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Court of Appeals
Division III
State of Washington

330931
NO. ~~330931~~

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

HEIDEMAN, et al.,

Appellants

v.

CHELAN COUNTY, a Washington corporation, et al.,

Respondents.

BRIEF OF RESPONDENT CHELAN COUNTY

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I. INTRODUCTION

Appellants Ceth, Keilah, and Danika Heideman (collectively “Heideman”), sued Respondent Chelan County (“Chelan County”) for damages they allegedly suffered while in the care of their father and stepmother. CP 1-6. Heideman alleged that they were abused by their father, Theron Heideman, and stepmother, Juanita (Ponce) Heideman, from childhood until August of 2007 (Ceth Heideman) and fall of 2009 (Keilah and Danika Heideman).¹ CP 2-5. Despite their refusal to cooperate with law enforcement’s investigation into reports of abuse until 2007, Heideman claim that Chelan County law enforcement officers were negligent in their investigation into the abuse. CP 5, 163, 177-78, 501.

Chelan County requested an order granting summary dismissal of these claims because (1) no genuine issue of material fact existed precluding summary judgment, (2) Chelan County’s actions were protected under the doctrine of prosecutorial immunity, (3) Heideman had not and could not provide sufficient evidence to maintain a claim of negligent hiring, supervision, and retention, (4) Heideman could not demonstrate a prima facie case of negligent investigation since no placement decisions were made that contributed to Heidemans’ alleged

¹ For clarity, this Brief refers to the individual Appellants, their father, and their stepmother by their first names.

damages, (5) the decisions of the Chelan County Prosecutor's Office to prosecute or not prosecute Theron Heideman for abuse were an intervening and superseding cause, breaking the chain of causation between Chelan County law enforcement's actions and Heidemans' alleged damages, and (6) Heideman could not demonstrate that Chelan County's actions caused them any damages. CP 193.

In an attempt to survive summary judgment dismissal, Heideman used the testimony of an alleged expert witness who failed to prove that she has the credentials necessary to testify in this matter. CP 241-243. Heideman also engaged in speculation regarding what might have happened if Chelan County Sheriffs had investigated claims of abuse towards Heideman in a different manner. CP 235-236. Heideman ignored the fact that they themselves testified they never would have disclosed the abuse even if the detectives had done things differently. Heideman failed to establish an issue of material fact sufficient to survive Chelan County's Motion for Summary Judgment. CP 162, CP 175, CP 189.

The Superior Court correctly granted Chelan County's Motion for Summary Judgment on the grounds that Heideman failed to establish that Chelan County's actions proximately caused Heideman's claimed damages. 1 RP 36; *see also* CP 412-414, 444-445. Heideman moved for reconsideration, which the Superior Court denied on the grounds that

Heideman failed to produce any new facts on which to base reconsideration. CP 418, CP 444-445. Now, Heideman appeals to this Court, presenting the same facts that were insufficient to overcome Chelan County's Motion for Summary Judgment. *See generally* Opening Brief of Appellants ("Brief"). As the Superior Court correctly decided Chelan County's Motion for Summary Judgment, this Court should so affirm.

II. ASSIGNMENTS OF ERROR

Heideman assigns only one error to the Superior Court with regard to Chelan County: that the court "erred by granting CCSO's² motion for summary judgment." Brief at 2. Because Heideman presented insufficient evidence to establish a genuine issue of material fact with regard to proximate causation of Heideman's alleged damages, the Superior Court correctly granted Chelan County's motion. Thus no error exists.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Heideman allege that Chelan County is liable for damages resulting from Chelan County's negligent investigation of allegations of child abuse and its negligent supervision of its sheriffs. CP 6. Heideman so alleges despite the fact that Heideman repeatedly and consistently told Chelan County sheriffs—in face-to-face interviews outside the presence of Theron and Juanita—that they were not being abused. CP 175, CP 165,

CP 191. And when Heideman finally did report allegations of abuse, the children were removed from the Heideman home and suffered no further abuse. CP 164, 173-174, 177-178, 186, 189. In addition, Heideman alleges no damages flowing from their claims and rely on speculation and conjecture to establish proximate cause. CP 166, 176-180. Such is insufficient to establish a prima facie negligence cause of action. Because no genuine issues of material fact exist as to Heidemans' claims against Chelan County, summary judgment was and is warranted. Accordingly, the Superior Court did not err in granting Chelan County's Motion for Summary Judgment.

IV. STATEMENT OF THE CASE

All the Heideman children allege that their father and stepmother physically and emotionally abused them. CP 25-26, 162, 189. Additionally, Keilah Heideman alleges that her father sexually abused her. CP 162. Ceth Heideman is now 23 years old. *See* CP 22. Keilah Heideman is now 22 years old, and Danika Heideman is now 20 years old. *See* CP 48.

Prior to August of 2007, none of the Heideman children had ever reported to Chelan County law enforcement that their father and stepmother were abusing them:

² "CCSO" is an acronym for the Chelan County Sheriff's Office.

Q: Okay? Was that the only time -- the time that you spoke with Mitch Matheson, was that the only time that you talked to law enforcement about being abused by your dad?

Keilah: Yes.

Q: All right. And when I say "law enforcement" I just mean a police officer. I'm not talking about CPS workers.

Keilah: Uh-huh.

...

Q: So I want to ask you again with that distinction: Was that the only time that you talked to a police officer of any kind about sexually abus-- about being sexually abused by your dad?

Keilah: That is the only police officer I talked to about it.

Q: Okay. Do you remember when you talked to Mitch Matheson?

...

Keilah: So shortly after November of 2009.

CP 163.

Q: How many times did you report the fact that your dad assaulted you to the Chelan County Sheriff's Office?

Ceth: Me myself? Once, that one incident when I was taken out of the house.

Q: So what was the date of the incident that you talked to the Chelan County Sheriff's Office?

Ceth: August 27, 2007.

CP 177-178.

Q: In between when that happened in 2007 and when you moved out of the house in October 2009, did you tell anyone about this thing with your dad, this incident?

Danika: No.

...

Q: Did you call the police?

Danika: No.

...

Q: So the only person you told between when it happened with your dad in 2007 and when you moved out of the house with your grandmother in October of 2009, the only person you told was your sister?

Danika: Yes.

CP 501.

In fact, prior to 2007, the Heideman children denied that their father and stepmother abused them and refused to cooperate with law enforcement investigations into abuse:

Q: . . . prior to August of 2007, did you report to Child Protective Services

that you were being physically abused?

Ceth: Oh, no, are you kidding -- I was too afraid.

Q: There was nothing that social workers could have done to make you feel comfortable enough to report any abuse prior to August of 2007?

Ceth: No...

CP 181.

Q: . . . So how many times do you think a law enforcement officer came out to talk to you?

Keilah: Every time CPS came out.

...

Q: . . . Did you tell them that you were being abused?

Keilah: No.

Q: Did you tell them that you weren't being abused?

Keilah: Yes.

Q: Did you ever tell law enforcement officers to leave you alone because your grandmother was lying?

Keilah: Yes.

CP 164-165.

Q: . . . How many times did you tell a police officer that nothing was happening, that your parents were not abusing you?

Keilah: Too many times to count.

CP 165.

Q: So this references a time in November of 2008 where you refused to speak with Detective Matheson, correct?

Keilah: Correct.

Q: He was there specifically to investigate allegations that you were being sexually abused, and you refused to speak with him?

...

Keilah: That's what it looks like.

CP 167.

Q: Did you ever see with your own eyes your dad having sex with your sister [Keilah]?

Danika: Yes.

...

Q: When you saw that happening between your dad and your sister, did you call the police?

Danika: No.

Q: Did you call CPS?

Danika: No.

CP 187, 189.

Q: Were you ever physically abused in your dad's house?

Danika: Yes.

CP 189.

Q: Would both your dad and Juanita do this?

Danika: Yes.

Q: Did you ever call the police about that?

Danika: No.

Q: Did you ever tell your grandma?

Danika: No.

CP 190.

Q: I'm going to ask my question again. Danika, this is an occasion where you met with a police officer outside of your father's presence and you didn't tell him what was going on; correct?

Danika: Yes.

Q: You lied to him?

Danika: Yes.

Q: And then you walked out of the room?

Danika: Yes.

CP 191.

Heideman testified that they would not have disclosed any information to law enforcement prior to the times they made their complaints:

Q: ...I'm asking you I guess more generally. I mean you didn't trust police officers in general?

Ceth: Yeah.

Q: And so you wouldn't have told him
--

Ceth: I wouldn't have told him anything.

CP 175.

Q: . . . Other than your sister Danika
and your best friend Allie, did you
tell anyone else that your dad was
abusing you between the ages of
seven and 15?

Keilah: No.

Q: . . . Why not?

Keilah: I was too scared.

CP 162.

Q: So if – if your parent's weren't there and you were
at school when you told law enforcement that
nothing was happening to you, why did you do that?

Keilah: I was scared of what would happen.

CP 165.

Q: Why didn't you call the police?

Danika: We were afraid.

Q: Of what?

Danika: Of the consequences of talking to
the police.

Q: Why didn't you call CPS?

Danika: Because they don't do their jobs
anyway.

Q: And that's something you knew at the time?

Danika: They never did it before. They had been there countless of times and never did anything.

CP 189.

In August of 2007, Ceth Heideman reported to law enforcement that his father had abused him. CP 19. Theron Heideman was arrested and Ceth was placed in foster care. CP 20. Although he later was placed back in the home with his father and stepmother for a brief period of time, he was never abused by his father or stepmother again after reporting the abuse in August of 2007:

Q: How many times did you report the fact that your dad assaulted you to the Chelan County Sheriff's Office?

Ceth: Me myself? Once, that one incident when I was taken out of the house.

Q: So what was the date of that incident that you talked to the Chelan County Sheriff's Office?

Ceth: August 27, 2007.

Q: And you were taken out of the house after that?

Ceth: Yes, that night.

CP 177-178.

Q: So just so we are clear, after you go back in the home in October of 2007, neither your father nor Juanita

physically disciplined you in any way?

Ceth: No...

...

Q: ...between October of 2007 and February of 2008, your father didn't physically discipline you?

Ceth: No, he did not physically discipline me.

Q: And Juanita didn't physically discipline you during that time?

Ceth: No.

...

Q: And since February 2008, . . . you haven't lived under the same roof with your father?

Ceth: No.

Q: Has he hit you or physically abused in any way since then?

Ceth: No.

Q: Have you lived under the same roof as Juanita at any point since February of '08?

Ceth: No.

Q: And has she physically abused you in any way since then?

Ceth: No.

CP 173-174.

Although Ceth Heideman reported the abuse against him to law enforcement outside the presence of Theron and Juanita in 2007, he told law enforcement that he was the only child in the household being abused

at that time. CP 37 (“I’m the only one.”). Ceth reported that he never even knew that Theron sexually abused Keilah. CP 154. Ceth also attempted to drop the charges against his father. CP 81. During the investigation into Ceth Heideman’s allegations of abuse, Danika Heideman was also interviewed by law enforcement outside of Theron’s and Juanita’s presence. CP 47. She denied that she or her siblings were subject to any abuse or neglect. CP 54-55.

Keilah Heideman first reported to law enforcement that her father was abusing her in September of 2009. CP 82-83. After Keilah made this report, Danika and Keilah were taken out of the home and never lived with Theron or Juanita again:

Q: So when you told Jill Storlie, that was the first time you told anybody at law enforcement that your dad sexually abused you?

Keilah: Yes.

Q: And from that day forward you never lived with your dad?

Keilah: No.

Q: And from that day forward your dad never sexually abused you?

Keilah: Correct.

CP 164.

Q: When was the last time you had any kind of contact with Theron,

your dad?

Danika: When I packed my stuff and left.

...

Q: How long ago, was it a year ago, two years ago?

Danika: It will be three years in October this year.

Q: So this is 2012, three years ago would be October of 2009?

Danika: Yes.

CP 186.

In sum, Heideman testified that they refused to cooperate with Chelan County's investigations into allegations of abuse until 2007 (Ceth) and 2009 (Danika and Keilah). CP 164-165, 167, 181, 187, 189, 190, 191. Heideman further testified that they would not have disclosed any information to law enforcement prior to the times they made their complaints and that once they reported the abuse to Chelan County, they were removed from the Heideman home and the abuse never occurred again. CP 162, 164, 189, 138-174, 175, 177, 178, 186.

V. ARGUMENT

1. Standard of Review.

Division III reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 611, 15 P.3d 210 *rev. denied*, 144 Wn.2d 1016, 32 P.3d 283 (2001). “A motion for summary judgment will be sustained if no genuine issue of material fact exists, viewing the evidence in a light most favorable to the nonmoving party.” *Id.* (citing CR 56(c)). The Court of Appeals may affirm summary judgment “on any ground supported by the record.” *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011).

Here, the Superior Court based its grant of summary judgment on the grounds that no genuine issue of material fact existed as to Chelan County’s proximate cause of Heidemans’ alleged damages. 1 RP 36; *see also* CP 414; CP 444-445. However, “the record” supports summary judgment on a number of grounds.

2. Heideman have failed to provide any evidence of negligent hiring, supervision, or retention of Chelan County employees.

Heideman have no evidence of and cannot prove negligent hiring, supervision, or retention. A claim for negligent hiring, supervision, or retention requires evidence that a Chelan County employee was acting

outside the scope of the employee's duty and that Chelan County was negligent in either hiring, supervising, or retaining that employee. *LaPlant v. Snohomish County*, 162 Wn. App. 476, 479-80, 271 P.3d 254 (2011) (footnotes omitted). No evidence exists supporting this claim because (1) Heideman have not identified any Chelan County employee who they believe acted outside the scope of his or her duty, and (2) Heideman have not produced any evidence that Chelan County negligently hired, supervised or retained any specific employee involved with the decisions regarding the Heideman family. Additionally, Chelan County concedes that the acts of County law enforcement officers related to the investigation and prosecution of Theron and Juanita Heideman would be within the scope of that officer's employment. Because of this, Heidemans' claim for negligent hiring, supervision, and retention fails, as a matter of law:

In Washington, a cause of action for negligent supervision requires a plaintiff to show that an employee acted *outside* the scope of his or her employment. But when an employee commits negligence within the scope of employment, a different theory of liability—vicarious liability—applies. Under Washington law, therefore, a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee's actions occurred within the course and scope of employment.

LaPlant v. Snohomish County, 162 Wn. App. 476, 479-80, 271 P.3d 254 (2011) (footnotes omitted).

The only claim Heideman could pursue in this case is one against an individual Chelan County employee for negligence while acting within the scope of his or her employment. *Gilliam v. Dep't of Soc. & Health Services, Child Protective Services*, 89 Wn. App. 569, 584-85, 950 P.2d 20 *rev. denied*, 135 Wn.2d 1015, 960 P.2d 937 (1998); *see also S.H.C. v. Lu*, 113 Wn. App. 511, 517, 54 P.3d 174 *rev. denied*, 149 Wn.2d 1011, 69 P.3d 874 (2003). However, Heideman have not named any specific employee who they allege was negligent. Accordingly, Heideman cannot sustain such cause of action.

3. Heideman cannot establish a prima facie case of negligent investigation.

Claims for negligent investigation against law enforcement officials require evidence that a faulty investigation led to a harmful placement decision, such as placing a child in an abusive home, removing a child from a non-abusive home, or failing to remove a child from an abusive home. *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 *rev. denied*, 152 Wn.2d 1033, 103 P.3d 201 (2004). Heideman cannot meet this evidentiary burden because (1) no evidence exists that the Chelan County Sheriff's Office conducted a faulty investigation, and (2) no

evidence exists that Chelan County officials made any placement decision regarding the Heideman children, harmful or otherwise.

When Ceth Heideman reported the abuse against him, he was immediately placed in foster care and his father and stepmother never abused him again. CP 174. Likewise, when Keilah Heideman first reported being sexually abused by her father in September 2009, Danika and Keilah were immediately removed from their father's home (by CPS, not Chelan County) and their father and stepmother never abused them again. CP 164, 186.

Heideman do not complain that the placement decisions made in 2007 and 2009 caused them harm (CP 166, 179-180), thus no claim for negligent investigation exists:

A claim for negligent investigation is available to a parent or child when the state conducts a biased or incomplete investigation that results in a harmful placement decision. To prevail, the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement.

Petcu, 121 Wn. App. at 56 (internal citations omitted); *see also Rodriguez v. Perez*, 99 Wn. App. 439, 443-44, 994 P.2d 874 *rev. denied*, 141 Wn.2d 1020, 10 P.3d 1073 (2000).

Merely conducting a faulty or incomplete investigation does not

open law enforcement up to liability:

There is no general cause of action for negligent investigation. A cause of action against the state for negligent investigation is a narrow exception that arises from the state's statutory duty under RCW 26.44.050 to investigate allegations of child abuse. A cause of action arises when the state conducts an incomplete or biased investigation that results in a harmful placement decision, such as wrongfully removing a child from a non-abusive home, placing a child into an abusive home, or allowing a child to remain in an abusive home. But our Supreme Court has rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures.

Petcu, 121 Wn. App. at 58-59 (citations and footnotes omitted).

RCW 26.44.030 sets forth the duty of care applicable to investigations of child abuse. This statute only requires law enforcement to (1) report suspected child abuse to CPS [RCW 26.44.030(1)(a)] and (2) report any instance of child abuse or neglect to the prosecutor "whenever the law enforcement agency's investigation reveals that a crime may have been committed [RCW 26.44.030(5)]." Although permitted, law enforcement is not required to interview the child alleged to be abused and/or interview the person making the report of abuse. RCW 26.44.030(6) and (12). No further investigatory duties exist.

Keilah Heideman asserts that her damages occurred after she turned her father in for abuse, yet she was placed outside of the home after that time:

Q: Okay. So tell me what kind of damage has been done to you by Chelan County.

Keilah: They didn't help when I asked them to.

Q: When did you ask them to help?

Keilah: When I turned my dad in.

Q: In September of 2009?

Keilah: Yes.

Q: Okay. Has -- has Chelan County damaged you in any other way?

Keilah: You mean other than -- no, no.

CP 166.

Likewise, Ceth and Danika cannot demonstrate they suffered any damages as a result of any law enforcement investigation. *See, e.g.*, CP 179-180. For these reasons, Heidemans' negligent investigation claims merit dismissal.

4. Heideman Cannot Establish a Prima Facie Claim for Negligence.

Heidemans' claims for negligence require Heideman to show the existence of a duty, a breach of that duty, a resulting injury, and the breach as the proximate cause of that injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). Heideman cannot make the required showing.

a. Heideman have no evidence of breach of duty.

The protocol established by Chelan County creates the applicable duty on the part of the Chelan County deputies regarding investigations into child abuse. However, the protocol at issue has sufficient discretion built into it within which the detectives may act on when investigating allegations of child abuse. Specifically, the Chelan County Sheriff Office Child Sex Abuse Protocol states the following:

This protocol is intended to guide investigators, emergency services providers, and other professionals in responding to alleged child abuse and neglect. ... This protocol provides guidelines and assistance to persons involved in the identification, investigation, evaluation, and treatment of child abuse. ... Because every case is unique, this protocol is not intended to, nor can it, apply to every situation. This protocol is intentionally flexible such that most cases can be investigated entirely within these guidelines. Investigators, accordingly, shall consider these guidelines in each instance and deviate from the protocol only as the circumstances dictate.

Failure to adhere to protocol guidelines does not, by itself, indicate the results of an investigation are unreliable...

CP 281.

...Ordinarily, law enforcement will respond to child abuse allegations within twenty-four hours. Investigations shall be thorough and, when possible, include an interview of the

alleged victim. Pursuant to statute, such interview may occur at the child's school, child care provider, home, or any other suitable place. ... The ultimate scope of the investigation will be dictated by the circumstances of the particular case.

CP 282.

In every case the scope and timing of the investigation, as well as the timing of each stage of the investigation, are matters within the discretion of the lead investigator. Hard and fast rules are impractical. Practices or actions which are necessary in one case, may be impossible, or constitute a waste of resources in another. Thus, in any given case, the lead investigator must be free to tailor the investigation to the circumstances.

CP 300.

The Chelan County detectives acted within their discretion in investigating the allegations of child abuse. The Chelan County protocol does not require a specific set of investigatory procedures and specifically recognizes that each case requires a different approach. Additionally, it is not enough to prove that the investigation fell below the standard:

...But our Supreme Court has rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures.

Petcu, 121 Wn. App. at 58-59 (citations omitted).

No genuine issue of material fact exists because the Chelan County detectives acted within the requirements of the Chelan County protocol for investigating such claims and properly exercised their discretion while doing so.

b. Heideman have provided no evidence of proximate cause.

Even if there was a breach of a duty to Heideman, which Chelan County does not acknowledge, there is no evidence that the allegedly deficient investigation proximately caused the Heidemans' harm. This is because there is no evidence, beyond mere speculation, that Heideman would have disclosed the abuse earlier than 2007 (for Ceth) and 2009 (for Keilah and Danika).

i. *Heidemans' self-serving declarations are not relevant and do not create a genuine issue of material fact.*

In post-deposition declarations, Heideman claim that they did not trust law enforcement during the time that the abuse was occurring and the allegations of child abuse were made on their behalf and that this lack of trust is the reason they did not disclose the abuse sooner. CP 239-240, 371-372, 381-382. However, these statements are inconsistent with previous evidence:

Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact. “When a party has given clear answers to unambiguous [deposition]

questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.”

McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511 (1999) (citations omitted).

Although Ceth Heideman reported the abuse against him to law enforcement in 2007 outside the presence of his father and stepmother, he told law enforcement that he was the only child in the household being abused at that time. CP 37. Even though he was out of the house and out of harm’s way, Ceth also attempted to drop the charges against his father. CP 81. At this point, Ceth was no longer in the home so he did not have any repercussions if he disclosed the abuse and his trust of law enforcement was irrelevant.

During the investigation into Ceth Heideman’s allegations of abuse, Danika Heideman was also interviewed by law enforcement outside the presence her father and stepmother. CP 47, 93. She denied that she or her siblings were subject to any abuse or neglect. CP 55.

Keilah disclosed the abuse in 2009 to law enforcement but explained that she only disclosed this because she was trying to protect her sister, not because of some newly gained trust in law enforcement or Child

Protective Services:

Q Why did you make that decision [to tell law enforcement of the abuse]?

A Because when I told him it wasn't -- he wasn't going to be doing that to me anymore, that it wasn't going to happen, that he moved on to my little sister. And then I still have two other little sisters. And I thought that I was going to be able to protect them by telling them, that my little sisters and brothers would get taken away and that he'd probably go to jail or something.

CP 398.

In fact, Keilah stated in her deposition that she had an expectation that law enforcement would do something, indicating a trust in the system, even though there is no evidence that the detectives had done something different to gain this trust:

Q: Did you expect Deputy Matheson to do something other than what happened?

Keilah: Other than close the case? Yes.

Q: What did you expect him to do?

Keilah: Maybe defend the innocent.

CP 399.

Heidemans' self-serving declarations contradict their previous statements about their disclosure of the abuse in 2007 (Ceth) and 2009

(Keilah and Danika). These contradictory declarations are insufficient to create a genuine issue of material fact sufficient to defeat summary dismissal.

ii. Heideman improperly rely on speculation.

The undisputed evidence demonstrates that Heideman refused to cooperate with Chelan County's investigations into allegations of abuse until 2007 (Ceth) and 2009 (Danika and Keilah). CP 164-165, 167, 181, 187, 189, 190, 191. Keilah Heideman refused to even talk to law enforcement until 2009 when she and Danika were removed from the home. CP 82-83, 165, 167. Once Heideman reported the abuse to Chelan County, the abuse never occurred again. CP 164, 173-174, 186. Whether they would have disclosed the abuse if Chelan County sheriffs had investigated the claims in a different manner is pure speculation and insufficient to prove proximate cause in this case:

Although ... circumstantial evidence can be as probative as direct evidence and may create a chain of facts from which the jury may draw reasonable inferences of ultimate facts, circumstantial evidence establishing proximate cause must still "rise above speculation, conjecture, or mere possibility."

Boguch v. Landover Corp., 153 Wn. App. 595, 614, 224 P.3d 795 (2009)

(citations omitted).

...to survive summary judgment, the

plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation. Summary judgment is proper if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Miller v. Likins, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (footnotes omitted).

The Washington Supreme Court in *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995), articulated the principal that governs here: "We cannot find negligence based upon speculation or conjecture." Speculation, argumentative assertions and/or conclusory statements in affidavits/declarations or memoranda, as a matter of law, are insufficient to preclude summary judgment. *Meyer v. Univ. of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). As stated below, it is mere speculation whether the specific investigations which Heideman claim Chelan County negligently performed would have resulted in a different outcome if Chelan County detectives had conducted the investigation differently.

a) The alleged 2006 report of sexual abuse is insufficient to create an issue of material fact as to proximate cause.

Heideman use two alleged reports of abuse that they either claim they made or were made on their behalf as the two incidents that were negligently investigated by Chelan County. CP 218-219, 220-222. The first is a report made regarding alleged sexual abuse of Danika in 2006. CP 272. Janice Heideman complained to a CPS worker of the alleged sexual abuse in 2006 but the record demonstrates that the report was beyond second hand information and might be insufficient to investigate.³ CP 256, 272. Regardless, CPS did investigate the allegation. CP 272. Social worker Karen Oyler interviewed Danika and Danika denied any abuse occurred or was occurring. *Id.* Ms. Oyler believed Danika was being truthful which ultimately concluded the investigation. *Id.*

In addition to an investigation taking place and CPS reaching the conclusion that Danika was not being sexually abused, the evidence suggests that Danika was not sexually abused. Danika has never disclosed that she was sexually abused, even in her deposition for this case:

³ Janice Heideman had made “similar accusations” seven times in the past year, and “all were determined to be unfounded.” CP 277. Keilah and Danika obtained a no contact order against Janice as a result of family disputes that had been ongoing between various Heideman family members, including allegations that Janice’s husband had sexually abused Danika. CP 263, 277, 817.

Q: ... Were you ever sexually abused by your dad?

A: I was not.

CP 400.

Heideman speculate that if Chelan County had investigated a claim of sexual abuse of Danika that she would have disclosed abuse that even now she claims did not occur. CP 227-228. This speculation is insufficient to prove proximate cause. This argument also ignores the fact that Danika has never disclosed sexual abuse and denied sexual abuse in her deposition taken in 2012. CP 400. Without proving proximate cause, Heidemans' claims against Chelan County should be dismissed as a matter of law.

b) *The 2008 report of abuse was investigated by Chelan County and Heideman denied any abuse occurred.*

Heideman claim that the other investigation that Chelan County negligently conducted was the report of abuse in 2008 made by Janice Heideman based on third party allegations. CP 274. Heideman again speculate that if the detectives had investigated the allegations differently, that they would have reached a different conclusion. CP 227-228. This argument again ignores the neither Danika nor Keilah disclosed any abuse in 2008. CP 164-165, 167, 189-191. As stated above, this is pure speculation which is insufficient to prove proximate cause. Thus,

Heideman have failed to prove proximate cause exists in their case against Chelan County.

- c. Heideman cannot prove that Chelan County's actions caused them any damages.

As stated above, Heideman must prove that Chelan County's actions caused their alleged damages in order to succeed in their claims. Heideman admit that any damages they suffered occurred before Chelan County's involvement in any investigation. CP 166. After Chelan County law enforcement officials were notified of Heidemans' complaints, Heideman did not suffer further abuse. CP 173-174, 161, 166.

After Ceth Heideman complained to law enforcement of his father physically abusing him, his father and stepmother never abused him again. CP 173-174. After Keilah Heideman finally cooperated with law enforcement and reported the abuse against her, neither she nor her sister Danika ever lived in the house with her father or stepmother again:

Q: So have you lived with your dad and your stepmom since you left the second time and reported abuse to Jill Storlie, your PO?

Keilah: No.

...

Q: Have you had any contact with Theron since you moved out of the house that second time?

Keilah: No. I have a restraining order.

CP 161.

After Keilah reported the abuse, she did not suffer any further abuse from her father and stepmother:

Q: Okay. So what did you want him (Deputy Matheson) to do?

Keilah: Anything other than pretty much look me in the eyes and tell me "You're a liar."

Q: Did he ever call you a liar?

Keilah: No.

...

Q: Okay. Did you want him to file criminal charges against your dad?

Keilah: I don't know. I mean --

Q: Did you want him -- or someone to remove your half-brothers and sisters from your dad's house?

Keilah: Yes.

Q: Okay. But after you talked to Deputy Matheson you yourself never went back to your dad's house, correct?

Keilah: Correct.

Q: And you yourself have never been abused again by your dad, correct?

Keilah: Correct.

CP 166.

Keilah Heideman admits that her complaint against Chelan County is for actions or omissions after she reported the abuse in 2009:

Q: What's your goal by suing Chelan

County in this lawsuit? What are you trying to obtain or accomplish?

Keilah: You know, that's why I hir-- I hired a lawyer was so me and him can make that decision.

Q: Okay. So I'm asking you. What -- what is your goal and what are you trying to accomplish?

Keilah: Maybe for people to look twice instead of just let it go.

Q: When did -- do -- do you think Chelan County "let it go" at some point?

Keilah: Yes.

Q: When? When did they do that?

Keilah: In 2009.

Q: I'm sorry?

Keilah: In 2009 right after it was reported.

...

Q: How did they let it go?

Keilah: It seems like to me that they didn't even try to investigate.

Q: So you wanted them to bring criminal charges, as I said before; is that correct?

Keilah: Well, I wanted them to do something, at least take my brothers and sisters.

...

Q: You were protected at that point, correct?

Keilah: Correct.

Id.

Ceth Heideman admits that he does not know why he sued Chelan

County:

Q: So I just want to make sure I understand what you have told me today. You don't know why you sued Chelan County, you never spoke to anybody at Chelan County, and you don't know what you want from Chelan County as part of this lawsuit; is that correct?

Ceth: That's what I said today, yes.

CP 179-180.

Q: Let's go back to the other question. Why did you sue Chelan County?

...

Ceth: . . . Basically to cover my bases, that's it.

Q: That's why you sued Chelan County, to cover your bases?

Ceth: Yes, because in the event that CPS says that: Well, they didn't do anything -- or, you know, they had reports made to them. And also because there were reports made to the sheriff's office about what was going on and nothing was done as well.

Q: Let me ask you about that. How many times did your dad physically assault you?

Ceth: Too many to count.

...

Q: How many times did you report the fact that your dad assaulted you to the Chelan County Sheriff's

Office?

Ceth: Me myself? Once, that one incident when I was taken out of the house.

Q: So what was the date of that incident that you talked to the Chelan County Sheriff's Office?

Ceth: August 27, 2007.

CP 176-178.

Heideman simply cannot demonstrate any damages they suffered as a result of Chelan County's actions. They suffered abuse until they reported the abuse to law enforcement at which time the abuse stopped. Chelan County's investigation into the abuse of Heideman was not the proximate cause of any of their alleged damages. Therefore, Heidemans' claims against Chelan County warrant summary dismissal.

5. The cases upon which Heideman rely are not relevant to the issues at bar.

Heideman rely heavily on two cases in support of their negligent investigation claim: *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) and *Yonker by and through Snudden v. State Dept. of Soc. and Health Svcs.*, 85 Wn. App. 71, 930 P.2d 958 rev. denied, 132 Wn.2d 1010, 940 P.2d 655 (1997). See Brief at 38-39, 41-43. Neither case is relevant to Heidemans' claims.

Hertog dealt with a claim for negligent supervision by a parole officer of a convicted rapist with a long and confirmed history of sexual

deviancy and recidivism. 138 Wn.2d at 269, 270. The Supreme Court stated the requisite duty of care owed by city parole officers to the public: “use reasonable care in supervising a parolee whose dangerous propensities pose a reasonably foreseeable danger to others.” *Id.* at 275. This duty is based on the “definite, established and continuing relationship” between a parole officer and parolee pursuant to RCW 72.04A.080. *Id.* at 276.

However, the Court also noted the limitations of the scope of that duty: “There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relation exists” between the party and the third person. *Id.* (quoting Restatement (Second) of Torts § 315 (1965)). Stated otherwise, absent a special relationship between government and a third person, no duty to control the conduct of that third person exists.

Hertog analyzed a standard of care (duty of a parole officer to supervise a known sex offender on parole) entirely different from that at issue here (duty of law enforcement to conduct reasonable investigation). Here, unlike the parole officer in *Hertog*, Chelan County owed no duty to reasonably supervise Theron Heideman. At the time Heidemans’ claims allegedly occurred, Theron was not under any form of supervision by Chelan County, nor was Chelan County in a “custodial relationship” with

Theron. *Hertog*, 138 Wn.2d at 277. Thus, Chelan County owed Heideman no duty to supervise Theron. Further, because Heideman had consistently and repeatedly denied that their father was abusing them when questioned by Chelan County Sheriffs outside the presence of their father and stepmother (CP 164-65, 181, 191), Chelan County was unaware of Heidemans' claims of abuse. *Hertog* provides no relevant guidance.

Yonker addressed duties owed by DSHS under the legislative intent exception to the public duty doctrine. 85 Wn. App. at 81-82, n. 4. There, a mother reported possible sexual abuse of her child by the child's father to DSHS. *Id.* at 73. The DSHS caseworker assigned to the case interviewed the child, but the child would not talk.⁴ *Id.* at 74. After the father later confessed to the molestation, the mother sued DSHS for negligent investigation. *Id.*

The trial court dismissed the suit on summary judgment, holding that Washington does not recognize a cause of action for negligent investigation and that DSHS was immune for liability under the public duty doctrine. *Id.* at 76. Division I reversed, holding that the public duty doctrine does not shield DSHS from the mother's claim. *Id.* at 81-82.

However, the Court did not address the reasonableness of DSHS's

⁴ In contrast to Heideman here, who repeatedly and consistently denied allegations of abuse to Chelan County Sheriffs outside the presence of Theron and Juanita. CP 164-65, 181, 191

investigation and was careful to limit the scope of its holding:

[The mother] does not argue that the State must somehow prevent all child abuse, **nor of course do we hold...** [T]he existence of a duty ... **does not mean that [DSHS] has a duty to investigate reports of all kinds, without regard to circumstances.** If there is a question whether a report is sufficient to invoke the duty to investigate, that issue will be resolved on a **case-by-case basis.** **Nor do we address the scope or intensity of the investigation required,** as those issues are not before us in this appeal.

Id. at 81 (emphasis added).

Stated otherwise, *Yonker* stands only for the proposition that DSHS owes parents a duty to investigate and is not immune from liability for negligent investigation under the public duty doctrine. Here, Chelan County does not argue that it is immune from liability under the public duty doctrine or that it does not owe Heideman a duty. Heideman challenges only the reasonableness of Chelan County's investigation of their claims. As *Yonker* did not address the adequacy of DSHS's investigation, it is not relevant here.

6. The Court should disregard the "expert" opinions of Susan Peters.

In support of their claims for negligent investigation, Heideman rely on the declaration of Susan Peters. Brief at 14. Because Ms. Peters'

declaration and report do not satisfy the requirements of ER 702, this Court should disregard her opinion.

- a. Ms. Peters does not meet the requirements of ER 702.

Expert testimony must meet the applicable reliability standard in order to be admissible at the time of trial. ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In Washington, the court must determine both if the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact. *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995). Evidence is helpful if it involves matters beyond the common knowledge of a layperson. *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 *rev. denied*, 154 Wn.2d 1026, 120 P.3d 73 (2005). The trial court acts as a gatekeeper and can exclude expert testimony if it fails to meet the requirements of ER 702. *State v. King Cnty. Dist. Court W. Div.*, 175 Wn. App. 630, 637-38, 307 P.3d 765 *rev. denied*, 179 Wn.2d 1006, 315 P.3d 530 (2013).

Ms. Peters does not establish that she is qualified as an expert, nor has

she demonstrated that her opinion is reliable expert testimony which would be helpful to the trier of fact.

b. Ms. Peters has not established that she is qualified as an expert or that her opinions are reliable.

Expert opinion testimony is only admissible if it has a rational basis, based on scientific, technical, or specialized knowledge. *State v. Kunze*, 97 Wn. App. 832, 850, 988 P.2d 977 rev. denied, 140 Wn.2d 1022, 10 P.3d 404 (1999). If the court determines that the witness qualifies as an expert and that the opinion is based upon reliable data and methodology, the court is required under Rule 702 to make a third inquiry: whether the expert's testimony will assist the trier of fact. *See* ER 702.

Heidemans' expert cannot establish that her opinions are based on specialized knowledge required to assist the trier of fact and she employs no methodology explaining how her experience led to her conclusions. Additionally, Ms. Peters does not describe her training in the investigation of child abuse. CP 376.

Ms. Peters' opinions are not reliable. Ms. Peters does nothing more than express opinions based on her unexplained, subjective beliefs. CP 377-379. Specifically, Ms. Peters claims that Chelan County does not comply with vague and general "best practices" she gleaned from her previous law enforcement experience, but she does not identify those

practices or explain where they come from. *Id.* Instead, Ms. Peters claims that Chelan County failed to comply with agency protocol but fails to recognize the protocol intentionally builds in a great deal of discretion to treat each case separately. *Id.*; *see also* CP 281, 281, 300 (discretion in protocol). An analysis of the discretion permitted is also necessary to determine whether the detectives properly followed protocol.

An expert must explain how her experience leads to her conclusions. Cases interpreting the Federal Rules of Evidence are helpful here:

Trained experts commonly extrapolate from existing data. But nothing in ... the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit*⁵ of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (footnote added).

“If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how

⁵ Latin for “he himself said it”—Something asserted but not proved. IPSE DIXIT, Black’s Law Dictionary (9th ed. 2009).

that experience is reliably applied to the facts.” Fed. R. Evid. 702 advisory committee’s note.

Heideman seek to have Ms. Peters’ opinions accepted as valid solely because of her unspecified experience without further analysis as to how she reached her conclusions. Ms. Peters must identify specific, applicable standards, and identify how Chelan County detectives’ conduct fell below or failed to comply with those standards. Without doing so, her opinions are unreliable and should not be considered.

c. Ms. Peters’ opinions are not helpful to the trier of fact.

In addition to not meeting the standard of ER 702, Ms. Peters’ report fails to assist the trier of fact. Expert opinion testimony is admissible only if it will “assist the trier of fact” to understand the evidence or to determine a fact in issue. ER 702. The purpose of ER 702 is to permit expert testimony in order to assist the trier of fact in understanding the evidence or issues which are beyond common understanding. *See id.* The benchmark for exclusion of expert testimony is whether the proffered testimony would usurp the function of the jury. *United States v. Langford*, 802 F.2d 1176, 1179-80 (9th Cir. 1986) *cert. denied*, 483 U.S. 1008, 107 S. Ct. 3235, 97 L. Ed. 2d 740 (1987).

Without explaining how she used her experience and knowledge to evaluate the Chelan County detectives' actions, Ms. Peters does nothing more than a trier of fact could do: measure the detectives' actions against their own protocol and procedures. CP 377-379. Such an analysis is not helpful to the trier of fact and is, therefore, inadmissible.

d. Ms. Peters' opinions are inadmissible legal conclusions.

Ms. Peters makes legal conclusions that usurp the role of the judge and jury. For example, Ms. Peters states:

...it is my professional opinion that the Chelan County Sheriff's Office and it's [sic] officers fell below the standard of professional care required of detective investigating allegations of child sexual abuse.

CP 379.

No expert may express an opinion on a question of law:

Expert opinion that consists solely of legal conclusions is not admissible under the Rules of Evidence and it cannot, by its very nature, create an issue of material fact when it only contains legal conclusions.

Stenger v. State, 104 Wn. App. 393, 408-09, 16 P.3d 655 rev. denied, 144 Wn.2d 1006, 29 P.3d 719 (2001).

This Court should disregard Mr. Peters' legal conclusions.

e. Ms. Peters makes improper assumptions.

Expert testimony is inadmissible if it consists of unsubstantiated assumptions: “The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert’s conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.” *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761-62, 27 P.3d 246 (2001) (citations omitted).

Ms. Peters’ testimony contains the following statement that is an unsubstantiated assumption and should not be considered:

The potential existed, if there had been a thorough investigation, that there could have been earlier disclosures of sexual abuse, prior to September of 2009.

CP 379.

As stated above, Ms. Peters provides no explanation as to how she reached this conclusion and it is an inadmissible assumption.

In sum, Ms. Peters’ opinions are inadmissible pursuant to the Washington Rules of Evidence and applicable case law. Her testimony is not sufficiently based on any knowledge, expertise, or methodology and

usurps the function of the trier of fact in evaluating the evidence. Accordingly, the Court should disregard her opinions.

7. Heidemans' Brief's "Statement of the Case" contains unsupported argument in violation of RAP 10.3(a)(5) and RAP 10.4.

RAP 10.3(a)(5) requires Heidemans' Brief's "Statement of the Case" to contain "a fair statement of the facts ... without argument." "Reference to the record must be included for each factual statement." *Id.* RAP 10.4(f) directs: "a reference to the record should designate the page ... of the record." "The purpose of [Title 10 of the Rules on Appeal] is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs" *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 305-06, 991 P.2d 638 (1999).

Heidemans' Brief fails to meet this standard. Two examples illustrate:

Even a cursory review of the DSHS records would have shown a long history of child abuse allegations against Heideman that, at a minimum, would have warranted an actual investigation. [no citation to the record]

Brief at 12.

A properly trained and experienced investigator of child abuse must understand that thorough and objective investigations

are required to overcome the difficulties investigations can encounter when children are victims of child abuse by parents living in the home. Nonetheless, the facts here show that these techniques were not even attempted. Unsurprisingly, Appellants were reluctant to confess the abuse to CPS or the CCSO. [no citation to the record]

Brief at 22.

The above-quoted excerpts of Heidemans' Statement of the Case are merely unsupported and unsupportable conclusions and opinions. The Washington Supreme Court has explained that "conclusory statements of fact" and "opinions as to the significance of facts" do not constitute "fact":

A fact is an event, an occurrence, or something that exists in reality.

...

The "facts" required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature ... conclusory statements of fact will not suffice ...

[C]onclusions and opinions as to the significance of the facts ... do not describe an event, an occurrence, or that which took place.

Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

The Court of Appeals will not address arguments that violate RAP 10.3. See, e.g., *Regan v. McLachlan*, 163 Wn. App. 171, 178, 257 P.3d 1122 (2011) (not addressing issues raised in violation of RAP 10.3(a)(6)). The above excerpts are but examples of RAP 10.3- and 10.4- violative

argument in Heidemans' Statement of the Case. However, the Court should disregard all RAP-violative argument in Heideman's Brief.

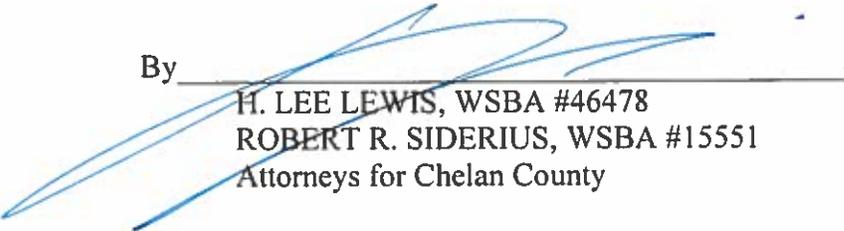
VI. CONCLUSION

For the reasons stated above, Respondent Chelan County requests this Court determine that no genuine issues of material fact exist with regard to Heidemans' claims against Chelan County and affirm the Superior Court's grant of Chelan County's Motion for Summary Judgment.

Respectfully submitted this 25th day of June, 2015.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By



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CERTIFICATE OF SERVICE

I, Joanna Nesgoda, hereby certify that

1. On June 25, 2015, on behalf of Respondent Chelan County, I electronically filed the:

BRIEF OF RESPONDENT CHELAN COUNTY

with the Court of Appeals Division III Clerk through the court's electronic filing system.

2. I sent a copy of this document via United States Postal Service, postage prepaid, to counsel addressed as follows:

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