tacoma under these circumstances is puzzling, however. As plaintiffs themselves made clear, DSHS and the Tacoma Police Department “serve different functions, protect different jurisdictions, owe different duties, have different standards of care...” Brief of Appellant, p. 38. Police officers, when serving their community caretaking function and when investigating possible crimes, do not have a special relationship with

children comparable to the relationship that created the common law duty at issue in H.B.H.

Moreover, this argument is essentially the argument that the plaintiffs in M.M.S. made, and that this Court rejected. As noted by the M.M.S. court, the kind of special relationships that will support such a duty are defined by §314A of the Restatement (Second) of Torts, and are limited to common carriers, inn keepers, possessors of land (concerning invitees), and “[o]ne who 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[.]” M.M.S., 1 Wn. App. 2d at 327-28. In this case, none of these circumstances apply and consequently, there is no special relationship between the City and the plaintiffs. And without a special relationship, the general rule, as stated in §315 of the Restatement (Second) of Tort, applies: “There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another[.]” Id.

Moreover, the provision of law enforcement services is a duty that is imposed on the government for the benefit of society as a whole; consequently, under the public duty doctrine, law enforcement actions will not generally support a cause of action unless an exception to the doctrine is established. Munich v. Skagit Emergency Communication Center, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). See also id. at 887 (Chambers, J.,

concurring (“Private persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the State of Washington.”); Washburn v. City of Federal Way, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013)(“governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law[.]”). In the instant case, there is no evidence to establish any of the recognized exceptions to the public duty doctrine¹⁹.

Finally, it is beyond dispute that Washington does not recognize a common law cause of action against law enforcement for negligent investigation. M.W. v. Dept. of Social and Health Services, 149 Wn.2d 589, 601, 70 P.3d 954 (2003) (“Our courts have not recognized a general tort claim for negligent investigation.”); Laymon v. Department of Natural Resources, 99 Wn. App. 518, 530, 994 P.2d 232 (2000) (“A claim of negligent investigation will not lie against police officers.”); Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000) (“Thus, in general, a claim for negligent investigation does not exist under the common law because

¹⁹ In order to establish the “special relationship” exception to the public duty doctrine, the plaintiff must show “(1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff.” Munich, 175 Wn.2d at 879. There is no evidence in the record to establish any of these essential elements.

there is no duty owed to a particular class of persons.”); Corbally v. Kennewick School District, 94 Wn. App. 736, 740, 973 P.2d 1074(1999) (“In general, a claim for negligent investigation is not cognizable under Washington law.”); Fondren v. Klickitat County, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) (“A claim for negligent investigation is not cognizable under Washington law.”); Donaldson v. City of Seattle, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992) (“Washington does not recognize the tort of negligent investigation.”); Dever v. Fowler, 63 Wn. App. 35, 816 P.2d 1237 (1991) (“The reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for the negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement.”).

There is no legal authority to support plaintiffs’ contention that the law enforcement officers who had contact with plaintiffs owed these plaintiffs an actionable, common law duty to act reasonably. There is no authority – and no factual basis – for any individualized common law duty owed to plaintiffs under the facts of this case, and the trial court did not err in so holding.

C. **To the extent it is at issue, the trial court correctly dismissed plaintiffs’ negligent hiring, training and supervision claims.**

On appeal, plaintiffs did not directly address the dismissal of the negligent hiring, training and supervision claims, although plaintiffs do argue that the superior court erred in dismissing their complaint. Therefore, to the extent plaintiffs are seeking review of the court’s order dismissing these claims, the superior court’s order on the dismissal of the negligent hiring, training and supervision claims should be affirmed.

In order to proceed with a claim of negligent training or supervision, a plaintiff must show that the employee was acting outside the scope of his employment. Anderson v. Soap Lake Sch. Dist., 191 Wn.2d 353, 361, 423 P.3d 197 (2018)(“This is because an action based on negligent training and supervision ‘is applicable only when the [employee] is acting outside the scope of employment.’”). See also Evans v. Tacoma Sch. Dist. No. 10, 195 Wn. App. 25, 47, 380 P.3d 553 (2016)(“an injured party generally cannot assert claims for negligent hiring, retention, supervision or training of an employee when the employer is vicariously liable for the employee’s conduct.”); Gilliam v. DSHS, 89 Wn. App. 569, 950 P.2d 20, rev. denied, 135 Wn.2d 1015 (1998). In the instant case, plaintiffs concede that Officers Corn and Terwilliger, and Detective Brooks, were all acting within the course and scope of their employment.

CP 443. Consequently, plaintiffs' claims of negligent training, supervision, hiring and retention are not cognizable.

D. In the alternative, summary judgment can be affirmed on plaintiffs' failure to join an indispensable party and the doctrine of res judicata.

In their prior suit against the State, plaintiffs contended 1) that DSHS failed to properly investigate following the October 2011 referral to CPS from TPD Officer Corn as a result of the welfare check; and 2) that the investigation by TPD Detective Brooks and CPS Investigator Rocky Stephenson in January 2012 was inadequate. See, generally, CP 336-386; CP 398-425; CP 437-440. These are the claims being asserted in this case.

Res judicata is a doctrine of claim preclusion that bars relitigation of a claim that has been determined by a final judgment²⁰. Storti v. Univ. of Wash., 181 Wn.2d 28, 330 P.3d 159 (2014). See also Landry v. Luscher, 95 Wn. App. 779, 976 P.2d 1274 (1999) (two separate lawsuits based on the same event is prohibited as "claim splitting"). Under the doctrine, no party may relitigate "claims and issues that were litigated, *or might have been litigated*, in a prior action." (emphasis added) Pederson v.

²⁰ For purposes of the doctrine of res judicata, a dismissal with prejudice following the parties' settlement of an action constitutes a final judgment. Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist., 121 Wn.2d 257, 850 P.2d 1306 (1993). See also Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 861, 766 P.2d 1 (1986) (a dismissal with prejudice as part of a settlement in a personal injury case is a final judgment).

Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000). Res judicata applies “not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, *and which the parties, exercising reasonable diligence, might have brought forward at that time.*” (emphasis added) Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (quoting Golden v. McGill, 3 Wn.2d 708, 720, 102 P.2d 219 (1940)).

The “threshold requirement of res judicata is a final judgment on the merits in the prior suit.” Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). The doctrine then applies where there is a concurrence of identities to the challenged action in four respects: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Lynn v. Labor & Indus., 130 Wn. App. 829, 836, 125 P.3d 202 (2005); Kuhlman v. Thomas, 78 Wn. App. 115, 120, 897 P.2d 365 (1995). Under res judicata, a judgment is binding upon parties to the litigation and persons in privity with those parties. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 764, 887 P.2d 898 (1995).

Plaintiffs' claims in this case are essentially identical as their claims²¹ in the case against State. The two suits arise out of the same transactional nucleus of facts, specifically, the CPS referrals of October 2011, and December 2011. CP 337-344. The same claims of negligent investigation of child abuse were asserted by plaintiffs against the City as they were against the State, for alleged inadequacies in the investigation which plaintiffs claimed resulted in their ongoing abuse until Jason Karlan's arrest. CP 354-411. The injuries that the plaintiffs attribute to the City in the instant matter are the same injuries as those the plaintiffs attributed to the State in the previous action. The evidence necessary in both cases is identical, as it relates to the investigations by CPS and TPD. CP 346-386. Plaintiff even has retained the same expert damage witness, whose opinion is substantially the same in both cases, and based on the same facts. CP 400-444. It is clearly the same subject matter and cause of action.

²¹ The determination of whether the same causes of action are present includes consideration of (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Pederson v. Potter, 103 Wn. App. at 72; Landry, 95 Wn. App. at 784. These four factors are analytical tools; it is not necessary that all four factors be present to bar the claim. Kuhlman, 78 Wn. App. at 122 ("there is no specific test for determining identity of causes of action"). See also Rains v. State, 100 Wn.2d 660, 663-64, 674 P.2d 165 (1983) ("identity of causes of action cannot be determined precisely by mechanistic application of a simple test").

The salient issue herein is whether the defendants in the two actions are in privity for purposes of res judicata. Even though the City of Tacoma and the State of Washington are different entities, they should be considered in privity for purposes of these claims. When different parties in separate suits are in privity with one another, they are the same parties for res judicata purposes. Ensley v. Pitcher, 152 Wn. App. 891, 902, 222 P.3d 99 (2009). Even a nonparty to a prior suit may have a concurrence of identity if the nonparty is in privity with a party. See Woodley v. Myers Capital Corp., 67 Wn. App. 328, 337, 835 P.2d 239 (1992).

Privity does not arise merely by virtue of the fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 764, 887 P.2d 898 (1995). While a party does not have to be identical in both suits, there must be at least privity between a party to the first suit and the party to the second suit. Kuhlman, 78 Wn. App. at 121. Privity is based on a mutual or successive relationship to the same right, property, *or subject matter of the litigation*. Loveridge, 125 Wn.2d at 764.

Thompson v. King County, 163 Wn. App. 184, 259, P.3d 1138 (2011), cited by plaintiffs, is factually distinguishable and does not demonstrate a lack of privity in this case. In Thompson, the plaintiff sued the county, alleging that other inmates had raped him while he was an

inmate in the county jail. He had previously filed a 42 U.S.C. §1983 action in federal court, against two correctional officers in their individual capacity for their negligent failure to prevent the rapes and for violations of the plaintiff's civil rights. The federal action was voluntarily dismissed by stipulation. Id. at 187-188. The plaintiff subsequently sued the County, on the basis that it was responsible for the maintenance and operation of the jail and was vicariously liable for the acts and omissions of unnamed employees acting within the scope of their employment. Id. at 189.

The Thompson court, although recognizing that generally the employee/employer relationship confers privity, concluded that the County did not have sufficient identity with the individual defendants in the earlier federal court action to permit the application of res judicata. Plaintiff's state court action alleged that the county was responsible for the maintenance and operation of the jail. This amounted to a colorable claim that as a custodian, the county was liable for breach of a duty that arose independently of its vicarious liability for negligence by its correctional officers. Id. at 196. Further the court noted the named defendants in the federal matter were dismissed on the basis of a defense personal to themselves, thus coming within one of the recognized exceptions to the rule of general privity between employer and employee

(the officers claimed they had no knowledge of the plaintiff's rape; the court noted that defense did not rule out the possibility that other correctional officers did have knowledge and did fail to protect the plaintiff). Id. at 195-196.

In the instant case, plaintiffs asserted that the City's officers breached a duty to investigate claims of possible sexual child abuse, including failing to properly investigate Jason Karlan. In the previous case, plaintiffs alleged that DSHS breached that same duty²² to investigate claims of possible child sexual abuse, including failure to properly investigate Jason Karlan. In both cases, the duty of the respective defendants is one conferred by statute, specifically RCW Chapter 26.44. As the public entities specifically designated by the Legislature with the statutory authority to investigate claims of possible child abuse, and the authority to remove children from such situations, the duties of TPD officer and the DSHS employees are so intertwined as to be essentially interdependent. With regards to investigation of child sexual abuse, especially when both the State and the City are actively involved in an investigation, there is a mutual relationship with regards to their statutory

²² Although both entities have a duty to investigate allegations of possible abuse or neglect, their respective jurisdictions and authority to act do diverge, given that law enforcement is limited to enforcement actions based on probable cause, while the State has authority to address conditions in the home and initiate dependency actions.

obligations under RCW 26.44 so as to establish privity in negligent investigation claims of this nature. Indeed, TPD and CPS work as an investigative team and develop an investigative plan together. For purposes of claim preclusion, this Court should find the State and the City in privity based on the unique intertwined nature of the statutory duties and roles imposed upon them pursuant to RCW 26.44²³. As such, these claims should be precluded.

Moreover, this matter should be dismissed because the State is a necessary and indispensable party to the instant action, and the State cannot be joined due to the previous settlement. A necessary party is one who “has sufficient interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved.”

Harvey v. Bd. of County Comm'rs, 90 Wn.2d 473, 474, 584 P.2d 391 (1978). An indispensable party is one without whose presence and participation a complete determination of the case may not be made.

Lindberg v. Kitsap County, 133 Wn.2d 729, 744-45, 948 P.2d 805 (1997).

The doctrine of indispensability is not jurisdictional and, instead, *is based*

²³ The final element of res judicata simply requires a determination of which parties in the second suit are bound by the judgment in the first suit. Ensley, 152 Wn. App. at 903 (explaining that the “identity and quality of parties” requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties). In the instant matter, the parties involved in the current action were either parties to the previous litigation (plaintiffs) or, as explained above, are in privity with those parties (the City in privity with the State).

on equitable considerations. Id. Ordinarily, the failure to join an indispensable party warrants dismissal. See e.g., Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County, 96 Wn.2d 201, 207, 634 P.2d 853 (1981); CR 19. When a party cannot be joined, as in the instant matter, the Court must determine whether, *in equity and good conscience*, the action should proceed. CR 19(b).

There is no question that the plaintiffs decided to sue the City of Tacoma while the litigation against the State was ongoing; plaintiffs' counsel acknowledged as much in an email to plaintiffs' retained damage expert:

Bob – I am happy to announce that this case settled at mediation yesterday. However, in the course of discovery it became clear to us that the City of Tacoma Police Department was also significantly negligent in handling reports of abuse and neglect; as such, we will likely pursue additional claims against the City. As such, please retain your file materials at this time. I don't think that the identity of the liable party will change your damage opinions in any meaningful way...please let me know if you disagree.

(emphasis added). CP 1100. Rather than add the City to the then-current litigation against the State, plaintiffs proceeded to settle out with the State, and sue the City in a separate litigation. Although not claim-splitting in a conventional sense, plaintiffs' failure to bring all of these related claims (against the State and the City) in a single action is

contrary to the intent of the Tort Reform Act and gives plaintiffs unfair tactical advantages that were never intended under Washington law.

Since the Tort Reform Act of 1986, the general rule in Washington is proportionate or “several” liability. Afoa v. Port of Seattle, 191 Wn.2d 110, 119, 4321 P.3d 903 (2018)(“The legislature left no doubt as to its intent – proportionate liability’ has now become the rule.”). One exception to the general rule occurs when the plaintiff is fault free and judgment is entered against two or more defendants. In this circumstance, the defendants are jointly and severally liable. The statutory scheme created by the Tort Reform Acts of 1981 and 1986 contemplates that the fault of all “at fault” entities will be determined by the jury in a single legal proceeding.

In this case, plaintiffs deliberately circumvented the statutory scheme, and its intent, by not naming the City in its original lawsuit against the State of Washington. Plaintiffs’ failure to bring the City into the lawsuit against the State gave plaintiffs a decided tactical advantage, one that has worked great prejudice to the City. Because the lawsuit against the State involved only a single defendant, the only court approval that plaintiffs were required to get was approval of the minor settlement under SPR 98.16W. In order to obtain approval of the minor settlement, the rule requires only that the petition identify the plaintiffs,

provide a general description of other parties having claims or potential claims arising from the same matter, a description of the liens and others, and a description of the settlement to be received. SPR 98.16W.

Similarly, GALR 2(i) only requires that a GAL provide the court with a report containing “relevant information.” Thus, by positioning the litigation so as to only require court approval under SPR 98.16W, plaintiffs were required to provide only limited information to the court. Moreover, plaintiffs were able to simply present the petition for settlement approval to a court commissioner and were not required to present any specific evidence, beyond the GAL’s report, to the judge presiding over the action.

Had the plaintiffs added the City to the 2015 cause against the State of Washington, plaintiffs would have been required to obtain court approval of the proposed settlement under RCW 4.22.060. Court approval of a settlement, pursuant to RCW 4.22.060, requires much more specific and detailed information about the claims to be settled. Under RCW 4.22.060, “the factors a court must consider to determine if a settlement is reasonable are (1) the releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's

ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released.” Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc., 165 Wn.2d 255, 263-64, 199 P.3d 376, 381 (2008).

“The burden of proof regarding the reasonableness of the settlement offer is on the party requesting the settlement.” RCW 4.22.060(1) 2018. Thus, if the plaintiffs had made the City a party to the earlier litigation, plaintiffs would have been required to provide the court with evidence to establish the strength of plaintiffs’ claims against the State, the strength of the State’s defenses, the State’s “relative fault” and the risks associated with continued litigation against the State. Moreover, the City would have been entitled to advance notice of the reasonableness hearing and would have been entitled to present evidence during the hearing. RCW 4.22.060(1). Thus, following the reasonableness hearing, there would be no question as to the basis for the State’s liability.

Instead, plaintiffs avoided the need for a reasonableness hearing, actively prevented the City from obtaining critical evidence to establish the State’s liability, and then moved for summary judgment on the City’s defense of the fault of a third party. In response, the City sought and obtained a CR 56(f) continuance on the plaintiffs’ motion for partial summary judgment on the fault of a third party in order to take the

deposition of Michael McKasy, the GAL who provided the court commissioner with a report in support of the minor settlement with the State. In his report to the court, Mr. McKasy indicated that he reviewed a number of documents, including *mediation materials which arguably provided the facts necessary to support his conclusions concerning the State's potential liability*²⁴. However, when the City attempted to question Mr. McKasy about the factual basis for these statements, plaintiffs' counsel instructed Mr. McKasy to not answer the City's questions, on the grounds of attorney client privilege and the confidentiality allegedly conferred by GALR 2(n)²⁵. Mr. McKasy followed plaintiffs' counsel's instructions, and refused to answer any

²⁴ In his report, in support of liability, Mr. McKasy advised the court as follows:

Mr. Roberts capably presented the case on behalf of the minor children, emphasizing the fact that *even the State's own experts questioned the practices and responses of DSHS relative to the sexual abuse of the minor children*. Mr. Roberts pointed out the recoveries in *other similar cases* and was able to negotiate a total settlement of \$2,650,000.

Mr. Roberts pointed out that DSHS had a duty to exercise ordinary care to protect the children and had an additional statutory duty "to safeguard, protect and contribute to the welfare of the children of the State" pursuant to RCW 74.13.010. The State has a duty to adequately investigate reports of child abuse. *Plaintiffs' expert, a former director of Washington State's Children's Administration would testify that DSHS fell far short of meeting its duty. The State's own liability expert and social workers admitted multiple breaches of the standard of care.*

²⁵ GALR 2(n) states in pertinent part: "As an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the court or as necessary to perform the duties of a guardian ad litem."

questions about the facts that supported his representations to the court. CP 1102-1112. Neither plaintiffs' counsel nor Mr. McKasy explained how answering questions about the facts underlying statements that Mr. McKasy made to the court would somehow result in a breach of confidentiality under GALR 2(n)²⁶. Further, neither addressed why disclosing Mr. McKasy's conclusions about the factual underpinnings for these claims in an open court document did not necessarily result in a waiver of any kind of privilege or confidentiality protection such information might have had. See Pappas v. Holloway, 114 Wn.2d 198, 207, 787 P.2d 30 (1990) (adopting test for implied waiver of attorney client privilege: "1) the assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; 2) through his

²⁶ Additionally, the only document review by Mr. McKasy that could have supplied the relevant factual information was the plaintiffs' mediation materials, but the City has not been provided with a copy of plaintiffs' mediation brief, as plaintiffs claim confidentiality under RCW 7.07.030. It is the City's position, however, pursuant to RCW 7.07.040, that plaintiffs have waived confidentiality by using the mediation communication as factual support in the GAL report. Their subsequent refusal to answer questions about the facts underlying the GAL report prejudices the City. Additionally, although Mr. McKasy expressly relies upon the plaintiffs' liability expert's opinion as a basis for the State's liability, the City was advised by plaintiffs' counsel that the liability expert against the State never wrote a report. Thus, the only possible sources of information about the expert's opinion that Mr. McKasy could have relied upon for his statements to the court were either the plaintiff's mediation materials or oral communications with counsel. In either event, knowingly and intentionally referencing the expert's opinions was a waiver of any privilege. Finally, had the City been a party to litigation against the State, the City would have been in a position to compel disclosure of the expert's opinions, since plaintiffs' response to the State's discovery requests was evasive and wholly inadequate. CP 1114-1130.

affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and 3) application of the privilege would have denied the opposing party access to information vital to his defense.”).

Plaintiffs knowingly skirted the spirit and intent of the court rules and the Tort Reform Act. Equitable considerations mandate that they not profit from their actions.

IV. CONCLUSION

For these reasons, the City respectfully urges this Court to affirm the grant of summary judgment.

DATED this 15th day of May, 2019.

Respectfully submitted,

By:


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APPENDIX A

Pierce County Superior Court Civil Case 17-2-10556-8

Case Title: M E VS CITY OF TACOMA
 Case Type: Personal Injury
 Access: Public
 Track Assignment: Standard
 Jury Size:
 Estimated Trial Length:
 Dept Judge: **14 SUSAN K. SERKO**
 Resolution: 12/07/2018 Summary Judgment
 Completion: 12/07/2018 Judgment/Order/Decree Filed

Litigants

Name	Type	Status
EDDO, JOSHUA	Plaintiff	
Attorneys for EDDO, JOSHUA	Type	Bar Number
<u>Nathan Paul Roberts</u>	Atty for Plaintiff/Petitioner	40457
<u>Meaghan Maryanne Driscoll</u>	Atty for Plaintiff/Petitioner	49863
CITY OF TACOMA	Defendant	
Attorney for CITY OF TACOMA	Type	Bar Number
<u>JEAN P HOMAN</u>	Atty for Defendant	27084
M E	Minor	
Attorneys for M E	Type	Bar Number
<u>PHILIP ALBERT TALMADGE</u>	Atty for Involved Party	6973
<u>Meaghan Maryanne Driscoll</u>	Atty for Involved Party	49863
<u>Nathan Paul Roberts</u>	Atty for Plaintiff/Petitioner	40457
J E	Minor	
Attorneys for J E	Type	Bar Number
<u>PHILIP ALBERT TALMADGE</u>	Atty for Involved Party	6973
<u>Meaghan Maryanne Driscoll</u>	Atty for Involved Party	49863
<u>Nathan Paul Roberts</u>	Atty for Plaintiff/Petitioner	40457
WILSON, JOHN R	Guardian Ad Litem	

Filings

Filing Date	Filing	Access	Pages	Microfilm
08/23/2017	FILING FEE RECEIVED \$240.00	Public	0	
08/23/2017	<u>CASE INFORMATION COVER SHEET</u>	Public	1	
08/23/2017	<u>ORDER SETTING ORIGINAL CASE SCHEDULE</u>	Public	1	
08/23/2017	<u>SUMMONS</u>	Public	2	
08/23/2017	<u>COMPLAINT</u>	Public	6	
08/29/2017	<u>AFFIDAVIT/DECLARATION OF SERVICE</u>	Public	1	
09/05/2017	<u>NOTICE OF APPEARANCE</u>	Public	1	
09/06/2017	<u>CONFIRMATION OF SERVICE</u>	Public	1	
09/06/2017	<u>STIPULATION FOR ELECTRONIC SERVICE</u>	Public	3	
10/06/2017	<u>ANSWER</u>	Public	10	
11/14/2017	<u>ORDER AMENDING CASE SCHEDULE</u>	Public	2	
11/14/2017	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	2	
01/31/2018	<u>NOTICE OF ABSENCE/UNAVAILABILITY</u>	Public	2	
06/13/2018	<u>NOTICE OF ABSENCE/UNAVAILABILITY</u>	Public	3	
06/18/2018	<u>DEFENDANT'S DISCLOSURE OF WITNESSES</u>	Public	7	
07/06/2018	<u>NOTICE OF ABSENCE/UNAVAILABILITY</u>	Public	2	
08/03/2018	<u>DEFENDANT'S DISCLOSURE OF REBUTTAL WITNESSES</u>	Public	3	
08/23/2018	<u>PRETRIAL ORDER</u>	Public	5	
08/29/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1	
08/29/2018	<u>MOTION TO CHANGE TRIAL DATE</u>	Public	2	
08/29/2018	AFFIDAVIT OF JEAN P HOMAN IN SUPPORT	Sealed	69	
09/05/2018	<u>RESPONSE IN OPPOSITION</u>	Public	48	
09/06/2018	<u>REDACTED AFFIDAVIT OF JEAN P HOMAN IN SUPPORT OF MOTION</u>	Public	69	
09/06/2018	<u>SUPP AFF OF HOMAN IN SUPPORT OF MOTION TO CONTINUE</u>	Public	37	
09/07/2018	<u>CLERK'S MINUTE ENTRY</u>	Public	2	

09/07/2018	<u>ORDER DENYING MOTION TO CONTINUE</u>	Public	2
09/07/2018	<u>ORDER SEALING DOCUMENT</u>	Public	3
09/12/2018	<u>NOTICE OF ABSENCE/UNAVAILABILITY</u>	Public	3
10/04/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
10/04/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
10/04/2018	<u>MOTION FOR PARTIAL SUMMARY JUDGMENT</u>	Public	19
10/04/2018	<u>DECLARATION OF MEAGHAN M. DRISCOLL</u>	Public	60
10/04/2018	<u>DECLARATION OF SUSAN M. PETERS</u>	Public	13
10/04/2018	<u>DECLARATION OF CORN IN SUPPORT OF SJ</u>	Public	10
10/04/2018	<u>DECLARATION OF QUILTO IN SUPPORT OF SJ</u>	Public	30
10/04/2018	<u>DECLARATION OF BROOKS IN SUPPORT OF SJ</u>	Public	106
10/04/2018	<u>DECLARATION OF TERWILLIGER IN SUPPORT OF SJ</u>	Public	5
10/04/2018	<u>MOTION FOR SUMMARY JUDGMENT</u>	Public	26
10/04/2018	<u>AFFIDAVIT OH HOMAN IN SUPPORT OF SJ</u>	Public	157
10/11/2018	<u>DEFENDANT'S SUPPLEMENTAL DISCLOSURE OF WITNESSES</u>	Public	7
10/17/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
10/17/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
10/17/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
10/17/2018	<u>PLAINTIFF'S MOTION FOR RELIEF FROM PCLR16</u>	Public	6
10/17/2018	<u>MOTION TO AMEND PROTECTIVE ORDER</u>	Public	10
10/17/2018	<u>MOTION TO COMPEL WYNNE FILE</u>	Public	7
10/17/2018	<u>MOTION FOR CR56(F) CONTINUANCE</u>	Public	6
10/17/2018	<u>AFFIDAVIT OF HOMAN IN SUPPORT OF COT'S MOTIONS</u>	Public	165
10/18/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	2
10/22/2018	<u>RESPONSE IN OPPOSITION</u>	Public	24
10/22/2018	<u>SUPPLEMENTAL DECLARATION OF MEAGHAN M. DRISCOLL</u>	Public	18
10/22/2018	<u>RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SJ</u>	Public	20
10/22/2018	<u>DECLARATION OF JEAN HOMAN</u>	Public	129
10/22/2018	<u>DECLARATION OF MARY PRIEBE-OLSON</u>	Public	23
10/23/2018	<u>PLAINTIFFS' WITNESS AND EXHIBIT LIST AND ER 904</u>	Public	9
10/23/2018	<u>RESPONSE TO MOTION TO AMEND PROTECTIVE ORDER</u>	Public	4
10/23/2018	<u>RESPONSE TO MOTION</u>	Public	5
10/23/2018	<u>RESPONSE IN OPPOSITION</u>	Public	8
10/23/2018	<u>RESPONSE TO MOTION TO AMEND</u>	Public	3
10/23/2018	<u>DECLARATION OF NATHAN P. ROBERTS</u>	Public	27
10/24/2018	<u>REPLY IN SUPPORT</u>	Public	8
10/24/2018	<u>REPLY IN SUPPORT OF 56(F) CONTINUANCE</u>	Public	6
10/25/2018	<u>DEFENDANT'S WITNESS EXHIBIT LIST & ER 904</u>	Public	10
10/26/2018	<u>CLERK'S MINUTE ENTRY</u>	Public	2
10/26/2018	<u>DEFENDANT'S AMENDED WITNESS EXHIBIT AND ER904</u>	Public	10
10/26/2018	<u>ORDER TO COMPEL</u>	Public	3
10/26/2018	<u>ORDER OF CONTINUANCE</u>	Public	3
10/26/2018	<u>ORDER GRANTING LEAVE TO AMEND</u>	Public	6
10/26/2018	<u>ORDER FOR RELIEF FROM PCLR16</u>	Public	2
10/29/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
10/29/2018	<u>PLAINTIFFS' REPLY IN SUPPORT OF MOTION</u>	Public	14
10/29/2018	<u>DECLARATION OF MEAGHAN M. DRISCOLL</u>	Public	21
10/29/2018	<u>REPLY IN SUPPORT</u>	Public	12
11/02/2018	<u>CLERK'S MINUTE ENTRY</u>	Public	2
11/02/2018	<u>ORDER ON MOTION FOR SUMMARY JUDGMENT</u>	Public	4
11/02/2018	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	2
11/05/2018	<u>DEFENDANT'S OBJECTIONS TO PLAINTIFFS' ER904 NOTICE</u>	Public	9
11/07/2018	<u>OBJECTIONS TO DEFENDANT'S ER 904</u>	Public	5
11/07/2018	<u>OBJECTIONS TO DEFENDANT'S AMENDED ER 904</u>	Public	5
11/09/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
11/09/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
11/09/2018	<u>NOTE FOR JUDGES MOTION CALENDAR</u>	Public	1
11/09/2018	<u>MOTION FOR RECONSIDERATION</u>	Public	6
11/09/2018	<u>MOTION FOR PARTIAL SUMMARY JUDGMENT</u>	Public	15

11/09/2018	 <u>MOTION FOR SUMMARY JUDGMENT</u>	Public	33
11/09/2018	 <u>DECLARATION OF QUILIO IN SUPPORT OF SJ</u>	Public	26
11/26/2018	 <u>PLTFS' RESPONSE IN OPPOSITION TO 2ND PSJ MOTION</u>	Public	12
11/26/2018	 <u>RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SJ</u>	Public	18
11/26/2018	 <u>AFFIDAVIT OF HOMAN IN SUPPORT OF RESPONSE</u>	Public	50
12/03/2018	 <u>REPLY IN SUPPORT</u>	Public	11
12/03/2018	 <u>PLAINTIFFS' REPLY IN SUPPORT OF MOTION</u>	Public	6
12/06/2018	 <u>ORDER ADJUSTING CASE CAPTION</u>	Public	2
12/07/2018	 <u>CLERK'S MINUTE ENTRY</u>	Public	2
12/07/2018	 <u>ORDER GRANTING SUMMARY JUDGMENT</u>	Public	2
12/10/2018	 <u>NOTICE OF ASSOCIATION OF COUNSEL</u>	Public	3
12/12/2018	 <u>NOTICE OF APPEAL TO COURT OF APPEALS DIVISION II</u>	Public	9
12/13/2018	 <u>TRANSMITTAL LETTER COPY FILED</u>	Public	1
01/03/2019	 <u>PERFECTION NOTICE FROM COURT OF APPEALS</u>	Public	2
01/03/2019	 <u>DESIGNATION OF CLERK'S PAPERS</u>	Public	4
01/18/2019	 <u>CLERK'S PAPERS PREPARED</u>	Public	6
02/05/2019	 <u>REQUEST FOR COPIES OF CLERK PAPERS</u>	Public	1
02/05/2019	 <u>REQUEST FOR COPIES OF CLERK'S PAPERS</u>	Public	2
02/07/2019	 <u>CLERK'S PAPERS PREPARED ***CORRECTED***</u>	Public	6
02/07/2019	 <u>CLERK'S PAPERS SENT</u>	Public	1
03/21/2019	 <u>ORDER AMENDING CASE CAPTION</u>	Public	2



PURCHASE COPIES

Proceedings

Date	Calendar	Outcome
11/14/2017	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 1:55 Exparte Action	Ex-Parte w/ Order Held
08/08/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Unconfirmed 12:00 Pretrial Conference	Cancelled/Stricken
08/22/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Trial	Cancelled/Amend Case Sched <u>Working Copies Provided</u>
09/07/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion(Other: CONTINUE) Scheduled By: Gisel Castro	Motion Held <u>Working Copies Provided</u>
10/26/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion(Other: CR 56(F) CONTINUANCE) Scheduled By: Gisel Castro	Motion Held
10/26/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion(Compel) Scheduled By: Gisel Castro	Motion Held <u>Working Copies Provided</u>
10/26/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion(Amend) Scheduled By: Gisel Castro	Motion Held <u>Working Copies Provided</u>
10/26/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion(Other: MOTION FOR RELIEF FROM PLCR16) Scheduled By: Meegan Langvad	Motion Held <u>Working Copies Provided</u>
11/02/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion - Summary Judgment Scheduled By: Gisel Castro	Summary Judgment Held <u>Working Copies Provided</u>
11/02/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion - Part Summary Judgment Scheduled By: Lorraine Kapau	Summary Judgment Held <u>Working Copies Provided</u>

11/12/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Unconfirmed 12:00 Pretrial Conference	Cancelled/Stricken
11/26/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Trial	Continued
11/30/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Unconfirmed 9:00 Motion - Summary Judgment Scheduled By: Lorraine Kapau	Continued <u>Working Copies Provided</u>
12/07/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion - Summary Judgment Scheduled By: Gisel Castro	Summary Judgment Held <u>Working Copies Provided</u>
12/07/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion - Part Summary Judgment Scheduled By: Lorraine Kapau	Summary Judgment Held <u>Working Copies Provided</u>
12/07/2018	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Motion(Other: MOTION FOR RECONSIDERATION) Scheduled By: Lorraine Kapau	Motion Held <u>Working Copies Provided</u>
01/07/2019	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 9:00 Trial	Cancelled/Stricken
03/21/2019	DEPT 14 - JUDGE SERKO (Rm. 533) Confirmed 2:42 Exparte Action	Ex-Parte w/ Order Held

Pending Case Schedule Items

Event	Schedule Date
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Judgments

Cause #	Status	Signed	Effective	Filed
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This calendar lists Confirmed and Unconfirmed Proceedings. Attorneys may **obtain access rights** to confirm/strike selected proceedings. Currently, any proceedings for the Commissioners' calendars can be stricken, but only Show Cause proceedings for the Commissioners' calendars can be confirmed.

Unconfirmed Proceedings will not be heard unless confirmed as required by **the Local Rules of the Superior Court for Pierce County** .

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

Created: Friday May 10, 2019 1:10PM

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DECLARATION OF SERVICE

On said day below, I electronically served a true and correct copy of the Respondent's Response Brief in Court of Appeals, Division II Cause No. 53011-2-II to the following parties:

John R. Connelly, Jr.
Micah R. LeBank
Meaghan M. Driscoll
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403

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.

EXECUTED this 15th day of May, 2019, at Tacoma, WA.



Staci Black, Paralegal
Tacoma City Attorney's Office

TACOMA CITY ATTORNEYS OFFICE

May 15, 2019 - 12:49 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., Appellants v. City of Tacoma, Respondents
Superior Court Case Number: 17-2-10556-8

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- 530112_Briefs_20190515124834D2897189_7849.pdf
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