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Division III
State of Washington

NO. 342255

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

SUZIE FOWLER,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, DIVISION OF CHILDREN AND FAMILY
SERVICES, KIM VAN DOREN, and ANGELA NEWPORT,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION/SUMMARY OF ARGUMENT

On April 17, 2011, four month old C.C. was taken into custody by Pend Oreille County Sheriff's deputy and turned over to the Washington Department of Social and Health Services (DSHS) Child Protective Services (CPS) when his mother, Suzie Fowler was arrested for domestic violence and placed in the Pend Oreille County Jail. C.C. was placed in shelter care pending a hearing to determine the need for further shelter care. On April 20, 2011, because Ms. Fowler's history of alcohol related domestic violence, unstable relationships and removal of other children from her care, created a substantial danger to C.C., DSHS filed a dependency petition in the Pend Oreille County Juvenile Court. The court issued a Summons and Notice to Appear for a June 2, 2011 dependency hearing to Ms. Fowler and C.C.'s biological father, Edwin Twitchell, a registered sex offender. At the time of her arrest, Ms. Fowler had ended her relationship with Edwin Twitchell (father of her child C.C.), was married to Chris Grisham (father of her child J.G.), and living with her boyfriend Jason Centorbi. After Ms. Fowler moved to Idaho and the Washington dependency petition was dismissed, she brought this action alleging, among other things,¹ that DSHS and Social Workers Kim Van

¹ In her complaint, Ms. Fowler alleged several non-specific claims/causes of action which appeared to sound in negligence/negligent investigation, negligent misrepresentation, violation of the state constitution, violation of RCW 69.51A.120

Doren and Angela Newport violated her right to privacy by providing Edwin Twitchell, whom she feared, with notice of the dependency proceedings as mandated by RCW 13.34.062 and .070. The trial court granted summary judgment dismissing all of Ms. Fowler's causes of action. Ms. Fowler's counsel then withdrew, and Ms. Fowler, *pro se*, filed timely notice of appeal.

On appeal, Ms. Fowler argues that the trial court erred in dismissing her invasion of privacy claim and failing to recognize what she now characterizes as an outrage claim (Br. Of Appellant at 27) because, even though she admits Edwin Twitchell is C.C.'s true biological father, DSHS's issuance of notice of the dependency proceedings to Mr. Twitchell was "illegal," violating her right to privacy and precluding summary judgment. Ms. Fowler's central argument appears to be that since she was married to Chris Grisham at the time of the dependency proceedings, Mr. Grisham was the "presumed father" of C.C. and it was therefore illegal to provide notice Mr. Twitchell. Br. of Appellant at 11-14, 19-23, and elsewhere throughout the brief.

Ms. Fowler's argument and her appeal are without merit. Washington law mandates notice of child dependency proceedings to the

regarding her use of medical marijuana and invasion of privacy. In the trial court, her opposition to summary judgment was limited to the privacy and medical marijuana statute claims. In her opening brief, Ms. Fowler limits her argument to the privacy claim.

parents of the children involved and the suggestion that a presumed parent should be given notice instead of an actual parent is offensive to both the statute and the traditional notions of due process engrained in the United States Constitution. In their RAP 18.4 motion on the merits, filed separately, Respondents request dismissal of the appeal. In the alternative, Respondents request that the order granting summary judgment be affirmed.

II. STATEMENT OF THE ISSUES

1. Whether summary judgment dismissing Ms. Fowler's invasion of privacy claim should be affirmed where the claimed invasion was issuance of notice of child dependency proceedings to the actual father of the allegedly dependent child as required by RCW 13.34.062 and/or .070.

2. Whether summary judgment dismissing Ms. Fowler's causes of action based on negligence/negligent investigation, negligent misrepresentation, violation of RCW 69.51A.120, negligent supervision and training, and/or violation of the Washington State Constitution should be affirmed when Appellant's brief contains no argument or authority addressing those claims/causes of action.

3. In the alternative, whether summary judgment dismissing all of Ms. Fowler's claims/causes of action should be affirmed where the defendants are immune from suit under RCW 4.24.595.

4. In the alternative, whether summary judgment dismissing Ms. Fowler's causes of action based on negligence/negligent investigation should be affirmed where:

- a. Plaintiff submitted no evidence to establish negligence or a "harmful placement decision;"
- b. Duly entered court orders constitute intervening superseding cause.

5. In the alternative, whether summary judgment dismissing Ms. Fowler's claims based on negligent misrepresentation should be affirmed when she presented no evidence establishing any of the essential elements of negligent misrepresentation.

6. In the alternative, whether summary judgment dismissing Ms. Fowler's claim based on RCW 69.51A.120 should be affirmed where the statute does not provide a cause of action for violation.

7. In the alternative, whether summary judgment dismissing Ms. Fowler's claim based on violation of the Washington State Constitution should be affirmed where it is well settled that Washington does not recognize such a cause of action.

8. In the alternative, whether summary judgment dismissing Ms. Fowler's claim for negligent supervision/training should be affirmed

where DSHS owes her no actionable duty to train and/or supervise its employees.

9. Whether Ms. Fowler may allege causes of action for outrage, unreasonable intrusion upon the seclusion of another, appropriation of another's name or likeness and/or unreasonable publicity for the first time on appeal.

10. Whether respondents should be awarded costs and attorney fees on appeal.

III. STATEMENT OF THE CASE

A. Facts Of The Case

In 2010, Suzie Fowler was in a personal relationship with Edwin Twitchell and became pregnant. Less than two months later Ms. Fowler found out Mr. Twitchell was a registered sex offender, told him she was going to get an abortion and left him. Br. of Appellant at 42-43. On November 30, 2010, C.C. was born. CP at 113-1. Though C.C.'s father is not named on the birth certificate, Ms. Fowler admits and acknowledges that Edwin Twitchell is C.C.'s father. CP at 100-1, 125-1; Br. of Appellant at 42-43. After leaving Mr. Twitchell, Ms. Fowler, who was married to Chris Grisham, the father of her second child² but no longer living with

² Ms. Fowler has three children: E.S., D.O.B. 1-23-05 who is in the custody of his/her grandparents, J.G., D.O.B. 06-12-06, who is in the custody of his father Chris Grisham, and C.C.

him, moved to Washington and began residing with her boyfriend Jason Centorbi. CP at 37.

Ms. Fowler had a volatile temper and she and Mr. Centorbi had a tumultuous relationship, resulting in at least two domestic violence incidents in the presence of the child and both being arrested for domestic violence. CP at 38. On Sunday April 17, 2011, when C.C. was four and a half months old, Pend Oreille County Sheriff's Deputy Glen Blakeslee responded to a domestic violence call in Newport, Washington and found Ms. Fowler, in a parking lot carrying C.C. in a child car seat. CP at 153. The deputy noted that Ms. Fowler would not look at him while talking to him, was moving around a lot, speaking fast and not making a lot of sense most of the time. CP at 154. The deputy could smell alcohol on Ms. Fowler. CP at 154. Jason Centorbi appeared on the scene with an injury to his face and was questioned by the deputy while Ms. Fowler yelled at him. CP at 154. During questioning, Ms. Fowler told the deputy that Jason Centorbi was not C.C.'s father and that she was pregnant before she ever met her boyfriend. CP at 154. Mr. Centorbi confirmed that he was not C.C.'s father, telling the deputy that Ms. Fowler was already pregnant when he met her and that he gave the baby his last name because Ms. Fowler had told him that the biological father was a sex offender in

Spokane and that she did not want the baby to have his last name. CP at 154.

After questioning and observing the two, the deputy determined that Ms. Fowler had assaulted Mr. Centorbi and placed her under arrest. CP at 155. She resisted and began screaming at Mr. Centorbi and at the deputy. CP at 155. When placed in the back of the police car, Ms. Fowler continued to scream and insisted that she needed to feed the baby but refused to tell the deputy or Mr. Centorbi where the formula for the baby was. CP at 155. She then exposed her breast and began squeezing breast milk onto the inside of the patrol car window. CP at 155-56. Ms. Fowler then began thrashing around in the patrol car, wiggled out of the handcuffs and attempted to escape from the patrol car but was stopped by the deputy. CP at 156. Mr. Centorbi left the scene and the deputy drove Ms. Fowler and C.C. to the Pend Oreille County Jail where Ms. Fowler again tried to escape by running away from officers but was caught and placed in a jail cell. CP at 156. Social Worker Kim Van Doren from DSHS Child Protective Services arrived, took C.C. into custody and took him to a foster home. CP at 156.

On April 20, 2011, Social Worker Van Doren met with Ms. Fowler in the jail, spoke with Ms. Fowler's stepmother, spoke with Chris Grisham, Ms. Fowler's estranged husband and father of her second child,

spoke with the foster parents caring for C.C., and provided a declaration advising the court:

- C.C.'s alleged father is Edwin Twitchell whose last known address was in Sandpoint, Idaho. According to Ms. Fowler, she broke off the relationship with Mr. Twitchell while she was pregnant with C.C. because she found out Twitchell was a registered sex offender, and Twitchell had no relationship with C.C.
- On April 17, 2011, Pend Oreille County Deputy Blakeslee responded to a domestic violence call and arrested Suzie Fowler for domestic violence against her boyfriend Jason Centorbi. According to the deputy, Ms. Fowler was out of control, appeared intoxicated and possibly on amphetamines of some kind. She was screaming and ranting at the time of arrest.
- C.C., then four months old, was taken into Deputy Blakeslee's custody and turned over to Child Protective Services for shelter care.
- On April 18, 2011, Social Worker Van Doren was contacted by Ms. Fowler's stepmother who reported that she was interested in having C.C. placed in her home. She reported

that she already had custody of Ms. Fowler's older child, Ms. Fowler having relinquished custody to her. The stepmother reported that Ms. Fowler had mental health issues, was prescribed medication which she did not take, used medical marijuana and "when she drinks she goes ballistic."

- Social Worker Van Doren met with Ms. Fowler at the jail on April 18, 2011 and was advised that Ms. Fowler and her boyfriend were drinking and got into a fight and she was arrested because she had blood under her fingernails and her boyfriend had scratches. Ms. Fowler disclosed that she and her boyfriend had been drinking and involved in another domestic violence incident the month before.
- Social Worker Van Doren learned from the shelter care foster parents, who had taken C.C. in for a medical checkup, that C.C. was in good physical condition and "developmentally on task for his age."
- Social Worker Van Doren learned, through her interviews with Ms. Fowler and her stepmother, that Ms. Fowler has two other children who were not in her care due to her "lifestyle and emotional instability."

- Chris Grisham is the father of Ms. Fowler's son J.G. who is in his custody. He and Ms. Fowler were still married but had no relationship. He advised that Ms. Fowler could be a good mother, but is moody and has a temper and becomes violent.

CP at 36-38.

On April 21, 2011, Commissioner Van de Veer held a shelter care hearing. Ms. Fowler and her attorney were present at the hearing along with Ms. Fowler's parents, her landlady and C.C's Guardian Ad Litem. CP at 46-47. Commissioner Van de Veer ordered that C.C. should be returned to Ms. Fowler and placed in shelter care with her pending the outcome of the dependency proceeding, subject to conditions imposed by the court. The conditions imposed by Commissioner Van de Veer included:

- Chemical dependency screening and any recommended substance abuse evaluation and treatment;
- Random UA/BA testing;
- Mental health treatment/counseling intake;
- Anger management and/or domestic violence prevention services, follow recommendations;
- Meet with doctor to discuss treatment for anxiety;
- Cooperate with EHS, PHN, FPS, OPD social worker;
- Restraining order prohibiting contact with Jason Centorbi.

CP at 51-53.

The Court scheduled a fact finding hearing to consider evidence relating to the Dependency Petition for June 2, 2011, and notice of the hearing was provided to Suzie Fowler (mother) and Edwin Twitchell (father). CP at 40-41, 42-43, 54 and 63. A review hearing was scheduled for September 15, 2011. CP at 46.

On May 6, 2011, in accordance with the court's order and RCW 13.34.062, Social Worker Van Doren mailed a letter with the dependency petition and Notice, Summons/order setting the fact finding hearing to Edwin Twitchell at his last known address. The letter was sent by regular mail and certified mail. The certified letter was returned by the Postal Service undelivered. In the letter Social Worker Van Doren advised Mr. Twitchell that Ms. Fowler had named him as the father of CC. CP at 103-04.

On May 19, 2011, Assistant Attorney General Carlson provided Notice of Contested Fact Finding Hearing scheduled for August 12, 2011.³ CP at 56.

At the June 2, 2011 hearing, Edwin Twitchell sought and obtained approval for appointment of a public defender to assist him in the

³ Under RCW 13.34.070 and LJuCR 3.4, such hearings should occur within 75 days of the date the petition is filed. The parties agreed to continuance because August 12, 2011 was the court's first available hearing date. CP at 64-66.

dependency proceedings. CP at 58-59. In addition, on that date Commissioner Van de Veer entered an order directing that Ms. Fowler refrain from using medical marijuana “until Ms. Fowler’s drug/alcohol assessment is complete and her counselor endorses such use.” The court also ordered Ms. Fowler and Mr. Twitchell to cooperate in paternity testing arranged by DCFS or the Prosecutor’s Office. CP at 60.

On June 9, June 30 and July 21, 2011, the court issued orders authorizing C.C.’s continued shelter care with Ms. Fowler pending the outcome of the fact finding hearing scheduled for August 12, 2011. CP at 61, 62 and 68.

On August 5, 2011, Ms. Fowler moved for dismissal of the petition because the child’s doctor opined that the child was happy and well cared for by his mother and that Ms. Fowler and the child had moved to Idaho. CP at 69-70.

At the hearing on August 12, 2011, the court was advised that, based on the doctor’s report, it appeared the child was in good health and being well cared for, the issues causing the dependency had been addressed, and that since Ms. Fowler had moved to Idaho, DSHS could not offer services or check on C.C. CP at 72. On that date the court dismissed the petition noting that “the plan to return the child home to the mother has been achieved and court supervision is no longer needed – mother resides in Idaho.” CP at 73.

B. Procedural History

On June 19, 2014 Ms. Fowler commenced this action against DSHS, Kim Van Doren and her supervisor, Angela Newport, seeking damages based on a number of allegations. CP at 2-1. With the exception of the claim based on violation of her rights under the Washington State Constitution, the complaint did not identify any specific cause action being asserted. CP at 2-1 thru 7-1.

On January 22, 2016, the defendants filed their motion for summary judgment seeking dismissal of all causes of action, broadly interpreting the complaint to include six causes of action including, Negligent Investigation of Child Abuse/Neglect, Negligent Misrepresentation, Invasion of Privacy, Violation of RCW 69.51A.120, Violation of Rights Under Article 1, Sections 3 and 7 of the Washington State Constitution and Negligent Supervision and Training. CP at 29-1 thru 30-1; 77-1 thru 97-1.

On February 16, 2016, Plaintiff filed her response to the Motion For Summary Judgment, limiting the response to “Invasion of Privacy Re: Disclosure of Information to Edwin Twitchell” and “Medical Marijuana Cause of Action.” CP at 105-1 thru 109-1. On March 4, 2016, the court entered the Order Granting Motion For Summary Judgment. CP at 186-1. On March 24, 2016, Ms. Fowler filed Notice of Appeal. On April 4, 2016,

Ms. Fowler's counsel served notice of intent to withdraw as her counsel. CP at 210-1.

IV. ARGUMENT

A. Standard Of Review

Appellate review of summary judgment is de novo and the appellate court engages in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "Summary judgment is appropriate 'if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Atherton Condo. Apart. Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (quoting CR 56(c)). A material fact is a fact upon which the "outcome of litigation depends in whole or in part." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). No genuine issue of material fact exists if the court, after considering the evidence in the light most favorable to the non-moving party, concludes that reasonable persons could reach only one conclusion. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). To prevail in a summary judgment motion, a defendant may either show that there are no material facts or that the plaintiff cannot meet the burden of proof to establish the required elements of a claim. *Guile v. Ballard*

Cnty. Hosp., 70 Wn. App. 18, 21, 851 P.2d 689 (1993), *review denied*, 122 Wn.2d 1010, 863 P.2d 72. To show that the plaintiff cannot meet the burden of proof, the moving party need not support its position with affidavits and need only point out the lack of evidence in the record. *Id.* at 22. The party opposing summary judgment, on the other hand, must go beyond the pleadings to designate specific facts establishing a genuine issue of material fact for trial. CR 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-26, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the non-moving party "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," then the trial court should grant the motion. *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487 (2012). Speculation, argumentative assertions and conclusory statements are not sufficient to meet the non-moving party's burden. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997), *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 260, 11 P.3d 883 (2000).

B. Statutory Immunity

RCW 4.24.595, entitled Liability Immunity – Emergent placement investigations of child abuse or neglect – Shelter care and other dependency orders provides:

(1) Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

(2) The department of social and health services and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of social and health services are entitled to the same witness immunity as would be provided to any other witness.

At this juncture, regardless of which tort label is applied to her cause of action,⁴ Ms. Fowler's allegations of liability are based on DSHS providing notice of the dependency proceedings to C.C.'s alleged father Edwin Twitchell. On April 20, 2011, Judge Nielson issued Notice and Summons/Order directed to Edwin Twitchell requiring him to appear at the dependency hearing scheduled for June 2, 2011. CP at 42. In addition, RCW 13.34.062 requires DSHS to provide notice to parents whenever a

⁴ Just which tort cause(s) of action are being alleged is difficult to discern. Though the complaint was not specific, in the motion for summary judgment the defendants broadly interpreted the complaint to include six possible causes of action. In response to the motion in the trial court, the plaintiff limited their response to Invasions of Privacy and violation of the medical marijuana statutes. On appeal, Ms. Fowler seems to focus on the privacy claim, but randomly uses other tort terminology. Regardless of the terminology used, the common liability denominator is allegedly "illegal" notice of the dependency proceedings to Mr. Twitchell.

child is taken into custody and placed in shelter care. The statute provides in pertinent part:

(1)(a) Whenever a child is taken into custody by child protective services pursuant to a court order issued under RCW 13.34.050 or when child protective services is notified that a child has been taken into custody pursuant to RCW 26.44.050 or 26.44.056, child protective services shall make reasonable efforts to inform the parent, guardian, or legal custodian of the fact that the child has been taken into custody, the reasons why the child was taken into custody, and their legal rights under this title, including the right to a shelter care hearing, as soon as possible. Notice must be provided in an understandable manner and take into consideration the parent's, guardian's, or legal custodian's primary language, level of education, and cultural issues.

(b) In no event shall the notice required by this section be provided to the parent, guardian, or legal custodian more than twenty-four hours after the child has been taken into custody or twenty-four hours after child protective services has been notified that the child has been taken into custody.

(2)(a) The notice of custody and rights may be given by any means reasonably certain of notifying the parents including, but not limited to, written, telephone, or in person oral notification. If the initial notification is provided by a means other than writing, child protective services shall make reasonable efforts to also provide written notification.

See also RCW13.34.070, requiring issuance of a summons and service of the summons and dependency petition on the parents, guardian, or custodian, and such other persons as appear to the court to be proper or necessary parties to the proceedings. Here, Ms. Van Doren, her supervisor

Ms. Newport and DSHS are entitled to the immunity accorded by RCW 4.24.595 because the notice upon which Ms. Fowler bases her complaint was issued in accordance with Judge Nielsen's order and the two statutes requiring notice to parents in dependency actions.

C. There Is No Evidence of Gross Negligence

In an attempt to avoid application of the immunity provided by RCW 4.24.595, Ms. Fowler makes the bare assertion that providing notice to C.C.'s true father is somehow "gross negligence." Br. of Appellant at 29-30. Ms. Fowler argues that notice should not have been given to Mr. Twitchell, (1) because the Division of Child Support's (DCS) Good Cause Decision prohibited notice to Mr. Twitchell, and (2) because, under RCW 26.26.116, her estranged husband Chris Grisham was the presumed father of CC and should have received notice of the dependency proceedings instead of Mr. Twitchell. Neither allegation is meritorious and neither establishes gross negligence or any other cause of action.

1. The Good Cause Decision Did Not Prohibit Notice of Dependency Proceedings To Edwin Twitchell

It is undisputed that 11 days before her April 17, 2011 arrest, when she applied for public assistance for herself and CC, Ms. Fowler identified Edwin Twitchell as CC's father, CP at 125-1, and claimed that she should not have to assist the Division of Child Support (DCS) in collecting child

support from him because she feared he would attempt to harm her or C.C. It is likewise undisputed that, based on Ms. Fowler's fear of Mr. Twitchell,⁵ DCS approved her claim that she should not have to assist in child support collection until at least October 6, 2011. However, the Good Cause Decision was not an "order" as contended by Ms. Fowler and had no bearing on the dependency proceedings that had been initiated before the decision was issued. The May 13, 2011 decision, issued by DSHS Division of Child Support (DCS) worker Bob Pound stated:

"You do not need to help in support collection. Your claim is approved until 10/06/2011. At that time we will review your case and the current situation for your child's best interest. Based on our decision about the best interest of your child, DCS will close your case and not try to establish paternity, enter a support order, nor collect/enforce the Noncustodial Parent's support obligation."

CP at 125-1.

The DCS decision, issued nearly a month after the dependency proceedings had been commenced and Judge Nielsen's order requiring notice to Edwin Twitchell had been issued, had nothing to do with the dependency proceedings. The decision was limited to the issue of whether the Ms. Fowler had good cause not to cooperate with the Division of Child

⁵ In her brief, Ms. Fowler often refers to Edwin Twitchell as a "murderer" and sex offender. It is undisputed that Edwin Twitchell was a registered sex offender. However, there is nothing in the record indicating Mr. Twitchell was convicted of murder or manslaughter, other than Ms. Fowler's unsupported, inadmissible statements.

Support in its effort to collect child support from Mr. Twitchell and was not an “order” prohibiting notice of the dependency proceedings as Ms. Fowler erroneously contends. Br. of Appellant at 35-37 and *see* WAC 388-422-010-020. Ms. Fowler offers no authority in support of her contention that the Good Cause Decision is superior to Judge Nielsen’s order or the statutes requiring notice of dependency proceedings to parents and other necessary parties. In order to avoid summary judgment on a negligence claim, plaintiff must submit admissible evidence sufficient to establish existence of a duty, breach of duty, proximate cause and damages. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 654, 869 P.2d 1014 (1994); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Negligence is never to be presumed. Rather, a party alleging negligence bears the burden of proving it by substantial evidence. *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006) (citing *Wilson v. Stone*, 71 Wn.2d 799, 802, 431 P.2d 209 (1967)); and *Charlton v. Baker*, 61 Wn.2d 369, 372, 378 P.2d 432 (1963). A scintilla of evidence is insufficient to carry this burden. *Johnson* 135 Wn. App. at 208-09, citing *Wilson*, 71 Wn. 2d at 802; and *Poland v. City of Seattle*, 200 Wash. 208, 216, 93 P.2d 379 (1939). Substantial evidence is “of a character ‘which would convince an

unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’ A verdict cannot be founded on mere theory or speculation.” *Johnson*, 135 Wn. App. at 209, citing *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 818, 733 P.2d 969 (1987) (quoting *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)). Ms. Fowler did not offer any evidence or authority indicating that providing notice breached any legal duty owed to Ms. Fowler or C.C. but even if she had, Judge Nielsen’s order requiring notice to Mr. Twitchell was an intervening superseding cause precluding liability for negligence. *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004) (citing *Tyner v. State Dep’t of Soc. & Health Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000)). To establish gross negligence, the evidence must establish that the defendants failed to exercise even slight care and the care they exercised was substantially or appreciably less than the quantum of care inhering in ordinary negligence. *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 460, 309 P.3d 528, 533 (2013). To overcome summary judgment “the plaintiff must offer something more substantial than mere argument that the defendants breach of care arises to the level of gross negligence.” *Id.* Here, Ms. Fowler offers only conclusory statements and argument and no evidence or authority to

support her claim that it was grossly negligent to provide notice of the dependency proceedings to Mr. Twitchell.⁶

2. RCW 26.26.116 Does Not Apply To Dependency Proceedings

Ms. Fowler's argument for liability, under any theory including gross negligence, is based on the notion that her estranged husband Chris Grisham was the presumed father of C.C. under RCW 26.26.116 and that it was therefore "illegal" to provide C.C.'s alleged father, Edwin Twitchell, with notice of the dependency proceedings. Br. of Appellant at 7, 8, 9, 12, 16, 22, 26, 27, 35, 36, 37, 40. On its face, RCW 26.26.116 is limited to "the context of a marriage or domestic partnership" and is therefore not relevant in dependency proceedings. The statute is entitled "Presumption of parentage *in the context of marriage or domestic partnership*" and provides, in pertinent part:

1) *In the context of a marriage or a domestic partnership*, a person is presumed to be the parent of a child if:

(a) The person and the mother or father of the child are married to each other or in a domestic partnership with each other and the child is born during the marriage or domestic partnership;

⁶ Ms. Fowler argues, in conclusory fashion and for the first time on appeal, that Ms. Van Doren's conduct somehow violated RCW 77.15.098, a statute pertinent to Department of Fish and Wildlife personnel, and/or RCW 50.04.294, which applies to claims for unemployment compensation and/or RCW 9a.36.050, which defines the crime of reckless endangerment. Br. of Appellant at 30-36. These statutes have no application here.

Emphasis supplied.

Here, though Ms. Fowler was still married to Chris Grisham at the time of the dependency proceedings, she was living with her boyfriend Jason Centorbi and had given her child his last name. Nevertheless, it is undisputed that neither Mr. Centorbi nor Mr. Grisham are C.C.'s father and that Ms. Fowler identified Edwin Twitchell as the father when she applied for public assistance and sought to be relieved of the obligation to assist DCS in collecting child support from Mr. Twitchell. CP at 125-1. RCW 13.34.062 and .070 require notice of dependency proceedings to parents and necessary parties and when a child's alleged father is identified by the mother, RCW 26.26.116 is of no help in determining who should get notice of dependency proceedings. Ms. Fowler offers no evidence or authority indicating that providing notice to Mr. Twitchell in these circumstances constituted negligence or gross negligence but argues that her declaration indicating that she did not tell Ms. Van Doren that Edwin Twitchell was C.C.'s father is enough to create a genuine material issue of fact and overcome summary judgment. Whether Ms. Van Doren found out that Mr. Twitchell was C.C.'s true father from Ms. Fowler or some other source is not material, given the statutory requirement that Mr. Twitchell be provided with notice of the dependency proceedings. Nevertheless, the Court need not, and should not accept Ms. Fowler's

assertion that she did not tell Ms. Van Doren that Edwin Twitchell was C.C.'s father, because the statement is so clearly contradicted by the contemporaneous written record, that it is implausible. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007), where the Supreme Court explained:

“[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 247–248 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

In her April 6, 2011 application for public assistance and claim to avoid assisting DCS in collecting child support from Mr. Twitchell, Ms. Fowler identified Edwin Twitchell as the “non-custodial parent” of C.C. CP 125-1. Since Ms. Fowler had already advised DSHS in an application for public assistance that Edwin Twitchell was C.C.'s father, no reasonable juror would believe that she would have told Social Worker Van Doren that someone else was the father. Ms. Fowler's declaration should therefore be disregarded.

D. Causes of Action Raised For The First Time On Appeal Should Be Disregarded

Beginning at page 27 of her brief, Ms. Fowler argues that numerous causes of action are established including Outrage, violation of RCW 26.26.116, violation of RCW 26.44.030, violation of the Privacy Act of 1974, violation of RCW 77.15.098, violation of RCW 50.04.294, violation of RCW 9A.36.050, and violation of RCW 9A.72.020. None of these causes of action are mentioned in the complaint and none were argued in the trial court. In fact, in response to the defendants' motion for summary judgment, Ms. Fowler's counsel in the trial court confined his response brief and argument to invasion of privacy and alleged violation of a statute pertaining to medical marijuana. CP at 105-1. Causes of action, issues and arguments raised for the first time on appeal and not brought to the attention of the trial court at the time of summary judgment may not be considered by the appellate court. RAP 9.12; *Houk v. Best Dev. & Const. Co., Inc.*, 179 Wn. App. 908, 915, 322 P.3d 29 (2014).

E. Assignments of Error Not Addressed In Appellant's Brief Should Be Disregarded

Ms. Fowler alleges 12 separate assignments of error and 24 issues related to assignments of error. However, in her brief she does not specifically or separately address many of the assignments of error, confining her argument to the realm of invasion of privacy caused by

notice of the dependency proceedings to Mr. Twitchell. While the arguments in Ms. Fowler's brief are not specifically related to assignments of error, her central arguments, read broadly, seem to be related to assignments of error one through six, with no argument or citation of authority submitted in support of assignments seven through twelve. "The failure of an appellant to provide argument and citation of authority in support of an assignment of error precludes appellate consideration of an alleged error." *Prostov v. State, Dep't of Licensing*, 186 Wn. App. 795, 823, 349 P.3d 874, 888 (2015). It is requested that the Court disregard and not consider assignments of error and/or issues that are not supported by citation to the record, argument or citation of authority. *Id.*; *see also Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237, 242, *review denied*, 181 Wn.2d 1009, 335 P.3d 940 (2014).

V. REQUEST FOR ATTORNEY FEES ON APPEAL

Based on Ms. Fowler's disclosures to DSHS, CP at 37-38; CP 125-1 and in her brief at 42-43, it is beyond debate that Edwin Twitchell, not Chris Grisham, is the father of C.C. It is undisputed that, before dependency proceedings were commenced, Ms. Fowler had advised DSHS that Edwin Twitchell was C.C.'s father. The law is clear, under RCW 13.34.062, .070, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, that DSHS must provide

notice to parents whose parental rights are subject to limitation or termination in juvenile court proceedings. *In re Dependency of K.N.J.*, 171 Wn.2d 568, 574, 257 P.3d 522, 526 (2011), *as modified on denial of reconsideration* (Aug. 2, 2011); *In re Martin*, 3 Wn. App. 405, 410, 476 P.2d 134, 137 (1970).

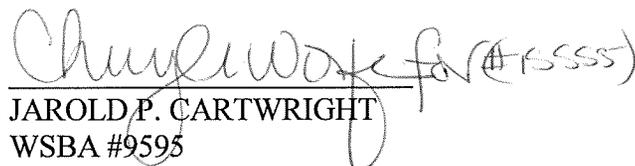
Though it is beyond debate that DSHS was required to provide Mr. Twitchell with notice of the dependency proceedings pertaining to C.C., Ms. Fowler argues, without citing any supporting authority, that it was tortious for DSHS to do so, because she was married to another man whom she admits was not C.C.'s father. Her argument is absurd, without legal merit and patently frivolous. An appeal is frivolous if there are “no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility’ of success.” *West v. Thurston Cty.*, 169 Wn. App. 862, 868, 282 P.3d 1150, 1153 (2012) (internal citations omitted). Ms. Fowler’s appeal meets the criteria in *West* and Pursuant to RAP 18.9(a), Respondents request that the Court order Ms. Fowler to pay Respondents’ attorney fees as a sanction and/or compensatory damages for filing a frivolous appeal.

VI. CONCLUSION

For all of the reasons set forth above, DSHS, Kim Van Doren and Angela Newport request that the Court affirm the order granting summary judgment and award attorney fees on appeal.

RESPECTFULLY SUBMITTED this 31 day of August, 2016.

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PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31 day of August, 2016, at Spokane, Washington.



NIKKI GAMON