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No. 84682-5-I

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

C.R. and J.L., infants, by BRUCE A. WOLF,
their guardian ad litem,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

Timothy R. Tesh
WSBA #28249
Jonathan Van Eck
WSBA #47755
Ressler & Tesh PLLC
710 Fifth Avenue NW, Suite 200
Issaquah, WA 98027
(206) 388-0197

Philip A. Talmadge
WSBA #6973
Aaron P. Orheim
WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioners

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A. IDENTITY OF PETITIONERS

Bruce Wolf, as guardian *ad litem* for C.R./J.L., asks this Court to accept review of the Court of Appeals decision terminating review in Part B.

B. COURT OF APPEALS DECISION

Division I filed its opinion on October 23, 2023. A copy is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Does CPS owe a duty under RCW 26.44.050 to properly investigate possible child abuse of other siblings in the family home when it receives a report of abuse regarding a sibling living in that home and it undertakes to investigate not only the sibling's abuse, but also the possible abuse of those other children?

2. Does CPS owe a common law duty to siblings in the family home to properly investigate their possible abuse when it receives a report of possible abuse of another sibling, investigates that abuse and the possible abuse of the other siblings in the family home, and requires the abuser under investigation to leave the family home for the children's safety?

D. STATEMENT OF THE CASE

Division I's opinion provides an abbreviated outline of facts and procedures in the case. Op. 2-4. However, several facts

relevant to CPS's duty to C.R./J.L. bear emphasis.

First, C.R. was only 10 years old when her older stepsister D.L. reported her abuse by C.R.'s father, Timothy Rowe; J.L., C.R.'s stepsister, was eight years old. CP 55-56. D.L., C.R., and J.L. all lived in the same house with Rowe.

Second, it is undisputed that the Department of Social & Health Services' Child Protective Services ("CPS")[1] received a report of J.L.'s abuse by Rowe. CP 49-54. CPS assigned social worker Amie McKey to investigate the allegation. CP 49-54. McKey interviewed both C.R. and J.L. pursuant to CPS Policy 2333 that mandated caseworker interviews of *all* children in the home where the abuse was alleged to occur. McKey interviewed C.R. and J.L. at school. CP 55-84. Both young girls answered in a fashion indicating they had been coached. CP 62, 74, 83-84.

Ignored in Division I's opinion, CPS developed a "safety

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[1] The Department of Social & Health Services or "DSHS" is now organized as the Department of Children, Youth and Families.

plan" for the girls, albeit the caseworkers testified they had no memory of its terms. CP 213, 224, 227. The caseworkers concluded that Rowe was a hazard to C.R. and J.L. necessitating his removal from the house (D.L. was already out of the home spending the night with a friend. CP 86). Obviously, CPS itself felt that allegations lodged by D.L. against Rowe were sufficiently serious to warrant the protection of C.R./J.L. as a result of the report about Rowe's abuse of D.L.

Critically, on the evening of the girls' interviews, CPS dispatched after-hours social worker Troy Harris to Rowe's home to obtain signatures on an agreed safety plan, CP 85-87, and "to verify that Mr. Rowe has left the home" pursuant to that plan. CP 85. When Rowe stated he would not agree to a safety plan that required him to leave his home for more than 24 hours, Harris told Rowe that if Rowe did not cooperate, CPS "may need to place all five children into [protective custody]." CP 86. Harris told Rowe that CPS was requiring Rowe to leave his own home due "to the seriousness of the allegations and the

responsibility of [CPS] to child safety." *Id.* Ultimately, Rowe left the home that night after Harris informed him that Harris "could not/would not leave until [Rowe] himself had left the home." CP 87. Notably, CPS forced Rowe to leave his home even though D.L. was out of the house staying with a friend and therefore did not need to be protected from him. CP 86. CPS staff were concerned about C.R./J.L.'s safety from Rowe's predatory conduct.

Finally, although Division I chose not to address CPS's conduct in breach of its duty to protect the girls, op. at 14 n.7, CPS incompetently investigated the report it had received regarding D.L.'s sexual abuse, as C.R./D.L.'s well-qualified expert, Barbara Stone, testified in detail. CP 27-45. In the C.R. and J.L. interviews, McKey negligently failed to ask the girls questions regarding "good touch/bad touch." CP 32-33.[2]

[2] These questions allow young children, who otherwise have no idea that what is happening is wrong, to express a feeling that something may be wrong. Often, young children do not like sexual advances, but they do understand it is wrong until they are

McKey also failed to attend D.L.'s forensic interview, review a transcript or recording of that interview, or interview any of the *11 people* to whom D.L. had previously disclosed Rowe's abuse. *Id.* Nor did the CPS staff attach significance to Brittany Rowe's physical abuse of D.L. and her open hostility toward her. CP 33-34. Ultimately, in January 2015, DSHS erroneously determined that D.L.'s allegation of abuse was unfounded, CP 185, despite the risk to the girls being "moderately high." *Id.* CPS closed its investigation of D.L.'s abuse by Rowe. CP 180-86.

CPS negligently failed to discover Rowe's prolonged sexual abuse of C.R./J.L. CP 34. Emboldened by DSHS's failure to stop his sexual molestation of the girls, Rowe's sexual abuse of C.R./J.L. escalated. CP 13.[3] After initially molesting the two

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much older. "Good touch/bad touch" questions help young children understand that such touching is wrong. Reply br. at 25-27.

[3] Strangely, Division I stated that the record does not support the intensification of Rowe's abuse after the CPS investigation. Op. at 20. The court should have treated the facts in a light most favorable to the children, inferring appropriately

girls, he now raped them; over the next several years, C.R. and J.L. regularly endured being orally, vaginally, and anally raped by Rowe. *Id.*

Division I's opinion glosses over these horrific facts to hold as a matter of law that DSHS owed no statutory or common law duty to the siblings living in the home with a child it was sent to investigate for potential abuse.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) CPS Owes a Duty to All Siblings Residing in the Family Home Pursuant to RCW 26.44.050 to Properly Investigate Their Possible Abuse

(a) Public Policy

Our Legislature and courts have steadfastly sought to

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from Rowe's conviction for rape of a child that his abuse reported by D.L. as molestation had intensified. At a minimum the court should have remanded the case for resolution of that key factual point that bears on CPS's *Restatement* § 302B liability in particular. *Afoa v. Port of Seattle,* 176 Wn.2d 460, 466, 296 P.3d 800 (2013) ("[S]ummary judgment is inappropriate where the existence of a legal duty depends on disputed material facts.").

protect children and control sexual predators because sexual abuse of children, especially girls, is widespread. As many as one in three girls will experience some form of sexual abuse before age 16.[4]

The Legislature recognized an overarching right of children in Washington to a safe placement, free of abuse, in the context of the importance of *the family unit*. RCW 13.34.020. Courts have confirmed that right as well. *E.g.*, *In re Dependency of M.S.R.*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012); *In re Dependency of J.D.E.C.*, 18 Wn. App. 2d 414, 421, 491 P.3d 224 (2021). To implement that overarching policy, the Legislature has directed that child abuse or neglect must be reported, RCW 26.44.010. Such reports of abuse or neglect must then be

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[4] King County Sexual Assault Resource Center, *Keeping Communities and Neighborhoods Safe*, *available at* https://www.kcsarc.org/sites/default/files/Resources%20-%20Neighborhood%20Safety.pdf. *See* Appendix. *See generally,* Supreme Court Gender & Justice Commission, *Sexual Violence Bench Guide for Judicial Officers* (Rev. 2018), *available at* http://www.courts.wa.gov/content/manuals/SexualOffense/WA_SV_Guide.pdf.

properly investigated by CPS or law enforcement. RCW 26.44.050.[5]

It is clear that Washington public policy is to *prevent the abuse of children,* in the context of the family unit, as this Court has confirmed, "The purpose of Washington's statutory scheme is 'to safeguard, protect, and contribute to the welfare of the children of the state.' Consistent with this purpose, the guiding principle of our child welfare system is that 'the child's health and safety shall be the paramount concern.'" *H.B.H. v. State*, 192 Wn.2d 154, 164, 429 P.3d 484 (2018) (quoting RCW 13.34.020 and 74.13.010); *C.J.C. v. Corp. of the Cath. Bishop of Yakima*, 138 Wn.2d 699, 717, 985 P.2d 262 (1999) (recognizing the "overriding and paramount legislative intent to protect children from physical and sexual abuse") (quoting *State v. Waleczek*, 90 Wn.2d 746, 751, 585 P.2d 797 (1978)).

Division I's outlier opinion, absolving DSHS of a

[5] The statutes referenced here are in the Appendix.

negligent investigation undercuts these clear goals.

(b) RCW 26.44.050's Plain Language

RCW 26.44.050's express language requires the investigation of any abuse upon CPS's receipt of a report.[6] RCW 26.44.050 does not confine that duty to investigate to *a particular child*. The plain statutory language in .050 merely requires that a report of abuse must be made, *not* a report of abuse as to each child in the home. Upon the receipt of any report of abuse or neglect, an investigation must occur, and CPS is liable if the investigation is negligent.

(c) CPS's Interpretation of Its Duty under RCW 26.44.050

Division I asserts that CPS's own internal investigative

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[6] In carrying out legislative intent as this Court mandates for statutory interpretation, *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002); *Cockle v. Dep't of Labor & Indus*., 142 Wn.2d 801, 807, 16 P.3d 583 (2001), courts must look at the words of the statute itself. *Federal Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) (the "bedrock principle of statutory interpretation" is the statute's "plain language.").

policies cannot form the basis for its duty to C.R./J.L. Op. at 7-8. That is wrong. In *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005), this Court recognized that "Internal directives, departmental policies, and the like may provide evidence of negligence." *See generally*, WPI 60.03. Departmental policies figure in the duty analysis. Indeed, in *Tyner v. State, Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 87-88, 1 P.3d 1148 (2000), CPS's manual was given to the jury as evidence of its negligence.

CPS Policy 2333 indicates that children in the home where abuse has been reported are owed a duty. Caseworkers must:

> b. Complete a face-to-face present danger assessment of children who are not a victim or identified child in the intake although are related to the household. Gather information to complete the safety assessment.
>
> c. Assess if present danger exists during any contact with a child to determine if an immediate, significant and clearly observable behavior or situation is actively occurring and is threatening or dangerous to a child. *Take immediate protective action if a child is in present danger.*

(emphasis added). Supervisors must confirm:

> a. All child victims or identified children were interviewed.
>
> b. Allegations of CA/N were addressed.
>
> c. Children not a victim or identified child in the intake related to the household had a face-to-face present danger assessment before the safety assessment was completed.

Resp't br. at 43.

All of these steps are consistent with expert Barbara Stone's undisputed testimony that CPS has historically undertook a duty to all siblings in a home where abuse was reported. CPS trained its caseworkers that when one child in a family unit is alleged to have been sexually abused, the possibility that all other children in the family unit may have also been sexually abused must be investigated. CP 31-32 ("…[w]hen CPS receives a report alleging that a child has been sexually abused, its duty to investigate that report encompasses all children in that child's family unit. That has been the standard of care for decades, and social workers in the state of Washington

have been trained on this policy for decades.").

Division I's misstatement of the law as to its duty derived from its own policies requires review. RAP 13.4(b)(1), (4).

(d) C.R./D.L.'s Implied Right of Action under RCW 26.44.050

Implementing the Legislature's direction in RCW 26.44.050 to properly investigate reports of abuse and neglect, this Court has recognized an implied right of action for negligent CPS investigations. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). The *Tyner* court confirmed that such an implied right of action for a negligent investigation existed, albeit as to a wrongfully accused father:

> [T]he Legislature has recognized the importance of the family unit and the inextricable link between a parent and child. *During its investigation the State has the duty to act reasonably in relation to all members of the family*.

141 Wn.2d at 79 (emphasis added). Thus, the investigative duty under RCW 26.44.050 must be seen within the familial context. If the duty extends to parents of the abused/neglected child, it

extends as well to the child's siblings residing in the home.

In *M.W. v. Department of Social & Health Services*, 149 Wn.2d 589, 70 P.3d 954 (2003), this Court made clear the essential elements of the implied action – the investigation must gather incomplete or biased information and such inadequate investigation must result in a harmful placement decision; the court reiterated that the two primary legislative concerns underlying Chapter 26.44 RCW are "the integrity of the family and the safety of *children within the family*." *Id.* at 597 (quoting RCW 26.44.010) (emphasis added).[7]

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[7] The duty under RCW 26.44.050 only extends to those with a biological connection to the reported abuse. *Ducote v. Department of Social & Health Services*, 167 Wn.2d 697, 701, 222 P.3d 785 (2009) (CPS's duty to competently investigate allegations of child abuse/neglect does not extend to stepparents).

A report of abuse is necessary for any claim. Division I correctly recognized that *Wrigley v. State*, 195 Wn.2d 65, 455 P.3d 1138 (2020), did not affect the duty analysis here. Op. at 8-9. The *Wrigley* court found *no report* was made to invoke the investigative duty in RCW 26.44.050. CPS received a report of D.L.'s abuse by Rowe. *See also*, *M.E. v. City of Tacoma*, 15 Wn. App. 2d 21, 471 P.3d 950 (2020), *review denied*, 196 Wn.2d

Nothing in this Court's decisions on the scope of the State's investigative duty under RCW 26.44.050 suggests that CPS is entitled to ignore the likely abuse of the other siblings residing in the same familial house as the child whose abuse is reported. In fact, in *Desmet v. State ex rel. DSHS*, 200 Wn.2d 145, 514 P.3d 1217 (2022), this Court reaffirmed the implied right of action under RCW 26.44.050, and rejected a broad reading of RCW 4.24.595, a statute designed to provide State relief from *Tyner*.

Other courts have held that the State owes the duty of competent investigation to *any* child in the family home it suspects of being abused. *See, e.g., Rodriguez v. Perez,* 99 Wn. App. 439, 445, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000) ("[B]oth the children who are suspected of being abused and their parents comprise a protected class under RCW 26.44

1035 (2021) (abuse report was made as to child the abuser babysat; Division II found that no harmful placement decision occurred as to two other children in the home).

and may bring [an] action for negligent investigation under that statute."); *Lewis v. Whatcom County*, 136 Wn. App. 450, 452-53, 149 P.3d 686 (2006) (defendant owed duty of competent investigation to plaintiff because it suspected she was being abused while investigating allegations that another girl was being abused); *Kirchoff v. City of Kelso*, 190 Wn. App. 1032, 2015 WL 5923455 (2015) (plaintiff's sister was being sexually abused by their stepfather; Division II reversed summary judgment for State; the report DSHS received concerned the plaintiff's sister, not the plaintiff herself); *K.C. v. State*, 10 Wn. App. 2d 1038, 2019 WL 4942457 (2019) (two women were sexually abused by their stepfather years after their stepsister reported that she was being sexually abused; on appeal, the State conceded that it owed a duty to all children in the home when each of these reports was received). This conflict in Court of Appeals precedent warrants review. RAP 13.4(b)(2).

Division I's outlier opinion conflicts with case law not only within the borders of our state but outside it, too. Courts in

other jurisdictions have not confined the duty of agencies like CPS solely to the child in the family home who is the subject of a report of abuse or neglect. In *Gowens v. Tys. S. ex rel. Davis*, 948 So. 2d 513 (Ala. 2006), the Alabama Supreme Court concluded that a state social worker and his supervisor were negligent when the State received a report from a hospital that a mother and her newborn baby were cocaine-affected. The social worker failed to investigate the impact of that report on the two half-sisters who resided in the mother's home. The seven-year-old half-sister was later severely injured in a fire in the home where she was left alone, locked in the house, after her grandmother (who resided with the mother) left for work. The Alabama court noted state agency protocols that required interviews with all children in the household after an abuse/neglect report. *Id.* at 523-24.

While there are cases declining to extend the duty to investigate under RCW 26.44.050 to *non-familial* persons or

children in a home,[8] those cases are inapplicable to a situation involving siblings residing in the family home, particularly where CPS actually investigated the abuse of C.R./J.L., interviewed them, and established a safety plan for them.

(e) The Real World Implication of Division I's Decision

Ultimately, Division I's opinion establishes bad public policy that is contrary to the statutory/common law policy of protecting children in the family context. The legislative intent underlying RCW 26.44.050 is to prevent child abuse, ensuring that children reside in a safe placement, by requiring CPS to properly investigate every report of past child abuse it receives.

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[8] *E.g.*, child caseworkers (*Pettis v. State*, 98 Wn. App. 553, 990 P.2d 453 (1999)); foster parents (*Blackwell v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 372, 127 P.3d 752 (2006)); a kidnapped child (*Estate of Linnik v. State ex rel. Dep't of Corrections*, 174 Wn. App. 1027, 2013 WL 1342316, *review denied*, 178 Wn.2d 1014 (2013)); children not yet born (*Albertson v. Pierce County*, 186 Wn. App. 1002, 2015 WL 783169 (2015)); children in private home daycare (*Boone v. Dep't of Soc. & Health Servs.*, 200 Wn. App. 723, 403 P.3d 873 (2017)).

RCW 26.44.010. Division I's condoning of a categorical exemption from liability for CPS's negligent investigation as to siblings in the familial home when one child in the home has been abused puts vulnerable Washington kids further at risk. Such a policy only encourages future negligent CPS abuse investigations, thereby increasing the number of children that will be harmed by the CPS's negligence. *See Babcock*, 116 Wn.2d at 622 ("The existence of some tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility that those injured by DSHS's negligence can recover.").

Ignoring C.R./J.L.'s abuse while investigating the report of D.L.'s abuse ignores the fact that a predator like Rowe did not confine his abuse to D.L. Indeed, CPS itself has readily acknowledged that "a home in which a sexual predator resides is dangerous to children." *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 198, 402 P.3d 346 (2017), *review denied*, 192 Wn.2d 1023 (2019). Courts also recognize that

evidence of sex crimes is probative of an offender's propensity to abuse others. *See, e.g.*, *In re Det. of Coe*, 160 Wn. App. 809, 819, 250 P.3d 1056 (2011), *aff'd on other grounds*, 175 Wn.2d 482 (2012); *State v. Herzog*, 73 Wn. App. 34, 50, 867 P.2d 648, *review denied*, 124 Wn.2d 1022 (1994). Available psychological research shows that pedophilia likely cannot be cured and can only be treated in a manner to enable a pedophile to resist his sexual urges. *See generally*, Harvard Medical School, *Pessimism About Pedophilia*, Harvard Mental Health Letter (July 2010), *available* at https://perma.cc/TTL5-CXFL (last visited Nov. 13, 2023).

To allow CPS a free pass to negligently overlook a pedophile's likely abuse of siblings in the same familial home as the child who is the subject of reported abuse flies in the face of legislative intent to protect children in the familial context.

Finally, if Division I's opinion stands uncorrected, the most vulnerable children potentially will receive the least

protection. Nonverbal children who cannot report abuse[9] or young children like C.R./J.L., who are uncomfortable in reporting on adult abusers, particularly parents, will not be protected. *See Heideman v. Chelan County*, 193 Wn. App. 1052, 2016 WL 2672012 (2016) (children resisted reporting abuse on fear of breaking up family).[10]

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[9] *See Yonker v. Department of Social & Health Services*, 85 Wn. App. 71, 930 P.2d 958, *review denied*, 132 Wn.2d 1010 (1997) (CPS refused to investigate mother's report that her two-and-a-half-year-old son had been sexually abused by this father).

[10] The dynamics of sexual abuse help explain this practical reality. Child molesters are usually well known and liked by their victims and their victim's parents. Offenders carefully "groom" parents and children to gain their trust and let down their guard, often for a long time before beginning their sexual abuse. *See* Gender & Justice Commission, *supra* n.1, at 1-12 n.72; *see generally,* Carla Van Dam, *Identifying Child Molesters: Preventing Child Sexual Abuse by Recognizing the Patterns of the Offenders* (2001). Because of the trust cultivated through grooming, parents' first reaction when learning about potential abuse is often to disbelieve it. *Id.* The grooming procedure is extremely effective. In fact, because the offender is generally someone known to the victim, the child may feel that she has no alternative but to accept the abuse. The offender then uses manipulative behavior, including threats, to secure the victim's silence.

In sum, Division I's opinion on the scope of RCW 26.44.050 investigations is contrary to precedent and public policy, and is dangerous for vulnerable children in our State, requiring this Court's review. RAP 13.4(b)(1), (2), (4).

(2) CPS Owed a Common Law Duty to C.R./J.L.

Quite apart from its statutory duty to C.R./J.L., CPS owed a common law duty to them arising out of its flawed investigation that it undertook in interviewing them. Division I's analysis seemingly concludes that the statutory duty under RCW 26.44.050 essentially forecloses the existence of common law duties. Op. at 14-20. That error conflicts with established precent from this Court on issues of public importance, thus meriting review. RAP 13.4(b)(1), (4).

In coming to this erroneous conclusion on CPS's common law duty, Division I overlooked critical facts on what CPS actually did in investigating C.R./J.L.'s possible abuse. Its caseworkers:

- interviewed C.R./J.L. to assess if they had been

abused by Rowe;
- developed a safety plan that likely covered their safety; and
- ousted Rowe from the house on November 24, 2014 to protect them specifically (because D.L. was not in the house, only C.R./J.L. could be the focus of the caseworkers' safety efforts).

Having taken such steps, Washington case law applying *Restatement* §§ 281, 302B *required* CPS to refrain from increasing the risk to the girls by its negligence.

Division I obviously labored under the misconception that the only thing CPS did was to interview the girls. Op. at 19-20. CPS's "safety plan" for them that its caseworkers cannot now recall[11] was obviously a failure. For Division I to assert that CPS's failure to adequately investigate Rowe's abuse did not increase the peril to C.R./J.L., op. at 20, is flatly false, given the years of rapes those girls endured *after* CPS's involvement, for which Rowe was convicted.

Under *Restatement (Second) of Torts* § 281, conduct is

[11] That odd fact alone should concern a court.

negligent when it subjects a person to a foreseeable risk of harm through acts of misfeasance.[12] *See, e.g.*, *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019); *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013). In other words, "'[a]t common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others.'" *Mancini v. City of Tacoma*, 196 Wn.2d 864, 879, 479 P.3d 656 (2021) (quoting *Beltran-Serrano* at 550); *Norg v. City of Seattle*, 200 Wn.2d 749, 522 P.3d 580 (2023).

The principles of the rescue doctrine also apply here. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975) (a common law duty of reasonable care arises when a

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[12] "Misfeasance" is "[a] lawful act performed in a wrongful manner." *Black's Law Dictionary* 1197 (11th ed. 2019). In *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), the Court held that the defendant's misfeasance, as opposed to nonfeasance, is required for the 302B duty. *Id*. at 439.

person voluntarily begins to assist a person needing help, the person must render that assistance in a non-negligent fashion); *Folsom v. Burger King*, 135 Wn.2d 658, 674-75, 958 P.2d 301 (1998) (same).

Similarly, a defendant owes a duty to a plaintiff not to exacerbate the risk to a plaintiff by negligent conduct. *Restatement (Second) of Torts* § 302B. *See, e.g., Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) (bus driver left keys in bus with engine running for passenger high on PCP to take the bus and smash it into plaintiffs' vehicle).

This Court arrived at essentially the same duty as in 302B in a *Restatement* § 281 case. In *Washburn*, Federal Way Police Department ("FWPD") officers were required by statute to serve antiharassment orders. 178 Wn.2d at 754-56. After a woman obtained an antiharassment order against her ex-boyfriend, an FWPD officer was tasked with serving the order on the ex-boyfriend. *Id.* at 738-40. The officer found the woman and the ex-boyfriend at the house they shared, served the ex-boyfriend

with the order, and then left, failing to take any action to ensure that the woman would be safe after he departed. *Id.* at 740. A short time later, the ex-boyfriend stabbed the woman to death. *Id.* This Court held that the City owed two separate duties to the woman: "a legal duty to serve the antiharassment order and a duty to act reasonably in doing so." *Id.* at 752. The second duty required the officer to take reasonable steps to guard against the possibility that the ex-boyfriend would harm the woman as a result of service of the order. *Id.* As for the latter aspect of duty, it was essentially to avoid enhancing the risk to the person by misfeasance.

Here, like the city in *Washburn*, CPS owed C.R./J.L. a common law duty to use reasonable care in investigating their abuse, once it investigated C.R./J.L.'s possible abuse by interviewing them, establishing a safety plan for them, and ousting Rowe from the familial home to protect them specifically. CPS had a duty to take reasonable steps to ensure that its investigation would not enhance the foreseeable harm to

the girls. But like the FWPD police officer in *Washburn*, CPS's McKey and Whitney committed misfeasance by their negligent investigation of Rowe's predatory conduct. The harm caused by that negligent failure to remove C.R./J.L. from the care of their pedophile abuser is completely foreseeable: the continuation, and intensification, of Rowe's sexual abuse of the girls *for years*.

In sum, Division I misapplied this Court's decisions on CPS's common law duty to C.R./J.L., meriting review. RAP 13.4(b)(1), (4).

F. CONCLUSION

This Court should grant review of Division I's flawed decision and reverse the trial court's erroneous conception of CPS's duty to C.R./J.L. Review by this Court is necessary to resolve conflicts with decisions of this Court and the Court of Appeals, and because this issue, providing our children with broad protection from preventable abuse, is one of statewide public importance.

This document contains 4,640 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of November, 2023.

Respectfully submitted,

/s/ Philip A. Talmadge
Philip A. Talmadge
WSBA #6973
Aaron P. Orheim
WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Timothy R. Tesh
WSBA #28249
Jonathan Van Eck
WSBA #47755
Ressler & Tesh PLLC
710 Fifth Avenue NW, Suite 200
Issaquah, WA 98027
(206) 388-0197

Attorneys for Petitioners

APPENDIX

RCW 13.34.020:

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child's health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.

RCW 26.44.010:

The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the 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. When the child's physical or mental health is jeopardized, or the safety of

the child conflicts with the legal rights of a parent, custodian, or guardian, the health and safety interests of the child should prevail. When determining whether a child and a parent, custodian, or guardian should be separated during or immediately following an investigation of alleged child abuse or neglect, the safety of the child shall be the department's paramount concern.

RCW 26.44.050:

…[U]pon 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.

KEEPING COMMUNITIES AND NEIGHBORHOODS SAFE

King County Sexual Assault Resource Center

HOW CHILD MOLESTERS GAIN ACCESS

- They pay attention to your child and make them feel special.
- They present the appearance of being someone you and your family can trust and rely on.
- They get to know your child's likes and dislikes very well.
- They go out of their way to buy gifts or treats your child will like.
- They isolate your child by involving them in fun activities so they can be together –alone.
- If you are a single parent, they may prey upon your fears about your child lacking a father figure or stable home life.
- If their career involves working with children, they may also choose to spend free time helping children or taking them on special outings.
- They take advantage of your child's natural curiosity about sex by telling "dirty" jokes, showing them pornography and playing sexual games.
- They will probably know more about what kids like than you do; i.e. music, clothing, video games, language, etc.
- They make comments like "anyone who molests a child should be shot!" or "Sexually abusing kids is the sickest thing anyone could do."
- If they are a parent, it is easier to isolate, control and molest their own children. They can sexually abuse their children without their spouse ever suspecting a thing. They gradually block the communication between children and their other parent, and make it look like they are the good parent.
- They may touch your child in your presence so that the child thinks you are comfortable with the way the sex offender touches them.

WHO IS THE TYPICAL MOLESTER

- They are probably well known and liked by you and your child.
- They can be a man, a woman, married or single.
- They can be a child, adolescent, or adult.
- They can be of any race, hold any religious belief and have any sexual preference.
- They can be a parent, stepparent, relative, family, friend, teacher, clergyman, babysitter, or anyone who comes in contact with children.
- They are likely to be a stable, employed, and respected member of the community.
- Their education and intelligence doesn't prevent them from molesting your child.

GROOMING TECHNIQUES

Offenders spend a great deal of time and energy in the process of "grooming" their victims. They generally gain the victim's trust and confidence to begin the process. Because the offender is generally someone known to the victim, the teen/child may feel that he/she has no alternative but to accept the abuse.

The next step in grooming is introducing the victim to sexual types of touch. This is often accomplished slowly, so that the victim is gradually desensitized to the touch.

Sexual offenders then manipulate the victim to keep the secret. The offender may trick or force a victim into keeping the sexual abuse a secret.

The grooming procedure is extremely effective, and consequently, the vast majority of children/adolescents do not disclose the abuse. Adults may be set up for victimization in similar ways.

WHY DON'T CHILD MOLESTERS GET CAUGHT

- Sex offenders convince your child that no one will believe them if they tell someone.
- They tell your child that their parents will be disappointed in them for what they have done.
- Sex offenders warn your child that the child will be the one punished if they tell someone.
- They may threaten your child with physical violence against them, you (a parent) or another loved one, or a pet.
- Sex offenders may get your child to feel sorry for them or believe they are the only one who understands the offender.
- If the sex offender is a parent or lives in a home with children, their behavior may look accidental. They may "accidentally" expose themselves or "accidentally" walk in on your child while they are using the bathroom or changing clothes.
- If they are a parent, their behavior may look "normal" to other people. They may use situations like tucking the kids in at night to touch them sexually.
- They may have told their children that "this is what all parents do with their children" so that children do not know to tell.
- They may be so good at manipulating children that the child may try to protect the sex offender.

SEX OFFENDER RISK LEVEL

An End-of-Sentence Review Committee surveys the records of all sex offenders upon release and determines the level of risk that each poses to "the community at large."

Level 1: Lowest risk to re-offend within community at large; offense occurred within family; low level of physical harm or violence to victim; the majority of offenders fall into this level.

Level 2: Moderate risk to re-offend within the community at large; more than one victim; "groom" victims and family; abuse of a position of trust (like teacher, clergy, coach, babysitter)

Level 3: Highest risk to re-offend within the community at large; violence used; victims usually unknown to the offender.

SEX OFFENDER SCREENING LIST

This is not an absolute guide to identifying sex offenders. This is information to pay attention to if it is exhibited by people who spend time with, or care for, your children. If someone behaves this way toward your children, they are probably not suitable to be left alone with your children.

Exceptionally charming and/or helpful;
and
Engaging in peer-like play, preferring the company of children;
and
"Roughhousing", wrestling, and/or tickling children, and obtaining immediate insider status;
and
Failing to honor clear boundaries, getting defensive or putting other adults on the offensive.

If someone exhibits these behaviors, it is a good idea to learn more about them, supervise them with your children, or not allow them near your children at all.

PERSONAL AND FAMILY SAFETY PREVENTION AND AWARENESS INFO

What is sexual assault?

Sexual assault is any unwanted or forced sexual contact including touching or fondling. Rape is forced penetration. For adolescents, force often involves emotional manipulation. Any sexual activity without someone's consent is sexual assault.

How vulnerable are young people?
As many as one in three girls and one in five boys will experience some form of sexual abuse before the age of 16. In addition, about one in four high school and college age women will experience rape or attempted rape. Most sexual assaults happen to people under the age of 18. Both young women and young men are vulnerable.

What do young people and teens need to know?

- Sexual assault is forced, unwanted sexual touching or intercourse, and that no one has the right to try to trick, force, or coerce them into doing something they do not want to do.
- Sexual assault can happen even with people they know and trust.
- Sexual assault is never a victim's fault.

The following are specific behaviors that are inappropriate and may be warning signs that someone might try to take advantage of you. It is important for young people to be able to identify early warning signs of disrespect, such as:

- Someone who tries to isolate or separate you from friends and/or family, or tries to be with you alone.
- Someone who gives you presents, food, and/or drugs.
- Someone who doesn't respect your opinions or limits.
- Someone who ignores or pushes past the boundaries that you set.

How do you start a conversation?
Talking to your child or teen about rape shouldn't be a one-time conversation, and you don't have to say everything at once. Instead, open up an on-going dialog about safety over time. You can:

- Use natural moments to bring up sexual assault, such as news about a rape, attempted abduction, or a television program containing a reference to sexual abuse. Ask your child what they have heard and what they know. Give them the opportunity to ask questions.
- Let your child know that you have read this article and want to check in with them about safety. Ask for their thoughts as you share your own.
- Link a discussion of personal and touching safety with conversations you have about bike safety and fire safety.
- Be open and available for your children to come to you. Let them know they can talk to you any time about anything that is on their mind.
- Create a family rule to have no secrets from each other. Secrecy and isolation are the most important goals for offenders. If they cannot isolate a child and convince them to keep the touching a secret, they cannot offend.

FILED
10/23/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

C.R. and J.L., infants, by BRUCE A. WOLF, their guardian ad litem, Appellants, v. STATE OF WASHINGTON, Respondent.	No. 84682-5-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — In 2014, the Department of Social and Health Services (Department) [1] investigated a report that Timothy Rowe was sexually abusing his stepdaughter, D.L. The Department's investigation concluded that the report was unfounded. In 2019, D.L.'s younger sister C.R. reported that she and their other sister J.L. had been sexually abused by Rowe since 2013. Rowe pled guilty to multiple counts involving the sisters, including rape, incest, and child molestation.

Subsequently, C.R. and J.L. filed this lawsuit against the State alleging negligent investigation and common law negligence. The trial court dismissed their claims because the only report the Department received in 2014 concerned

[1] In 2018, all child welfare services were transferred from the Department of Social and Health Services (DSHS) to the Department of Children, Youth and Families (DCYF). RCW 43.216.906. The parties refer to DSHS, DCYF, and Child Protective Services (CPS) interchangeably. We use the term "Department" herein to refer to actions by the relevant state agencies without distinguishing among them.

the abuse of their sister D.L., concluding the Department did not have a duty to investigate the potential abuse of C.R. and J.L.

The issue on appeal is whether C.R. and J.L. have a cause of action against the State for negligent investigation, either based on a statutory duty arising out of RCW 26.44.050 or based on common law. We hold that there is no implied cause of action under the statute for children about whom the State has received no report of suspected abuse. We further conclude that under these circumstances, the State owed no common law duty to C.R. and J.L. when conducting the investigation of D.L.'s report of abuse. We therefore affirm the trial court's dismissal of the complaint below.

FACTS

In November 2014, 15-year-old D.L. disclosed to her mental health therapist that her stepfather, Timothy Rowe, had been touching her inappropriately. D.L. lived near Vancouver, Washington, with Rowe, her mother Brittany Rowe, her 8-year-old sister J.L., her 10-year-old stepsister C.R., and two younger brothers.[2]

After the therapist reported the disclosure, both the Clark County Sheriff's office and the Department investigated. D.L. told the Department's investigator, Amie McKey, that her stepfather had admitted to touching her inappropriately,

[2] The brothers were 9 and 4 years old. C.R. and the older boy were Rowe's biological children. D.L. and J.L. were Brittany Rowe's biological children. The youngest boy was the biological child of Rowe and Brittany Rowe.

but that "she was the odd one out," and that her other siblings were "all fine and safe."

McKey interviewed C.R. at school. Asked whether she felt safe at home with her mom and her dad, C.R. said that she did. McKey interviewed J.L. at school immediately after interviewing C.R. When McKey asked J.L. if she felt safe at home, J.L. replied "Mm-hm," and when asked "[e]verything's good there?", she replied "Uh-huh." In the course of the Department's investigation, no one reported abuse or suspected abuse of C.R., J.L., or any of the other children in the Rowe household.

In January 2015, the Sheriff's office concluded that D.L.'s allegations were unfounded and "arose during a period of drama and conflict within her home," that she made inconsistent statements, and that she "expressed focus on getting out of her house or emancipated." The Department likewise determined there was no present danger and closed the investigation.

Approximately 5 years after the investigation of D.L.'s allegations, in October 2019, the Department received a report from C.R. via law enforcement that she and J.L. had been abused by Rowe since C.R. was 8 or 9 years old, i.e., prior to the Department's 2014 investigation of their older sister.[3] At that point, the children still living in the Rowe home were taken into protective custody. Following an investigation by law enforcement, Rowe pled guilty to rape of a child

[3] The investigation at issue in this case is the 2014 investigation, not the 2019 investigation.

in the first degree and incest in the first degree as to C.R., child molestation in the first degree as to J.L., and child molestation in the third degree as to D.L.

In 2020, C.R., J.L., and D.L. sued the State in King County Superior Court. D.L. accepted the State's offer of judgment, and C.R. and J.L. voluntarily dismissed their claims without prejudice.

In 2022, Bruce Wolf, guardian ad litem for C.R. and J.L., sued the State for negligent investigation and common law negligence. C.R. and J.L. moved for partial summary judgment on the question of whether the State owed them a duty under RCW 26.44.050 or common law. The State did not move for summary judgment but asked the court to dismiss C.R. and J.L.'s claims because it owed no duty to them. The trial court denied C.R. and J.L.'s motion and, "[p]ursuant to C.R. 56," it dismissed their claims with prejudice.[4]

C.R. and J.L. sought direct review before the Supreme Court of Washington. The Supreme Court transferred the case to this court.

ANALYSIS

C.R. and J.L. challenge the trial court's denial of their motion for partial summary judgment on the legal question of whether the State owed them a duty and the dismissal of their claims of negligent investigation and common law negligence. The standard of review for an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.

[4] The Department never moved for summary judgment. However, at oral argument before the trial court, C.R. and J.L. agreed that "under the circumstances" the court should dismiss their claims in order to facilitate their appeal.

Washburn v. City of Federal Way, 178 Wn.2d 732, 752, 310 P.3d 1275 (2013). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The threshold determination in any negligence action is whether a duty of care is owed by the defendant to the plaintiff. Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). If the defendant owed the plaintiff no duty, the negligence action fails. Folsom v. Burger King, 135 Wn.2d 658, 671, 958 P.2d 301 (1988). A duty of care may exist by virtue of the common law or a statute. Mathis v. Ammons, 84 Wn. App. 411, 416-17, 928 P.2d 431 (1996). Whether the defendant owes a duty to the plaintiff is a question of law reviewed de novo. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

C.R. and J.L. brought two alternative causes of action, negligent investigation and common law negligence. They claim the Department owed them an implied duty under RCW 26.44.050 not to negligently investigate their abuse by gathering biased or incomplete information. Alternatively, they claim the Department affirmatively acted, so it owed them a common law duty of reasonable care under either RESTATEMENT (SECOND) OF TORTS § 281 or § 302B.

I. Implied cause of action under RCW 26.44.050

It is well-settled that the Department has an implied duty to investigate child abuse under RCW 26.44.050. Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs., 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) (implying a cause of action under the analysis set forth in Bennett v. Hardy, 113 Wn.2d 912, 919,

784 P.2d 1258 (1990)). However, Washington courts do not recognize a general tort claim for negligent investigation in this context. M.W. v. Dep't of Soc. & Health Servs., 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Instead, the cause of action against the Department for negligent investigation is a "narrow exception" because it is based on, and is limited to, the statutory duty to investigate child abuse and the harms that duty was designed to address. Id. Thus, an implied cause of action for negligent investigation "must stem from the type of harm the statute seeks to prevent, namely, 'the abuse of children within the home and unnecessary interference with the integrity of the family.' " Desmet v. State by and through Dep't of Soc. & Health Servs., 200 Wn.2d 145, 160, 514 P.3d 1217 (2022) (quoting M.W., 149 Wn.2d at 602)). The statute supports a claim for negligent investigation only when the Department conducts a biased or faulty investigation that leads to a harmful placement decision, such as placing the child in an abusive home, removing the child from a nonabusive home, or failing to remove a child from an abusive home. M.W., 149 Wn.2d at 591. General legislative statements such as "the child's health and safety shall be the paramount concern" in RCW 13.34.020 do not give rise to a general duty, and it is an error for a court to imply a duty from such general statements rather than analyze a statute's stated purpose. Id. at 599-600.

We begin our analysis with the statutory language at issue. Former RCW 26.44.050 provides in relevant part:

> [U]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services 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.

Former RCW 26.44.050 (2013). C.R. and J.L. contend that the statute's plain language "requires the investigation of any abuse upon [the Department's] receipt of an abuse report," and that "[i]t is noteworthy that this language of RCW 26.44.050 does not confine the duty to investigate to *a particular child*." By contrast, the Department argues that the plain language unambiguously provides that "unless there is a report, there is no duty to investigate."

The State is correct that the statute plainly conditions the duty to investigate "upon the receipt of a report concerning the possible occurrence of abuse or neglect." Former RCW 26.44.050. As C.R. and J.L. implicitly acknowledge, while the statute may not confine the duty to a particular child, neither does the plain language expressly state that the duty to investigate extends to all children within a family or household.

C.R. and J.L. point to the State's "well-established practice" of training CPS caseworkers that upon receipt of a report of abuse of one child, they should investigate the possibility of abuse of all children in the child's family unit. But this is not a plain language argument, as the plain language does not reference this practice. Moreover, while internal Department practices and policies may provide evidence of a standard of care, they cannot establish a duty. See Joyce v. Dep't of Corrs., 155 Wn.2d 306, 323-24, 119 P.3d 825 (2005) (internal policies that are not promulgated pursuant to legislative delegation do not have the force of law). Thus, even if the plain language of former RCW 26.44.050 does not specify the

scope of the ensuing investigation, the only reasonable reading is that the Department must investigate "the possible occurrence of abuse or neglect" that is the subject of the report.

The Department contends that "this case falls squarely within" the holding in Wrigley v. State, 195 Wn.2d 65, 455 P.3d 1138 (2020). We disagree. In Wrigley, the sole issue was whether predictions of future abuse constituted a "report concerning the possible occurrence of child abuse or neglect" invoking the Department's duty to investigate under former RCW 26.44.050. Id. at 70, 77. After receiving its sixth referral for abuse and neglect, the Department removed six-year-old A.A. from his mother's home, placed him in shelter care, and filed a dependency petition. Id. at 68. The mother told the Department that A.A.'s biological father had a criminal history, abused alcohol and drugs, and engaged in domestic violence that led her to obtain a restraining order against him. Id. Despite lacking prior contact with A.A., the father petitioned for A.A. to be placed with him. Id. The boy's mother told the Department social worker she opposed the placement and that if A.A. remained with the father, the boy "would be dead within six months." Id. at 69. The court dismissed the dependency petition and placed A.A. with the father. Id. Tragically, less than 3 months later, A.A. was killed after the father struck him on the head. Id.

The court held that absent an allegation of current or past abuse or neglect by the father toward A.A., the mother's prediction that A.A. would be dead within six months was not a "report" sufficient to trigger the duty to investigate. Id. at 77. The court reasoned that the Department's duty to

investigate cannot be invoked until it receives a report. Id. at 71 (construing the former RCW 26.44.050). Focusing on the language "report concerning the possible occurrence of abuse or neglect" in former RCW 26.44.050, the court first deemed it ambiguous as to whether it encompassed future conduct. Id. at 72. Then, looking to the context of the statute as a whole, the court noted that other provisions containing the word "reports" supported finding that reports are "intended to be backward looking, grounded in some past conduct." Id. at 73. "The overall statutory purpose and scheme confirm that a report must allege some previous or existing behavior or conduct concerning the child. . . . [S]ome conduct or incident must exist to make a finding of whether child abuse or neglect occurred." Id. at 74-75. Such a report is necessary "[f]or the statute to remain harmonious with constitutional familial rights" because it is "[o]nly where parental actions or decisions conflict with the physical or mental health of the child" that the Department possesses a right to intervene within the family unit. Id. at 76.

Here, unlike in Wrigley, it is not disputed that there was a report—the report by D.L. about Rowe's inappropriate touching of her—that triggered a duty to investigate. But contrary to the Department's contention, Wrigley does not answer the question posed here: whether a child who is not the subject of a report has an implied cause of action for negligent investigation of a report of abuse to another child in the same family unit or household.[5]

[5] The concurring opinion in Wrigley suggests a separate basis for declining to extend the implied cause of action under RCW 26.44.050 in that case: that the investigation was of a

Moreover, the plain language of the statute is not the end of the inquiry in this case. While the statute may limit the scope of the investigation, the determination of who has an implied cause of action is a different question. Whether there is a cause of action for negligent investigation under RCW 26.44.050 requires determining (1) whether the plaintiff is within the class of persons for whose benefit the statute was enacted, (2) whether the legislative intent supports creating a remedy, and (3) whether the underlying purpose of the legislation is consistent with inferring a remedy. M.W., 149 Wn.2d at 596; see also M.M.S. v. Dep't of Soc. & Health Servs. & Child Protective Servs., 1 Wn. App. 2d 320, 331, 404 P.3d 1163 (2017).[6]

C.R. and J.L. contend that general statements of legislative intent in RCW 13.34.020 and RCW 26.44.010 make it "clear that Washington public policy is to prevent the abuse of children, in the context of the family unit." Indeed, in the first case to recognize an implied cause of action for negligent investigation, the court stated broadly that the legislature's purpose was "to protect children and preserve the integrity of the family." Tyner, 141 Wn.2d at 80. However, in subsequent cases, courts have established limits on who may bring an action for negligent investigation.

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different type, "namely, the State's investigation into whether living with [the father] would be a suitable placement for A.A. after he was removed from [the mother's] care." Id. at 85. (Stephens, C.J., concurring). Thus, according to the concurrence, "[t]his circumstance simply falls outside the scope of the statute." Id.

[6] The second element of the Bennett test, whether the legislative intent supports creating a remedy, is not at issue when analyzing chapter 26.44 RCW. M.W., 149 Wn.2d at 596-97.

In M.W., our Supreme Court held that general statements of legislative intent do not support a general statutory duty of care for a claim of negligent investigation, and it is error for a court to imply a duty from such general statements rather than analyze a statute's stated purpose. 149 Wn.2d at 599-600. Then, in Ducote v. Dep't of Soc. & Health Servs., the court rejected the argument that a stepparent had a cause of action based on broad language in Tyner that suggested the State had a " 'duty to act reasonably in relation to all members of the family.' " 167 Wn.2d 697, 704, 222 P.3d 785 (2009) (quoting Tyner, 141 Wn.2d at 79). Instead, "[c]onsistent with the test articulated in Bennett, we confirm that the class of persons who may sue for negligent investigation is limited to those specifically mentioned in RCW 26.44.010, namely, parents, custodians, and guardians, and the child or children themselves." Id. at 704.

Certainly, children generally are within the class of persons who may in some circumstances sue for negligent investigation under RCW 26.44.050. And C.R. and J.L. are correct that actual past or current abuse is not required; a child who is the subject of a report about possible or suspected abuse also may bring an action for negligent investigation under the statute. See Rodriguez v. Perez, 99 Wn. App. 439, 445, 994 P.2d 874 (2000) (allowing negligent investigation claim by parents and children arising from law enforcement's aggressive investigation of an alleged "sex ring" based on multiple reports about a number of parents and a number of abused children). See also Wrigley, 195 Wn.2d at 77 (requiring existing conduct "does not necessarily mean that [the Department]

must wait for the child to be harmed before taking any action"; "[c]onduct that 'constitute[s] a clear and present danger' to the child's welfare will still trigger the action even where no harm has occurred yet.") (quoting former RCW 26.44.020(14)).

However, courts have rejected claims that all children and families of children who could have been exposed to an abuser, but were not themselves the subject of reported abuse or possible abuse, have an implied cause of action for negligent investigation. For example, in Boone v. Dep't of Soc. & Health Servs., the Department received reports of abuse at a private in-home day care in 1992, 1997, and 2006. 200 Wn. App. 723, 727-29, 403 P.3d 873 (2017). The Boone children attended the day care between 2004 and 2006. Id. at 729. In 2006, their mother reported abuse by the day care operator's husband. Id. The report was investigated and determined to be founded. Id. The Boones argued that the duty to investigate reports of abuse with reasonable care "extends to every child who could foreseeably be harmed by a negligent investigation." Id. at 732. However, the court declined to extend the duty beyond children who were the subject of the reported abuse or neglect. Id. Analyzing the first Bennett factor, whether the plaintiff was within the class of persons for whose benefit the statute was enacted, the court reasoned, "Insofar as the Boones rely on the investigations into the abuse of other children in the day care in 1992, 1997, and January 2006, the Boones are not within the class of persons for whose benefit RCW 26.44.050 was enacted because the Boone children were not the subjects of the reports of alleged abuse that triggered those investigations." Id. at 734. As

to the other applicable Bennett factor, the underlying purpose of the legislation, the court held that "the duty to investigate reasonably is not meant to protect all children from all harm"; rather, the statute "is meant to respond to reports of child abuse or neglect and to provide protection for children when there is a reason for the Department or law enforcement to believe a child is being abused or neglected." Id. at 736-37 (citing M.W., 140 Wn.2d at 598-99).

Similarly, in M.M.S., Division Two declined to find M.M.S. had a cause of action based on the Department's failure to discover and disclose her stepbrother J.A.'s prior sexualized behavior that had been documented in his earlier dependency proceedings. 1 Wn. App. 2d at 322. The court reasoned that neither M.M.S. nor her mother was within the class of persons for whom RCW 26.44.050 was enacted to benefit because there was no report that M.M.S. was abused or neglected before her stepbrother J.A. was placed in her home. Id. at 331-32.

The Boone court distinguished two other cases in which the plaintiffs were the subjects of specific allegations of abuse, and, thus, were within the class of persons for whose benefit RCW 26.44.050 was enacted. 200 Wn. App. at 734-35. First, in Lewis v. Whatcom County, during the investigation of abuse of a different girl, the sheriff received two reports that each discussed the likelihood that the plaintiff was also being abused. 136 Wn. App. 450, 452, 149 P.3d 686 (2006). Thus, while the plaintiff was not the subject of the original report of abuse, there were specific allegations that she was being abused. Likewise, in Yonker v. Dep't of Soc. & Health Servs., a child's mother reported possible abuse by the child's father, but CPS failed to take action. 85 Wn. App. 71, 73-74, 930

P.2d 958 (1997). Thus, the plaintiff was the subject of the reported abuse that triggered the duty to investigate. Id. at 81.

Here, the Department received no report of abuse of C.R. or J.L. until C.R.'s disclosure in 2018. When C.R. and J.L. were interviewed as part of the Department's investigation of their sister D.L.'s report, neither of them reported any abuse. C.R. said she felt safe with her dad, and J.L. also answered affirmatively to the investigator's query as to whether she felt safe at home. D.L. also said her other siblings are "all fine and safe." The fact that they shared a household with D.L. at the time of her disclosure in 2014 does not alone support extending the duty Department owed to J.L. to them.

C.R. and J.L. are not within the class of persons who may sue for negligent investigation because there was no report of abuse, or suspected or possible abuse, of either of them. We conclude that the Department was entitled to judgment as a matter of law because, absent a report of abuse about C.R. and J.L., they have no cause of action under RCW 26.44.050 for negligent investigation.[7]

II. Common law negligence

C.R. and J.L. argue in the alternative that the Department owed them a common law duty under either RESTATEMENT (SECOND) OF TORTS § 281 or § 302B

[7] C.R. and J.L. also argue the Department's investigation of D.L. was incompetent. But the question before the trial court was the existence of a duty, not whether the Department breached a duty. The scope of the present appeal is likewise limited to the existence of a duty, so we do not address this argument. We also need not address the Department's contention that we should disregard C.R. and J.L.'s statement of the facts under RAP 10.3(a)(5) on the grounds that it is argumentative.

when it investigated their sister's report of abuse, "undertook to investigate" their abuse, and required Rowe to leave the family home overnight even when their older sister D.L. was already out of the house. The Department counters that Washington courts do not recognize a common law tort claim for negligent investigation in this context and the court should decline to extend a common law duty under the circumstances in this case.[8] We agree with the Department.

RESTATEMENT (SECOND) OF TORTS § 281, "Statement of the Elements of a Cause of Action for Negligence," states:

> The actor is liable for an invasion of an interest of another, if:
> (a) the interest invaded is protected against unintentional invasion, and
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
> (c) the actor's conduct is a legal cause of the invasion, and
> (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST. 1965). Thus, at common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others. Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 550, 442 P.3d 608 (2019) (citing § 281).

The Department argues that § 281 merely restates the elements of negligence, and that in Washington, there is no common law tort claim for negligent investigation, citing M.W., 149 Wn.2d at 601. C.R. and J.L. assert they

[8] The Department argues that Appellants did not preserve their § 302B argument. However, C.R. and J.L. note, in their summary judgment briefing, that they relied on Washburn, 178 Wn.2d 732, and Robb v. City of Seattle, 176 Wn.2d 427, 295 P.3d 212 (2013), both of which analyze § 302B. We therefore address their § 302B argument on appeal.

are not arguing that they are owed a common law duty to investigate, but rather, that a common law duty arises because "when a person voluntarily begins to assist a person needing help, the person must render that assistance in a non-negligent fashion."

The cases to which C.R. and J.L. point for support hold that if a government official owes an individual a legal duty, the official must act reasonably in undertaking that action. In Washburn, Federal Way police served an anti-harassment order on a woman's partner at her request. 178 Wn.2d at 739. She informed law enforcement that the person to be served was her domestic partner and that he did not know she had obtained the order or that it would force him out of her home. Id. She informed law enforcement that he would likely react violently to service of the order and he had a history of assault, and she requested a Korean language interpreter. Id. at 739-40. Yet the officer served the order without bringing an interpreter, did not interact with the woman who had requested the order or inquire as to her safety, and left her to explain to her partner that he needed to vacate the home. Id. at 740. The partner stabbed the woman to death within hours of being served with the order. Id. The court affirmed that the city owed the woman a legal duty to serve her anti-harassment order and a common law duty to act reasonably in doing so. Id. at 752. The court then relied on RESTATEMENT (SECOND) OF TORTS § 302B to hold more specifically that this "duty to act reasonably includes a duty to take steps to guard another against the criminal conduct of a third party." Id. at 757.

In Beltran-Serrano, the court held that a mentally ill homeless man, whom a city of Tacoma police officer shot multiple times after a simple social contact escalated into the use of deadly force, could sustain a negligence action against the city. 193 Wn.2d at 540, 548. The court recognized the § 281 common law duty to refrain from causing foreseeable harm in interactions with others, and held that this common law duty applied in the context of law enforcement and "encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance." Id. at 550.

In Mancini v. City of Tacoma, Tacoma police serving a search warrant broke into the wrong apartment. 196 Wn.2d 864, 868, 479 P.3d 656 (2021). The court sustained the jury's verdict in the plaintiff's favor because police executing a search warrant owed a duty of reasonable care when doing so. Id. at 879.

Unlike these cases involving the common law duty under § 281, here, as discussed above, there is no underlying statutory duty to investigate owed by the Department to C.R. and J.L. because it received no report of possible abuse as to them. The Department's duty to conduct an investigation with reasonable care was limited by the scope of the duty to investigate. Thus, unlike the police departments in Washburn, Mancini, and Beltran-Serrano, in the present case the Department had no duty to C.R. and J.L. for which it was required to exercise reasonable care. The Department's duty to investigate is a "narrow exception" implied from RCW 26.44.050. Wrigley, 195 Wn.2d at 76 (quoting M.W., 149 Wn.2d at 601). That narrow exception applies to the Department's conducting

"an incomplete or biased child abuse investigation that resulted in a harmful placement decision." M.W., 149 Wn.2d at 601.

C.R. and J.L. further argue that this court should determine the Department owed them a duty under RESTATEMENT (SECOND) OF TORTS § 302B, "Risk of Intentional or Criminal Conduct," which states as follows:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

RESTATEMENT (SECOND) OF TORTS § 302B (AM. LAW INST. 1965).[9] A person may have a duty to protect others from the criminal acts of third parties when the person's "own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct." M.M.S., 1 Wn. App. 2d at 329 (quoting § 281 cmt. e) (citing Washburn, 178 Wn.2d at 757-58). Mere nonfeasance is insufficient; § 302B requires misfeasance. Robb v. City of Seattle, 176 Wn.2d 427, 439, 295 P.3d 212 (2013). Further, the misfeasance needs to create new harm; the failure to eliminate risk is insufficient. Id.

Thus, in M.M.S., the court rejected the mother's argument that the Department's failure to warn her of her stepson's history of sexually inappropriate behavior with younger children was an affirmative act establishing a duty under § 302B. 1 Wn. App. 2d at 329. The court noted that this argument was "actually

[9] Recognizing that criminal conduct may be foreseeable "in limited circumstances," Washington has adopted RESTATEMENT (SECOND) OF TORTS § 302B. Washburn, 178 Wn.2d at 757.

based on policy considerations," and, moreover, the facts did not support concluding that Department had an affirmative duty to warn the mother of the stepson's prior behavior because there was no unreasonable risk of harm." Id. at 330. In Robb, the court reversed summary judgment against the city, determining there was no common law duty under § 302B when police officers failed to collect shotgun shells laying on the ground that were later used to kill Robb. 176 Wn.2d at 439-40. The court reasoned that the officers did not commit misfeasance, only nonfeasance; they did not affirmatively create a new risk. Id. at 437-38.

In contrast, in Parrilla v. King County, this court determined there was a § 302B common law duty and reversed dismissal in the County's favor after a bus driver exited his bus with the engine running, leaving a "visibly erratic" passenger on board. 138 Wn. App. 427, 430, 157 P.3d 879 (2007). The passenger then stole the bus and crashed into Parrilla's car. Id. We held that the driver had a duty to guard against a third party's foreseeable criminal conduct exists where his own affirmative act had created or exposed another to a recognizable high degree of risk of harm through such misconduct. Id. at 439.

C.R. and J.L. argue that these cases addressing § 302B "clearly articulate that a defendant may assume a duty to a plaintiff by its misfeasance." They then contend that by interviewing them the Department undertook a duty to investigate their possible abuse by Rowe, so it owed them a duty to do so reasonably and by failing to competently investigate their abuse, the Department created or enhanced their risk.

However, interviewing C.R. and J.L. as part of the investigation into D.L.'s reported abuse was not an affirmative act of misfeasance that created their peril. The tragic but undisputed facts pled in this case are "that C.R. had disclosed that she and J.L. had been repeatedly raped by Mr. Rowe since she [was] approximately 8 or 9 years old," i.e., prior to the Department's 2014 investigation of D.L. and its interviews of C.R. and J.L.[10]

C.R. and J.L. also argue that the Department increased their peril because after the investigation, Rowe escalated his abuse of them. Br. of Appellant at 33-34 ("the continuation, and intensification, of Rowe's sexual abuse of the girls for years); Reply Br. of Appellant at 23 ("No longer satisfied with merely molesting the two girls, he began raping them after CPS closed its negligent investigation."). But they provide no citation to the record for this argument. Even plaintiffs' expert Barbara Stone stops short of declaring that Rowe's abuse of C.R. and J.L. intensified after the investigation of D.L.'s report.

This tragic fact matters because the failure to eliminate risk is insufficient to establish the act of affirmative misfeasance established a duty under § 302B. See Robb, 176 Wn.2d at 439. Therefore, because the Department did not create or increase C.R. and J.L.'s peril when it interviewed them in 2014, its conduct was not an affirmative act of misfeasance giving rise to a duty under § 302B.

[10] Regardless of whether as C.R. and J.L. argue, they were the non-moving party as to the court's dismissal of their claims, there can be no dispute regarding this material fact, when their complaint alleges, and the Department admits, C.R. and J.L. were being abused by Rowe when it interviewed them about the abuse of their older sister in 2014.

III. Costs

C.R. and J.L. request costs on appeal. Because they do not prevail, we deny the request for costs.

Affirmed.

Chung, J.

WE CONCUR:

Bilke, J.

Smith, C.J.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Division, I Cause No. 84682-5-I to the following:

Meghan Callagee O'Brien
WSBA #55104
Sara Cassidey
WSBA #48646
Assistant Attorney General
Washington State Office of Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Timothy R. Tesh
WSBA #28249
Jonathan Van Eck
WSBA #47755
Ressler & Tesh PLLC
710 Fifth Avenue NW
Suite 200
Issaquah, WA 98027

Original E-filed via appellate portal with:
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 15, 2023 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

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Third Floor Ste C
Seattle, WA, 98126
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