

NO. 71317-5-I

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

DAN ALBERTSON, as Court Appointed Limited Guardian for L.O. and  
T.J., and TERESA JOHNSON, individually, Appellants

v.

PIERCE COUNTY, Respondent

**RESPONDENT'S BRIEF**

MARK LINDQUIST  
Prosecuting Attorney

By  
MICHELLE LUNA-GREEN  
DANIEL R. HAMILTON  
Deputy Prosecuting Attorneys  
Attorneys for Pierce County

955 Tacoma Avenue South  
Suite 301  
Tacoma, WA 98402  
PH: (253) 798-6732

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAY 14 PM 1:16

ORIGINAL

**Table of Contents**

	<u>Page</u>
I. STATEMENT OF ISSUES .....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	6
A. JOHNSON HAS NO CLAIM AGAINST THE COUNTY FOR HER OWN CHILDHOOD ABUSE BY HER FATHER 18 YEARS AGO .....	9
B. NO PLAINTIFF HAS A NEGLIGENT INVESTIGATION CLAIM AGAINST THE COUNTY FOR FINCH'S ABUSE OF L.O. AND T.J. ....	12
1. Pierce County Breached No Duty Owed Plaintiffs Individually .....	12
a. No Common Law Claim Exists for Negligent Investigation.....	13
b. No RCW 26.44 Duty Was Owed to L.O. or T.J. as Individuals Because They Were Not Subjects of a Child Abuse Report.....	16
c. Plaintiffs Were Not Forseeable Victims as Matter of Law .....	23
d. No Proximate Causation Between 1996 Investigation and Abuse That Occurred More Than a Decade Later .....	28
1) 1996 Investigation Was Not Shown a "Cause in Fact" of the Abuse of L.O. and T.J. Over a Decade Later.....	30
2) 1996 Investigation Was Not a "Legal Cause" of the Abuse of L.O. and T.J. by Their Grandfather Over a Decade Later .....	35
IV. CONCLUSION.....	37

## Table of Authorities

	<u>Page</u>
<b>Cases</b>	
<i>Aba Sheikh v. Choe</i> , 156 Wn.2d 441, 577, 128 P.3d 574 (2006).....	14, 15
<i>Alexander v. County of Walla Walla</i> , 84 Wn.App. 687, 692-93, 929 P.2d 1182 (1997).....	13
<i>Alger v. Mukilteo</i> , 107 Wn.2d 541, 545, 730 P.2d 1333 (1987).....	29
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 252 (1986).....	8
<i>Babcock v. Mason County Fire Dist. No. 6</i> , 144 Wn.2d 774, 785, 30 P.3d 1261 (2001).....	14
<i>Bailey v. Town of Forks</i> , 108 Wn. 2d 262, 271, 753 P.2d 523 (1987).....	23
<i>Bishop v. Miche</i> , 137 Wash.2d 518, 530, 973 P.2d 465 (1999).....	13
<i>Blackwell v. State Dept. of Social and Health Services</i> , 131 Wn.App. 372, 376, 127 P.3d 752 (2006).....	20, 21
<i>Bratton v. Welp</i> , 145 Wn.2d 572, 576, 39 P.3d 959 (2002).....	13
<i>Brownfield v. City of Yakima</i> , _ Wn.App. _, 316 P.3d 520, 533 (2014).....	7
<i>Cameron v. Murray</i> , 151 Wn.App. 646, 652-54, 214 P.3d 150 (2009).....	27
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322 (1986) .....	7, 8
<i>Charbonneau v. Wilbur Ellis Co.</i> , 9 Wn.App. 474, 477, 512 P.2d 1126 (1973).....	33

<i>Colbert v. Moomba Sports, Inc.</i> , 163 Wn.2d 43, 51, 176 P.3d 497 (2008) .....	29
<i>Couch v. Dep't of Corr.</i> , 113 Wn.App. 556, 564, 54 P.3d 197 (2002), <i>rev. denied</i> , 149 Wn.2d 1012 (2003) .....	15
<i>Davidson v. Seattle</i> , 43 Wn.App. 569, 575, 719 P.2d 569 (1986) .....	31
<i>Devellis v. Lucci</i> , 697 N.Y.S.2d 337, 339 (App. Div. 1999) .....	36
<i>Dever v. Fowler</i> , 63 Wn.App. 35, 816 P.2d 1237 (1991) .....	16
<i>Dewey v. Tacoma Sch. Dist. 10</i> , 95 Wn.App. 18, 23, 974 P.2d 847 (1999) .....	11
<i>Donaldson v. Seattle</i> , 65 Wn.App. 661, 671, 905 P.2d 928, <i>rev. dismissed</i> , 120 Wn.2d 1031 (1993) .....	16
<i>Ducote v. State Dept. of Social and Health Servs.</i> , 167 Wn. 2d 697, 697, 222 P.3d 785 (2009) .....	21
<i>Estate of Bordon ex rel. Anderson v. State Dept. of Corrections</i> , 122 Wn.App. 227, 241-42, 95 P.3d 764, <i>rev. denied</i> , 154 Wn.2d 1003 (2004) .....	10, 32
<i>Estate of Davis v. Dep't of Corr.</i> , 127 Wn.App. 833, 841, 113 P.3d 487 (2005) .....	15
<i>Fabre v. Town of Ruston</i> , _ Wn.App. _, 2014 WL 1064804 (2014) .....	13
<i>Fondren v. Klickitat Cy.</i> , 79 Wn.App. 850, 853 & 863, 905 P.2d 928 (1995) .....	16
<i>Garcia v. State, Dept. of Transp.</i> , 161 Wn.App. 1, 607, 270 P.3d 599 (2011) .....	32
<i>Gmerek v. Rachlin</i> , 390 So.2d 1230, 1231 (Fla.App. 1980) .....	35
<i>Granite Beach Holdings, LLC v. State ex rel. DNR</i> , 103 Wn.App. 186, 195, 11 P.3d 847 (2000) .....	29, 34

<i>Haberman v. Washington Public Power Supply System</i> , 109 Wn. 2d 107, 121, 750 P. 2d 254 (1987).....	6
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 483, 824 P.2d 483 (1992).....	26
<i>Hansen v. Washington Natural Gas Co.</i> , 95 Wn.2d 773, 779, 632 P.2d 504 (1981).....	10
<i>Harbeson v. Parke-Davis, Inc.</i> , 98 Wn.2d 460, 656 P.2d 483 (1983).....	24
<i>Hartley v. State</i> , 103 Wn.2d 768, 777–79, 698 P.2d 77 (1985).....	28, 29, 35
<i>Hostetler v. Ward</i> , 41 Wn. App. 343, 361, 363-64, 704 P.2d 1193 (1985).....	15
<i>Hungerford v. State Dept. of Corrections</i> , 135 Wn.App. 240, 255, 139 P.3d 1131 (2006).....	36
<i>Hunsley v. Giard</i> , 87 Wn.2d 424, 435-36, 553 P.2d 1096 (1976).....	23
<i>Impecoven v. Department of Revenue</i> , 120 Wn. 2d 357, 365, 841 P.2d 752 (1992).....	6
<i>In re Welfare of Ian Garth Frederiksen</i> , 25 Wn.App. 726, 610 P.2d 371 (1980).....	19
<i>Janaszak v. State</i> , 173 Wn.App. 703, 297 P.3d 723 (2013).....	18, 19
<i>Johanson v. King County</i> , 7 Wn.2d 111, 122, 109 P.2d 307 (1941).....	31
<i>Judy v. Hanford Environmental Health Foundation</i> , 106 Wn.App. 26, 34, 22 P.3d 810 (2001).....	6
<i>Kim v. Budget Rent A Car Sys.</i> , 143 Wn.2d 190, 205, 15 P.3d 1283 (2001).....	28, 29, 35, 37
<i>Kristjanson v. Seattle</i> , 25 Wn.App. 324, 326, 606 P.2d 283 (1980).....	31

<i>Lahey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 929, 296 P.3d 860 (2013).....	14
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975) .....	29
<i>Las v. Yellow Front Stores, Inc.</i> , 66 Wn.App. 196, 198, 831 P.2d 744 (1992).....	8
<i>Lewis v. Whatcom County</i> , 136 Wn.App. 450, 452, 149 P.3d 686 (2006).....	18, 19, 20
<i>Lundberg v. Coleman</i> , 115 Wn.App. 172, 180, 60 P.3d 595 (2002).....	11
<i>Lybbert v. Grant County</i> , 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).....	7
<i>Lynn v. Labor Ready, Inc.</i> , 136 Wn. App. 295, 311, 151 P. 3d 201 (2006).....	10, 29, 32
<i>M.W. v. Department of Social and Health Services</i> , 149 Wn.2d 589, 602, 70 P.3d 954 (2003).....	17, 19, 22
<i>Marsh v. Commonwealth Land Title Ins. Co.</i> , 57 Wn.App. 610, 622, 789 P.2d 792 (1990).....	31
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 608, 257 P.3d 532 (2011).....	24
<i>Miller v. Likins</i> , 109 Wn.App. 140, 148, 34 P. 3d 835 (2001).....	31
<i>N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints</i> , 175 Wn.App. 517, 530, 307 P.3d 730 (2013).....	27
<i>Ortblad v. State</i> , 85 Wn.2d 109, 111, 530 P.2d 635 (1975).....	6
<i>Osborn v. Mason County</i> , 157 Wn.2d 18, 27, 134 P.3d 197 (2006).....	passim

<i>Pacific Northwest Shooting Park Ass'n v. City of Sequim</i> , 158 Wn.2d 342, 144 P.3d 276 (2006).....	11
<i>Petcu v. State</i> , 121 Wn.App. 36, 56 & 58, 86 P.3d 1234 (2004).....	18
<i>Pettis v. State</i> , 98 Wn.App. 553, 560, 990 P.2d 453 (1999).....	21
<i>Pratt v. Thomas</i> , 80 Wn.2d 117, 119, 491 P.2d 1285 (1972).....	29, 34
<i>Reese v. Stroh</i> , 128 Wn.2d 300, 907 P.2d 282 (1995).....	31
<i>Rodrigues v. State</i> , 52 Haw. 156, 472 P.2d 509, 512 (1970).....	23
<i>Rodriguez v. Perez</i> , 99 Wn.App. 439, 445, 994 P.2d 874 (2000).....	21
<i>Rubenser v. Felice</i> , 58 Wn.2d 862, 866, 365 P.2d 320 (1961).....	6
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn.App. 170, 177, 817 P.2d 861 (1991).....	31
<i>Schooley v. Pinch's Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	21
<i>Seiber v. Poulsbo Marine Center, Inc.</i> , 136 Wn.App. 731, 736, 150 P.3d 633 (2007).....	8
<i>Shepard v. Mielke</i> , 75 Wn.App. 201, 206, 877 P.2d 220 (1994).....	26
<i>Sligar v. Odell</i> , 156 Wn.App. 720, 731, 233 P.3d 914 (2010).....	8
<i>Spellmeyer v. Weyerhaeuser Corp.</i> , 14 Wn.App. 642, 647 n. 3, 544 P.2d 107 (1975).....	37
<i>Steinbock v. Ferry County Public Utility Dist. No. 1</i> , 165 Wn.App. 479, 485, 269 P.3d 275 (2011).....	7
<i>Sundberg v. Evans</i> , 78 Wn.App. 616, 621, 897 P.2d 1285 (1995).....	7
<i>Taggart v. State</i> , 118 Wash.2d 195, 218, 822 P.2d 243 (1991).....	13

<i>Taylor v. Stevens County</i> , 159, 163, 759 P.2d 447 (1988).....	13
<i>Tender v. Nordstrom</i> , 84 Wn.App. 787, 791, 929 P.2d 1209 (1997).....	7
<i>Theonnes v. Hazen</i> , 37 Wn.App. 644, 649, 681 P.2d 1284 (1984).....	34
<i>Torres v. City of Anacortes</i> , 97 Wn.App. 64, 74, 981 P.2d 891 (1999), <i>rev. denied</i> , 140 Wn.2d 1007 (2000) .....	16
<i>Tyner v. State Dept. Of Social and Health Servs.</i> , 141 Wn.2d 68, 77, 1 P.3d 1148 (2000).....	17, 21
<i>Vergeson v. Kitsap County</i> , 145 Wn.App. 526, 535, 186 P.3d 1140 (2008).....	14
<i>Walker v. King County</i> , 630 F.Supp.2d 1285, 1295 (W.D.Wash. 2009).....	18, 20
<i>Walters v. Hampton</i> , 14 Wn.App. 548, 550, 543 P.2d 648 (1975).....	33
<i>Washington Federal Sav. and Loan Ass'n v. McNaughton Group</i> , __ Wn.App. __, 319 P.3d 805, 808 (2014).....	7
<i>Webstad v. Stortini</i> , 83 Wn.App. 857, 874, 924 P.2d 940 (1996).....	36
<i>Whitlock v. Pepsi Americas</i> , 681 F. Supp.2d 1123, 1125-28 (N.D.Cal., 2010).....	24
<i>Yonker By and Through Snudden v. State Dept. of Social and Health Services</i> , 85 Wn.App. 71, 79, 81, 930 P.2d 958 (1997).....	20, 21
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 225, 770 P.2d 182 (1989).....	7, 8

**Statutes**

42 U.S.C. § 1983..... 1  
RCW 4.16.340 ..... 5, 9, 11, 12  
RCW 4.16.340(1)(a) ..... 12  
RCW 4.24.010 ..... 2  
RCW 26.44 ..... passim  
RCW 26.44.010 ..... 22  
RCW 26.44.050 ..... 18, 23  
RCW 66.44.270(1)..... 21  
RCW 66.44.320 ..... 21

**Other Authorities**

4 K. Tegland, *Wash. Prac.*: Rules Practice CR 56, at 413 (6th ed. 2013).. 6  
F. Harper & F. James *Torts* § 18.2 at 1019 (1956)..... 10  
Restatement (Second) of Torts § 395 (1965)..... 37  
Restatement (Second) of Torts § 433 (1965)..... 36

**Rules**

CR 12(b)(6)..... 4, 5, 6  
CR 56 ..... 5, 6, 29  
ER 703 ..... 31

## **I. STATEMENT OF ISSUES**

A. Was Teresa Johnson's claim against Pierce County for her own childhood abuse by her father 18 years ago properly dismissed where that claim was not made in the complaint, proximate cause was absent because her abuse ended before the Sheriff learned of the allegation, and the statute of limitations had expired over a decade before she sued the County?

B. Were claims of all plaintiffs against Pierce County for the abuse of L.O. and T.J. by their grandfather properly dismissed where the County owed them no duty as individuals, their harm was unforeseeable because they would not even be born until years after the allegedly negligent 1996 investigation, and the County was not a proximate cause of their harm?

## **II. STATEMENT OF THE CASE**

On January 5, 2012, plaintiff Dan Albertson as "limited guardian" for "L.O." and "T.J.," filed suit in Pierce County Superior Court against the Washington State Department of Social and Health Services and its placement officer. The suit asserted claims of "42 U.S.C. 1983-State Created Danger," as well as "Common Law Negligence" for the State's "failure to properly investigate," "negligently conducting a home assessment regarding the placements of L.O. and T.J., and negligently monitoring the placements of L.O. and T.J." *See* CP 10-13. Specifically, plaintiff alleged L.O. and T.J. were sexually abused after the State and its agent placed

them with their grandfather, Edward Finch. The State did so despite the fact in 1996 it had received a report Finch had sexually abused his daughters and its "own records indicate that the 1996 allegations against Finch were not fully or properly investigated: 'Unable to complete invest – No finding.'" CP 12. On April 5, 2013, the State settled for \$3 million. CP 40.

On July 25, 2013, Albertson then sued the "Pierce County Sheriff's [sic] Department" in King County Superior Court now alleging it caused the aforementioned sexual abuse by Finch. *See* CP 150. On August 14, 2013, the complaint was amended to add Teresa Johnson, the mother of L.O. and T.J., as an additional plaintiff based on the new allegation under "RCW 4.24.010" that, but for the Sheriff's Department, "Ms. Johnson's children would not have been raped over a period years [sic] by Finch." *See* CP 162, 165. Otherwise, both the original and amended King County complaint claimed that in July of 1996,<sup>1</sup> more than 17 years earlier, a Pierce County Sheriff's detective received a referral from

---

<sup>1</sup> Contrary to Appellant's Brief, the record contains no evidence CPS sent the referral to the Pierce County Sheriff's Department on June 19, 1996. AB 2. Instead, State, Tacoma Police Department, and the Sheriff's records show the CPS referral was only dated June 19, 1996, and had been first sent by CPS to Tacoma Police and only later forwarded to the Sheriff on July 17, 1996. *See* CP 72-76. *See also* CP 11, 123-27. The Sheriff's detective then contacted CPS but neither the reporting witness nor the victims responded to his repeated efforts – *i.e.*, by 1) attempting to contact the complaining witnesses in person; 2) leaving a card at their home; and 3) sending a letter requesting they respond – so the matter was "placed in an inactive file pending contact or further evidence." CP 76. Also contrary to Appellants' Brief, *see* AB 1-2, 4, 11, 14-15, 19, the record contains no evidence the County failed to report back to CPS, but plaintiffs' own complaint against the State affirmatively states that CPS's files noted it knew: 'Unable to complete invest - No finding.'" CP 12.

the State Child Protective Services (hereinafter "CPS") "pertaining to allegations of child rape perpetrated by ... Finch against his children, Teresa and Veronica Johnson." CP 151, 164. The pleadings continued: "Years later, Teresa Johnson became the mother of L.O. [in "2000"] and T.J. [in "1999"]," then "lost custody of L.O. and T.J." who – "after a number of failed placements" – were "placed into the foster care system" in 2007, and that later still the State placed them with their grandfather Finch. CP 150, 152, 162, 164.

Both complaints also included the conclusory allegation that had the Sheriff's Department taken 17 years earlier – long before the girls were born – "reasonable steps to investigate and bring about a prosecution" of Finch based on the referral for Johnson's abuse pursuant to its "statutory obligation to investigate child abuse" under "RCW Chapter 26.44," then "[a]s a result, L.O. and T.J." would not have been harmed over a decade later. CP 153, 165. Though both versions of the complaint alleged a supposedly "NEGLIGENT INVESTIGATION" was conducted by the Sheriff, *id.*, neither alleged Johnson had been abused after the 1996 referral had been received by the Sheriff's Department. Indeed, in the earlier suit against the State Johnson submitted sworn testimony that she had been last abused by father in June 1996 when she was "approximately 15" – *i.e.*, before the CPS report was received by the Pierce County Sheriff's De-

partment in July 1996. CP 113, 115. *See also* CP 57, 61.

On September 19, 2013, the Sheriff's Department timely noted its CR 12(b)(6) motion to dismiss with prejudice. CP 174. On September 24, 2013, plaintiffs responded by noting a partial summary judgment motion on the issue of "Breach of Statutory Duty" that relied for its factual assertions only on the unauthenticated attachments to their amended complaint. *See* CP 1-5, 176. Defendant opposed plaintiffs' summary judgment and argued instead that the Sheriff's Department was "the only party actually entitled to summary judgment" because: "(1) Plaintiffs have not and cannot present admissible evidence in support of their motion; (2) Plaintiffs were owed no statutory duty as a matter of law[;] (3) Plaintiffs were not foreseeable victims as a matter of law[; and] (4) Pierce County Sheriff's Office is not a legal entity which may be sued." CP 18. On November 4, 2013, plaintiffs sought to cure one of their complaint's defects through a motion for leave to file a second amended complaint that would substitute "Pierce County" as the named defendant instead of its "Sheriff's Department." *See* CP 178, 180. On November 6, 2013, the County filed a CR 12(b)(6) motion to dismiss because, among other things, there still was no duty, foreseeability, or proximate cause by the County for Finch's abuse of L.O. and T.J. *See* CP 26.

In order to address the lack of factual evidence for their partial

summary judgment motion, plaintiffs' November 12, 2013, reply brief for the first time relied on declarations regarding the issue of breach by both Johnson and their previously undisclosed expert, Sue Peters, and asked they also be considered in opposition to the County's CR 12(b)(6) motion – which did not concern the issue of breach – and argued that by doing so plaintiffs were unilaterally "converting the [County's] original CR 12(b)(6) motion to dismiss to a motion for summary judgment under CR 56." CP 47, 57, 62, 196. Plaintiffs also asserted for the first time a new claim outside any of their previous complaints; *i.e.*, that Johnson was "owed a duty, too, as a victim 'suspected' of being abused." CP 49. On November 14, 2013, the County filed its CR 12(b)(6) reply brief noting, among other things, that the newly minted Johnson claim was absent from all the complaints – presumably because "any 1996 claim was barred long ago by the statute of limitations, *see* RCW 4.16.340 (three year statute of limitations for 'childhood sexual abuse')" and because "she has sworn under oath her abuse ended in June 1996" and the "referral was not received from DSHS until July 1996." CP 102. Accordingly, the County moved to strike the two declarations on numerous evidentiary and procedural grounds. *See* CP 103-109.

On December 2, 2013, the trial court issued orders: 1) granting plaintiffs leave to file their second amended complaint, CP 129, 131; 2)

denying the County's motion to strike, CP 132; 3) denying plaintiffs' motion for partial summary judgment, CP 131, 140; and 4) granting the County's motion and dismissing the claims of all plaintiffs. CP 131, 134, 140. On December 13, 2013, plaintiffs filed a notice of appeal for "the trial court's orders dated November 27, 2013 [sic] in relation to the dismissal of their claims" only. CP 141.

### III. ARGUMENT

Plaintiffs requested the trial court convert the County's CR 12(b)(6) motion to dismiss into one for summary judgment under CR 56 due to plaintiffs' declarations, *see* CP 47, and the trial court did so over the County's objection.<sup>2</sup> CP 98, 132. Because the trial court treated the County's motion as one for summary judgment at plaintiffs' request and then dismissed plaintiffs' claims, *see, e.g., Sundberg v. Evans*, 78 Wn.App. 616,

---

<sup>2</sup> Plaintiffs' submissions could not unilaterally convert the County's CR 12(b)(6) motion over its objection. *See Haberman v. Washington Public Power Supply System*, 109 Wn. 2d 107, 121, 750 P. 2d 254 (1987) (though "court considered matters extraneous to the complaints, it ruled as a matter of law that plaintiffs and intervenors had not stated a claim and did not make any determination of facts in dispute" so "standard of review remains that required by CR 12(b)(6)"); *Ortblad v. State*, 85 Wn.2d 109, 111, 530 P.2d 635 (1975) (CR 12(b)(6)) motion not converted since "basic operative facts are undisputed and the core issue is one of law"); *Judy v. Hanford Environmental Health Foundation*, 106 Wn.App. 26, 34, 22 P.3d 810 (2001) (same). However, the trial court could dismiss plaintiffs' claims pursuant to CR 56 on the ground their summary judgment showed it was the County instead that was entitled to dismissal. *See, e.g., Impecoven v. Department of Revenue*, 120 Wn. 2d 357, 365, 841 P.2d 752 (1992) ("Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party"); *Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961) (same); 4 K. Tegland, *Wash. Prac.: Rules Practice* CR 56, at 413 (6th ed. 2013) (our Courts "have long held that summary judgment may be granted in favor of the nonmoving party if it becomes clear that he or she is entitled thereto").

621, 897 P.2d 1285 (1995) (plaintiffs could not object on appeal where they "agreed to the court's summary resolution"), the standard of review in this appeal is that for summary judgment. Hence, "the standard of review is de novo and the appellate court performs the same inquiry as the trial court." *Brownfield v. City of Yakima*, 178 Wn.App. 850, 316 P.3d 520, 533 (2014) (citing *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)). See also *Washington Federal Sav. and Loan Ass'n v. McNaughton Group*, \_\_\_ Wn.App. \_\_\_, 319 P.3d 805, 808 (2014) ("This court reviews summary judgment de novo"). The Court therefore "may affirm on any basis supported by the record." *Steinbock v. Ferry County Public Utility Dist. No. 1*, 165 Wn.App. 479, 485, 269 P.3d 275 (2011).

A defendant moving for summary judgment meets its burden merely "by 'showing' – that is pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). See also *Tender v. Nordstrom*, 84 Wn.App. 787, 791, 929 P.2d 1209 (1997) (defendant's burden on summary judgment "may be met by pointing out that there is an absence of evidence in support of the nonmoving party's case"). It is well settled that summary judgment should then be granted where in response a plaintiff "fails to make a showing sufficient to establish the existence of an element essen-

tial to that party's case, and on which that party will bear the burden of proof at trial." *Young*, 112 Wn.2d at 225 (citing *Celotex Corp.*, 477 U.S. at 322). See also *Sligar v. Odell*, 156 Wn.App. 720, 731, 233 P.3d 914 (2010) (where a "plaintiff fails to present evidence to prove each essential element of the negligence claim, then summary judgment for the defendant is proper"). Plaintiffs do not meet their burden just by presenting some evidence on a claim because a "scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (emphasis added). See also *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn.App. 731, 736, 150 P.3d 633 (2007) ("if ... the non-moving party, can only offer a 'scintilla' of evidence, evidence that is 'merely colorable,' or evidence that 'is not significantly probative,' the plaintiff will not defeat the motion").

In other words:

A defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. In response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists.

*Las v. Yellow Front Stores, Inc.*, 66 Wn.App. 196, 198, 831 P.2d 744

(1992). Here, as the County "point[s] out" below, there was no evidence – much less "sufficient" evidence – of the essential elements of plaintiffs' claims that would support a verdict in their favor.

A. JOHNSON HAS NO CLAIM AGAINST THE COUNTY FOR HER OWN CHILDHOOD ABUSE BY HER FATHER 18 YEARS AGO

Apart from the "mother's claim ... connected to that of the children," the trial court held any separate Johnson "individual claim would be legally barred by the statute of limitations." CP 134. On appeal plaintiffs' brief contests dismissal of Johnson's claim for her own childhood abuse by her father that ended 18 years ago, based on its conclusory assertions that: 1) Johnson's declaration supposedly showed "she ... continued to be molested based upon the bungled investigation by Pierce County;" 2) the statute of limitations issue supposedly "was never even briefed, raised or argued before the trial court;" and 3) her claim was "preserved under the childhood sex abuse tolling statute: RCW 4.16.340." AB 9, 19-20. None of these cursory assertions withstand examination.

First, neither Johnson's testimony nor any other evidence of record asserts she "continued to be molested based upon the bungled investigation by Pierce County" as her brief now claims. To the contrary, Johnson's sworn testimony repeatedly affirms her father last abused her on June 24, 1996, when she was "approximately 15." See CP 57, 61, 113, 115. The

records of the State, Tacoma Police Department, and Pierce County Sheriff confirm the CPS referral at issue was addressed to Tacoma Police and not received by the Sheriff's Department until July 17, 1996. See CP 11, 72-76, 123-27. Because any abuse of Johnson stopped in June 1996, before the Sheriff's Department received CPS's referral in July 1996, the County could not have been the *ex post facto* cause of abuse that already had occurred and ended. As our state Supreme Court holds: "Proof of negligence in the air, so to speak, will not do," because "there also must be a causal connection between the negligence arising from the violation of the ordinance and the [event] itself before a cause of action arises" so that "when, as here, the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion, [cause in fact] is a question of law for the court" and grounds for summary judgment. *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 779, 632 P.2d 504 (1981) (granting summary judgment) (*quoting* F. Harper & F. James Torts § 18.2 at 1019 (1956)). See, e.g., also *Estate of Bordon ex rel. Anderson v. State Dept. of Corrections*, 122 Wn.App. 227, 241-42, 95 P.3d 764, *rev. denied*, 154 Wn.2d 1003 (2004) (suit dismissed because no proximate cause that death was result of convict's release); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311, 151 P. 3d 201 (2006) (dismissal because to "prove cause-in-fact, [plaintiff] had to be able to show that, but

for [defendant's] breach of duty, Owens would not have killed Cordova" but he "cannot meet this burden").

Second, the record confirms the statute of limitations was "briefed, raised[, and] argued before the trial court." None of plaintiffs' many complaints asserted a right to recover for Johnson's childhood abuse by her father or even claimed Johnson actually was abused – much less abused after the referral was received by the Sheriff. *See* CP 10, 117, 150, 162, 165. Johnson's new cause of action for her own abuse by her father 18 years ago was first raised only in plaintiffs' brief opposing the County's dismissal motion. *See* CP 49. As a matter of law: "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *See Lundberg v. Coleman*, 115 Wn.App. 172, 180, 60 P.3d 595 (2002) (*quoting Dewey v. Tacoma Sch. Dist. 10*, 95 Wn.App. 18, 23, 974 P.2d 847 (1999)). *See also Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006) (refusing to consider claim not raised in complaint). In any case, also contrary to the assertions of Appellant's Brief, the County's reply brief in the trial court expressly argued not only that Johnson's "new theory" came too late, but had not been asserted in the complaint because "any 1996 claim was barred long ago by the statute of limitations" and specifically cited "RCW 4.16.340

(three year statute of limitations for 'childhood sexual abuse')." *See* CP 102.

Third, Johnson nowhere explains how her claim for her childhood abuse could be "preserved under the childhood sex abuse tolling statute: RCW 4.16.340." Instead, RCW 4.16.340(1)(a) provides: "All claims or causes of action based on intentional conduct brought by any person for recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced" within "three years of the act alleged to have caused the injury or condition" and that the limitation period begins to run once "the child reaches the age of eighteen years." Here, as shown above, Johnson has repeatedly sworn under oath that she was last abused by her father on June 24, 1996, when she was "approximately 15." *See* CP 57, 61, 113, 115. Hence, the statute of limitations for any such claim expired, at the latest, six years later in 2002 – over a decade before she was named as an afterthought in the first amended complaint of August 2013.

B. NO PLAINTIFF HAS A NEGLIGENT INVESTIGATION CLAIM AGAINST COUNTY FOR ABUSE OF L.O. AND T.J. BY FINCH

1. Pierce County Breached No Duty Owed Plaintiffs Individually

The threshold determination in any negligence action "is a question of law; that is, whether a duty of care is owed by the defendant to the

plaintiff." *Alexander v. County of Walla Walla*, 84 Wn.App. 687, 692-93, 929 P.2d 1182 (1997) (citing *Taylor v. Stevens County*, 159, 163, 759 P.2d 447 (1988)). The public duty doctrine precludes any duty to plaintiffs individually and thus required dismissal of their claims against the County.

a. No Common Law Claim Exists For Negligent Investigation

Under the public duty doctrine, "recovery from a municipal corporation is possible only when the plaintiff can show that the duty breached was owed to her individually, rather than to the public in general." *Bratton v. Welp*, 145 Wn.2d 572, 576, 39 P.3d 959 (2002) (emphasis added). See also *Fabre v. Town of Ruston*, \_\_ Wn.App. \_\_, 321 P.3d 1208, 1213 (2014) ("public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular and was not the breach of a duty owed to the public in general") (emphasis added). As our Supreme Court explains:

The public duty doctrine simply reminds us that a public entity – like any other defendant – is liable for negligence only if it has a statutory or common law duty of care. And its "exceptions" indicate when a statutory or common law duty exists. "The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff." *Taggart [v. State]*, 118 Wash.2d [195,] 218, 822 P.2d 243 [(1991)]. See also *Bishop v. Miche*, 137 Wash.2d 518, 530, 973 P.2d 465 (1999) ("Exceptions to the doctrine generally embody traditional negligence principles and may be used as focusing tools to determine whether a duty is owed"). In other

words, the public duty doctrine helps us distinguish proper legal duties from mere hortatory "duties."

*Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). Thus: "Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general." *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001) ("no liability may be imposed for a public official's negligent conduct unless it is shown that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one)"). *See also Aba Sheikh v. Choe*, 156 Wn.2d 441, 577, 128 P.3d 574 (2006) ("under the public duty doctrine, the State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general."); *Vergeson v. Kitsap County*, 145 Wn.App. 526, 535, 186 P.3d 1140 (2008) ("under the public duty doctrine, a government entity is not liable for a public official's negligence unless the plaintiff shows that the government breached a duty owed to her individually rather than to the public in general"). Indeed, in *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 929, 296 P.3d 860 (2013), our Supreme Court unanimously reiterated that it will not allow "subverting our public duty doctrine" or attempting

"an end-run around this Court's law on the public duty doctrine."

Here, plaintiffs sought to impose liability on the government for a crime committed against L.O. and T.J. by their grandfather because they claim that – years before they were born – the Sheriff's Department was negligent in its investigation of a CPS referral concerning other children. *See* CP 117. However, because the "duties of public officers are normally owed only to the general public," as a matter of law "a breach of such a duty will not support a cause of action by an individual injured thereby." *Hostetler v. Ward*, 41 Wn. App. 343, 361, 363-64, 704 P.2d 1193 (1985). Hence, under the common law a public official "has no duty to prevent a third person from causing physical injury to another." *Couch v. Dep't of Corr.*, 113 Wn.App. 556, 564, 54 P.3d 197 (2002), *rev. denied*, 149 Wn.2d 1012 (2003) (claim for wrongful death of murder victim dismissed). *See, also Aba Sheikh*, 156 Wn.2d at 448 (verdict on claim government should have prevented assault is reversed because "our common law imposes no duty to prevent a third person from causing physical injury to another"); *Estate of Davis v. Dep't of Corr.*, 127 Wn.App. 833, 841, 113 P.3d 487 (2005) (wrongful death claim dismissed since there "is no general duty to protect others from the criminal acts of a third party").

Failure to properly investigate is not a basis for suit because:

The relationship of police officer to citizen is too general to create an actionable duty. Courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual. [Citation omitted.] Courts frequently deny recovery for injuries caused by the failure of police personnel to ... investigate properly or to investigate at all. [Citations omitted.]

*Torres v. City of Anacortes*, 97 Wn.App. 64, 74, 981 P.2d 891 (1999), *rev. denied*, 140 Wn.2d 1007 (2000). *See also Fondren v. Klickitat Cy*, 79 Wn.App. 850, 853 & 863, 905 P.2d 928 (1995) (court erred in failing to dismiss because "claim for negligent investigation is not cognizable under Washington law"); *Donaldson v. Seattle*, 65 Wn.App. 661, 671, 905 P.2d 928, *rev. dismissed*, 120 Wn.2d 1031 (1993) (the "overall law enforcement function ... does not generate a right to sue for negligence" in murder by a third party). One "reason courts have refused to create a cause of action for negligent investigation is that holding investigations liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement." *Dever v. Fowler*, 63 Wn.App. 35, 45, 816 P.2d 1237 (1991).

- b. No RCW 26.44 Duty Was Owed to L.O. or T.J. as Individuals Because They Were Not Subjects of a Child Abuse Report

Plaintiffs attempted to bring themselves within an exception to this rule by alleging the Sheriff "had a statutory obligation to investigate child abuse" pursuant to "RCW Chapter 26.44." CP 119. As a matter of law,

however, the test for this implied statutory action is: "[F]irst, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Tyner v. State Dept. of Social and Health Servs.*, 141 Wn.2d 68, 77, 1 P.3d 1148 (2000) (emphasis added). As shown below, the record establishes as a matter of law that plaintiffs' complaint was properly dismissed because no such implied statutory duty was owed under the allegations made here.

It is undisputed the 1996 report at issue did not concern the then unconceived plaintiffs, L.O. and T.J. *See* CP 118-19. No case has ever extended the RCW 26.44 cause of action to anyone other than the parents and children about whom an abuse report was received and to whom further abuse later occurs. Nevertheless, plaintiffs somehow argue "[a]ll of the cases that analyze the scope of the 'class' that is intended to be protected interpret the duty broadly when it comes to child victims" under RCW 26.44. *See* AB 11. *See also id.* at 7. Instead, our Courts uniformly hold directly to the contrary. As the Supreme Court held in *M.W. v. Department of Social and Health Services*, 149 Wn.2d 589, 602, 70 P.3d 954 (2003), suits under RCW 26.44 are "a narrow exception" to the public duty doctrine and apply only "in limited situations." (Emphasis added). *See*

also *Walker v. King County*, 630 F.Supp.2d 1285, 1295 (W.D. Wash. 2009) (dismissing child and parent's RCW 26.44.050 claim because "Washington Supreme Court has ... has severely limited the scope of the duty to investigate") (emphasis added). Precedent of this and other Courts of Appeal hold likewise. See e.g. *Janaszak v. State*, 173 Wn.App. 703, 297 P.3d 723 (2013) (Division I recognizes RCW 26.44.050 cause of action is "narrowly limited") (emphasis added); *Petcu v. State*, 121 Wn.App. 36, 56 & 58, 86 P.3d 1234 (2004) (Division II holds "state's statutory duty under RCW 26.44.050 to investigate allegations of child abuse" is "a narrow exception" and rejecting "a much broader cause of action for negligent investigation than has been recognized by our courts") (emphasis added).

Ignoring this fundamental principle, plaintiffs' assert a much broader cause of action for all children by claiming the statutory duty supposedly is "not limited to only the particular child that is the subject of the originating investigation" because this Court in *Lewis v. Whatcom County*, 136 Wn.App. 450, 452, 149 P.3d 686 (2006), summarized its holding as: "RCW 26.44.050 creates a duty to all children who may be abused or neglected, regardless of the relationship between the child and his or her alleged abuser." AB 5-7. *Lewis*, however, concerned a child who was previously suspected of being abused by her uncle who then "continued to

molest her" when a report about her was not investigated. 136 Wn.App. at 454-55.<sup>3</sup> The only issue there was if the State under the statute "owed no duty to Lewis because her abuser was her uncle rather than her parent." *Id.* at 453-56. *Lewis* nowhere implies a public entity owes a duty to those children who are not the subject of a DSHS report or referral but who over a decade later are harmed by a child abuser. Again, no court has ever held this "narrowly limited" duty is owed to the class of "**all** children who may be abused" in future decades so long as there was a report of abuse of any child. *C.f. Janaszak, supra.* (Div. I holds "[o]ur courts have created no further exceptions to the general rule that we do not recognize claims for negligent investigation").

Instead, the Supreme Court in *M.W.* reinstated a trial court's dismissal of a suit for a negligent investigation that had caused sexual abuse of children – *i.e.*, it required dismissal of members of the very "class" plaintiffs' erroneously now claim is absolutely protected against negligent investigations. The Supreme Court so ordered because it found the Court

---

<sup>3</sup> Plaintiffs mischaracterize the County as somehow arguing RCW 26.44 requires that government "must stay its hand until actual damage to the endangered child has resulted" and that a duty only is "owed to children that are already being abused." AB 10. Law enforcement clearly has the right to intervene to protect children who are known to be at risk once they are born. See *In re Welfare of Ian Garth Frederiksen*, 25 Wn.App. 726, 610 P.2d 371 (1980) (DSHS is empowered to remove child immediately at birth to prevent future harm). Instead, the issue raised by plaintiffs' appeal is whether, despite the language of RCW 26.44, government must protect children who are unknown to it at the time of its investigation and will be liable even to a "class" of plaintiffs consisting of all future generations yet to be conceived.

of Appeals had erred by doing exactly what plaintiffs' request of it now; *i.e.*, "finding a general duty to investigate reasonably implicit in the statutory duty to investigate, instead of analyzing the stated purpose of the statute." 149 Wn.App. at 600. *See also Walker*, 630 F.Supp.2d at 1295 ("Washington Supreme Court has rejected the notion of a 'general statutory duty of care' for child abuse investigations and has severely limited the scope of the duty to investigate"). Likewise, this Court later in *Blackwell v. State Dept. of Social and Health Services*, 131 Wn.App. 372, 376, 127 P.3d 752 (2006), holds a "review of Washington court holdings shows consistency in the determination that under chapter 26.44 RCW, [the] duty to conduct a reasonable investigation of allegations of child abuse is owed to a particular, circumscribed class; children who are alleged to be abused, and their parents." (Emphasis added.)<sup>4</sup> Thus, this Court in *Yonker By and Through Snudden v. State Dept. of Social and Health Services*, 85 Wn.App. 71, 79, 81, 930 P.2d 958 (1997), long ago expressly rejected the same argument plaintiffs now make by ruling the statute does not require that "the State must somehow prevent all child abuse" but only that "services required by RCW 26.44 are for children and adult dependents who

---

<sup>4</sup> Plaintiffs attempt to limit *Blackwell* by asserting it only held "no statutory duty is owed to foster parents for negligent child abuse investigations." AB 9. This ignores *Blackwell* limits such suits to "parents" because of the above guiding principle cited by the County, and unmentioned by plaintiffs, because the statute protects only "a particular, circumscribed class; children who are alleged to be abused, and their parents." 131 Wn.App. at 376.

may be abused or neglected, and their families, not all children and their parents" as plaintiffs erroneously now claim. (Emphasis added.)

As the Supreme Court holds in *Tyner*, 141 Wn.2d at 80, and as this Court states in both *Rodriguez v. Perez*, 99 Wn.App. 439, 445, 994 P.2d 874 (2000), and *Yonker, supra.*, precedent is clear the statutory claim is limited to those "suspected of being abused and their parents."<sup>5</sup> Our Courts repeatedly have refused to extend that duty under RCW 26.44 to anyone else. *See, e.g., Ducote v. State Dept. of Social and Health Servs.*, 167 Wn. 2d 697, 697, 222 P.3d 785 (2009) (no duty owed stepparents of abused children); *Blackwell*, 131 Wn.App. at 379 (no duty to foster parents); *Pettis v. State*, 98 Wn.App. 553, 560, 990 P.2d 453 (1999) (no duty to child care workers). Thus, plaintiffs cannot meet even the first part of the test for an implied statutory cause of action because they are not within

---

<sup>5</sup> Plaintiffs argue the Supreme Court in its earlier opinion of *Schooley v. Pinch's Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998), somehow "rejected" any "distinction between protecting children that are 'suspected' of being abused ...." AB 9-10. The baseless nature of this argument is shown by the fact that, rather than acknowledge the principles cited above from later Supreme Court and Division One precedent that actually directly interpret RCW 26.44 in the context of the public duty doctrine for suits against government over child abuse reports, plaintiffs can cite only the prior *Schooley* case which did not involve RCW 26.44, government liability, the public duty doctrine, or child abuse reports. In any case, *Schooley* is helpful to the extent it advises that in statutory causes of action a Court must "look to the language of the statute to ascertain whether the plaintiff is a member of the protected class." *See* 134 Wn.2d at 475 (emphasis added). There the Court instead looked to the dissimilar RCW 66.44.320 and RCW 66.44.270(1) which it recognized "explicitly prohibits commercial vendors from 'sell[ing] any intoxicating liquor to any minor'" and "any person under the age of twenty-one years ...." *See id.* (emphasis added). The 1998 *Schooley* decision on dram shop statutes therefore did nothing to "reject" later Supreme Court and Courts of Appeal decisions interpreting RCW 26.44 in the context of child abuse reports and the public duty doctrine.

the class for whose "especial" benefit the statute was enacted.

Further, our Court's uniform description of the action as being limited to children previously "suspected of being abused and their parents" also is supported by the stated purpose of the statute. In RCW 26.44.010 the legislature specifically provided:

[T]he state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children.

Though, the statute's express purpose is to prevent "further abuses" to "such children" that were the subject of "such reports" of abuse, plaintiffs nowhere confront the meaning of the language of the statute. As a matter of law the Supreme Court has "decline[d] to expand this cause of action beyond these bounds because the statute from which the tort of negligent investigation is implied does not contemplate other types of harm." *M.W.*, 149 Wn.2d at 602 (emphasis added).

Here plaintiffs assert "other types of harm" than that contemplated by the statute – *i.e.*, they seek liability to all children who might be abused untold years in the future but who were never mentioned in any prior report because they would not be born until a decade several years later.

Because prior to the filing of this action no County agent failed to properly investigate a report that L.O. or T.J. were "suspected of being abused," under the statutory language and the essential principles established by uniform precedent, plaintiffs are not part of the "particular and circumscribed class of persons" required by our courts for any claim under RCW 26.44.050.

c. Plaintiffs Were Not Foreseeable Victims as Matter of Law

Though the legislative intent exception to the public duty doctrine does not apply so that no duty existed, even applicable exceptions are "limited by the requirements of foreseeability." *Bailey v. Town of Forks*, 108 Wn. 2d 262, 271, 753 P.2d 523 (1987). Thus, even where a duty exists, the "element of foreseeability plays a large part in determining the scope of defendant's duty" so that a "further limitation on the right of recovery, as in all negligence cases, is that the defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Hunsley v. Giard*, 87 Wn.2d 424, 435-36, 553 P.2d 1096 (1976) (*quoting Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509, 512 (1970)) (emphasis added). *See, also, Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 608, 257 P.3d 532

(2011) (once "a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability serve to define the scope of the duty owed").

Plaintiffs argue the fact that L.O. and T.J. did not come into being until years after the alleged negligence, and were not harmed until even more years passed – and then only after their removal from Johnson and from a series of foster homes – is not an obstacle to foreseeability because under *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), "a duty can be owed to unborn children." AB 12. Plaintiffs ignore that *Harbeson* concerned the *sui generis* "wrongful life" cause of action where beforehand "parents informed the defendant physicians of their intention to have further children" so that "future children were therefore foreseeably endangered by defendants' failure to take reasonable steps to determine the danger of prescribing Dilantin for their mother." *See* 98 Wn.2d at 480-81. In the 30 years since *Harbeson*, our state courts have never applied its holding outside this limited context of medical prenatal treatment. Instead, courts recognize "a duty to the unconceived exists only when a defendant's conduct involves the provision of medical services or products related to the reproductive process." *See Whitlock v. Pepsi Americas*, 681 F. Supp.2d 1123, 1125-28 (N.D.Cal., 2010) (emphasis added).

Plaintiffs also refuse to confront the far more relevant and recent

Supreme Court holding of *Osborn v. Mason County*, cited by both defendant and the Superior Court. Compare AB 12 with CP 23, 100-01, 145.<sup>6</sup> In *Osborn*, a County was sued for violating a statutory duty to warn the community of a level III "high risk" sex offender who eight months after his release from prison from his second conviction for a violent sexual offense raped and murdered a minor girl. See 157 Wn.2d at 21. Our Supreme Court reversed the failure to dismiss and ordered judgment entered for the County because, among other things, the decedent minor girl "was not a foreseeable victim." *Id.* at 20 & 25. Neither to the trial court nor on appeal have plaintiffs explained how the minor girls here somehow were more foreseeable victims than the minor girl decedent in *Osborn* – especially where L.O. and T.J. would not be conceived until years after the alleged negligence; Finch was not a convicted sex offender, he had only the single CPS referral; and neither girl he was alleged to have abused nor his ex-wife in 1996 would respond to repeated requests to confirm that single report.

Plaintiffs' instead discuss what they characterize as "landmark" cases applying the "field of danger" test, AB 13-14, but then ignore both

---

<sup>6</sup> Plaintiffs' sole reference to *Osborn*, is their mischaracterization of it in a footnote as holding only "that there is not a generalized duty owed to the general public under certain sex offender notification statutes." AB 14 n. 18. This ignores the Supreme Court also therein expressly reversed the failure to dismiss that action because it held a decedent minor girl "was not a foreseeable victim" despite far worse facts. 157 Wn.2d at 20 & 25.

that the cases they cite concern those who were in existence at the time of the act and that the test they apply requires the harm be "reasonably perceived as within the general field of danger covered by the defendant's specific duty." See, e.g., *Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992) (emphasis added); *Shepard v. Mielke*, 75 Wn.App. 201, 206, 877 P.2d 220 (1994) (same). Plaintiffs nowhere explain how that test is met here where the "specific duty" is owed only to those "suspected of being abused and their parents," and plaintiffs would not even come into existence until years later. Likewise, plaintiffs fail to explain how a trial court could hold unconceived generations are "foreseeable" victims for decades into the future or how they avoid the far more applicable *Osborn* ruling. See AB 13-14, 18-19. Indeed, where prior precedent addressing similar situations hold "[c]riminal assault is 'not within the general field of danger traditionally covered by the duty,'" it "is the closer case and the precedent we must follow in a case concerning" similar circumstances. See *Cameron v. Murray*, 151 Wn.App. 646, 652-54, 214 P.3d 150 (2009).

In an additional separate section of their brief that expands upon their discussion of foreseeability, plaintiffs claim the trial court "decided what should be a jury question." AB 18-19. However, plaintiffs' again ignore that in *Osborn* the Supreme Court did affirm a trial court's proper summary judgment ruling, without a jury, on the issue of "foreseeability" –

as did this court in *Cameron*, 151 Wn.App. at 649. Finally, in their brief's additional section plaintiffs also quote the statement in *N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn.App. 517, 530, 307 P.3d 730 (2013), that: "A sexual assault is not legally unforeseeable 'as long as the possibility of sexual assaults ... was within the general field of danger which should have been anticipated.'" AB 19. Plaintiffs again fail to acknowledge that the parameter of a "general field of danger" is limited to that "covered by the defendant's specific duty," and that the specific duties in *N.K.* – unlike here – were owed to existing plaintiff children who were in a custodial relationship with the defendant. Further, plaintiffs also again fail to explain how their interpretation can avoid *Osborn's* holding under far worse facts where the victim of sexual assault existed at the time of the alleged government negligence, her assailant was a known convicted – rather than merely suspected – child abuser, and the harm occurred within months of the government act.

As a matter of law it was not foreseeable that if a 1996 report about Finch abusing Johnson and her sister was not "better" investigated: 1) Johnson would grow up and years later have her own children; 2) more years later those children would be removed from Johnson by the State; 3) numerous foster placements would be unsuccessful; 4) the State years later would place the children with the same abuser despite its notice of the

previous report; and 5) he would then abuse them also. Even more than in *Osborn*, neither of the not yet existing children here was "a foreseeable victim" at the time of the alleged negligence as a matter of law. Thus no cause of action could exist for those who were not even in existence at the time or for abuse occurring over a decade after the alleged negligence.<sup>7</sup>

d. No Proximate Causation Between 1996 Investigation and Abuse That Occurred More Than a Decade Later

In *Hartley v. State*, 103 Wn.2d 768, 777–79, 698 P.2d 77 (1985),

the Supreme Court established that:

Washington law recognizes two elements to proximate cause: Cause in fact and legal causation. [Citations omitted.] Cause in fact refers to the "but for" consequences of an act – the physical connection between an act and an injury. .... Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent."

Where "the facts do not admit of reasonable differences of opinion, [cause

---

<sup>7</sup> Plaintiffs conflate foreseeability with legal causation by arguing as to the former that the fact "years pass before L.O. and T.J. are abused did not make it any less likely that Finch would molest them too." AB 17. As discussed in the next section below, legal causation is an issue of law concerning "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 205, 15 P.3d 1283 (2001). As is shown in that section, plaintiffs neither rebut legal causation's absence here nor address the County's cited authority thereon.

in fact] is a question of law to be decided by the court." *Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1972). *See also Granite Beach Holdings, LLC v. State ex rel. DNR*, 103 Wn.App. 186, 195, 11 P.3d 847 (2000) (summary judgment affirmed because "[w]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law"); *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975) (same).

"Legal causation" on the other hand is always a question of law for the court. *See Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008); *Alger v. Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987). It focuses "on 'whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.'" *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 205, 15 P.3d 1283 (2001). In a case such as this, dismissal on summary judgment is appropriate either where: 1) plaintiffs "cannot meet this burden" that "but for [defendant's] breach of duty" they would not have been injured by a third party, *Lynn*, 136 Wn.App. at 311; or 2) where a County does not fall within the "boundaries of legal causation, even assuming the validity of plaintiffs' factual allegations." *Hartley, supra.* at 784 (Supreme Court reversed trial court's denial of CR 56 motion).

The record in this case contains no evidence that but for a "better"

investigation of the 1996 referral, the abuse a decade later of L.O. and T.J. would not have occurred. Likewise, plaintiffs cannot show that logic, common sense, justice, policy, and precedent show the connection between the ultimate result and the act of the defendant is not too remote or insubstantial to impose liability.

- 1) 1996 Investigation Was Not Shown a "Cause in Fact" of the Abuse of L.O. and T.J. Over a Decade Later

As to the element of "cause in fact," plaintiffs exclusively rely on their expert declaration which, without explanation or citation to any fact of record, makes conclusory assertions that speculate "any report back to Child Protective Services should have indicated that the allegations were 'founded' and/or legitimate" so that if "proper reports were conveyed to DSHS about Finch in 1996, he never would have been cleared to become a foster parent." AB 15-16. However, this declaration nowhere provides any factual basis for concluding a "better" investigation somehow would have been able to report that the referral was "founded and/or legitimate" – especially where the reporting mother and the alleged victims were nonresponsive at the time of the detective's repeated efforts to contact them. *See* CP 76. A "proper report" that the referral was "founded and/or legitimate" would have required the cooperation of the previously uncooperative Johnson, her sister and mother, a confession from Finch, or some oth-

er actual evidence – but there is no factual basis for speculating such proof somehow would have been obtained by doing something "more."

As a matter of law, ER 703 requires that an expert's opinion have a reliable factual basis, *Reese v. Stroh*, 128 Wn.2d 300, 907 P.2d 282 (1995), and plaintiffs have produced no such factual basis. Hence, their expert's baseless speculation is not "sufficient evidence" of cause in fact because: "There is no value in an opinion where material supporting facts are not present." *Davidson v. Seattle*, 43 Wn.App. 569, 575, 719 P.2d 569 (1986) (emphasis added). *See also Miller v. Likins*, 109 Wn.App. 140, 148, 34 P. 3d 835 (2001) (expert opinion is not admissible if it is a "conclusory or speculative" opinion "lacking an adequate foundation") (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 177, 817 P.2d 861 (1991)). *See, also*, discussion CP 108-09. As a matter of law, "recovery cannot be based upon a claim of what "might have happened." *Kristjanson v. Seattle*, 25 Wn.App. 324, 326, 606 P.2d 283 (1980) (affirming summary judgment for lack of proximate cause and quoting *Johanson v. King County*, 7 Wn.2d 111, 122, 109 P.2d 307 (1941)). *See, also, Marsh v. Commonwealth Land Title Ins. Co.*, 57 Wn.App. 610, 622, 789 P.2d 792 (1990) ("Whenever cause in fact is too speculative ... there is no proximate cause"). Rather, to "prove cause-in-fact, [plaintiff] had to be able to show that, but for [defendant's] breach of duty, [the criminal]

would not have" harmed the victim yet plaintiff "has not and cannot meet this burden." *Lynn*, 136 Wn.App. at 311.

Ignoring that the record is devoid of any actual factual support, plaintiffs are forced to hypothecate that if in some unexplained way there had been a "proper report" in 1996, one of two alternative cascading chains of assumptions would show "cause in fact" of abuse that occurred over a decade later. For example, plaintiffs assert that a "better" investigation "would have led to a criminal conviction." AB 4. This necessarily assumes without basis in the record that: 1) the Sheriff would have been able obtain sufficient evidence to arrest Finch; 2) then the Prosecutor would concluded there was sufficient evidence to charge him; 3) then the jury would have found sufficient evidence to convict him beyond a reasonable doubt; and 4) then CPS would not have negligently approved him to be a foster parent over a decade later anyway. AB 4. Such extended speculation is not "proof" of proximate cause but impermissibly requires "a jury to guess not only whether and when the violation would have been pursued but also whether a judge would have done something ... and what that different result would have been." *Estate of Bordon ex rel. Anderson*, 122 Wn.App. at 241-42 (dismissing wrongful death claim after killer's release). *See, also, e.g., Garcia v. State, Dept. of Transp.*, 161 Wn.App. 1, 607, 270 P.3d 599 (2011) (no proximate cause because claim required "the

City ... to request a permit" but there was "nothing in the record showing that if the City had exercised its discretion to apply for a permit ..., the permit would have been granted, or that if granted, the City could have obtained funding ... before the accident"); *Charbonneau v. Wilbur Ellis Co.*, 9 Wn.App. 474, 477, 512 P.2d 1126 (1973) (summary judgment where "trier of fact would be unable to do any more than speculate or guess").

In *Walters v. Hampton*, 14 Wn.App. 548, 550, 543 P.2d 648 (1975), a County also was sued on speculation that "had [the assailant] been prosecuted" in 1970 "plaintiff would not have been injured in 1972," but it was dismissed because:

[T]here are too many gaps in the chain of factual causation to warrant submission of that issue to the fact finder. It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would have prevented plaintiff's injuries at Hampton's hands in February 1972. Such a conclusion would require the assumption of a successful prosecution of Hampton. ... Factual causation requires a sufficiently close, actual connection between the complained-of conduct and the resulting injuries. [Citations omitted.] Where inferences from the facts are remote or unreasonable, as here, factual causation is not established as a matter of law.

*Id.* at 553 & 556.

Plaintiffs' alternative theory of causation – again made without support in the record – relies on further speculation that if the Sheriff's de-

tective had "at least provided sufficient reporting to DSHS that the investigation was inconclusive, Finch never would have been permitted to become a foster parent, and these horrific abuses would have been avoided." AB 1-2. First, this ignores that plaintiffs cite no evidence the detective failed to report to the State "that the investigation was inconclusive." Second, plaintiffs ignore they in fact have admitted the State's files did show "Unable to complete invest – No finding," and that this knowledge still did not prevent the State from making Finch a foster parent. CP 12.

Further, both plaintiffs' theories of causation are what this Court in *Theonnes v. Hazen*, 37 Wn.App. 644, 649, 681 P.2d 1284 (1984), criticizes as "reasoning in a circle. It assumes a fact ... [*i.e.*, a "proper investigation" would "have indicated that the allegations were 'founded' and/or legitimate"], but concerning which assumed fact there is no evidence, and then employs the supposititious fact as the basis for a conjecture [*i.e.*, as a result he "never would have been permitted to become a foster parent]." As a matter of law, such speculation cannot create a genuine issue concerning cause in fact. *Id.* Instead, where "the facts do not admit of reasonable differences of opinion, proximate cause is a question of law to be decided by the court." *Pratt v. Thomas*, 80 Wn.2d 117, 119, 491 P.2d 1285 (1972). *See also Granite Beach Holdings, LLC v. State ex rel. DNR*, 103 Wn.App. 186, 195, 11 P. 3d 847 (2000) (summary judgment affirmed

because "[w]here reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law").

Here, the record contains no evidence that a hypothetical "proper report" would have developed evidence showing "the allegations were 'founded' and/or legitimate," and affirmatively disproves any claim that "reporting to DSHS that the investigation was inconclusive" would ensure "Finch never would have been permitted to become a foster parent."

2) 1996 Investigation Was Not a "Legal Cause" of the Abuse of L.O. and T.J. by Their Grandfather Over a Decade Later

"Legal causation" also is absent because plaintiffs' claim fails based on "considerations of logic, common sense, justice, policy, and precedent." *Hartley*, 103 Wn.2d at 779. An alleged failure more than a decade before to "better" investigate a report by an uncooperative witness about her ex-husband is simply "too remote or insubstantial to impose liability." *See Kim*, 143 Wn.2d at 205. Our Supreme Court holds "the remoteness in time between the criminal act and the injury is dispositive to the question of legal cause" because even where there is negligence "the responsibility for such negligence must terminate at some time in the future" because a defendant "should not be 'answerable in perpetuity for the criminal and tortious conduct of others.'" *Id.* (quoting *Gmerek v. Rachlin*, 390 So.2d 1230, 1231 (Fla.App. 1980) (defendant not legal cause of harm

"occurring some five and one-half months after" because "responsibility of a tortfeasor for the consequences of his negligent acts must end somewhere, and under our legal system the liability of the wrongdoer is extended only to the reasonable and probable, not the merely possible, results of a dereliction of duty") and *Devellis v. Lucci*, 697 N.Y.S.2d 337, 339 (App. Div. 1999) ("passage of 24 days between the theft of the vehicle and the injury-producing event vitiated any proximate cause between the purported negligence and the accident as a matter of law"). *See also Hungerford v. State Dept. of Corrections*, 135 Wn.App. 240, 255, 139 P.3d 1131 (2006) ("[a]s a matter of legal causation, we hold that Davis's future crimes were too remote for DOC's actions to be a proximate cause of Hungerford-Trapp's murder").

The only discussion in Appellants Brief's of legal causation declines to address the above Washington precedent and exclusively relies instead on "Restatement of Tort Section 433 Comment f" which vaguely states: "where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm." AB 16 (emphasis added). First, our state has never adopted comment "f" to the Restatement (Second) of Torts §433. *C.f. Webstad v. Stortini*, 83 Wn.App. 857, 874, 924 P.2d 940 (1996) ("Washington has not adopted §

324 of the Restatement" (Second) of Torts); *Spellmeyer v. Weyerhaeuser Corp.*, 14 Wn.App. 642, 647 n. 3, 544 P.2d 107 (1975) ("Washington Supreme Court has not adopted the language of Restatement (Second) of Torts § 395 (1965)"). Second, as shown above when addressing "cause in fact" – plaintiffs have not shown from the record that as a factual matter "the influence of the actor's negligence is still a substantial factor." Third, and most importantly, our State Supreme Court expressly holds to the contrary so that "remoteness in time between the criminal act and the injury is dispositive to the question of legal cause" because even where there is negligence "the responsibility for such negligence must terminate at some time in the future" and the defendant "should not be 'answerable in perpetuity for the criminal and tortious conduct of others." *Kim*, 143 Wn.2d at 205 (emphasis added).

#### IV. CONCLUSION

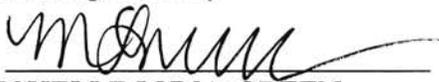
As demonstrated above, Teresa Johnson had no claim against Pierce County for her own childhood abuse 18 years ago by her father because that claim was not made in the complaint, proximate cause was absent because her abuse ended before the Sheriff learned of the allegation, and the statute of limitations expired over a decade before she sued the County. Likewise, the claims of all plaintiffs against the County for the abuse of L.O. and T.J. by their grandfather were properly dismissed be-

cause the County owed them no duty as individuals, their harm was unforeseeable because they would not be born until years after the allegedly negligent 1996 investigation, and the County was not the proximate cause of their harm.

Accordingly, Pierce County respectfully requests the Court affirm the trial court's dismissal of plaintiffs' suit against it.

DATED this 14th day of May, 2014.

MARK LINDQUIST  
Prosecuting Attorney

By:   
MICHELLE LUNA-GREEN  
Deputy Prosecuting Attorney  
Attorney for Pierce County  
Ph: (253)798-6380 / WSB # 27088

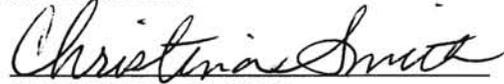
By:  for  
DANIEL R. HAMILTON  
Deputy Prosecuting Attorney  
Attorney for Pierce County  
Ph: (253)798-7746 / WSB # 14658

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing RESPONDENT'S BRIEF was electronically served this 14th day of May, 2014, on the following pursuant to the agreement of the parties:

- Lincoln Beauregard: lincolnb@connelly-law.com
- Kenneth Selander: ken@selanderobrien.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



CHRISTINA SMITH

Legal Assistant

Pierce County Prosecutor's Office

Civil Division, Suite 301

955 Tacoma Avenue South

Tacoma, WA 98402-2160

Ph: 253-798-7732 / Fax: 253-798-6713