

FILED
Court of Appeals
Division II
State of Washington
7/11/2019 2:11 PM

No. 53011-2-II

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

M.E. and J.E., minors, through JOHN R. WILSON,
as Litigation Guardian *ad Litem*;
and JOSHUA EDDO, individually,

Appellants,

v.

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

Respondent.

REPLY BRIEF OF APPELLANTS

Nathan P. Roberts
WSBA #40457
Meaghan M. Driscoll
WSBA #49863
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100

Philip A. Talmadge
WSBA #6973
Gary Manca
WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-v
A. INTRODUCTION	1
B. REPLY ON STATEMENT OF THE CASE	2
C. ARGUMENT	4
(1) <u>Under A Proper Construction of the Statutory Elements of RCW 26.44.050, a Jury May Reasonably Find Tacoma Police Are Liable for Breaching Their Duty to Investigate</u>	4
(a) <u>Tacoma Police Had a Duty to Reasonably Investigate the April 29, 2013 Report About Karlan Raping a Child</u>	4
(b) <u>Jury Could Reasonably Find Liability for the 2012 Investigation, Given the Record and the Proper Analysis of Causation Under RCW 26.44.050</u>	10
(c) <u>In October 2011, Tacoma Police Received a “Report” Triggering Their Statutory Duty to Investigate, a Duty Which Continued After the First Inconclusive Visit to the Girls’ Home</u>	14
(2) <u>The Police Had a Concurrent Common Law Duty of Care</u>	18
(3) <u>The City Fails to Justify <i>Res Judicata</i> Because the Prior Case Settled</u>	21

(4)	<u>The City Was Not an Indispensable Party</u> <u>Under CR 19 to the Children's Prior</u> <u>Suit Against DSHS</u>	24
D.	CONCLUSION.....	26

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Auto. United Trades Org. v. State,
175 Wn.2d 214, 285 P.3d 52 (2012).....24

Beltran-Serrano v. City of Tacoma,
___ Wn.2d ___, 442 P.3d 608 (2019).....18

Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990).....18

Boone v. Dep’t of Soc. & Health Servs.,
200 Wn. App. 723, 403 P.3d 873 (2017).....5

C.L. v. State Dep’t of Soc. & Health Servs.,
200 Wn. App. 189, 402 P.3d 346 (2017),
review denied, 192 Wn.2d 1023 (2019).....2, 9

Dunning v. Pacerelli, 63 Wn. App. 232,
818 P.2d 34 (1991) , *review denied*,
118 Wn.2d 1024 (1992).....23

Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483,
145 P.3d 1196 (2006).....24

H.B.H. v. State, 192 Wn.2d 154,
429 P.3d 484 (2018).....19, 21

Hisle v. Todd Pac. Shipyards Corp.,
151 Wn.2d 853, 92 P.3d 108 (2004).....21

In re Det. of Coe, 160 Wn. App. 809,
250 P.3d 1056 (2011), *aff’d on other grounds*,
175 Wn.2d 482 (2012).....2

In re Johns-Manville Corp., 99 Wn.2d 193,
660 P.2d 271 (1983).....25

Keck v. Collins, 184 Wn.2d 358,
357 P.3d 1080 (2015).....2

Krikava v. Webber, 43 Wn. App. 217, 716 P.2d 916,
review denied, 106 Wn.2d 1010 (1986).....24

Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909,
296 P.3d 860 (2013).....2

Lewis v. Whatcom Cty., 136 Wn. App. 450,
149 P.3d 686 (2006).....4, 6, 8

Mita v. Guardsmark, LLC, 182 Wn. App. 76,
328 P.3d 962 (2014).....19

<i>M.M.S. v. Dep't of Soc. & Health Servs., Child Protective Servs.</i> , 1 Wn. App. 2d 320, 404 P.3d 1163 (2017), <i>review denied</i> , 190 Wn.2d 1009 (2018).....	5, 20
<i>M.W. v. Dep't of Soc. & Health Servs.</i> , 149 Wn.2d 589, 70 P.3d 954 (2003).....	<i>passim</i>
<i>Marquardt v. Federal Old Line Ins. Co. (Mut.)</i> , 33 Wn. App. 685, 658 P.2d 20 (1983).....	23
<i>McCarthy v. County of Clark</i> , 193 Wn. App. 314, 376 P.3d 1127, <i>review denied</i> , 186 Wn.2d 1018 (2016).....	12
<i>Munich v. Skagit Emergency Commc'n Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	18
<i>Orwick v. Fox</i> , 65 Wn. App. 71, 828 P.2d 12, <i>review denied</i> , 120 Wn.2d 1014 (1992).....	25
<i>Rodriguez v. Perez</i> , 99 Wn. App. 439, 994 P.2d 874, <i>review denied</i> , 141 Wn.2d 1020 (2000).....	7, 12, 17
<i>Schoeman v. New York Life Ins. Co.</i> , 106 Wn.2d 855, 726 P.2d 1 (1986).....	21, 22, 23
<i>State v. Herzog</i> , 73 Wn. App. 34, 867 P.2d 648, <i>review denied</i> , 124 Wn.2d 1022 (1994).....	2
<i>State, Dep't of Ecology v. Yakima Reservation Irr. Dist.</i> , 121 Wn.2d 257, 850 P.2d 1306 (1993).....	21, 22, 23
<i>Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.</i> , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	6
<i>Wrigley v. State</i> , 5 Wn. App. 2d 909, 428 P.3d 1279 (2018), <i>review granted</i> , 193 Wn.2d 1008 (2019).....	7, 14, 15
<i>Yonker v. Dep't of Soc. & Health Servs.</i> , 85 Wn. App. 71, 930 P.2d 958, <i>review denied</i> , 132 Wn.2d 1010 (1997).....	19

Statutes

RCW 4.22.060	25
RCW 4.22.070(1).....	26
RCW 26.44.020(1).....	16
RCW 26.44.020(16).....	16
RCW 26.44.030(1)(a)	16

RCW 26.44.030(5).....	20
RCW 26.44.040	6, 14
RCW 26.44.050	<i>passim</i>

Rules and Regulations

CR 19	1, 24, 26
CR 19(a).....	25
CR 19(b).....	25
CR 26	25
CR 27	25
CR 28	25
CR 29	25
CR 30	25
CR 31	25
CR 32	25
CR 33	25
CR 34	25
CR 35	25
CR 36	25
CR 37	25
CR 45	26

Other Authorities

Laws of 1981, ch. 27, § 14.....	25
<i>Restatement (Second) of Torts</i> § 314A	19
<i>Restatement (Second) of Torts</i> § 314A cmt. e.....	21
<i>Webster's Third New International</i> <i>Dictionary</i> 1561 (2002).....	14
<i>Webster's Third New International</i> <i>Dictionary</i> 1771 (2002).....	15
WPI 41.04	26

A. INTRODUCTION

The City of Tacoma's ("City") argument only confirms that the trial court erred in barring the presentation of the girls' claims to a jury. The City's argument depends on a credulous view of the facts, ignoring the long-standing summary judgment standard. The City also misinterprets and misapplies RCW 26.44.050. It relies on an incorrectly narrow scope of the statutory duty to investigate; misconstrues the "report" that triggers this duty; and confuses the role of "probable cause." If the City's formalistic reading of RCW 26.44.050 were adopted, police could choose to disregard obvious instances of possible child abuse and neglect, to the detriment of this state's children's health and safety. The City also argues incorrectly that it had no common-law duty to protect the girls. Finally, the City's attempt to escape liability on procedural technicalities also fails. CR 19 and the doctrine of *res judicata* do not bar the children's claims here. This Court should reverse the trial court's summary judgment and remand the case for trial on the merits.¹

¹ The girls noted in their opening br. at 9 n.8 that the trial court never made clear how it addressed their claims of negligent training/supervision against the City. The City asserts, however, that the trial court's order dismissed such claims. Resp't Br. at 36. That is untrue. The trial court's orders do not address the issue. CP 977-80, 1166-67. The record is *silent* on the trial court's reasoning on its disposition of this issue. In the absence of such a record, the better course for this Court is to have the trial court squarely address the issue on remand.

B. REPLY ON STATEMENT OF THE CASE

The City offers nothing more than a dress rehearsal of its closing argument to the jury.² For instance, the City argues that the April 29, 2013 report about Jason Karlan raping another child “did not include any new allegations involving M.E. or J.E.” Resp’t Br. at 10. The City is welcome to make that argument to the jury.

But, viewing the record in the light most favorable to the girls, the jury may reasonably find that Karlan’s sexual crime against another child *was* new information about the danger to the girls. In another case, DSHS acknowledged that “a home in which a sexual predator resides is dangerous to children.” *C.L. v. State Dep’t of Soc. & Health Servs.*, 200 Wn. App. 189, 198, 402 P.3d 346 (2017), *review denied*, 192 Wn.2d 1023 (2019). Courts also recognize that evidence of sex crimes is probative of an offender’s propensities. *See, e.g., In re Det. of Coe*, 160 Wn. App. 809, 819, 250 P.3d 1056 (2011), *aff’d on other grounds*, 175 Wn.2d 482 (2012); *State v. Herzog*, 73 Wn. App. 34, 50, 867 P.2d 648, *review denied*,

² As this Court knows, under CR 56 the inquiry is not whether the moving party or the court believes one view of the facts more persuasive than the other. Rather, the question is whether “a reasonable *jury* could return a verdict for the [nonmoving party].” *Keck v. Collins*, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015) (emphasis added). The evidence in the record must be viewed in the light most favorable to the girls as the nonmoving party, and all reasonable inferences from the record must be drawn in their favor. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

124 Wn.2d 1022 (1994).³ The children’s expert witness on police practices explains the point as well. CP 102-03.

The City is also wrong to be dismissive of the police officers’ observations of pornography at the foot of the bed where the girls slept. Resp’t Br. at 6; CP 44-45, 112-13. While “possession of adult pornography” is “not [a] crime[],” as the City notes, *id.* at 20, it was “near the foot of the bed,” where the girls could see it or one of the nonrelative men in the home could use it while the girls slept. CP 43-44. Exposure to pornography is inappropriate developmentally for three- and five-year-old girls, as Tacoma police admit. CP 54. But also, in any police investigation into possible child sex abuse, pornography near children is “a potential red flag” and “important,” because, as an officer explained, “we seem to see a lot of pornographic material when involved with sex offenders, and even sometimes people who’ve sexually abused children.” CP 54-55. Thus, the pornography was a clear warning sign (among many others) of Karlan’s danger to the girls.

³ Washington courts’ view is consistent with the available psychological research showing that pedophilia likely cannot be cured and can only be treated in a manner to enable a pedophile to resist his sexual urges. *See generally* Harvard Medical School, *Pessimism About Pedophilia*, Harvard Mental Health Letter (July 2010), available at https://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia (last accessed July 5, 2019).

C. ARGUMENT

(1) Under A Proper Construction of the Statutory Elements of RCW 26.44.050, a Jury May Reasonably Find Tacoma Police Are Liable for Breaching Their Duty to Investigate

Law enforcement officers' statutory duty to children arises "[u]pon the receipt of a report concerning the possible occurrence of abuse or neglect." RCW 26.44.050. After receiving such a report, police must "reasonably investigate." *Lewis v. Whatcom Cty.*, 136 Wn. App. 450, 460, 149 P.3d 686 (2006). The investigation is inadequate if it is "incomplete or biased." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003). The statute authorizes, but does not require, law enforcement officers to take a child into protective custody upon probable cause in some circumstances. RCW 26.44.050. The City misconstrues and misapplies these statutory elements.

(a) Tacoma Police Had a Duty to Reasonably Investigate the April 29, 2013 Report About Karlan Raping a Child

The City argues that the 2013 CPS referral was not a "report" within the meaning of RCW 26.44.050. Resp't Br. at 21-27; CP 64-69, 122, 130-38, 152-53, 163-67. According to the City, the CPS referral concerned Karlan's rape of a different child, not the girls, and thus was not a "report" concerning girls. Resp't Br. at 24-25. The City is absurdly literal and incorrect.

The City's reliance on *M.M.S. v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 1 Wn. App. 2d 320, 404 P.3d 1163 (2017), *review denied*, 190 Wn.2d 1009 (2018) is misplaced. In *M.M.S.*, DSHS received self-reports from J.A. about inappropriately touching his half-sister. DSHS then placed J.A. in his biological father's home, where a different girl, M.M.S., lived. J.A. later touched her inappropriately. M.M.S. was held to be outside the scope of the statute because the statute protected "children who are subjects of reports concerning possible abuse or neglect." *Id.* at 331. But unlike here, J.A.'s self-reports referenced only his half-sister, not any prior concerns about him harming the plaintiff.

Another inapposite case is *Boone v. Dep't of Soc. & Health Servs.*, 200 Wn. App. 723, 403 P.3d 873 (2017), which concerned reports of possible abuse or neglect only of other children many years before. There, the plaintiffs were the Boone children. Before the Boone children began attending their daycare, other children there were the subjects of reports of possible abuse or neglect investigated in 1992 and 1997. *Id.* at 727-29. The *Boone* court held that the Boone children were outside the class of persons protected by the statutory duty to investigate because they "were not the subjects of the reports of alleged abuse that triggered those investigations." *Id.* at 734. But the Boone children were not specifically referenced in the prior reports or investigations.

Here, however, the girls were one of the subjects of the CPS referral based on Karlan's rape of a child. CP 64-69, 122, 130-38, 152-53, 163-67. Although the referral focused on Karlan's rape of a six-year-old boy who had been to the same home, the referral also mentioned the girls: "Referrer reported that there were previous allegations of sexual abuse of Jason's fiance's daughters." CP 135. The referral then cited the intake number for the January 2012 referral to Tacoma police. *Id.*

Even though DSHS included this information in the document focused on Karlan's rape of the boy, this new referral still constituted a "report" about the danger to the girls. RCW 26.44.050. The statute does not require a "report" be in a separate written document or take any specific form whatsoever. *See* RCW 26.44.040, .050. As this Court has recognized, RCW 26.44.050 "is a broad mandate covering *any* report of possible abuse or neglect." *Lewis*, 136 Wn. App. at 454 (emphasis added). Thus, by DSHS informing the Tacoma police about new information—specifically, the suspect in the prior report was accused of raping another child in the home and thus likely had a propensity to molest children—and referencing the prior report, DSHS submitted a new "report" to the police under RCW 26.44.050. A technical, formalistic reading of "report" would undermine the legislative purpose behind the statute. *See Tyner v. State Dep't of Soc. & Health Servs., Child Protective*

Servs., 141 Wn.2d 68, 80, 1 P.3d 1148 (2000) (“RCW 26.44.050 has two purposes to protect children and preserve the integrity of the family.”).

This conclusion finds additional support in *Wrigley v. State*, 5 Wn. App. 2d 909, 428 P.3d 1279 (2018), *review granted*, 193 Wn.2d 1008 (2019). This Court held that “the phrase “reports concerning the possible occurrence of abuse or neglect’ ... contemplates both reports concerning incidents that have already occurred and reports suggesting a reasonable possibility of future abuse or neglect if the placement is made.” *Id.* at 931. Indeed, the whole point of RCW 26.44.050 is to protect children against abuse that has not yet occurred. Although the 2013 CPS “report” concerned past danger to the girls, the new information about their caregiver’s propensity to molest children necessarily raised a reasonable possibility of future abuse or neglect.

Ultimately, whether the 2013 referral counts as a “report” under RCW 26.44.050 matters only if the police had no duty to re-open their 2012 investigation. As Division I made clear, RCW 26.44.050 does not “limit the officer’s required response to certain specified acts or time periods.” *Rodriguez v. Perez*, 99 Wn. App. 439, 448, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000). Instead, the “statutory language is broad.” *Id.* at 449. In contrast to other statutes, RCW 26.44.050 “provides a *general* mandatory duty to investigate.” *Rodriguez*, 99 Wn.

App. at 449 (emphasis added).

This Court should reaffirm this breadth of the statutory duty. Otherwise, the likelihood would decrease that an investigation would be accurate, undermining the legislative purpose of protecting children from abuse. When police close a murder investigation as inconclusive and then later learn the suspect committed another murder, police surely should realize their prior investigation was incomplete and re-open it. The same should hold here. If the police had learned Karlan raped a child on the day after the police closed their 2012 investigation, surely they should not have simply said, “Oh well, we closed our file yesterday.” The Court should confirm that RCW 26.44.050 requires law enforcement officers to re-open a prior investigation of possible abuse or neglect when officers learn about previously unconsidered evidence that would lead a reasonable officer to conclude that the prior investigation was incomplete.⁴

Under this construction of the statutory duty to investigate that arose from the 2012 referral, a jury question on breach is created by common sense and expert opinion in light of the information newly known

⁴ The police are not at risk of having an unlimited duty to search out information and continually update their files. The police’s statutory duty is inherently limited by the standards of reasonableness and completeness. *M.W.*, 149 Wn.2d at 602; *Lewis*, 136 Wn. App. at 460. The circumstances here were unique. The April 29, 2013 CPS referral specifically mentioned the girls and supplied new information about the propensities of the prime suspect. CP 122, 130-38. Thus, the police had actual knowledge about (1) its prior investigation, and (2) new information relevant to its prior investigation. This Court need not decide whether the police’s statutory duty may require reopening of an investigative file in circumstances other than these.

in 2013. According to the girls' expert witness on police practices, "TPD should have re-opened the girl's case," because:

A reasonable officer would have known there was ongoing danger of abuse to the children based on what was reported in the J.B. investigation, including that the girls still lived with the alleged child rapist, there were prior allegations of sexual abuse against Jason, J.B. was molested in the Eddo house, Karlan babysat both the girls and J.B., Karlan did not want the police involved and never denied the allegations to his close friend, and the mother was in denial that Karlan is an offender.

CP 102-03. This expert opinion must be given weight on summary judgment. *See, e.g., C.L.*, 200 Wn. App. at 200 ("[W]hen experts offer competing, apparently competent evidence, summary judgment is inappropriate."). The police's prior observation of pornography, discussed above, also took on even clearer significance. A stronger light also shined on J.E.'s prior report about Karlan "punching her in her back and it really, really hurt," followed by vaginal pain. CP 164. The reasonable inference became even more obvious: This five-year-old girl, uneducated about sex, misinterpreted Karlan's vaginal penetration from behind as being punches in her "back." Thus, the past and future danger to the girls became even more glaringly apparent. The circumstances must be viewed in their totality, and the City's efforts to divide the police's two-year relationship with the girls into isolated events is inappropriate on summary judgment.

The City argues incorrectly that the police did not make a “harmful placement decision” for the girls after receiving the 2013 CPS report. Resp’t Br. at 28. A “harmful placement decision” includes “letting a child remain in an abusive home.” *M.W.*, 149 Wn.2d at 601-02. If leaving children in the same home as a nonrelative child rapist does not qualify as a harmful placement decision, it is difficult to imagine what would.

In sum, summary judgment on the statutory negligence claims based on the April 29, 2013 CPS referral was improper.⁵ The referral constituted a “report” under RCW 26.44.050, triggering a new duty to investigate. Even if it was not a “report,” it implicated the police’s existing duty arising from the 2012 referral. A jury may reasonably find a negligent investigation that resulted in a harmful placement decision.

(b) Jury Could Reasonably Find Liability for the 2012 Investigation, Given the Record and the Proper Analysis of Causation Under RCW 26.44.050

The City does not dispute that the 2012 referral constituted a

⁵ The City also misstates counsel’s argument at the hearing last December. The City asserts that “plaintiffs’ counsel conceded that—in light of the court’s prior ruling [dismissing the girls’ claims based on the first two reports]—summary judgment on the 2013 investigation into the abuse of J.B. would be appropriate as well.” Resp’t Br. at 17 (citing RP (12/7/18) 4-7). The girls’ counsel said no such thing. Their attorney noted simply that the “2013 events” were “the final act of sort of a three-act play and that without the first two components, it wouldn’t make any sense necessarily legal or factually for a jury.” RP (12/7/18) 5. Their attorney further explained that, practically speaking, he expected a jury to find for the City if the girls were not allowed to put the 2013 events into context by trying claims based on all three reports together. *Id.* at 6. In short, the girls’ attorney was arguing in favor of them having their day in court on all three causes of action together, not conceding summary judgment on the claims based on the 2013 referral.

“report” triggering the duty to investigate, but the City argues the 2012 investigation was complete and could not have been the proximate cause of a harmful placement decision. Respt’s Br. at 21-24. The City is wrong.

The City argues that the police should not have conducted a national criminal background check on Karlan. Resp’t Br. at 21-24. The City appears to argue that because it took some investigative steps, it did not need to take this additional one. But the standard for an investigation is not to take many steps, but to be complete. *M.W.*, 149 Wn.2d at 602. A national criminal background check is free for Tacoma police and takes just 30 seconds to a minute to *complete*. CP 60. Using common sense, the jury may reasonably find that the investigation was incomplete without this cheap and quick investigative step being done for the prime suspect. The City is incorrect that there were no departmental standards requiring police officers to run a criminal background check; the Tacoma Police Department’s own procedures manual provides that officers investigating a crime “should ... [c]heck criminal histories.” CP 71. In any event, the children’s expert said, “In an investigation of abuse against a child, an officer should check the criminal history of not only the suspect, but all adults living in the home with the children.” CP 101. Had the Tacoma police done so, they would have discovered that Kaplan was arrested in

California for a sex act against a minor and pleaded guilty to that crime. CP 124-25, 953.⁶

The City is incorrect that, upon finding breach, a reasonable jury could not find proximate causation of a harmful placement decision. Resp't Br. at 23-24. The City's focus on the presence or absence of probable cause misdirects the analysis, because probable cause is relevant only to an optional step for the police under the statute. It provides, "A law enforcement officer *may* take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected" RCW 26.44.050. This Court has already flatly rejected the argument that police's duty to investigate is tied to this optional step. *See Rodriguez*, 99 Wn. App. at 449 ("That provision specifies, however, only what is required in order to take a child into custody and does not address the general investigative responsibility.").

"Cause in fact generally is a jury question." *McCarthy v. County of Clark*, 193 Wn. App. 314, 329, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018 (2016). Here, a jury could reasonably find any number of ways in which Tacoma's police's negligent investigation "was a

⁶ Further underscoring the unreasonableness of the police's failure to conduct a background check on Karlan is the fact that the officers had actual knowledge that Karlan had criminal history which he self-reported. Appellants Br. at 5. The police knew there was some criminal history, but then contrary to the standard of care and Departmental policies, they did not bother to investigate further.

proximate cause of the harmful placement.” *Id.* “Cause in fact exists when ‘but for’ the defendant’s actions, the claimant would not have been injured.” *Id.* The injury here was, again, “letting a child remain in an abusive home.” *M.W.*, 149 Wn.2d at 602. After completing a proper investigation, Tacoma police were required to “provide the protective services section with a report ..., and where necessary to refer such report to the court.” RCW 26.44.050. Because of the investigation’s incompleteness, however, CPS and the courts lacked a police report containing accurate information about Karlan’s troubling criminal history and propensity. More probably than not, Tacoma police also would have alerted the girls’ mother and biological father, Joshua Eddo, that the mother’s fiancé was a convicted child molester. A Tacoma police officer acknowledges that “most any investigator that I know of when faced in that situation has made sure to notify” the parents about an abusive caregiver. CP 761-62. With that knowledge, the parents could have prevented the girls from being left in an abusive home. There were numerous grounds for finding cause in fact.

In short, viewing the record in the light most favorable to the girls, their claim based on the 2012 referral should be tried to a jury.

(c) In October 2011, Tacoma Police Received a “Report” Triggering Their Statutory Duty to Investigate, a Duty Which Continued After the First Inconclusive Visit to the Girls’ Home

The City argues that in October 2011 it did not receive a “report concerning the possible occurrence of abuse or neglect.” RCW 26.44.050.⁷ Resp’t Br. at 18-19. The City is incorrect. Although the statute does not define “report,” it may mean “something that gives information.” *Wrigley*, 5 Wn. App. at 925-26 (quoting *Webster’s Third New International Dictionary* 1561 (2002)). The surrounding statutory context shows that this is an appropriate reading of the word. The statute provides only for “[a]n immediate oral report ... by telephone or otherwise to the proper law enforcement agency.” RCW 26.44.040. It requires reports to be in writing only “upon request” of the responding agency. *Id.*

⁷ The rules of statutory interpretation are well known to this Court and were recently set out in *Wrigley*:

The resolution of this issue requires us to interpret former RCW 26.44.050. The meaning of a statute is a question of law reviewed de novo. Our fundamental objective is to ascertain and carry out the legislature’s intent, and if the statute’s meaning is plain on its face, we give effect to that plain meaning as an expression of legislative intent.

Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Dictionaries are an appropriate source of plain meaning when the ordinary definition furthers the statute’s purpose. If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history.

Wrigley, 5 Wn. App. 2d at 924-25 (citations omitted).

The statute does not define “possible.” See ch. 26.44 RCW; *Wrigley*, 5 Wn. App. at 925. A dictionary definition of “possible” is a source of plain meaning that is consistent with the statute’s purpose of ferreting out child abuse and neglect: “possible” means “that [which] may or might be the case.” *Id.* at 925 (quoting *Webster’s Third New International Dictionary* 1771 (2002)). Thus, a “report” includes a phone call to police merely giving information about abuse or neglect that may or might be the case.

Under that definition, the Tacoma police received a “report” in October 2011 that triggered their duty to “investigate” under RCW 26.44.050. Over the course of two phone calls with the girls’ biological father, Joshua Eddo, the police learned that the girls were three and five years old; that the youngest had told Eddo “that she had taken her mom’s medicine and vomited”; that the youngest had also told him that she had bruises on her ankles and legs because “I got hit”; that “the children’s mother had some people staying with her who were involved with drugs and guns;” and that the mother “has a prescription drug problem as well as uses marijuana and he is concerned that the girls may have had access to something dangerous.” CP 43-44. If Tacoma police believe that such phone calls are merely “requests for a welfare check” which fall outside the scope of RCW 26.44.050, a jury is entitled to assess how such an

assertion squares with the facts cited above or proper police policies and procedures generally.

The police's personal observations also must be treated as a "report" under RCW 26.44.050. Tacoma police are mandatory reporters of child abuse and neglect. RCW 26.44.030(1)(a). Upon having "reasonable cause to believe that a child has suffered abuse or neglect," the responding officers were required "to report such incident, or cause a report to be made, to the proper law enforcement agency or to [DSHS]." *Id.* Eddo's statement about drugs coincided with the officers' observations of prescription-drug bottles strewn across the master bedroom. CP 43-44. Because this "evidence of a parent's substance abuse" appeared to be "a contributing factor to negligent treatment or maltreatment," the evidence had to be given "great weight" in determining whether the girls were subject to "abuse or neglect." RCW 26.44.020(1), .020(16). Thus, Tacoma police's own observations triggered the duty to investigate. Again, a "report" must concern only "the *possible* occurrence of abuse or neglect." RCW 26.44.050 (emphasis added). Thus, to receive a qualifying "report" triggering their duty to investigate, the officers did not need to receive *conclusive* information showing a physical beating or endangerment from unsecured prescription drugs. Rather, they needed only to be given information that abuse or neglect *might* be the case.

The City appears to argue that Tacoma police's duty to investigate terminated after a single inconclusive visit to the home. Resp't Br. at 19-20. According to the City, in October 2011 its officers failed to "develop probable cause to believe that a crime had occurred and did not have probable cause to take the children into protective custody." Resp't Br. at 19-20. But the jury question is not whether the officers then had probable cause to take the girls into protective custody. Again, this Court held in *Rodriguez* that RCW 26.44.050 does not "limit the officer's required response to certain specified acts or time periods." *Rodriguez*, 99 Wn. App. at 448. Instead, RCW 26.44.050 "provides a *general* mandatory duty to investigate." *Id.* at 449 (emphasis added).

So the jury question is whether the Tacoma police's investigation was reasonable and complete despite police not returning to interview the mother, despite not returning to interview the girls, despite not physically inspecting the girls for bruises the next day when they were awake, despite seeing a wrecked home with an unusable kitchen and prescription medications accessible to children, despite not performing criminal background checks on the nonrelative adults who lived there, and despite credulously taking a man named "Rikki Buttelo" at his word that the littlest girl had thrown up pink vomit because she had eaten strawberry yogurt and was sick. It was for the jury to decide whether this was

adequate police work. An expert opines that it was not. CP 100-01. Summary judgment was in error.

(2) The Police Had a Concurrent Common Law Duty of Care

This Court should disregard the City's invocation of the public duty doctrine and the general rule about police not being liable for botched investigations. Resp't Br. at 33-35. The Tacoma police had a duty of reasonable care *to the girls*. The public duty doctrine is a "focusing tool" for determining whether an actionable duty of care exists to particular individuals, as opposed to the public generally. *Beltran-Serrano v. City of Tacoma*, ___ Wn.2d ___, 442 P.3d 608, 614 (2019). The doctrine does not apply to common law, as opposed to statutory, causes of action. *Beltran-Serrano*, 442 P.3d at 614; *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 885-95, 288 P.3d 328 (2012) (Chambers, J., concurring) (the public duty doctrine does not limit common law duties owed by governmental entities). Insofar as a cause of action for negligent investigation under RCW 26.44.050 is an implied common law cause of action as the Supreme Court determined in *M.W.*, 149 Wn.2d at 596,⁸ the doctrine does not apply.

Even if the present action involves a statutory claim, however, the doctrine does not apply because the girls here were in the protected class

⁸ *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) established the protocol for an implied cause of action.

of RCW 26.44.050. The so-called legislative intent exception applies. *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 79-82, 930 P.2d 958, *review denied*, 132 Wn.2d 1010 (1997). Because of their inherent vulnerability, children who are subject to possible abuse or neglect stand apart from the public at large. In enacting RCW 26.44.050, the Legislature recognized such children's vulnerability and their dependence on responsible adults from outside their abusive homes.

Further, the special relationship exception applies. *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 85, 328 P.3d 962 (2014). "A special relationship, and the accompanying duty to protect, arises where ... the defendant has a special relationship with the victim that gives the victim a right to protection." *H.B.H. v. State*, 192 Wn.2d 154, 168-69, 429 P.3d 484 (2018). The special relationship need not involve physical custody or control. *Id.* at 172. Instead, "entrustment and vulnerability ... are at the heart of the special protective relationship." *Id.* As recognized in *Restatement (Second) of Torts* § 314A, the law increasingly reflects "a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." *Id.* cmt. b. Here, the police's duty of care to children arises from the special relationship created under RCW 26.44.050 or by the police voluntarily checking on their welfare.

Once the police begin an inquiry into the welfare of children as they did here, the police had at least some measure of constructive control over the girls' custody, because under the statute they were involving with making a "placement decision." *M.W.*, 149 Wn.2d at 601-02. The police were able, and in some instances obligated, to make a report to CPS, to refer the matter to the courts, to themselves take the children into physical custody, and to refer the matter to the county prosecutor. RCW 26.44.030(5), .050. Once the police undertook to help the girls, whether voluntarily in 2011 as the City suggests, or mandatorily under the statute, the girls' health and safety was dependent on the police getting their case right. The duty was not to the amorphous public, it was to these little girls.⁹

The City's reliance on *M.M.S.* is misplaced because, unlike the girls here, *M.M.S.* was not within the class of persons protected by RCW 26.44.050. *M.M.S.*, 1 Wn. App. 2d at 332. *M.M.S.* also still had the protection of her caregivers (her parents), neither of whom were the subjects of reports of abuse or neglect. *Id.* at 328. Here, all the adults residing with the girls were accused of being abusive, neglectful, or otherwise irresponsibly engaged in inappropriate behavior. CP 43-44.

⁹ It is ironic that the City could argue that the statute creates privity between the City and DSHS with respect to their duties under RCW 26.44.050, Resp't Br. at 42-43, but not any common-law relationship between the City and the people whom the statute is meant to protect—the girls.

The public duty doctrine is not implicated here. The Tacoma Police Department had a well-recognized duty *to the girls*, not the public in general, to “simply to use reasonable care to protect [them] from the criminal or tortious acts of third parties.” *H.B.H.*, 192 Wn.2d at 176 (citing *Restatement* § 314A cmt. e).

(3) The City Fails to Justify *Res Judicata* Because the Prior Case Settled

The City’s defense of *res judicata* still fails on the threshold requirement that the prior judgment be final and on the merits of the plaintiff’s claim. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 92 P.3d 108 (2004). This Court need not examine the elements of *res judicata* here, because this deficiency is enough to sink the City’s defense. *See id.* at 864 (“The party asserting the defense of *res judicata* bears the burden of proof.”).

The City relies on *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 726 P.2d 1 (1986) and *State, Dep’t of Ecology v. Yakima Reservation Irr. Dist.*, 121 Wn.2d 257, 850 P.2d 1306 (1993) to argue that “a dismissal with prejudice following the parties’ settlement of an action constitutes a final judgment.” Resp’t Br. at 37 n.20. Those cases are inapposite.

In *Schoeman*, an insurance company brought an interpleader action for the proceeds from an insurance policy. 106 Wn.2d at 857. The insurer

then filed a motion to be discharged on the ground that it had fulfilled all its obligations under the insurance policy, and the claimants on the policy did not object. *Id.* at 858. The trial court then entered an order stating that the insurer was “discharged from any and all liability in this cause and from any and all liability to all parties to this cause of action for any claims they may have against the plaintiff arising from the issuance of the insurance policy giving rise to this interpleader action.” *Id.* at 858, 860. A claimant then filed a separate action against the insurer. *Id.* at 858. The Court held the discharge order was a final judgment for purposes of *res judicata* because, by the order’s terms, it “was an adjudication and discharge on the merits.” *Id.* at 862. Here, however, the stipulated judgment of the girls and DSHS in the prior case stated expressly that the parties were not making “admissions of liability” and were merely “settling and compromising this action.” CP 338. Unlike in *Schoeman*, neither party made a motion seeking a resolution of liability. *Compare Schoeman*, 106 Wn.2d at 858, with CP 337-344.

In *Yakima Reservation*, the Yakama Indian Nation stipulated to entry of judgment on claims that the tribe’s treaty rights had been violated. 121 Wn.2d at 288-89. The stipulated judgment stated that the parties had agreed to a settlement “which shall finally dispose of said cases” and that entry of judgment was “part and parcel of the settlement.” *Id.* at 289.

Here, however, the stipulated judgment did not state or incorporate any statement that the girls were agreeing that all their potential claims were finally resolved. In *Yakima Reservation*, moreover, controlling federal case law held that “payment of [a] claims award establishes conclusively that a taking occurred, even though the claim was not actually litigated.” *Id.* at 290 (quotation omitted). Here, by contrast, the City cites no authority for the proposition that DSHS’s settlement payment to the girls conclusively establishes a violation of the girls’ rights under the law. Resp’t Br. at 37-43. Again, DSHS and the girls’ stipulated judgment here expressly disclaimed any resolution of liability. CP 338.

Given these unique features of the judgments at issue in *Schoeman* and *Yakima Reservation*, the general rule remains that where a judgment of dismissal does not resolve the parties’ liability, as here, the judgment does not count as a final judgment for purposes of *res judicata*. As this Court has explained, “collateral 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.” *Marquardt v. Federal Old Line Ins. Co. (Mut.)*, 33 Wn. App. 685, 689, 658 P.2d 20 (1983); accord *Dunning v. Pacerelli*, 63 Wn. App. 232, 242, 818 P.2d 34(1991), review denied, 118

Wn.2d 1024 (1992); *Krikava v. Webber*, 43 Wn. App. 217, 222, 716 P.2d 916, 919, *review denied*, 106 Wn.2d 1010 (1986).

The City's defense of *res judicata* fails.

(4) The City Was Not an Indispensable Party Under CR 19 to the Children's Prior Suit Against DSHS

Even if the City were correct that DSHS was an "indispensable party" (it is not), Resp't Br. at 43-50, dismissal is not the appropriate remedy for the inability to join DSHS to this case. Dismissal under CR 19 "is a 'drastic remedy' and should be ordered only when the defect cannot be cured and significant prejudice to the absentees will result." *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 222, 285 P.3d 52 (2012).

All the City's claims of prejudice are curable with alternative remedies, or are red herrings. The City laments the children's objections to the discovery of mediation materials from the prior suit against DSHS. Resp't Br. at 48-50. The City's remedy was to file a motion to compel under CR 37. Perhaps the City could somehow prove that it may be entitled to discover the otherwise-confidential mediation materials only if it had been a party in the prior suit. In that event, an order compelling discovery would be the appropriate remedy under CR 19, not dismissal, because "[d]ismissal under CR 12(b)(7) ... should be employed sparingly when *there is no other ability to obtain relief.*" *Gildon v. Simon Prop.*

Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (emphasis added).

The City's arguments about the Tort Reform Act are simply diversions. The City makes noise about reasonableness hearings under RCW 4.22.060. Resp't Br. at 45-47. But since the enactment of RCW 4.22.060, Laws of 1981, ch. 27, § 14, appellate courts have repeatedly held that joint-and-several tortfeasors are not indispensable parties. *See, e.g., In re Johns-Manville Corp.*, 99 Wn.2d 193, 198, 660 P.2d 271 (1983) (holding that other tortfeasors were not indispensable parties because principles of joint-and-several liability *Orwick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12, *review denied*, 120 Wn.2d 1014 (1992) ("Although tortfeasors who are jointly and severally liable may be necessary parties under CR 19(a), they are not indispensable parties under CR 19(b)."). Given these precedents, the City's arguments about RCW 4.22.060 are baseless.

The City also fails to demonstrate any significant prejudice warranting dismissal as a result of there having been no reasonableness hearing. The City cites several categories of facts that would have been disclosed in a reasonableness hearing: evidence of "the strength of the plaintiffs' claims against the State, the strength of the State's defenses, [and] the State's 'relative fault.'" Resp't Br. at 47. But the City remains free to discover such evidence from the children. *See* CR 26-37. Even

though DSHS is not a party here, the City is free to serve subpoenas on DSHS and other nonparties for depositions and to obtain documents. *See* CR 30; CR 45. At trial, the City is protected against liability for DSHS's share of fault. *See* RCW 4.22.070(1) (providing for apportionment of fault to both parties and nonparties, and providing for joint liability only for party defendants); WPI 41.04 (jury instruction for apportionment of fault). Indeed, the City has already pled affirmative defenses apportionment of fault to DSHS under chapter 4.22 RCW. CP 14. Thus, even without DSHS's participation as a party, the City is not at risk of being jointly liable for DSHS's share of liability, is free to seek an allocation of fault to DSHS, and has all discovery tools available to obtain evidence supporting this defense. There is no prejudice warranting dismissal under CR 19.

D. CONCLUSION

In its defense, the City merely offers a dress rehearsal of its closing argument to the jury on why its police officers were not negligent rather than a coherent legal analysis, or one that reflects its duty to protect child victims of abuse. But this is not the time for a summation, because all evidence and reasonable inferences from the record must be viewed in the light most favorable to the vulnerable children whom the police were sworn to protect.

The trial court erred in dismissing the girls' action on summary judgment. This Court should reverse, and afford the girls their day in court. Costs on appeal should be awarded to appellants.

DATED this 14th day of July, 2019.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Gary Manca, WSBA #42798

Talmadge/Fitzpatrick

2775 Harbor Avenue SW

Third Floor, Suite C

Seattle, WA 98126

(206) 574-6661

Nathan P. Roberts, WSBA #40457

Meaghan M. Driscoll, WSBA #49863

Connelly Law Offices, PLLC

2301 North 30th Street

Tacoma, WA 98403

(253) 593-5100

Attorneys for Appellants

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Reply 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

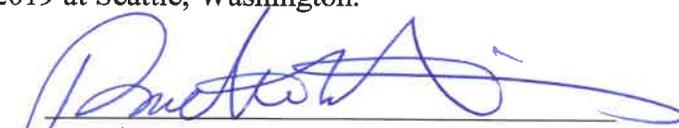
Jean P. Homan, WSBA #27084
Deputy City Attorney
Tacoma City Attorney
747 Market Street, Room 1120
Tacoma, WA 98402-3767

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: July 11, 2019 at Seattle, Washington.


Patrick J. Aguilar, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK/TRIBE

July 11, 2019 - 2:11 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

The following documents have been uploaded:

- 530112_Briefs_20190711140827D2377813_9196.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief of Appellants.pdf
- 530112_Motion_20190711140827D2377813_9946.pdf
This File Contains:
Motion 1 - Waive - Page Limitation
The Original File Name was Mot for Overlength Reply Brief.pdf

A copy of the uploaded files will be sent to:

- assistant@tal-fitzlaw.com
- bmarvin@connelly-law.com
- jhoman@cityoftacoma.org
- matt@tal-fitzlaw.com
- mdriscoll@connelly-law.com
- nroberts@connelly-law.com
- sblack@cityoftacoma.org

Comments:

Motion for Leave to File Over-Length Reply Brief of Appellants Reply Brief of Appellants

Sender Name: Patrick Aguilar - Email: assistant@tal-fitzlaw.com

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

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20190711140827D2377813