Supreme Court No. 101560-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 381901

DIVISION III
OF THE STATE OF WASHINGTON

RICHARD L. MATHIEU, as Litigation Guardian ad Litem for M.J. and A.J., minors.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, AND YAKIMA VALLEY COUNCIL OF ALCOHOLISM, PBC, aka TRIUMPH TREATMENT SERVICES,

Respondents.

PETITION FOR REVIEW

Bryan G. Smith, WSBA No. 29382
Tamaki Law Offices
1340 North 16th Avenue
Suite C
Yakima, WA 98902
Telephone: (509) 248-8338

Sidney C. Tribe, WSBA No. 33160
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
Telephone: (206) 622-8020

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

Page

Page

Page

APPENDICES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Other Authorities

I. IDENTITY OF PETITIONER

Petitioner Richard L. Mathieu seeks review of the decision described in Section II below.

II. COURT OF APPEALS DECISION

The decision for which petitioner seeks review was in Washington State Court of Appeals Cause No. 38190-1-III. On September 15, 2022, Division Three issued an unpublished decision. Appx. 1-33. After petitioner moved to publish the opinion, the panel ordered publication in part. That order was entered on November 22, 2022. Appx. 34-35.

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals ruled that the State of Washington's Department of Children, Youth, and Families ("Department") did not have a common law duty of reasonable care to prevent foreseeable harm to two dependent foster children in its custody. Should this Court take review of the Court of

Appeals opinion because it conflicts with precedent of this Court and the Court of Appeals?

2. The tribal court granted the Department custody of Indian children, required the Department to inform it of information relevant to a dependency, and make recommendations about the children's placement. The Court of Appeals ruled, in this case of first impression, that principles of tribal sovereignty effectively immunized the Department from its common law or statutory negligence in undertaking those tasks. Should this Court take review because the decision raises issues of substantial public importance involving the protection of Indian children and the duties of a State agency providing services to a tribal court?

IV. STATEMENT OF THE CASE

A. Twin sisters were in the Department's custody and control from the moment of their birth in June 2006 until their dependency was terminated in May of 2014.

On June 14, 2006, when twins AJ and MJ were born, their mother Kai Martinez tested positive for opioids and methamphetamine. CP 908, 1106. Martinez had positive drug tests and a multi-year history of drug and alcohol abuse, mental health issues, and criminal history. CP 1111. Their father was incarcerated for murder and thus was not capable of caring for them. CP 1252. The Department's Child Protective Services to take custody of the twins. CP 1111.

After temporarily placing the twins with Martinez's drug-addicted mother who had caused the death of one of Martinez's other children, the Department then placed the children with foster parents Sonny and Christina Ozuna (non-tribal members). CP 908, 1154, 1778, 1780.

On September 25, 2007, the Yakama Nation Tribal Court with jurisdiction over the dependency approved a case plan that maintained the Department's custody, continued their foster placement with the Ozunas, and denied any visitation to Martinez. CP 2016-2018. The Department was to provide "[a]ll

necessary services" and finalize a permanency plan of care for the tribal court. CP 2017.

The twins were cared for exclusively by Department, in the "loving, safe, nurturing, and stable home" of their foster parents, for the first seven years of their lives. CP 1780. Martinez had almost no contact with her children during this period. CP 1153, 1184, 2020-2048.

From 2007-2012, consistent with Department reports and recommendations, tribal court repeatedly held that it was not in the best interest of the twins to be returned to Martinez. CP 2020-2048. The tribal court also followed the Department's recommendations to remove Martinez from the service plan,[1] and not to reunite the children with her because she threatened their safety. *Id.* The Tribal Court incorporated these recommendations into its orders.

[1] Being off the service plan means that the Department was not required to offer Martinez services because she was not involved with her children. CP 1588.

During this 2007-2012 time period, Martinez expressed her desire to relinquish her parental rights to the twins. CP 1184. Martinez also continued to abuse drugs and accumulate criminal history. CP 2020-2048.

B. In 2013, the Department began advocating for the twins' return to Martinez's custody. However, Martinez was still drug addicted, was not complying with court-ordered services, and frequently missed opportunities to see the children.

In May 2013, shortly before the twins' seventh birthday, the Department recommended that the tribal court place Martinez back on the twins' service plan. CP 1537. The Department then began facilitating the twins' reunification with Martinez through referrals to counseling and various services. CP 1154.[2] The reunification plan included supervised visitation between

[2] In this time frame, the Department and the Yakama Nation were operating under a compact, pursuant to which DCYF agreed to perform and carry out social services for parents and children in the context of tribal court dependencies. CP 1155. The State and the Yakama Nation Tribal Court thus had concurrent jurisdiction over the twins. CP 2153.

Martinez and the twins beginning in May 2013. However, the visitations were delayed two months; Martinez's first visitation with the twins did not occur until July 2013. CP 1337. Martinez was in active drug relapse in this time frame, as evidenced by her positive urinary analysis on June 4, 2013. CP 1185, 1190. Despite claiming to want reunification with her children she had not seen for most of their lives, Martinez frequently cancelled or no-showed for visits. CP 1138-1141, 1190.

Throughout 2013, Martinez was in a drug treatment program through Central Washington Comprehensive Mental Health (CWCMH) and undergoing drug testing. CP 1185, 1190. Martinez's drug counselor was Trisha Jennings. CP 1188. Throughout her treatment at CWCMH, Martinez repeatedly failed to show for appointments or frequently failed to maintain contact. CP 1185. On June 3, 2013, Martinez was a "no-show" for a psychological evaluation connected with her drug treatment. CP 1243. On June 10, 2013, Martinez failed to show up for therapy. CP 1326. On June 14, 2013, Jennings was unable

to contact Martinez to set up individual therapy. *Id.* On July 18, 2013, Counselor Jennings wrote that she feared Martinez was without a safety net and discussed the dangers of relapse. Martinez admitted that she was "not sure" if she would "be sober" if she were not with her boyfriend upon whom she depended. CP 1139.

The Department had a release Martinez signed that allowed it to obtain information from Martinez's methadone program. CP 815, 1205. In fact, Martinez signed a slew of releases regarding her drug use status. CP 1205. The Department had access to her positive UAs. *Id.* Department social workers thus had a right to this information and could have provided this relevant information to the tribal court when considering the possibility of reunification. CP 1157-1166.

The Department, however, failed to contact Jennings and failed to investigate Martinez's participation in drug counseling. CP 1160-1163. Moreover, the Department failed to consider and

account for Jennings' assessment of Martinez's failure to progress in the program. *Id.*

In August 2013, Department social worker Michelle Betts was assigned responsibility for the twins' file. CP 1285. Her responsibilities included monitoring and documenting supervised visits, recommending services for Martinez, and preparing documentation for the tribal court to consider whether to place the twins with Martinez for a "trial return home." CP 1154.

Pursuant to the Department policy regarding trial returns of children to a home, the Department and Betts were supposed to investigate and confirm Martinez's drug usage and her progress in treatment, which it could access through Martinez's own signed release. CP 1165. Between August 21, 2013, and October 29, 2013, Martinez cancelled or no-showed approximately 50% of her visits with the twins. CP 1338-1340.

C. **The Department provided false information to the tribal court, stating that Martinez was clean and sober when she was not, and failed to disclose her inability to even visit the children on a consistent basis. The Department then recommended that the tribal court return the children to Martinez's custody.**

On October 29, 2013, the tribal court held a hearing regarding the twins' placement. CP 1340. Betts failed to provide the information about Martinez's recent relapse or no-shows for visits to either the LICWAC or tribal court. CP 1159-1160. After the hearing, while the tribal court was considering the already incomplete information Betts presented, Martinez cancelled two more of her four scheduled visits. CP 1340-1341. This information also never was given to the tribal court; Betts told the court that Martinez had engaged in "regular" visits. CP 1160-1161. This was critical information because "[l]ack of bonding and attachment is known to be a contributing factor in many child fatalities and near fatality cases." CP 1161.

On November 12, 2013, Betts recommended a new plan where, rather than a relative placement with someone other than

Martinez, the twins would return home to Martinez as the primary caregiver. CP 1837. Her recommendation falsely stated that Martinez was "in compliance with court ordered services." *Id.* On November 27, 2013, Betts filed an affidavit to set a date for an emergency review hearing to discuss change of placement and recommended to change the plan of placement with relatives to placement of the twins to Martinez. CP 776. This affidavit was based on Betts' own recommendation that the only impediment to the girls' placement with Martinez was her lack of safe, stable housing, and that placement with Martinez was safe because this impediment had been lifted. CP 781.

On December 13, 2013, one week before the tribal court ruled on the Department's recommendation to return the twins to Martinez's care, counselor Jennings noted that Martinez was "in active relapse" on methamphetamine. CP 1188, 1317.

On December 19, 2013, the tribal court adopted the Department's recommendation and placed back the twins with Martinez. CP 1341. Because the children were part of the

Department's trial return home efforts, its social workers were required to conduct proper health and safety assessments of the children during their transition from foster care into parental custody. CP 1155. These assessments in turn required, among other things, that social workers interview the children apart from the receiving parent to promote a candid discussion of the home environment free from interference and intimidation. CP 1162.

Within a week of receiving the twins into her Triumph "clean and sober" housing unit in Toppenish, Martinez admitted to Jennings that she had relapsed into methamphetamine use with a neighbor. CP 1164. Significantly, on or about December 23, 2013, around the time that she used methamphetamine with a neighbor, Martinez also disclosed to Parent Child Assistance Program (PCAP) case manager Andrea Ross that she was feeling depressed and was overwhelmed by having the twins in her custody. *Id.* Betts had no documented contact with Jennings or Ross about these issues despite having authorizations for release of information for both CWCMH and PCAP. CP 1161, 1165.

Betts failed to properly conduct health and safety assessments of the twins during their transition into Martinez's custody. CP 1158. AJ testified that she didn't remember Betts talking with her and MJ apart from Martinez. CP 1981. MJ testified that Betts may have visited the twins twice but that Ms. Betts "never talked to us" and "only ever talked to Kai" and would do so outside. CP 1985. In addition to her omitted/substandard health and safety assessments, Betts failed to conduct any investigation into the continued viability of this high-risk placement and Martinez's basic capacity to parent twins with whom she had had no contact for seven years. CP 1157-1166. Martinez admitted multiple times that she had been relapsing into drug use. *Id.* Between December 20, 2013 and August 2014, Betts had no documented contact with PCAP worker Andrea Ross. *Id.*

On February 13, 2014, Jennings reported that "[Martinez] said she has tried to quit numerous times, she has not been able to do more than a month at a time." CP 1187. In addition,

Martinez reported that she was feeling overwhelmed with caring for her twin daughters. CP 1509.

On February 21, 2014, a mental health counselor to whom Betts had referred the twins wrote a letter to Martinez and copied Betts. CP 1238. He said he had been unable to contact Martinez and was going to close the referral. CP 1238, 1900.

On April 30, 2014, Betts received a call from Garfield Elementary School, in Toppenish stating that the school had early release and that Martinez had not picked up the girls from school. CP 918, 1900. School staff had tried to reach Martinez and her boyfriend by phone but were unable to make contact. *Id.* Betts went to Toppenish herself to pick up the girls, took them to Dairy Queen and then home. *Id.* Despite having to personally intervene to care for the twins when Martinez was still in a "trial period" with the twins' placement, Betts did not pursue the matter. CP 1187. Betts again failed to contact Jennings to assess Martinez's progress in the methadone program. *Id.*

Had Betts called CWCMH and talked with counsel Jennings as she was authorized to do, she would have obtained confirmation of Martinez's failed sobriety and lack of progress in drug treatment. CP 1188. More importantly, Betts would have acquired critical facts regarding Martinez's drug use and her ability to safely parent. CP 1182-1210. Betts conceded at deposition that had she known that Martinez was using, she would have told the tribal court, and recommended against the trial return home. CP 1586, 1623.

By April 2014, Martinez was in active relapse. CP 1187. Betts' last contact with Martinez's methadone counselor was a voicemail exchange in April 2014. CP 1189. Betts had no contact with Martinez or the twins from April 2014 to the date the dependency was dismissed. CP 1187. By May 2014, while the Department still had a duty to properly conduct health and safety visits on behalf of the children, Martinez slipped further into active relapse. CP 1164.

Lacking this crucial information, the tribal court dismissed the twins' dependency on May 20, 2014, pursuant to Betts' recommendation. CP 760, 1166. The Department closed its file on the twins on August 7, 2014. CP 1575. On that same day, Martinez again tested positive for methamphetamine. CP 1204.

D. Shortly after the Department relinquished custody of the children to Martinez, they were found by relatives in Martinez's apartment. She had abused, tortured, and starved them.

Martinez's heavy drug use continued after the dependency was dismissed: in June 2014 alone, Martinez tested positive for methamphetamine and/or opiates four times: on June 4th, 14th, 25th, and 28th. CP 1204. Martinez beat, abused, threatened, intimidated, imprisoned, dehumanized, tortured, and starved the helpless children. CP 1113. They stayed in their room all day every day. CP 1107. They were not allowed to leave, either to go to the kitchen for food, or go outside to play. *Id.* They would go for days without food. *Id.* While confined to their room, all they could do was lie in their beds. They were not reading or

watching television. *Id.* When "company" came to the apartment, they were not even allowed to leave their room to use the toilet. They had to "hold it all day." CP 1108. Martinez would hit the children and refer to them as "retard." *Id.* She would hold their heads underwater, choke them, and smother them with pillows. *Id.* She would take away their blankets and pillows and force them to endure the cold. *Id.* She threatened to hang one of the twins by her neck with a belt in the closet. *Id.*

In February 2015, the twins were found by a relative, starved to half their normal body weight, beaten, tortured, and wallowing in urine and feces in a dark room, suffering from permanent, life-altering injuries, including partial blindness, cognitive deficits, and PTSD. CP 906.

According to liability expert Tanya Copenhaver, the Department breached its duties to the twins in this time frame in the following ways: (a) failing to utilize releases on file to obtain Martinez's drug testing results in the summer and fall of 2013; (b) misrepresenting to the tribal court that Martinez had been

clean and sober for a year; (c) failing to properly investigate the CPS referral from September 2013, wherein Martinez injured AJ; (d) failing to conduct proper health and safety visits which would have included, by necessity, individual interviews of the twins in a safe setting apart from Martinez; (e) failing to contact PCAP caseworker Andrea Ross about Martinez's progress and cooperation in the PCAP program before recommending dismissal of the dependency; (f) and failing to obtain up-to-date drug counseling information before recommending dismissal of the dependency, among other criticisms. CP 1157-1158.

E. The children's GAL brought negligence claims against the Department, which moved for summary arguing that it had no legal duty to the twins. The trial court dismissed on summary judgment, and the Court of Appeals affirmed on the same duty grounds.

The twins brought negligence claims against the Department, arguing that as their custodian, the Department had

certain duties, including a duty to protect them from foreseeable harms. CP 72-74.[3]

Division Three of the Court of Appeals affirmed summary judgment, concluding that the Department owed no common law or statutory duty to the children to take reasonable care to ensure

[3] The children also brought claims against the "clean and sober" housing facility for its failure to protect them from Martinez. Although the children disagree with the Court of Appeals' reasoning, those claims are not at issue in this petition.

Martinez was not still drug addicted, abusive, or neglectful before recommending their reunification. Slip op. 24.[4]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The clash of two unusual factual circumstances resulted in a legally unsound Court of Appeals opinion that this Court should review. It has the potential to endanger both Indian and non-Indian foster children in Washington. First, this case

[4] At one point, the opinion incorrectly states the children's argument below, claiming they argued the Department only had statutory duties during the dependency, and only had common law duties after the dependency was terminated. Slip Op. 10. The children's *primary* argument to the Court of Appeals was that that Department had a common law duty of care to prevent foreseeable harm to the children during the dependency. Opening Br. App. 30-35 (arguing Department has common law custodial duty to children in foster care when they are dependent, including during proceedings to dismiss a dependency). The opinion later corrects this error by acknowledging that the children did argue that the Department had a common law duty during the dependency: "Mathieu argues that the Department had a duty to investigate Martinez as the children's custodian," Slip. Op. 19. However, for undisclosed reasons, the Court's rationale for dismissing the children's claims focuses only on the statutory duties during the dependency. Slip Op. 19-22.

involves the removal of children from their safe and stable long-term foster home and their placement back in the custody of their drug-addicted and abusive birth parent. Second, this case involves a tribal court entrusting Indian children to the custody and control of the Department.

These two unusual facts led the Court of Appeals to overlook the most basic common law duty DCYF owes to children in its custody: to protect them from *all* reasonably anticipated dangers, including the patent danger of an abusive birth parent. Instead, the Court of Appeals focused on the children's Indian status, and the fact that in this case, it was their birth parent (as opposed to their foster parents) that ultimately abused them.

This Court should take review to reverse the Court of Appeals' holding that (1) excludes from the universe of "foreseeable harms" the foreseeable neglect and abuse of children upon their return to their methamphetamine-addicted

birth parent and (2) eliminates certain common law and statutory duties in cases involving Indian foster children.

A. The Court of Appeals' decision conflicts with decisions of this Court and the Court of Appeals by holding that the Department does not have a common law duty to protect dependent foster children from all reasonably anticipated dangers, including that resulting from premature reunification with a methamphetamine-addicted birth parent who was considered an immediate danger to the children for seven years.

It is undisputed that the children were in the Department's custody as dependent foster children from their birth in 2006 until the dependency was dismissed in May of 2014. Yet the Court of Appeals ruled that the Department did not owe them a common law duty to protect them from all foreseeable harm during the dependency. Specifically, the opinion holds that the Department has no duty to protect these children from the reasonably anticipated danger of premature reunification with Martinez while she was still drug-addicted and unfit to parent.

1. Decisions of this Court and the Court of Appeals establish that the Department has a duty to protect dependent foster children from foreseeable harm.

The Department has a duty to prevent children in foster care from harm at the hands of third parties when the child was a foreseeable victim of the third party's conduct. *H.B.H. v. State*, 192 Wn.2d 154, 168, 429 P.3d 484 (2018). This duty arises where the Department has a special relationship with the victim that gives a right to protection. *Id*. (citing RESTATEMENT §315).

When a special relationship exists under §315, the party owing a duty must use reasonable care to protect the victim from the tortious acts of third parties. RESTATEMENT §314A cmt.e ("The duty in each case is only one to exercise reasonable care under the circumstances.").

When a child is in the custody of the Department, it steps into the *parens patriae* protective role that the custodial parent usually occupies. *H.B.H.*, 192 Wn.2d at 174-175. During that

period of custody "the State alone controls the placement of the child, determines the child welfare services to be provided, and decides when the child will be removed from a foster home, placed with a new foster family, *or returned to the family home*." *Id.* at 174 (emphasis added).

This common law duty is not limited to the statutory duties imposed on the Department. It is a general duty to protect children from all foreseeable "reasonably anticipated dangers". *Id.* at 168-172. This common law duty is no different from the duties imposed on public and private entities and individuals even when no statutory duty of protection exists. *Id.* at 169, citing *McLeod v. Grant County Sch. Dist. No. 128,* 42 Wn.2d 316, 320, 255 P.2d 360 (1953) (holding that a school has a duty to protect students from reasonably anticipated dangers); *Hutchins* v. *1001 Fourth Ave. Associates*, 116 Wn.2d 217, 227-28, 802 P.2d 1360 (1991) (holding that an innkeeper has a duty to protect guests from the criminal actions of third parties); *Hunt v. King County*, 4 Wn. App. 14, 20, 481 P.2d 593 (1971) (holding

that a hospital has a duty to protect patients from the reasonably foreseeable risk of self-inflicted harm through escape).

2. Although *H.B.H.* involved the Department's failure to discover the danger posed by foster parents, nothing in the reasoning or analysis of *H.B.H.* eliminates the Department's duty to prevent foreseeable abuse after returning a dependent child to the hands of a dangerous birth parent.

The Court of Appeals here rejected the argument that the Department has a common law duty to protect foster children from the "reasonably anticipated danger" of reunification with an abusive birth parent. Slip Op. 19. Instead, the Court framed this duty as a limited statutory "duty to investigate" Martinez and held that those statutes did not apply because this was a tribal dependency. *Id.* The opinion held that the *H.B.H.* duty exists only during "the "preadoption period of a dependency or termination proceeding," as opposed to when the children are in foster care and their birth parent is seeking their return. *Id.* at 22. The Court of Appeals concluded that because *H.B.H.* was a case of abuse by foster parents, the common law duties enunciated

therein can only be applied in cases where foster parents are the abusers. *Id.* at 21.

Nothing in this Court's analysis in *H.B.H.* circumscribes the Department's duty as only protecting dependent children from abusive foster parents. This Court was explicit: the Department's duty is to protect dependent children from all foreseeable harms and "reasonably anticipated dangers." This Court should take review to establish that those dangers include the danger of returning children to an abusive, drug addicted birth parent who posed an immediate threat to their safety.

3. The Court of Appeals opinion concluded that the Department's negligent acts and omissions breached no statutory duties, but failed to apply the common law principles in *H.B.H.* to those same negligent acts and omissions.

Based on its finding that the Department had no duty to the children, the Court of Appeals rendered summary judgment in this case despite ample evidence that the Department acted negligently. Again, this evidence includes: (a) failure to obtain Martinez's many positive drug tests; (b) misrepresentations to

the tribal court that Martinez had been "clean and sober" for a year; (c) failure to evaluate incidents of abuse and neglect in the context of Martinez's history; (d) failure to conduct proper health and safety visits during the trial reunification including individual interviews of the twins in a safe setting apart from Martinez; (e) failing to contact caseworkers about Martinez's progress and cooperation with services before recommending dismissal of the dependency; and (f) failure to obtain up-to-date drug counseling information before recommending dismissal of the dependency. CP 1157-1158. A reasonable juror could conclude that the Department could have foreseen that the children would be endangered if they recommended that the tribal court return the children to Martinez when she was still drug addicted and unable to parent. Due to the Department's negligence, the tribal court was misled to believe that Martinez was not still drug addicted, when drug addiction was the reason the Department originally took custody of the children.

This Court should take review to correct the Court of Appeals' misapprehension of Washington law. The common law duty of reasonable care under Restatement §315 and *H.B.H.* applies to *all* reasonably foreseeable dangers.

B. The question of whether DCYF owes different common law or statutory duties of care to dependent Indian foster children in its care than it owes to dependent non-Indian foster children is a question of first impression and public importance that this Court should address.

For the sole reason that the dependency was overseen by a tribal court, the Court of Appeals held that the Department was not bound by otherwise mandatory Washington statutes and common law. Slip. Op. 16-19, 22. Despite the fact that the Yakama tribal court expressly placed the children in the Department's care and custody, the opinion held that it would offend the tribes' sovereign immunity if the Department were obligated to follow these laws. Slip. Op. 16-19, 22. These general concerns about sovereignty led the Court of Appeals to conclude the Department had no duty under these statutes or this

Court's decisions in *H.B.H, Babcock v. State*, 116 Wn.2d 596, 601, 809 P.2d 143 (1991), and *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs*., 141 Wn.2d 68, 1 P.3d 1148 (2000). *Id.*

In particular, the Court of Appeals here was concerned with a provision in the Yakama Nation Children's Code that allowed investigation into the "personal and family history and environment" of a child at the tribal court's request. Slip. Op. 17. The opinion concluded that the tribal court had made no such request, despite the fact that the tribal court requested, in a court order, that the Department (1) take custody of the children, (2) provide "all necessary services" to them, and (3) be their advocate in the tribal court. CP 554, 1343, 2016-2018. Citing *In re Adoption of Buehl*, 87 Wn.2d 649, 662, 555 P.2d 1334 (1976) Division Three concluded that holding the Department had a duty here would "infringe on the tribe's right to govern itself" and erode the tribal court's authority. Slip Op. 17.

In addition to disregarding the tribal court's role in tasking the Department with protection of these children, the offense to tribal sovereignty at issue in the Court of Appeals opinion is the Department's dereliction of its duty to the tribe and these Indian children. Sovereign immunity should not be an escape from liability for the Department's acts and omissions, including misleading and false statements to the tribal court, which led to the children's torture and permanent injuries.

Holding the Department accountable for its own negligence in fulfilling its obligations to Indian children and tribal courts is not a threat to the tribe's sovereignty. On the contrary, it is an insult to the authority of tribes and tribal members to suggest that the Department has no duty simply because these are Indian children under the jurisdiction of a tribal court. If the Department would be liable to non-Indian children in these precise same circumstances, then tribal sovereignty is vindicated, not offended, by holding the Department had duties here.

The sovereignty issues raised in *In re Buehl* have no bearing on the issues here. *Buehl* involved an adoption proceeding where foster parents of an Indian child instituted adoption proceedings. *Buehl*, 87 Wn.2d at 651. However, the tribal court with jurisdiction over the dependency ordered the child returned to the natural mother. *Id.* A Washington superior court ruled that the tribal court decree was not entitled to full faith and credit, and that Washington State courts should separately adjudicate the custody issue. *Id.* Unsurprisingly, this Court reversed the superior court's order because it displayed a total disregard for the tribe's jurisdiction and final ruling. *Id.* at 653-654.

This case raises an entirely new issue. Here, the State of Washington did not disregard tribal court jurisdiction. The tribal court *authorized* the Department to take custody of children and be their advocate in dependency proceedings. The Department undertook those tasks negligently. Yet the Court of Appeals

founds the Department functionally immune from liability based on tribal sovereignty.

Before Division Three's opinion in this case, no Washington court, let alone this Court, opined on the important issue of public concern in this case.

This Court should take review to examine whether principles of tribal sovereignty negate the Department's duty in these circumstances.

VI. CONCLUSION

For the reasons stated herein, this Court should take review.

> This document contains 4998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 21st day of December, 2022.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Sidney C. Tribe*
Sidney C. Tribe, WSBA No. 33160

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal, to the following:

Bryan G. Smith Vito de la Cruz Tamaki Law Offices 1340 North 16th Avenue Suite C Yakima, WA 98902	Daniel J. Judge Office of the Attorney General 7141 Cleanwater Drive SW P.O. Box 40124 Olympia, WA 98504
Gerald Kobluk KSB Litigation, P.S. 221 North Wall, Suite 210 Spokane, WA 99201	

DATED this 21st day of December, 2022.

*S:/ Patti Saiden*_____
Patti Saiden, Legal Assistant

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 15, 2022

William McGinty
Washington State AGO
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
william.mcginty@atg.wa.gov

Bryan Gregory Smith
Tamaki Law Offices
1340 N 16th Ave Ste C
Yakima, WA 98902-7106
bsmith@tamakilaw.com

Gerald Kobluk
KSB Litigation, P.S.
510 W Riverside Ave Ste 300
Spokane, WA 99201-0515
gkobluk@ksblit.legal

Daniel John Judge
Attorney General's Office
PO Box 40124
Olympia, WA 98504-0126
Daniel.Judge@atg.wa.gov

Vito R. De La Cruz
Attorney at Law
14727 SE 132nd Ave
Clackamas, OR 97015-8298
vito_delacruz@yahoo.com

Sidney Charlotte Tribe
Carney Badley Spellman
701 5th Ave Ste 3600
Seattle, WA 98104-7010
tribe@carneylaw.com

CASE # 381901
Richard L. Mathieu v. Washington Dept. of Children, Youth & Families, et al
YAKIMA COUNTY SUPERIOR COURT No. 1920224039

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:sh
Enclosure
c: **E-mail** Honorable Blaine G. Gibson

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

RICHARD L. MATHIEU, as Litigation Guardian ad Litem for M.J. and A.J., minors, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, and YAKIMA VALLEY COUNCIL ON ALCOHOLISM, PBC, aka TRIUMPH TREATMENT SERVICES, and KAI MARTINEZ and ROBERTO VALLADARES, Respondents.	)	No. 38190-1-III UNPUBLISHED OPINION

STAAB, J. — In December 2013, the Yakama Tribal Court returned twin seven-year-old children, A.J. and M.J., to their mother's care after a lifetime in foster care through a tribal court dependency serviced by the Washington State Department of Children, Youth & Families (Department). The mother had recently enrolled in the Parent-Child Assistance Program (PCAP) through Yakima Valley Council on

Alcoholism, PBC (d/b/a Triumph Treatment Services) (Triumph), and obtained suitable housing through Triumph. The tribal court dismissed the dependency in May 2014, and the Department closed its file shortly thereafter.

In February 2015, a relative discovered that the mother had severely abused and neglected the twins. Through their guardian ad litem, Richard Mathieu, the twins sued the Department for negligence for placing them in their mother's custody and care. They also sued Triumph, which housed the mother and the twins, for negligently monitoring and supervising that placement. The Department and Triumph each successfully moved for summary judgment dismissing all claims against them.

We affirm the trial court's dismissal of Mathieu's claims against the Department and Triumph. Recognizing that the dependency in this case was under the exclusive jurisdiction of the Yakama Tribal Court, Mathieu fails to identify a statutory duty under Yakama law that required the Department to investigate the mother absent a report of neglect or abuse. Nor did the Department have a common law duty to monitor the mother after the tribal dependency was dismissed. Similarly, we hold that Mathieu has failed to demonstrate that Triumph, as either the landlord or the provider of social services to the mother, had a common law duty to protect the twins from the criminal acts of their mother.

BACKGROUND

In June 2006, Kai Martinez gave birth to drug-affected twins, A.J. and M.J. The children were immediately removed from Martinez's care due to her ongoing use of methamphetamine and the twins' positive toxicology screen at the time of birth. A dependency was opened in Yakama Nation Tribal Court. The tribal court entered a fact-finding hearing order that found A.J. and M.J. to be neglected and dependent Indian children pursuant to tribal and federal law. It awarded custody and supervision of the twins to the Department and authorized the Department to place the children in foster or relative care. A.J. and M.J. were ultimately placed in foster care with a non-Native family from June 2006 to December 2013. Martinez had little involvement in the dependency from June 2006 to May 2013.

In September 2012, Martinez enrolled in a program offered by Yakima Valley Council on Alcoholism, PBC (d/b/a Triumph Treatment Services) called the PCAP after discovering she was pregnant with A.J.'s and M.J.'s younger sibling. According to PCAP literature:

> The primary goals of PCAP are to help mothers with substance abuse disorders
>
> - Achieve and maintain recovery
> - Build healthy family lives
> - Prevent the births of subsequent alcohol/drug exposed infants
>
> We do this by building trusting relationships with mothers, connecting clients with comprehensive, relevant community services, and teaching them to believe in themselves.

Clerk's Papers (CP) at 978. The PCAP client service agreement signed by Martinez states in part:

> While you are in PCAP, your case manager will be in touch with you many times a month, including home visits. She will ask about what kinds of goals and needs you have, and develop a plan of care and services that will meet your needs and help you reach your goals. She will review this plan with you every few months. During the program, your case manager will help link you with the community services that are just right for you. She will offer transportation and childcare for some of your important appointments. Based on your needs, she will help you with supplies, activities, and incentives while you are in the program. If you sign release forms to coordinate services with other providers, your case manager will talk with those other service providers (such as DSHS, probation, medical) when she needs to.

CP at 1072. Martinez had also enrolled in a methadone program.

At a May 2013 review hearing, the tribal court reinstated visitation for Martinez, but rejected Martinez's request to relinquish her parental rights. To further reunification efforts, the Department recommended that Martinez be ordered to engage in mental health counseling and family preservation services; however, the tribal court did not order Martinez to engage in these services.

Martinez began attending Department-supervised visits with A.J. and M.J. in July 2013. Between July 2013 and December 2013, Martinez canceled eight of 22 visits for various reasons. After a visit in early September 2013, A.J. told her foster mother that Martinez had squeezed her hand hard. The foster mother saw no injury but reported A.J.'s statement to the assigned social worker, Michelle Betts. Betts asked Martinez

what happened at the visit, and Martinez said A.J.'s hand had been "scrunched up" while working with beads during the visit. CP at 1338. The foster mother's report was "screened out" for no specific child abuse, neglect allegation, or risk.

Throughout 2013 and part of 2014, Martinez was in a methadone program through Central Washington Comprehensive Mental Health. As part of this program, Martinez was tested for drug use. In July 2013, when Martinez began visitations with A.J and M.J., she began struggling with her sobriety. On June 3, Martinez failed to show up for a psychological evaluation as part of her treatment. On June 4, she tested positive for amphetamines. On June 10, she failed to show up for therapy, and her counselor was unable to reach Martinez to set up another therapy appointment. Although Martinez had signed releases to allow the Department to access her methadone program records, Betts did not request these records.

In October 2013, the tribal court ordered that A.J. and M.J. start transitioning back to Martinez's care and custody, first through a relative care placement and then with Martinez for an in-home dependency. While still enrolled in Triumph's PCAP, Martinez signed a clean and sober housing agreement (Agreement) with Triumph Treatment Services in November 2013 to become a resident at one of its Transitional Housing Program units. The Agreement does not require Martinez to pay rent. Instead, by signing the Agreement, Martinez stipulated to several policies and rules in order to live in one of Triumph's Transitional Housing Program units. One of the rules or policies was

Triumph's inspection procedures, i.e., weekly, mandatory inspections performed "in order to provide a safe and healthy environment" and "with the intention of assuring that premises are in good conditions and to report any damage or repairs to the Maintenance Department." CP at 1076. Martinez's presence in the home was not necessary during inspections.

Martinez moved into her Triumph apartment unit in mid-November 2013. A.J. and M.J. transitioned to an in-home dependency with Martinez on December 20. The Department conducted monthly health and safety checks on the twins for the next five months and noted no concerns.

Unbeknownst to the Department and the tribal court, in December, Martinez told her methadone treatment counsel that she had relapsed on methamphetamine after moving to her new apartment and was unable or unwilling to re-engage with the clinic. However, by April 4, 2014, Martinez's methadone counsel told Betts that Martinez was compliant with the program and doing "amazing," and the counselor had no concerns.

On April 30, 2014, Betts received a call from the children's school stating that the school had early release and Martinez had not picked up the twins from school. The school could not reach Martinez or her boyfriend. Betts picked up the twins from school and eventually took them home. Martinez explained that she did not realize it was an early release day.

Yakama Nation Children's Court dismissed A.J.'s and M.J.'s dependency proceeding in May 2014, and the Department closed its file on the matters in June 2014. Unknown to the court and the Department, Martinez was in active relapse on methamphetamine when the dependency was dismissed. For the next several months, Martinez continued to abuse methamphetamine and heroin.

Martinez's PCAP case manager, Andrea Ross, never visited Martinez inside her apartment and never observed Martinez interact with A.J. and M.J. during her visits with Martinez. Martinez expressed to Ross that she was struggling and depressed, but Ross never suspected Martinez had relapsed or was abusing her children. She did not see A.J. or M.J. between September 2014 and February 2015.

Triumph's housing manager, Sophia Sanabria, inspected Martinez's apartments at various times. She observed the apartment to be clean but not spotless and once smelled urine in the apartment and was told by Martinez that one of the kids had had an accident. Sanabria received no reports of concern in December 2014 and never saw A.J. and M.J. at the apartment.

In February 2015, concerned that they had not seen A.J. and M.J., Martinez's sisters entered her apartment. Martinez's children were home alone. A.J. and M.J. were in extremely poor health, malnourished, emaciated, and skeletal. Their room smelled strongly of urine. Martinez's sisters and mother took A.J. and M.J. from the apartment and called 911. Due to their extreme health conditions, including severe malnutrition,

torture, and starvation, the children were ultimately admitted to Seattle Children's Hospital. The ensuing investigation into A.J.'s and M.J.'s conditions revealed that Martinez and her boyfriend had subjected the children to torture, including physical assaults; psychological maltreatment, such as death threats, terrorization, degradation, and humiliation; and restrictions on basic necessities of life, such as food, basic hygiene, isolation from others, and medical neglect.

Procedural History

Richard L. Mathieu was appointed the litigation guardian ad litem for A.J. and M.J. On their behalf, he sued the Department and Triumph for damages arising from the abuse and neglect the twins suffered at the hands of their mother after they were returned to her care following a seven-year-long dependency in Yakama Nation Children's Court. (complaint for damages filed March 11, 2019).

Mathieu alleged the Department breached its common law and statutory duties to keep its file open; provide services; investigate and monitor Martinez before and after placement; monitor A.J.'s and M.J.'s health, safety, and school attendance; and hold periodic hearings. These breaches, alleged Mathieu, proximately caused harm to A.J. and M.J.

Similarly, Mathieu alleged that Triumph breached its duties to supervise Martinez by failing to provide her with services, follow up on her participation in its PCAP program, report suspected child abuse or neglect, conduct home visits to ensure the

children's welfare, communicate with A.J.'s and M.J.'s school, and monitor A.J.'s and M.J.'s care. He further alleged that Triumph's breaches were the proximate cause of harm to A.J. and M.J.

Following discovery, the Department and Triumph moved for summary judgment. Both defendants argued that they either had no duty to protect the twins or their duty to protect was not triggered under the circumstances. The superior court entered orders granting the Department's and Triumph's respective motions for summary judgment, dismissing all of A.J.'s and M.J.'s claims against the two agencies with prejudice. On behalf of the twins, Mathieu appeals.

ANALYSIS

1. DID THE DEPARTMENT OWE A.J. AND M.J. STATUTORY AND COMMON LAW DUTIES DURING AND AFTER DISMISSAL OF THE DEPENDENCY PROCEEDINGS?

The superior court dismissed all of the claims against the Department on summary judgment. This court reviews summary judgment decisions de novo. *Turner v. Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 284, 493 P.3d 117 (2021). A claim of negligence requires the plaintiff to show (1) the existence of a duty to the plaintiff, (2) breach of that duty, (3) proximate cause, and (4) resulting injury. *Id.* A defendant moving for summary judgment on a negligence claim has the initial burden of demonstrating the absence of an issue of material fact or that the plaintiff lacks competent evidence of an essential element of the claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). The

primary issues in this case concern the existence and scope of any duty owed by either the Department or Triumph to A.J. and M.J. "The existence and scope of a duty is a threshold inquiry in a negligence action, and it is a question of law we review de novo." *Turner*, 198 Wn.2d at 284. Whether a legal duty exists "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quoting *Lords v. N. Auto Corp*., 75 Wn. App. 589, 596, 881 P.2d 256 (1994).

Mathieu argues that the Department owed various duties of care to A.J. and M.J. during and after the dismissal of the dependency. He asserts that during the dependency the Department owed A.J. and M.J. a statutory duty under RCW 26.44.050 to investigate reports of abuse and neglect. Specifically, Mathieu contends that the reports that Martinez squeezed A.J.'s hand during a supervised visit and that Martinez failed to pick up the children after school one day are sufficient to trigger the duty to investigate. He further asserts that the Department owed a statutory duty under RCW 13.34.138 and *Babcock v. State*, 116 Wn.2d 596, 608, 809 P.2d 143 (1991) to investigate Martinez before recommending an in-home dependency to the tribal court. He argues the Department had a duty to A.J. and M.J. to provide accurate information to the court, relying on *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 83-84, 1 P.3d 1148 (2000). Finally, Mathieu contends that, after the dependency was dismissed, the Department owed a common law duty of reasonable care to protect A.J. and M.J. from

Martinez's abuse and neglect based on a continuing special relationship between the Department and the twins. He relies on *H.B.H. v. State,* 192 Wn.2d 154, 429 P.3d 484 (2018), to support his special relationship argument. Each alleged duty will be analyzed in turn.

1. Duty to investigate reports of abuse under chapter 26.44 RCW

Mathieu contends that the Department had a statutory duty to investigate reports that Martinez abused and neglected her children. "Under RCW 26.44.050, [the Department] has a statutory duty to investigate reports of child abuse. The purpose of RCW 26.44.050 is to protect children." *Albertson v. State,* 191 Wn. App. 284, 299, 361 P.3d 808 (2015). The statute requires the Department to investigate a report alleging abuse upon receipt of the report and to refer the report to the court "where necessary":

> Except as provided in RCW 26.44.030(11), upon the receipt of a report alleging that abuse or neglect has occurred, the law enforcement agency or the department must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

RCW 26.44.050. However, the duty is limited to "conducting an investigation that was not biased or faulty and leading to a harmful placement decision under RCW 26.44.050." *Albertson,* 191 Wn. App. at 301.

The Department does not deny its duty to investigate under this statute. Instead, the Department argues that its duty to investigate was not triggered because neither the

report of hand squeezing nor the report of failing to pick up the children once after school rose to the level of abuse or neglect.

The Department's duty to investigate is not invoked until it receives a report of abuse or neglect. RCW 26.44.050; *Wrigley v. State*, 195 Wn.2d 65, 71, 455 P.3d 1138 (2020). "[N]ot all communications made to [the Department] qualify as duty-triggering 'reports.' Only a specific class of reports will warrant [the Department's] duty to investigate—those involving alleged abuse or neglect." *Wrigley*, 195 Wn.2d at 73. In other words, to trigger the Department's duty to investigate, the report must allege "past or current sexual abuse, sexual exploitation, or injury of a minor child, constituting abuse or neglect as provided in former RCW 26.44.020(1)" or "identify an act, a failure to act, or a pattern of behavior evidencing a 'clear and present danger to a child's health, welfare, or safety,' to constitute negligent treatment or maltreatment under former RCW 26.44.020(14)." *Id*. at 77.

The questions presented are whether a parent's singular failure to pick up her children from school on an early release date constitutes neglect, or whether the alleged act of a parent squeezing a child's hand that results in no observed injury constitutes "injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100." RCW 26.44.020(1) (defining "abuse or neglect"). Under these circumstances, the Department's duty to investigate was not triggered.

"Negligent treatment or maltreatment" is defined as "an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100." RCW 26.44.020(19). We have previously interpreted this definition as requiring serious misconduct rather than mere negligence. *Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 590, 360 P.3d 875 (2015).

Similarly, "injury" is "hurt, damage, or loss sustained." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1993); *see In re Welfare of Dodge*, 29 Wn. App. 486, 493, 628 P.2d 1343 (1981) (observing that the term "injury" should be given its ordinary definition and meaning). "[T]he nonaccidental infliction of physical injury or physical mistreatment on a child that harms the child's health, welfare, or safety" is "physical abuse" and includes "any . . . act that is likely to cause and that does cause bodily harm greater than transient pain or minor temporary marks or that is injurious to the child's health, welfare or safety." WAC 110-30-0030(1)(f); *See* RCW 9A.16.100. "Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child." WAC 110-30-0030(2).

The report in this case does not allege abuse or neglect. Neither A.J. nor her foster parent described Martinez's alleged act of squeezing A.J.'s hand as nonaccidental or an

unreasonable act of discipline. Moreover, A.J.'s foster parent testified that she "did not observe anything hurt," such as bruising or any other injury. CP at 1973. Based on the facts in the record, the alleged act did not cause bodily harm greater than transient pain or leave minor temporary marks. Nor does a singular instance of forgetting to pick up a child from school on early release date constitute serious misconduct. Mathieu's assertion that these incidents nonetheless trigger the Department's duty to investigate is insufficient to overcome summary dismissal.

Citing *Wrigley*, Mathieu also contends that the two reports should be viewed in the context of the entire history of the dependency, and when done so, the incidents are more serious than they would ordinarily appear. *Wrigley* does not support Mathieu's indirect attempt to expand the statutory duty to investigate reports of abuse or neglect. Instead, *Wrigley* reaffirms that the statutory duty to investigate is a "narrow exception" that carefully balances familial rights with the need to protect children. *Wrigley*, 195 Wn.2d at 76.

Because the Department did not receive a report of past or current conduct indicating abuse or neglect by Martinez against A.J., its statutory duty to investigate under RCW 26.44.050 was not triggered. The trial court, therefore, did not err by dismissing Mathieu's negligent investigation claim on summary judgment.

2. Duty to investigate proposed in-home placement under RCW 13.34.138 and Babcock

Mathieu contends that the Department has a statutory duty to investigate any residential placement, including an in-home dependency, that might cause harm to the child. RCW 13.34.138(2) establishes in-home placement requirements. The subsection provides, "A child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists." If the court orders that the child be returned home under these circumstances, then "[p]rior to the child returning home, the department must" "conduct background checks on" "all adults residing in the home"; "determine whether [any person who may act as a caregiver is] in need of any services"; and "[n]otify the parent with whom the child is being placed that he or she has an ongoing duty to notify the department of all persons who reside in the home or who may act as a caregiver." RCW 13.34.138(2)(b)(i)-(iii).

Mathieu argues that the Department had an affirmative duty to investigate the proposed in-home placement with Martinez *before* recommending such a placement to the tribal court. The plain language of the statute and its subparts expressly indicates that the Department's obligation to conduct background checks occurs only *after*—not before—the court orders that the child be returned home. Moreover, Mathieu assumes without citation to authority that a private right of action for negligent investigation is available under RCW 13.34.138. "Washington law does not recognize a general tort

claim for negligent investigation." *Albertson*, 191 Wn. App. at 299. And Mathieu offers no argument or analysis in favor of recognizing a new private right of action for negligent investigation under RCW 13.34.138.

The Department argues that RCW 13.34.138 did not apply to the dependency proceedings in this case. It maintains that Yakama Nation Children's Code (chapter 80.02 RYC)[1] applied and that the tribal code contains no code provision parallel to RCW 13.34.138. We agree.

The Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Indian Reservation is a federally-recognized Indian Tribe pursuant to the Treaty of 1855 (Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859)) with the United States of America, possessed of sovereign rights and powers. It is a self-governing Indian tribe that operates under its own laws. It maintains a court system that includes the Yakama Nation Children's Court. The Yakama Nation Children's Court determined, pursuant to its tribal code, that it possessed exclusive jurisdiction over A.J.'s and M.J.'s dependency proceedings after a fact-finding hearing.

The Supreme Court of Washington has previously stated:

> We agree with the court in *Wakefield v. Little Light*, [276 Md.333, 348,] 347 A.2d [228 (1975),] that "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . (t)ribe to govern themselves than to interfere with tribal control over the custody

[1] Revised Yakama Nation Code (RYC).

> of their children . . .". . . "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right . . . to provide for the care and upbringing of its young, a Sine qua non to the preservation of its identity." *Wisconsin Potowatomies v. Houston*, 393 F.Supp. 719, 730 (W.D. Mich. 1973).

In re Adoption of Buehl, 87 Wn.2d 649, 662, 555 P.2d 1334 (1976) (some alterations in original).

The Yakama Nation Children's Code allows an investigation into family history and environment of a child within its jurisdiction only upon the tribal court's request: "Upon request of the Court, . . . any other Agency or person so designated may investigate the personal and family history and environment of any child coming within the jurisdiction of the Court under Section 80.02.03 and file a report of its findings with the Court." Br. of Resp't, App. A at 9 (RYC 80.05.07). The record on appeal includes no request by the tribal court to investigate Martinez. Applying RCW 13.34.138 here would conflict with RYC 80.05.07 by substantially expanding the Department's authority to investigate the parent of a child within the tribal court's jurisdiction. Such a result would infringe on the tribe's right to govern itself, interfere with tribal control over the custody of their children, and create a substantial risk of conflicting adjudications affecting child custody and eroding tribal court authority. *Buehl*, 87 Wn.2d at 662. The trial court did not err by dismissing Mathieu's claim for negligent investigation of Martinez under RCW 13.34.138 and *Babcock*.

3. Duty to provide accurate information to the court under Tyner

Next, Mathieu contends the Department had a specific duty to provide relevant information to the tribal court during the dependency action and breached this duty when it failed to seek out information on Martinez's compliance with her methadone program and provide this information to the tribal court. He argues that *Tyner* held that "the Department's undisputed duty to investigate included the duty to accurately inform courts that are involved in child custody proceedings, and breach of those duties was actionable." Appellant's Opening Br. at 39.

In *Tyner*, a father suspected of child abuse successfully sued the Department for negligent investigation that resulted in a four and one-half month separation from his children during an investigation for child abuse. Notably, the case worker's final report—completed three weeks after the investigation began—concluded that the allegations against the father were unfounded. *Tyner*, 141 Wn.2d at 73-74. Neither the report nor its contents were provided to the court. *Id*. at 74-75. The Supreme Court concluded that the Department's statutory duty to investigate extended to the parent of a dependent child, even a parent suspected of abusing their own children. *Id*. at 82.

Turning to the issue of legal causation, the Court "agree[d] . . . that the conduct of a [Department] caseworker may, in some circumstances, be the legal cause of a parent's separation from a child, even when the separation is imposed by court order" because, without a contested fact-finding hearing, the Department caseworker controls the flow of

information to the court upon which dependency decisions are made. *Id*. at 83. The court's decisions may be impacted by the caseworker's concealment of information or negligent failure to discover material information. *Id*. at 83-84. On the other hand, "if all material information is presented to the judge, cause in fact will not be found if the complained of action is linked to the judge's decision." *Id*. at 86.

Tyner held that the Department's statutory duty to investigate extends to a parent, and exists apart from any action that the court may take. As we noted above, however, in a dependency under the exclusive jurisdiction of the tribal court, state statutes do not govern the procedure. To preserve tribal sovereignty, RCW 13.34.138 must yield to tribal law in a tribal court dependency.

Mathieu argues that the Department had a duty to investigate Martinez as the children's custodian. But the Department's duty to investigate, as recognized in *Tyner*, does not come from its status as custodian, but rather from the statute. While acknowledging that Yakama Tribal Court had exclusive jurisdiction over the dependency in this case, Mathieu fails to point to a similar statutory duty to investigate under the Yakama Nation Children's Code. Nor does Mathieu point to any order by the tribal court directing the Department to investigate Martinez and provide information to the court.

To the extent that Mathieu argues that RCW 26.44.050 implies a concomitant duty to report accurate information concerning placement decisions to the court, the argument must also fail. *Tyner* did not involve a placement decision, and neither RCW 26.44.050

nor its duty to investigate applies to placement decisions. As then Chief Justice Stephens explained in her concurring opinion in *Wrigley*:

> The State's duty to evaluate the suitability of a potential placement is separate and distinct from the State's duty to investigate allegations of child abuse under former RCW 26.44.050. These duties arise in different contexts and at different times during the dependency process. The State's duty to investigate under former RCW 26.44.050 triggers the State's intervention into an allegedly abusive family unit and so necessarily precedes the placement decision process. The duty to investigate under former RCW 26.44.050 cannot arise within the dependency and placement process itself. Rather, once the State has investigated a report under former RCW 26.44.050 and concluded the child should be removed and placed elsewhere, its investigation into potential placement options must be conducted pursuant to RCW 13.34.065 and other portions of Washington's comprehensive child welfare laws.

195 Wn.2d at 87 (Stephens, C.J., concurring). Thus, the Department had no duty under RCW 26.44.050 to provide accurate information concerning Martinez to the tribal court. Accordingly, the court did not err by dismissing Mathieu's negligence claim based on an alleged duty to provide accurate information.

4. Common law duty of protection based on a continuing special relationship

Mathieu's final claim against the Department is that it had a common law duty, even after the dependency was dismissed, to supervise and control Martinez's conduct and to use reasonable care to protect A.J. and M.J. from Martinez's abuse and neglect because the Department had a continuing special relationship with the children.

Common law does not recognize a duty to protect others from a third party's criminal acts, except where "'a special relationship exists between the defendant and

either the third party or the foreseeable victim of the third party's conduct.'" *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)). This special relationship exception is described in *Restatement (Second) of Torts* § 315 (AM. L. INST. 1965):

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

In *H.B.H.*, our state Supreme Court recognized that the Department's "legal duty under the principles of § 315(b) furthers the overarching purpose of Washington's child welfare laws 'to safeguard, protect, and contribute to the welfare of the children of the state,'" and held that the Department "stands in a special relationship with foster children in its charge." 192 Wn.2d at178, (quoting RCW 74.13.010). "Under the theory of *Restatement* § 315(b), this special relationship supports recognition of a duty in tort to protect foster children from foreseeable harms at the hands of *foster parents*." *Id*. (emphasis added).

The Department argues that during the tribal court dependency, A.J. and M.J. were wards of the tribal court, not the Department, so the Department could not have had a special relationship with the children. This argument is not convincing. Although the tribal court's March 2007 order entered after a fact-finding hearing found that A.J. and

M.J. were wards of Yakama Nation, it also ordered that "[c]ustody and supervision of the child[ren] is awarded to: [Department of Children and Family Services]" and that the Department "has authority to place the child[ren] in foster/relative care." CP at 2012. Because the children were removed from their parent and entrusted to the care of the Department, the Department's argument that it did not have a special relationship with A.J. and M.J. during the dependency fails.

Nevertheless, the holding in *H.B.H.* is limited to the preadoption period of a dependency or termination proceeding. *See* 192 Wn.2d at 161 (stating, "On appeal, the foster children argued that the trial court erred in dismissing their claims of negligence by [Department of Social and Health Services] concerning the preadoption period."). Neither *H.B.H.* nor any other Washington case law has extended the holding in *H.B.H.* to the period following adoption or dismissal of a dependency or termination proceeding. And no Washington case law has applied *H.B.H.* to a negligence action arising out of tribal court dependency proceedings.

While Mathieu contends the Department's special relationship to A.J. and M.J. did not end with the dismissal order, he offers no supporting authority for the contention. Although imposing such a duty under the circumstances of this case is appealing, such a duty would have unintended consequences. Parents have a fundamental, constitutional right to the care and custody of their children—a right that yields to the State's parens patriae right to intervene and remove children from their homes and place them into

foster care only "[w]hen a child's health, safety, and welfare are seriously jeopardized by parental deficiencies[.]" *H.B.H.*, 192 Wn.2d at 163-64. Once the State exercises its parens patriae right to intervene, it "has a statutory and constitutional duty to ensure that those children are free from unreasonable risk of harm . . . while under the State's care and supervision." *Id*. at 164.

That duty is no longer triggered after dismissal of a dependency because the children are no longer entrusted to the Department or under the State's care and supervision. They are under their parent's care and supervision. Therefore, the dismissal of a dependency proceeding restores the primacy of a parent's fundamental constitutional right to rear their children without State interference. And the State may not intervene again unless a child's health, safety, and welfare are again seriously jeopardized. Indeed, *H.B.H.* acknowledges that the Department "retains legal custody of the child [only] throughout the *duration of the dependency*," not after the dependency has been dismissed. *Id*. at 174 (emphasis added). RCW 13.34.020 declares a legislative purpose of nurturing the family unit and keeping a family intact unless the parents jeopardize a child's right to basic nurture, health, and safety. Thus, *H.B.H.* does not support Mathieu's negligence claim based on an alleged postdismissal special relationship between the Department and the twins. The claim fails for lack of a duty. Accordingly, the trial court did not err by dismissing it.

Because we hold that the Department did not owe a statutory duty to investigate Martinez during the dependency, or a common law duty to supervise Martinez after the dependency was dismissed, we do not decide whether disputed issues of fact pertaining to breach and causation should prevent summary judgment.

2. DID TRIUMPH OWE A COMMON LAW DUTY TO THE CHILDREN?

We next consider whether Triumph owed A.J. and M.J. common law duties to protect them from the abuse and neglect inflicted by Martinez based on the existence of a special relationship. Mathieu asserts that a special relationship exists because Triumph received public funds to provide services to women like Martinez and her children through Triumph's PCAP and to Martinez as a tenant in one of Triumph's apartments in its clean and sober housing program.

As we explained above, we review de novo the summary judgment dismissal of claims against Triumph. *Turner*, 198 Wn.2d at 284. The existence and scope of a duty in a negligence action is a threshold question of law reviewed de novo. *Id*. Whether a legal duty exists "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Snyder*, 145 Wn.2d at 243 (quoting *Lords*, 75 Wn. App. at 596.)

An exception to the general rule that there is no duty to prevent a third party from causing injury to another is the development of a special relationship. *Lauritzen*, 74 Wn. App. at 438. A legal duty may arise in two ways: when a special relationship develops between the defendant and either a third party or the foreseeable victim of the third

party's conduct. *Id*. Though special relations depend largely on context, all share in common (1) the presence of a relationship, (2) the entrustment of one party's well-being to the other, and (3) a financial benefit to the party entrusted with the care of the other. *Id.* at 439-41.

Although not entirely clear, Mathieu argues that both exceptions apply: Triumph developed a special relationship with both Martinez and the twins giving rise to a duty to protect the twins from their mother's conduct. Mathieu's briefing does not treat the two exceptions separately and tends to blend the theories. We address the exceptions in turn.

1. § 315(a) Special Relation with Martinez

Under § 315(a) of the *Restatement*, Triumph would have a duty to protect the children from Martinez's criminal conduct if there was a special relationship between Triumph and Martinez that imposed a duty upon Triumph to control Martinez's conduct. The *Restatements* give examples of a parent's duty to control their child's conduct, an employer's duty to control the conduct of its employee even when acting outside the scope of employment, and the duty of a possessor of land to control the conduct of a licensee. RESTATEMENT §§ 316, 317, 318 (AM. L. INST. 1965). Our Supreme Court has also held that a special relationship exists between psychiatrists and their inpatient and

outpatient patients. *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983); *Volk v. DeMeerleer*, 187 Wn.2d 241, 262-63, 386 P.3d 254 (2016).[2]

Mathieu does not cite any cases from Washington or any other jurisdiction that have recognized a special relationship between a social services nonprofit and its client sufficient to create a duty to third parties under *Restatement* § 315(a). Mathieu is correct that a defendant need not exert physical control over a third person to create a special relation under this exception, *see Taggart v. State*, 118 Wn.2d 195, 219, 223, 822 P.2d 243 (1992). However, some type of control is still a necessary element of a special relation under *Restatement* § 315(a), and Mathieu does not articulate the type or degree of control needed to create a special relationship under these circumstances. Instead of addressing control, Mathieu argues that Triumph's business model, along with the fact it contracts with Martinez and the State created goals and contractual obligations. Appellant's Opening Br. at 54.

Martinez had two connections with Triumph: (1) she was enrolled in Triumph's PCAP; and (2) she was a tenant in a Triumph-owned apartment. Triumph contends that neither connection afforded Triumph any ability to control Martinez's actions, especially with respect to her children. We agree. PCAP is an advocacy and research program that

[2] Mathieu does not argue that Triumph's caseworkers are mental health professionals pursuant to the Supreme Court's decision in *Volk*. We do not address this issue because it was not raised.

utilizes advocates who engage with and help pregnant or new mothers with a history of substance abuse connect to relevant community services; it is not a social work or child protection program. A mother's participation in PCAP is voluntary. PCAP advocates are not social workers, clinical professionals, or treatment providers; they have no authority to control the mother or to compel her to participate. PCAP's voluntary engagement model is inconsistent with the characteristics of a special relationship.

Nor did Martinez's residence in a Triumph-owned apartment create the ability to control Martinez. That Agreement was independent of Martinez's participation in the assistance program. And though the Agreement required Martinez to remain clean and sober, Triumph would generally not evict a tenant who relapsed. The apartment was not a residential treatment facility, and rules relating to Martinez's expected conduct did not legally obligate Triumph to ensure or investigate her sobriety. The Agreement gave Triumph the right to inspect the apartment for damage, but neither Martinez nor her children were required to be present during this inspection.

For the first time on appeal, Mathieu argues that a special relationship between Triumph and Martinez developed under *Restatement (Second) of Torts*, § 318 (AM. L. INST. 1965), which requires a landowner to prevent a *licensee* from intentionally harming another. Appellant's Opening Br. at 57-60. Mathieu did not allege the existence of a duty under § 318 of the *Restatement* either in his complaint or on summary judgment, and

the trial court did not rule on the issue. We decline to address the issue. RAP 2.5(a)[3]; RAP 9.12[4]. Mathieu does not establish that Triumph could exert control of Martinez's conduct and thus fails to establish a special relationship between Triumph and Martinez under *Restatement* § 315(a).

2. § 315(b) Special Relation with the Children

Triumph would also have a duty to protect the twins from the criminal conduct of their mother if it had a special relation with the twins, which gives the twins a right to protections. RESTATEMENT § 315(b). The protective duty imposed by this special relation is based on an element of entrustment. *Turner*, 198 Wn.2d at 287. In the context of vulnerable children, the special relationship is one of parens patriae. *H.B.H.*, 192 Wn.2d at 171. "Rather than physical custody or control, vulnerability and 'entrustment for the protection of a vulnerable victim . . . is the foundation of a special protective relationship,'" under this exception. *Turner*, 198 Wn.2d at 287 (alteration in original) (quoting *H.B.H.*, 192 Wn.2d at 173). "[I]n all the situations where a special relationship has been recognized, the party that has been found to have a legal duty was in a position to provide protection from foreseeable criminal acts of third parties because he or she had

[3] "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a).

[4] "On review of an order granting . . . a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12.

control over access to the premises that he or she was obliged to protect." *Lauritzen*, 74 Wn. App. at 440-41. "Furthermore, most of the existing special relationships involve situations where the prospective defendant (employer, innkeeper, business owner) is benefiting financially from the prospective plaintiff (employee, guest, business invitee)." *Id*. at 441.

Examples under this exception include the Department's duty to protect preadoption children in foster care from the criminal acts of foster parents. *H.B.H.*, 192 Wn.2d at 178; *see also McLeod v. Grant County. Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953) (school has duty to protect its students from reasonably foreseeable dangers); *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (group home has duty to its vulnerable residents); *Caulfield v. Kitsap County*, 108 Wn. App. 242, 256, 29 P.3d 738 (2001) (county has a duty to disabled adults when county provides in-home caregivers); *R.N. v. Kiwanis Int'l*, 19 Wn. App. 2d 389, 407, 496 P.3d 748 (2021)(group care facility had a duty to protect foster children in its care from intentional torts of third persons).

Mathieu misconstrues the special relation under *Restatement* § 315(b) by arguing that the Triumph's business model constitutes "entrustment and assumption of a protective duty" to "drug-addicted mothers who may foreseeably harm their children." Appellant's Reply Br. at 34. Essentially, Mathieu claims that Triumph was entrusted with the care of Martinez and this relation created a duty for Triumph to protect the

children from their mother. This exception, however, is based on a relationship between the defendant (Triumph) and the vulnerable person (the children); not with the third party (Martinez).

In *McLeod*, the relationship between the plaintiff and defendant was that of a school district and school child. 42 Wn.2d at 319. The Court described the relationship as follows:

> It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. The result is that the protective custody of teachers is mandatorily substituted for that of the parent.

Id. (internal citations omitted).

Here, Mathieu does not attempt to describe the relationship between Triumph (in its PCAP capacity) and A.J. or M.J. Nor does he offer any evidence that the twins were entrusted to the care and protection of Triumph. He merely offers the conclusory argument that Triumph had a protective relationship with A.J. and M.J. because its PCAP staff was responsible for conducting home visits and developing a safety plan for A.J.'s and M.J.'s protection.

A review of the record regarding Triumph's PCAP and housing program shows Triumph had no relationship with A.J. or M.J. of the nature described in *McLeod*. A.J. and M.J. were not compelled to attend Triumph programming or obey Triumph's rules and authority. Triumph did not have custody of A.J. or M.J. at any time or act as a

substitute parent. Instead, Triumph had a relationship with Martinez. She was an enrolled client in Triumph's PCAP program and a tenant of one of Triumph's clean and sober housing apartments. *See* CP at 1072.

Mathieu also suggests that whether a special relation existed is a disputed factual issues and the parties' disagreement about whether the PCAP model sets forth mandatory duties or simply best practices raises a genuine issue of material fact for trial. This argument disregards how Washington courts determine whether a duty exists. Again, the "existence of a legal duty is a question of law and 'depends on mixed considerations of logic, common sense, justice, policy, and precedent.'" *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (internal quotation marks omitted) (quoting *Snyder*, 145 Wn.2d at 243). The determination of the issue does not depend on the PCAP model's mandatory or optional nature. The two factors to be considered when determining a defendant's legal duty are (1) "the relationship between the parties," and (2) "the general nature of the risk." *McLeod*, 42 Wn.2d at 319.

Mathieu produced no evidence that Triumph/PCAP was entrusted with A.J.'s and M.J.'s well-being. When A.J. and M.J. were living in Triumph housing, A.J. and M.J. were entrusted to and in the custody of either the Department or Martinez.

Mathieu has failed to demonstrate that Triumph had a special relation with either Martinez or the children sufficient to give rise to a duty on Triumph's part to protect the

children from the criminal acts of their mother. The trial court did not err by dismissing Mathieu's negligence claims against Triumph.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Pennell, J.

Fearing, J.

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

RICHARD L. MATHIEU, as Litigation Guardian ad Litem for M.J. and A.J., minors, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, and YAKIMA VALLEY COUNCIL ON ALCOHOLISM, PBC, aka TRIUMPH TREATMENT SERVICES, and KAI MARTINEZ and ROBERTO VALLADARES, Respondents.	)	No. 38190-1-III ORDER GRANTING MOTION TO PUBLISH OPINION IN PART

THE COURT has considered the appellant's motion to publish the court's opinion of September 15, 2022, and the record and file herein, and is of the opinion the motion should be granted in part. Therefore,

IT IS ORDERED, the motion to publish is granted in part. The opinion filed by the court on September 15, 2022 shall be modified on page 1 to designate it is a published in part opinion and on page 24 after the first paragraph by adding the following language:

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PANEL: Judges Staab, Fearing, Pennell

FOR THE COURT:

Siddoway, C.J.

LAUREL H. SIDDOWAY, Chief Judge

CARNEY BADLEY SPELLMAN

December 21, 2022 - 9:36 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Richard L. Mathieu v. Washington Dept. of Children, Youth & Families, et al (381901)

The following documents have been uploaded:

- PRV_Petition_for_Review_20221221093550SC944791_2256.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Daniel.Judge@atg.wa.gov
- Victoria.Johnson@atg.wa.gov
- bsmith@tamakilaw.com
- gkobluk@ksblit.legal
- mhernandez@ksblit.legal
- shsappealnotification@atg.wa.gov
- vito_delacruz@yahoo.com
- william.mcginty@atg.wa.gov

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com
Filing on Behalf of: Sidney Charlotte Tribe - Email: tribe@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20221221093550SC944791