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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 330931-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CETH HEIDEMAN, et al.,

APPELLANTS

vs

CHELAN COUNTY, a Washington Municipal Corporation, et al.,

RESPONDENTS.

APPEAL FROM DOUGLAS COUNTY SUPERIOR COURT
CAUSE NO. 11-2-00287-7

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. The trial court misapplied the summary judgment standard.

On summary judgment, all reasonable inferences must be resolved against the moving party, and in the light most favorable to plaintiff. *Detweiler v. J. C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108, 751 P.2d 282 (1988). The responding party's only obligation at this stage is to present evidence to "create an issue of fact, not to carry of burden of persuasion." *deLisle v. F.M.C. Corp.*, 57 Wn. App. 79, 84, 786 P.2d 839 (1990). In other words, "the court's function is to determine whether a genuine issue of material fact exists, not to resolve the issue." *Ashcraft v. Wallingford*, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977).

The trial court misapplied this standard by not construing the evidence in Appellants' favor and by making factual determinations to resolve the claims presented. When a trial court issues a written decision without explaining its reasoning, "appellate courts may look to the trial court's oral decision to interpret the judgment." *City of Lakewood v. Pierce Cnty.*, 144 Wn.2d 118, 127, 30 P.3d 446 (2001). Here, the trial court explained its rulings only in its oral decisions, thus permitting this Court to examine them. The trial court's statement that "DSHS acted reasonably" is not mere opinion, but an oral ruling explaining its decision.

That the trial court indicated that reasonability was not only relevant but determinative shows that there was a question of material fact. *Hoffman v. Gamache*, 1 Wn. App. 883, 888, 465 P.2d 203 (1970) (reasonableness is a jury question). This Court should not permit the trial court to resolve a summary judgment motion by a factual determination.

Furthermore, both the trial court and Respondents fail to view all of the evidence in the light more favorable to Appellants. Both the trial court and Respondents focus on a few select quotations from Appellants' depositions, to the exclusion of all other evidence. Summary judgment requires the court to examine *all* evidence presented to it by the parties. *Keck v. Collins*, 181 Wn. App. 67, 81, 325 P.3d 306 *review granted*, 181 Wn.2d 1007, 335 P.3d 941 (2014). This evidence must be viewed in the light most favorable to the plaintiff; weighing of the evidence is not permitted. *Browning v. Ward*, 70 Wn.2d 45, 51, 422 P.2d 12 (1966); *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007).

The importance of construing the facts in the light most favorable to the plaintiff cannot be understated. Our constitution grants all Washington residents the right to have factual determinations made by a jury. WASH. CONST. Art I, § 21. Construing all evidence in favor of the nonmoving party is necessary to preserve that inviolable right. *See Davis v. Cox*, ___ Wn.2d ___, 2005 WL 3413375 (May 28, 2015) (“when a suit

raises ‘a genuine issue of material fact that turns on ... the proper inferences to be drawn from undisputed facts,’” plaintiff has right to a jury) (quoting *Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 745, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)). The trial court failed to honor this right by focusing almost exclusively on Appellants’ earlier denials of abuse and by construing DSHS’ actions as “reasonable.” This Court should correct this error and remand for a jury to determine the matter on the merits.

B. Respondents conducted an incomplete investigation into the numerous reports of child abuse.

There is no question that DSHS and the Chelan County Sheriff’s Office (CCSO) have a duty to investigate reports of suspected child abuse. RCW 26.44.050. At the very least, these investigations must be complete and unbiased. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn. 2d 589, 601, 70 P.3d 954 (2003). What constitutes a complete investigation is necessarily a question of fact. *See Hoffman*, 1 Wn. App. at 888 (reasonableness and negligence are questions of fact). Generally speaking, however, a complete investigation is one that considers all material facts. *Tyner v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn. 2d 68, 86, 1 P.3d 1148 (2000).

The investigations performed by the CCSO were incomplete even by their own standards. CCSO child abuse investigation protocols call for the investigator to review all information available to them, which includes interviewing the reporting party, the party to whom the initial disclosure was made, and the alleged perpetrator. CP 301. Although, as Chelan County points out, “the scope and timing of investigation ... are matters within the discretion of the lead investigator,” CP 300-01, law enforcement is not free to simply ignore the child abuse investigation protocols adopted by the CCSO. In every investigation, “[t]here are ... certain minimum practices which should be performed when possible.” CP 301. The interview protocols are one of such minimum practices. See CP 301 (“The remainder of this section describes activities which should normally occur in an investigation.”).

Both Detective Mike Harnett and Detective Mitch Matheson agreed that no determination can be made off of a complaint of child abuse without any follow-up investigation. CP 331-33, 342-43. Detective Matheson also testified that conclusions should not be drawn until at the very least “talking to the ... child and whoever made the ... statement.” CP 332. Yet, both detectives failed to follow even this most basic protocol when investigating complaints of abuse in the Heideman home. In 2006, Detective Harnett declined to interview Danica, the child at issue.

Similarly, in 2008, Detective Matheson did not interview one of the reporting parties (Keilah), or either of the parties to whom the disclosure was made (Janice Heideman and Taylor), and in fact closed the file less than a day after opening it. CP 514-15.

DSHS' investigations were also incomplete by their own standards. Karen Oyler, Kathie Pete, and Lucy Moro all testified that children should not be interviewed in the presence of their alleged abuser.¹ CP 603, 635, 683. As Ms. Oyler stated, "no child is going to testify against their parent when their parent is in the same room." CP 603. As all three investigators knew of this policy, all three should have known that they were not likely to get truthful answers by interviewing Appellants in the presence of their parents. Yet, DSHS often concluded its investigations after interviewing the children within hearing distance of their parents. CP 272, 591-93 (Karen Oyler questions Danika about sexual abuse with Theron present), 616 (Kathie Pete interviews Keilah in the front yard while Juanita is sitting on the front steps), 731, 745, 776,

¹ Contrary to DSHS' assertion, the trial court did not find that DSHS has no duty to interview children away from their alleged abusers. The portion of the report of proceedings to which DSHS cites is the trial court's discussion of the weight it afforded Katherine Kent's declaration. 2 RP 35-36.

Furthermore, it is ironic that DSHS contends this discussion constitutes a finding, while simultaneously arguing that the very next sentence in the trial court's colloquy is mere personal opinion. DSHS cannot have it both ways.

822. A jury could quite reasonably conclude that an investigation that is likely to prompt untruthful answers is necessarily incomplete.²

DSHS had other instances where it failed to consider all information available to them. When Theron Heideman sent Ceth to the hospital in 2007, there was an open investigation into reports of abuse of Keilah, also by Theron Heideman. CP 618, 701. In *Lewis v. Whatcom County*, 136 Wn. App. 450, 452, 149 P.3d 686 (2006), the Court of Appeals stated that “RCW 26.44.050 creates a duty *to all children who may be abused or neglected*, regardless of the relationship between the child and his or her alleged abuser.” (emphasis added). Nowhere does the statute state that law enforcement and DSHS must investigate only the child referenced in the abuse report, and ignore all other children potentially harmed by the abuser. Such an interpretation would be contrary to both law and Washington State public policy. Yet, DSHS never bothered to continue the investigation of abuse against Keilah, even when it verified that another child in the home had been severely beaten by the same parent.

Chelan County additionally advances the argument that its duty in child abuse investigations is limited solely to reporting suspected child

² Accordingly, DSHS’ argument that it has no duty to interview children outside the presence of their alleged abusers must fail, especially given that every one of DSHS’ employees testified to the contrary.

abuse to DSHS and referring the case to the prosecuting attorney if it believes a crime has been committed. This argument was flatly rejected in *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000). In that case, law enforcement argued that its sole duties were to respond to a report of child abuse and report it to DSHS. *Rodriguez*, 99 Wn. App. at 446. This Court found no merit in the argument, as RCW 26.44.050 imposes a mandatory duty on law enforcement, as well as DSHS, to investigate allegations of child abuse. *Id.* at 448. Law enforcement is thus held to the same standard of performing complete and unbiased investigations as is DSHS. As the *Rodriguez* court stated, “It makes little sense to conclude that one agency owes a duty of care and the other does not when both are conducting investigations required by the statute.” *Id.* at 446.

In sum, both DSHS and the CCSO have a duty to perform complete and unbiased investigations upon receiving a complaint of possible child abuse. While certainly not every investigation will be the same, both agencies have adopted minimum standards to ensure that every investigation is complete and accurate determinations can be made therefrom. Neither agency has met these minimum standards in this case.

C. Appellants presented sufficient evidence for a jury to find that CCSO and DSHS would have uncovered the abuse earlier in the absence of negligence.

Proximate cause is a jury question, which can only be decided on summary judgment if no reasonable juror could find that the plaintiff's injuries were the result of defendant's actions. *Attwood v. Albertson's Food Centers, Inc.*, 92 Wn. App. 326, 330, 966 P.2d 351 (1998). Although plaintiffs cannot rely on mere speculation in response to a motion for summary judgment, they are by no means required to actually prove their claims. *Martini v. Post*, 178 Wn. App. 153, 165, 313 P.3d 473, 479 (2013).

Both Chelan County and DSHS state, repeatedly, that Appellants present no evidence beyond speculation that they would have disclosed the abuse at an earlier time, had Respondents not acted negligently. First, this assertion is patently false. Appellants *did* disclose the abuse long before they were removed from the home. In 2007, after Ceth was hospitalized as the result of his father's beatings, Kathie Pete interviewed Danika at Pioneer Middle School. CP 47, 627. At that time, Danika reported that the Heideman children have been slapped and yelled at, that they had been getting hit for years for things such as not completing their chores, that Keilah had been hit the most and yelled at the most, that Theron gets really angry, hits Ceth, and throws things at him, that she is afraid of Theron and that he might start hitting her like he hits Ceth, and that Juanita restricted their access to food. CP 627-628. There is no indication

that Respondents followed up on Danika's disclosures, and neither Keilah nor Danika were removed from the home until two years later.

Further, in 2008, Keilah reported to her probation officer that Theron has an anger problem and yells at her and her siblings. CP 561. Keilah also reported that Juanita made the Heideman children do excessive amounts of chores, sometimes waking them up in the middle of the night to complete any unfinished chores. CP 561. Keilah confirmed Theron's anger issues and the excessive chore assignments when she spoke to social worker John Plotz. CP 452. Even as early as 1999, Ceth complained about how Juanita would inflict pain to get him to do chores. CP 586.

Second, Respondents' argument is premised on the entirely wrong question. There is no policy, rule, or otherwise binding affirmation that DSHS and/or law enforcement can only remove a child from a home if the child confirms the abuse his- or herself. Were such a rule to exist, then children who were too young, too disabled, or too frightened to make a disclosure would never be removed from abusive homes. This could not be more contrary to the public policy of protecting children from abuse. RCW 26.44.010 ("It is the intent of the legislature that ... protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children.").

With public policy and the intent of the legislature in mind, the true question to be asked is this: Had they performed their duties in a non-negligent manner, would the CCSO and/or DSHS have discovered the abuse and removed the Heideman children from the home earlier than they ultimately did? When viewing all of the evidence in the light most favorable to Appellants, a jury could answer this question with “yes.”

The evidence presented shows that when confronted with an allegation of abuse in the Heideman household, it was the CCSO’s and DSHS’ pattern to speak to the subject child (often in close proximity with the alleged abuser), then immediately give up when the child denied abuse. CP 593 (case closed after Danika denied abuse, Theron present during interview); 630 (referral closed after girls reported feeling safe in home); 631 (case closed after Danika told Detective Matheson to “leave them alone”). As discussed in section B, *supra*, this method of investigation was not reasonable even by their own standards.

It is not reasonable or proper to rely solely on the word of a child to close an investigation into possible abuse. This is evident in the facts of *Yonker By and Through Snudden v. Dep’t of Soc. & Health Servs.*, 85 Wn. App. 71, 930 P.2d 958 (1997). DSHS attempts to distinguish *Yonker* on factual grounds, asserting that the child in *Yonker* was only three, whereas Appellants were pre-teens at the time they were first interviewed. DSHS

misses the obvious similarity: that a fully-trained professional adult is relying on the word of a child that has possibly been abused, traumatized, coached, or all of the above. Whether the child is two or ten, it is not a stretch of the imagination that a jury could find that such “reliance” was not reasonable.

On those instances when Respondents did interview³ someone other than the subject child or the alleged abuser, the abuse was often confirmed. In investigating the allegations that Theron Heideman had beaten Ceth enough to require medical attention, DSHS investigator Kathie Pete made the effort to speak to a neighbor of the Heidemans. CP 620. The neighbor, Veronica Figueroa, confirmed that Theron had beaten Ceth on multiple occasions. CP 620.

Similarly, in 2009, DSHS interviewed multiple persons after Keilah’s probation officer reported possible sexual abuse by Theron Heideman. Appellants’ aunt Stephanie Vaca confirmed that Keilah had told her about the sexual abuse a few years prior. CP 154. Even Juanita Ponce admitted that Keilah had told her about being sexually abused by Theron, albeit she had not believed her at the time. CP 156.

³ DSHS’ assertions that it interviewed collateral sources on numerous occasions are not reflective of the evidence presented. While there is evidence that many of the initial referrals were made by collateral sources; CP 269, 454, 458, 560; there is no indication in DSHS’ records that any follow-up was conducted with the referents. To the contrary, DSHS’ records show that on multiple occasions, the investigation began and ended with a conversation with the subject child and their parents. *See e.g.* CP 593, 630, 631.

The evidence presented shows that when DSHS and CCSO made more than the minimal effort to investigate the allegations of child abuse, the result was that the allegations were substantiated and Appellants were removed from their abuse home. It is not mere speculation to believe that had their earlier investigations been performed with the same level of care, Respondents would have uncovered the abuse much earlier.

Ruff v. County of King, 125 Wn.2d 697, 887 P.2d 886 (1995), cited by Chelan County, is inapposite. *Ruff* was decided on the question of duty, and the court specifically declined to reach the issue of proximate cause. 125 Wn.2d at 707. Specifically, counties have a duty to erect a barrier on the side of the road only if the condition on the road is inherently dangerous, or if otherwise mandated by statute. *Id.* at 706. As no statute mandated the barrier at the location of the plaintiff's accident, King County only had a duty if the road was inherently dangerous. *Id.* However, the plaintiff's own experts all testified that the road was not inherently dangerous. *Id.* Thus, the plaintiff's claims failed on the question of duty. *Id.* at 707. This case does not even remotely resemble *Ruff*.

DSHS contends, briefly, that Appellants cannot demonstrate proximate cause because DSHS would have needed a court order to

remove the children from the home.⁴ This is incorrect. RCW 26.44.050 permits DSHS and/or law enforcement to remove a child from a home without a court order if there is probable cause to believe that the child is being abused or neglected. Furthermore, even if DSHS had needed a court order, it is DSHS' duty to present all relevant information, and DSHS may be held liable if a court enters an order based on an incomplete or biased investigation. *Tyner*, 141 Wn.2d at 86.

When Respondents followed the minimum guidelines set out for child abuse investigations, it substantiated the abuse and removed the Heideman children from their home. The abuse they substantiated was not anything new, but had been ongoing for many years. The eventual finding of abuse is but some of the circumstantial evidence that had Respondents not acted negligently in regard to earlier complaints of abuse, Appellants would have been removed much earlier and avoided years of abuse at the hands of their parents. Appellants presented more than mere speculation to the trial court, and the entry of summary judgment in favor of Respondents must be reversed.

D. The trial court correctly found that Appellants established legal causation.

⁴ Similarly, CCSO contends that it is not responsible for placement decisions and thus cannot be held liable for negligent investigation. This argument fails for the same reasons as DSHS' similar contention.

Legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 888, 73 P.3d 1019 (2003) (quoting *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998)). It is a mixed question of duty and foreseeability, and depends upon “mixed considerations of logic, common sense, justice, policy, and precedent.” *Schooley*, 134 Wn.2d at 479 (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)).

Here, the trial court found that summary judgment could not be granted in favor of Respondents on the basis of legal causation. This finding was undoubtedly correct in light of Washington’s strong public policy favoring the protection, prevention, and safeguarding of children against abuse by their parents and guardians. RCW 26.44.010. Respondents present no convincing argument that they should not be held responsible for the results of their incomplete investigations. This Court should uphold this finding by the trial court.

E. The expert testimony offered by Susan Peters is admissible.

1. Susan Peters is qualified to be an expert.

Chelan County’s challenge to Susan Peters’ qualification as an expert is frivolous. Chelan County cites the rule in ER 702 that permits a

witness to be qualified as an expert based upon knowledge, experience, skill, training, or education. It then argues that Susan Peters is unqualified because Ms. Peters “cannot establish that her opinions are based on specialized knowledge.” Br. of Chelan County, at 39. This is not an accurate reflection of the record.

The first paragraph of Susan Peters’ report demonstrates the factual basis of her qualification as an expert on police investigations, including: 29 years of law enforcement experience; Special Assault Detective from 1989 to 1991; Major Crimes Detective from September 1991 to May 2011; nearly 20 years of experience investigating child sexual assaults for the King County Sheriff’s Office; nearly 20 years of experience investigating child neglect for the King County Sheriff’s Office; and assisted in the Green River Task Force Investigations. CP 404.

In addition to the above, Ms. Peter’s resume lists the following credentials: Training at the Washington State Criminal Justice Trainings Academy; Bachelor’s Degree in Criminal Justice from Central Washington State University; Professional Development with Identifying and Understanding Sexual Offenders in Sexual Assault Investigations; Professional Development with the Washington Association of Legal Investigations Conference; King County Sheriff Office, Officer of the

Year, 1997; Professional Affiliation with the Washington Association of Legal Investigations; and Professional Affiliation with the World Association of Detectives. CP 409-11.

The culmination of these credentials qualifies Susan Peters to testify as an expert regarding police investigations based upon her knowledge, experience, skill, training, and education.

2. Susan Peters' opinions are based on reliable data, specialized knowledge, and are helpful to the jury.

An opinion is admissible if it has a rational basis, which is the same as to say that the opinion must be based on knowledge. *See* ER 701; ER 702; *Riccobono v. Pierce Cy.*, 92 Wn. App. 254, 267–68, 966 P.2d 327 (1998). The knowledge may be personal, or it may be scientific, technical or specialized. *Compare* ER 701 *with* ER 702. *See also* Advisory Committee Note to Federal Rule of Evidence 701, 56 F.R.D. 183, 281 (FRE 701's requirement that lay opinion be "rationally based on the perception of the witness" is "the familiar requirement of first-hand knowledge or observation"). Expert opinion is simply opinion based in whole or in part on scientific, technical or specialized knowledge. ER 702. When an expert desires to apply scientific knowledge to the facts of the particular case, his or her opinion must also, of course, rest on appropriate case-related facts. *See* ER 703; *Riccobono*, 92 Wn. App. at

267–68, 966 P.2d 327; Advisory Committee Note to Federal Rule of Evidence 703, 56 F.R.D. 183, 283.

Here, Susan Peters bases her opinions on the facts of the case and specialized knowledge as an experienced investigator. This is discussed in the third full paragraph of her report. CP 404. The final page of the report also identifies 12 sets of documents as being reviewed in preparation of the report. CP 407. Moreover, Ms. Peters applies the facts of the Heideman investigation to the standards of police investigations and bullet points the deficiencies in the CCSO investigations. CP 404-07.

Chelan County also argues that Ms. Peters' opinions are unreliable. The proper way to test the reliability of an expert's opinion is through cross examination of that expert. *State v. Eaton*, 30 Wn. App. 288, 292, 633 P.2d 921 (1981). Any claim of unreliability goes to weight rather than admissibility.

Finally, expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). "Courts generally 'interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.'" *Moore v. Hagge*, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) (quoting *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)).

Chelan County objects to Ms. Peters' opinions, not the reasoning behind them. For example, in regards to the 2006 investigation, Susan Peters opines that the CCSO failed to adhere to basic police principles. CP 405. Ms. Peters then identifies the standard that law enforcement is obligated to investigate child abuse and neglect cases and then explains how the CCSO fell below the standard of care by declining to assign an investigator to determine if a crime had been committed. CP 405. Going one step further, Ms. Peters refers to Detective Harnett's deposition in which he admits to failing to investigate the matter and explains that the safety of Danika Heideman was jeopardized as a result of the CCSO's failure to investigate after DSHS interviewed Danika Heideman in front of her abuser. CP 405.

Chelan County contends, without any analysis, that this report is not helpful because the jury could just as easily "measure the detectives' actions against their own protocol and procedures." Br. of Chelan County, at 42. However, Chelan County repeatedly refers to the discretion permitted in its investigation of child sex abuse allegations. Ms. Peters' testimony is critical to assisting the trier of fact in determining if the CCSO negligently abused that discretion. Ms. Peters' expertise provides insight that a layperson would not necessarily think of as occurring; for example, discussing how the child abuse investigation and Danika's safety

was compromised by the CCSO's failures in 2006. A layperson does not possess the decades of experience as an investigator, and would not necessarily understand how and why the CCSO's investigation was negligent. Thus, Ms. Peters' testimony would be helpful to a jury.

3. Susan Peters Does Not Make Improper Assumptions.

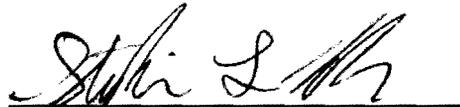
Susan Peters' opinion that the *potential* existed for earlier disclosure of sexual abuse is an admissible opinion as it is premised upon the entirety of her report. Ms. Peters, after identifying the deficiencies in the CCSO investigation, points out the potential opportunity for disclosure lost by the negligent investigations of the CCSO. A competent investigation may overcome the difficulties investigations can encounter when children are victims of sex abuse by parents living in the home. The CCSO's negligent investigation squandered this opportunity for disclosure. Ms. Peters' opinion is not an improper assumption, and her expert report was properly considered by the trial court on summary judgment.

II. CONCLUSION

The trial court erred by granting summary judgment in favor of DSHS and Chelan County, failing to consider all of the evidence in the light most favorable to the Appellants. Appellants presented ample

evidence that both Respondents failed to adhere to the minimum standards set for themselves and that as a result of their incomplete investigations, the complaints were dismissed and Appellants were left in an abusive home for longer than they should have been. This Court should REVERSE the decision of the trial court and remand for further proceedings.

DATED this the 24th day of July, 2015.



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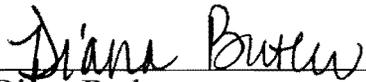
CERTIFICATE OF SERVICE

I certify that I caused one copy of the foregoing Reply Brief of Appellant to be served on the following parties of record and/or interested parties by delivering it via Email & Fed-Ex, to the below named attorneys:

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