NO. 45123-9-II

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

KELSEY BREITUNG,

Appellant,

v.

STATE OF WASHINGTON and
COMMUNITY COUNSELING INSTITUTE

Respondents,

Appeal from the Superior Court of Washington
for Pierce County

(Cause No. 12-2-08149-8)

APPELLANT'S REPLY BRIEF

REBECCA J. ROE, WSBA #7560
M. LORENA GONZÁLEZ, WSBA #37057
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

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I. ARGUMENT

A. CCI's and the State's "Blame-The-Victim-Defense" Does Not Absolve Them Of Their Duties And Negligence

The defense posture in this case is offensive. The respondents are agencies that exist to help abused, neglected and addicted children. Instead, they take no responsibility for the misconduct of their professional staff and blame the child for their failings.

It is undisputed that Andrew Phillips ("Phillips"), while still employed at Community Counseling Institute ("CCI"), sexually abused Kelsey Breitung ("Kelsey") when she was 17 years old. It is also beyond dispute that Phillips was Kelsey's drug and alcohol counselor until August 30, 2009, during which time he repeatedly violated therapeutic boundaries, culminating in a prohibited sexual relationship. Also undisputed is that CCI had knowledge of Phillips' improper relationship with Kelsey prior to discharging her from its care. Indeed, Kelsey's temporary guardian reported concerns of the sexual nature of the relationship between Kelsey and Phillips to CCI's deputy director, precipitating Kelsey's discharge from CCI's care. It is also undisputed that Phillips remained an employee of CCI through November 30, 2009, and was immediately fired upon his disclosure of having engaged in a sexual relationship with Kelsey. In spite of these undisputed facts, CCI now seeks to blame the victim, Kelsey Breitung, for the predatory behavior of its employee.

Likewise, the State of Washington's Department of Social and Health Services ("State" or "DSHS"), through the Division of **Children** &

Family Services ("DCFS") is responsible for **protecting** Washington children from abuse and neglect. Yet, DCFS's legal representative, the Attorney General, instead vilifies the child it was responsible for protecting. The State accepts no responsibility for the caseworker's mistakes, displays alarming ignorance of the dynamics of child sexual abuse and exploitation, and absolves a chemical dependency counselor, who preyed on a dependent child.

In their ignorance of the dynamics of sexual abuse and exploitation CCI and the State stand at odds with Washington's legislature and appellate courts. Unlike the respondents, the legislature has long understood the dynamics of child sexual abuse that were present in this case. For example, under RCW 4.16.340, Actions based on childhood sexual abuse, the legislature's intent, in relevant part, appears as follows:

> (1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.
>
> (2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.
>
> ....
>
> (4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.

Additionally, the crimes of sexual misconduct in the first and second degree, RCW 9A.44.093 and 9A.44.096, criminalize sexual relationships involving 16- and 17-year-old victims if the perpetrator is in

a "significant relationship" with the minor. A significant relationship is one where the perpetrator undertakes the responsibility to provide health, education, or supervision, to minors. RCW 9A.44.010(8). Such a perpetrator abuses the supervisory position by a direct or indirect threat or promise or by exploiting the relationship to obtain consent. RCW 9A.44.010(9).

In *State v. Fisher*, 99 Wn. App. 714, 995 P.2d 107 (2000), the court understood the "benefits" a high school girl felt from a sexual relationship with her teacher coach. She felt flattered by the relationship with an admired teacher. She had an emotionally intimate relationship, talking about school events, and the teacher's unhappiness in his marriage, leading to a physically intimate relationship. As the Court of Appeals noted he was an authority figure in the school, and she benefitted from having a special relationship with him that she did not have with others.

In 2001, the legislature amended RCW 9A.44.093 and .096 to make sexual relationships involving school employees *per se* a crime without regard to threats or "benefits." In *State v. Hirschfelder,* 148 Wn. App. 328, 199 P.3d 1017 (2009), the court cited the legislative intent in making a sexual relationship *per se* criminal:

> The way that the crime of sexual misconduct with a minor is currently defined does not pick up on situations in which adults prey upon teenagers who are physically mature but who are not developmentally prepared to make sound judgments in adult situations. .... It is also more likely that a perpetrator will gradually gain the trust of a vulnerable youth and then take

> advantage of that trusting relationship by seducing the youth. The law should protect children under 18 from coaches, mentors, foster parents, and others who manipulate them into consenting to sexual contact or intercourse.

S.B. Rep. on S.B. 5309, at 2, 59th Leg., Reg. Sess. (Wash. 2005).

As noted in Kelsey's opening brief, blaming the child was rejected in *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), with the court acknowledging the law requires strict liability for sex with minors regardless of "consent."

Citing *Christensen*, the Supreme Court of Minnesota also rejected the "blame-the-victim" approach taken by the respondents here. *See Bjerke v. Johnson*, 742 N.W.2d 660, 670-71 (Minn. 2007). The defendant in *Bjerke* was the owner of a horse ranch. Her boyfriend groomed, then abused, the minor plaintiff. As here, several people had observed a "close" relationship that caused concern. Like CCI and the State, the *Bjerke* defendant claimed the teenage plaintiff "assumed the risk" of harm in consenting to a sexual relationship. *Bjerke* rejected that argument at 742 N.W.2d at 670-71, stating:

> Beyond the strong public interest in protecting children from sexual abuse, it seems to us unlikely that children can be expected to comprehend the multitude of long-term effects of sexual abuse by an adult. Aside from the immediate dangers, a victim of sexual abuse faces the risk of "depression and other psychosocial disorders, promiscuity, and revictimization" as well as "guilt, shame, phobias, and eating disorders." Michelle Oberman, Regulating Consensual Sex With Minors: Defining A Role For Statutory Rape, 48 Buff. L.Rev. 703, 728–29 (2000). Such abuse can lead to "lower self-esteem, higher rates of emotional distress, and considerably elevated rates of

> suicide and self-harm." *Id.* at 729. Because a plaintiff's ability to appreciate the danger arising from her behavior is a key component of assumption of the risk, *Knutson v. Arrigoni Bros. Co.,* 275 Minn. 408, 413–14, 147 N.W.2d 561, 566 (1966), we find it difficult to conclude that children could meaningfully assume the risks of sexual assault.[7]
>
> Although it might be argued that the facts in this case go beyond mere consent, given Bjerke's admission that she took efforts to conceal her relationship with Bohlman, we are not convinced that this is a meaningful distinction. As we noted above, a number of pressures are placed on a child to consent to the sexual abuse of an adult. To presume that such pressures begin and end simply with the child's consent would be to ignore the disparity of power that typifies the relationship between the abuser and his victim. The pressures brought by the adult to procure the child's participation in sexual activity can be the same pressures that procure the child's silence. Given the impossibility of separating the pressures that give rise to a victim's consent from those that lead the victim to conceal her abuse, we do not believe that even active concealment by a minor victim of sexual abuse is sufficient to establish the defense of primary assumption of the risk. (Footnote omitted.)

Washington child sexual abuse statutes that protect children who are too immature to rationally or legally consent to sexual relationships, reflect society's recognition of the imbalance of power between adults and children, as well as society's determination that underage sex hurts children. *State v. Knutson*, 121 Wn.2d 766, 775, 854 P.2d 617 (1993); *State v. Clemens*, 78 Wn. App. 458, 898 P.2d 324 (1995); *State v. Heming*, 121 Wn. App. 609, 90 P. 3d 62 (2004).

Professionals in the field of sexual abuse and exploitation explain the dynamic:

> It is normal for an adolescent to be flattered and charmed by an adult who treats them as if they matter; as if they are more mature and knowledgeable than they are; as if they are an adult. It is normal for an adolescent who is struggling to understand his or her own emerging sexuality to look to adults for guidance, limits and assurances. It is not unusual for an adolescent to have a crush on an adult. It is not unusual for adolescents to be insecure about whether they are "normal," "attractive," or "mature." It is not unusual for youth who are traversing through the pitfalls of adolescence to want to be viewed as more mature and worldly than they are. It is not unusual for adolescents to put on the wares of a society that packages everything in terms of sex-and then to look like they know more than they do.

"A Prevention View of the Compliant Child Victim," 14 The APSAC Advisor 2, 17 (2002).

Similarly, Kenneth V. Lanning,[1] wrote:

> We must understand that the offenders often are "nice guys" who typically sexually exploit children by befriending and seducing them. Equally important, we must also understand that the child victims are human beings with needs, wants and desires. Child victims cannot be held to idealistic and superhuman standards of behavior. Their frequent cooperation in their victimization must be viewed as an understandable human characteristic ....

"Law Enforcement Perspective on the Compliant Child Victim," 14 The APSAC Advisor 2, 5 (2002).

The impetus to blame victims of sexual abuse for their so-called participation in the abuse, particularly teenage girls like Kelsey, stems from the chauvinistic "Lolita" myth that young girls are enticers and

[1] Mr. Lanning is a retired FBI agent specializing in child abuse. He served on the task force of the National Center For Missing and Exploited Children and was a founding member of the American Professional Society on the Abuse of Children (APSAC).

instigators of sexual relations with adult men. "This notion of the child harlot, ready to entrap an unsuspecting partner, exemplifies the most dated, sexist notions of women (and girls), as avaricious temptresses." *See* Jennifer Ann Drobac, Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws, 79 Wash. L. Rev. 471, 531 (2004).

This Court should reject respondents' outdated and offensive attacks on a neglected, abused child used to excuse their own negligence.

B. The Duty CCI Owed To Kelsey Breitung Did Not Require Prior Specific Notice Of Phillips' Propensity To Sexually Abuse.

CCI's reply distorts the duty it owes to the children to whom it is supposed to provide counseling and treatment. Contrary to its position, and as demonstrated above, the fact that Kelsey was a teenager rather than a grade-school child does not diminish or eviscerate CCI's duty to Kelsey.

1. CCI Had A Duty To Protect Kelsey From Reasonably Foreseeable Harm, Which Included Sexual Abuse.

CCI had a special relationship **with Kelsey** that gave her a right to protection against reasonably foreseeable harm, including sexual misconduct. *N.K. v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,* 175 Wn. App. 517, 526, 307 P.3d 730 (2013). In this type of special relationship, unlike the relationships in *Kaltreider v. Lake Chelan Comm. Hosp.,* 153 Wn. App. 762, 224 P.3d 808 (2009), and *Smith v. Sacred Heart Med. Ctr.,* 144 Wn. App. 537, 184 P.3d 645 (2008), Kelsey does not need to show CCI's prior specific knowledge that Phillips had a propensity to abuse children sexually. *N.K.,* at 526. Rather, Kelsey

need only establish CCI's knowledge of the "general field of danger" within which the harm occurred. *Id.* (citing *McLeod v. Grant County Sch. Dist. No. 128,* 42 Wn.2d 316, 321, 255 P.2d 360 (1953)).

In *N.K.,* just as CCI argues here, the defendants contended they did not owe the victim a duty of protection because they did not possess prior specific knowledge that the tortfeasor posed a threat to the boys he molested. *N.K.,* at 525-26. The court rejected that argument and concluded genuine issues of material fact existed to defeat summary judgment on the church's liability even though the church had no knowledge of the tortfeasor's propensity to molest children before permitting him to have contact with N.K. and other boys. *Id.*

The *N.K.* holding is even stronger in the context of this case, where even though Kelsey is not required to show CCI's prior specific knowledge of Phillips' propensity to sexually abuse, such evidence exists. In particular, Kelsey's then-legal guardian, Rose Beitler, reported concerns about the sexual nature of Kelsey and Phillips' relationship to CCI at least two weeks before CCI discharged Kelsey.[2] CP 946-947. CCI did nothing to investigate Ms. Beitler's reported concern about the sexual nature of their relationship.[3] Rather than firing Phillips, reporting

[2] At the same time, CCI became aware of other significant boundary violations that resulted in CCI admonishing Phillips and prematurely terminating Kelsey's treatment. CP 950, 965.

[3] Indeed, CCI admits only investigating Ms. Beitler's report that Phillips breached Kelsey's patient-confidentiality rights by disclosing therapeutic information to his wife without consent.

concerns about sexual misconduct to a licensing agency and retaining Kelsey as a patient, CCI summarily discharged Kelsey even though she continued to need services. CP 965. In doing so, CCI failed to take adequate measures to protect Kelsey from Phillips.

But even if the Court were to conclude that Ms. Beitler's report was insufficient to establish specific notice regarding the danger Phillips posed, the record shows CCI knew or should have known that Kelsey–a vulnerable, chemically-dependent teenager–was within the general field of danger posed by Phillips. Kelsey presented sufficient evidence, including unrebutted expert testimony by Sharon Fenton, to create a genuine issue of material fact as to whether CCI breached its duty by taking inadequate measures to investigate Ms. Bietler's report of a sexually inappropriate relationship and ultimately allowing the improper relationship to foreseeably continue and even progress. CP 1010-1013.

Like CCI, the church in *N.K.*, attempted to distinguish *Niece* by claiming that under *Niece* sexual abuse is reasonably foreseeable only if evidence of prior specific knowledge of sexual abuse existed. *N.K.*, 175 Wn. App. at 530. In particular, the defendant in that case argued that in *Niece* there was a duty because there was evidence of "prior sexual assaults that had occurred at the group home, an earlier policy at the home against unsupervised contact with residents, expert testimony that such contact was unwise, and legislative recognition of the problem of abuse in residential care facilities." *Id.* (citing *Niece*, 131 Wn.2d at 50-51). The

N.K. court rejected defendant's argument and confirmed that the victim was only required to establish that the general field of harm posed by the perpetrator was reasonably foreseeable:

> The general field of danger was that scouts would be sexually abused if a stranger newly arrived in town was permitted to supervise them one-on-one in isolated settings. Whether considered from the standpoint of negligence or proximate cause, such a risk cannot be described as so highly extraordinary or improbable as to compel deciding the issue of foreseeability as a matter of law. *See McLeod*, 42 Wn.2d 1t 323-24, 255 P.2d 360. A defendant's actual knowledge of the particular danger "is not required if the general nature of the harm is foreseeable under the circumstances." *Travis v. Bohannon*, 128 Wn. App. 231, 240, 115 P.3d 342 (2005). Therefore, even if there was no evidence that the church knew about specific past incidents of child sexual abuse in scouting, we would decline to decide as a matter of law that sexual abuse by adult scout volunteers was unforeseeable by the church.

N.K., 175 Wn. App. at 531.

Similarly, CCI asks this court to find, as a matter of law, that a chemical treatment agency cannot foresee that a chemical dependency counselor could sexually abuse a vulnerable, chemically-dependent teenager. CCI fails to present any admissible evidence to support its position likely because there is none. In contrast, Kelsey presented Sharon Fenton's expert testimony that sexual abuse by a chemical dependency counselor, in these circumstances, ***is*** reasonably foreseeable. CP 1013. Ms. Fenton also testified that Phillips' pattern of boundary violations in conjunction with Ms. Beitler's report and Kelsey's history, were all indicators of the reasonable potential for a sexual relationship. CP 1115-

1116. At a minimum, Kelsey presented sufficient evidence to establish that CCI negligently missed these indicators thereby failing to fulfill its duty to protect Kelsey from the reasonably foreseeable harm posed by Phillips.

CCI also argues that it cannot be held liable for Phillips' misconduct because the sexual abuse did not occur while Kelsey was at CCI. Washington courts have also rejected this argument. "[T]he focus is not on where or when the harm occurred, but on whether the [defendant] negligently caused the harm by placing its agent into association with the plaintiffs when the risk was, or should have been, known." *C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wn.2d 699, 727, 985 P.2d 262 (1999). In *C.J.C.,* at 724-725, the court noted that the "special relationship giving rise to a duty to prevent intentional harm need not be 'custodial or continuous,' but arises where ability to supervise is present and necessity for such supervision is or should be known." *Id.* (citing *Petersen v. State*, 100 Wn.2d 421, 428-29, 671 P.2d 230 (1983) (psychiatrist-patient relationship gives rise to duty to take reasonable precautions to protect all persons foreseeably endangered by mental patient's release into community)). Under *C.J.C.*, it does not matter that Phillips consummated his improper sexual relationship with Kelsey away from CCI. CCI was aware of the threat Phillips posed to Kelsey at least two weeks before prematurely discharging her from treatment but did nothing to investigate

that report. CP 946-947. This is undisputed. CCI cannot now credibly claim that it had no idea Phillips would ultimately sexually abuse Kelsey.

2. The Trial Court Misapplied *Smith* and *Kaltreider* And Improperly Concluded That It Was Unforeseeable That Phillips Would Sexually Abuse Kelsey Breitung

The superior court misapplied *Smith* and *Kaltreider* here, as those cases are based on the second type of special relationship duty (*i.e.*, duty to control the employee). The court also took the foreseeability limitations of those cases too far.

Foreseeability is a question for the jury unless the circumstances of the inquiry "'are so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *Shepard v. Mielke,* 75 Wn. App. 201, 206, 877 P.2d 220 (1994) (quoting *McLeod,* 42 Wn.2d at 323); *see also M.H. v. Corp. of Catholic Archbishop of Seattle,* 162 Wn. App. 183, 193, 252 P.3d 914, *rev. denied,* 173 Wn.2d 1006 (2011) (dismissal under CR 12(c) improper when tortfeasor's sexual molestation "was not wholly beyond the range of expectability").

> The *C.J.C.* court cited both *Niece* and *McLeod* with approval. We conclude that *Niece* and *McLeod* are consistent with *C.J.C.* and they remain good law. To establish the element of duty arising from a special protective relationship, *NK* did not have to prove the church had prior specific knowledge that Hall posed a threat.
>
> A duty arising from a protective relationship, as in *Niece* and *McLeod*, is limited by the concept of foreseeability. *Niece*, 131 Wn.2d at 50, 929 P.2d 420. The duty "is to anticipate dangers which may reasonably anticipated, and to then take precautions to protect the pupils in its custody from such dangers."

> *McLeod*, 42 Wn.2d at 320, 255 P.2d 360. The church contends sexual abuse by an adult volunteer was unforeseeable.
>
> Foreseeability is a question for the jury unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Niece*, 131 Wn.2d at 50, 929 P.2d 420 (internal quotation marks omitted), quoting *Johnson v. State*, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995); *McLeod*, 42 Wn.2d at 323, 255 P.2d 360. A sexual assault is not legally unforeseeable "as long as the possibility of sexual assaults ... was within the general field of danger which should have been anticipated." *Niece*, 131 Wn.2d at 50, 929 P.2d 420.

N.K., 175 Wn. App. at 529-30.

In *Smith* and *Kaltreider*, the plaintiffs alleged that the defendant hospitals breached their duty to control their employees, who sexually abused them. *Smith*, 144 Wn. App. at 542, 544-45; *Kaltreider*, 153 Wn. App. at 765-66. In both cases, the court held that the hospitals did not owe such a duty to those plaintiffs because the perpetrators committed a tort against discharged-adult patients **after** the employees abandoned their employment. *Id.* at 766; *Smith*, 144 Wn. App. at 546. Logically, the *Smith* and *Kaltreider* courts concluded that the hospital could not be liable for failing to control the perpetrators because they no longer worked at the hospital and the hospital had no way of controlling an employee that no longer worked for it. Additionally, unlike this case, there was no showing that the *Smith* and *Kaltreider* defendants knew or should have known of the potential for sexual abuse. But here, CCI's knowledge of the danger Phillips posed to Kelsey was at a minimum disputed. It is unrebutted that CCI knew Phillips had repeatedly crossed boundaries with his vulnerable,

under-aged client (CP 842, 845), was dangerous to her and, based on Ms. Beitler's reported concern, would foreseeably harm Kelsey in the future (CP 946-947). That reasonably foreseeable harm was even greater once CCI discharged Kelsey but retained Phillips. Based on Ms. Beitler's report of a sexualized relationship between Kelsey and Phillips, it was highly foreseeable, not speculation or conjecture, that Phillips would engage Kelsey in a sexual relationship.

The trial court erred in concluding that there was no evidence to create a genuine issue of material fact as to the foreseeable consequence of CCI's failure to take adequate measures to protect Kelsey from the threat Phillips posed to her.

3. CCI's Negligence Was A Proximate Cause Of The Harm To Kelsey Breitung

CCI maintains that, even if the Court assumed that it owed a duty to Kelsey, its alleged negligence cannot be found to have proximately caused harm to Kelsey because there is a "confluence of superseding causes," including the State's negligence. CCI Resp. Br. at 38. CCI claims, without offering admissible evidence, six other alleged causes for Kelsey's harm and characterizes each as a "superseding cause." *Id.* In particular, CCI claims that Phillips, DSHS, the juvenile court and Kelsey, were each a superseding cause.[4] *Id.*

[4] One of the superseding causes CCI identifies is the juvenile court's dependency orders. Kelsey replies to that argument below.

Washington courts have long held that the existence of multiple causes of harm does not necessarily break the chain of causation, as would be required to establish a superseding cause. Contrary to CCI's position, the negligent act of another does not break the causal connection between CCI's negligence and the harm caused to Kelsey unless it can show that the negligence of another was the **sole** proximate cause of Kelsey's injuries. *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983); *see also* WPI 15.04. "If the acts are ... within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence." *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 870 P.2d 999 (1994).

CCI had abundant knowledge that abuse or exploitation of Kelsey was well within the general field of danger posed by Phillips. In contravention to CCI's ethical policies, Phillips gave his personal cell phone number to Kelsey (CP 845), invited Kelsey to a prohibited outside recovery group (CP 841), gave Kelsey rides to and from the prohibited outside recovery group (CP 842), introduced Kelsey to his wife (CP 958-959), and failed to make a mandatory report regarding Kelsey to CPS (CP 941). Moreover, Kelsey's guardian told CCI that she believed Phillips and Kelsey had a sexualized relationship before she was prematurely discharged from treatment. CP 946-947. While Phillips bears responsibility, CCI, both on appeal and below, failed to present any

evidence that Phillips' actions were the **sole** cause of the inappropriate sexual relationship with Kelsey.

Likewise, CCI has failed to establish that the State's negligent investigation was the **sole** cause of Phillips' sexual abuse of Kelsey. Indeed, Phillips' relationship with Kelsey began under CCI's supervision. CP 961. And although the relationship began without incident it progressed into an "enmeshed" relationship (CP 852) that even her temporary legal guardian recognized as problematic and potentially harmful to Kelsey (CP 946-947).

Kelsey presented sufficient evidence to create a genuine issue of material fact that CCI's actions were a proximate cause of the relationship between Phillips and Kelsey that culminated in an improper sexual relationship.

C. The Trial Court Erred In Granting Summary Judgment To The State

1. RCW 4.24.595(2) Does Not Immunize The State of Washington From Liability

RCW 4.24.595(2) does not provide DSHS immunity from its negligent investigation in placing Kelsey with Phillips. The legislative history of RCW 4.24.595 demonstrates the purpose of the legislation:

> 1. Declare that protection of the child takes precedence over parents' rights; modifying *Tyner v. State*, 141 Wn.2d 68 (2000) to the extent *Tyner* held the interests were equal.
>
> 2. Give DSHS the benefit of a gross negligence standard in actions about child placement made in emergent circumstances.

3. Give DSHS employees the same "witness immunity" as other witnesses, and immunity for following court orders.

Under the common law, witnesses are immune from suit based on their testimony in a judicial proceeding. *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). "The purpose of granting immunity to participants in judicial proceedings is to preserve and enhance the judicial process." *Id.* at 128; *see also Deatherage v. Bd. of Psychology*, 134 Wn.2d 131, 136, 948 P.2d 828 (1997). Without this immunity, witnesses may either be reluctant to come forward to testify, or once they take the stand, their testimony might be distorted by fear of subsequent liability. *Bruce*, 113 Wn.2d at 126.

In the case of expert witnesses, the immunity has been extended to the basis of testimony:

> An expert's courtroom testimony is the last act in a long, complex process of evaluation and consultation with the litigant. There is no way to distinguish the testimony from the acts and communications on which it is based. Unless the whole, integral enterprise falls within the scope of immunity, the chilling effect of threatened litigation will [lead to less objective expert testimony and discourage anyone who is not a full time professional expert witness from testifying], regardless of the immunity shielding the courtroom testimony.

Bruce, 113 Wn.2d at 135.

Child abuse and custody battles have generated several of the witness immunity cases. For instance, in *Gustafson v. Mazer*, 113 Wn. App. 770, 54 P.3d 743 (2002), the court rejected an argument that an expert child custody evaluator did not have immunity for her investigative

activities leading up to her report and testimony, noting "Dr. Mazer had no role as a psychologist independent of her participation in the litigation ..."

However, a litigation witness has a status that is in marked contrast to caseworker Gabrielle Rosenthal ("Rosenthal"). Rosenthal had not just an independent role, but an independent **duty** as Kelsey's caseworker to investigate abuse allegations and prospective placements. This distinction formed the basis of the decision in *Tyner v. State*, 92 Wn. App. 504, 513, 963 P.2d 215 (1998), *rev'd on other grounds*, 141 Wn.2d 68, 1 P.3d 1148 (2000), wherein the court stated:

> The State also claims the immunity afforded to expert witnesses by the Supreme Court's decision in *Bruce v. Byrne–Stevens & Assocs.*
>
> In *Bruce*, the expert witnesses were engineers who had been retained to give an opinion supporting a suit for damage to property. They were sued themselves when the compensation that was awarded based on their estimate turned out to be inadequate to restore the property. The court held that expert witnesses have immunity not only for their testimony in court but also for the investigation and gathering of information on which their testimony rests.
>
> Unlike the engineers, the CPS investigators did not act because a potential litigant had retained them in anticipation of the need for expert testimony at judicial proceedings. They conducted their investigation because it was their statutory duty to do so. Their duty to investigate exists independently of the possibility that they may eventually testify about the results of their investigation.

The distinction drawn in *Tyner* was followed in *Childs v. Allen*, 125 Wn. App. 50, 105 P.3d 411 (2004).

The State argues that any witness in an underlying court case is immune not just for their testimony, but for all their actions. Such a broad reading has been rejected in *Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008). *Wynn* was a suit against a marriage counselor for disclosure of confidential information to a guardian ad litem in a custody dispute. The Supreme Court held:

> [W]e distinguish between a claim of negligence based on the witness's testimony, as in this case, and a claim of negligent diagnosis or treatment. We emphasize that a health care professional is not immune from suit for negligent diagnosis or treatment merely because he or she has been a witness whose testimony touched on that treatment. Here, for example, if Mr. Wynn had sued Ms. Earin for negligence in counseling him, she would not enjoy witness immunity preventing his suit merely because she testified about that treatment during the course of a child placement hearing. Also, a health care provider cannot by testifying in a court proceeding about treatment thereby immunize himself or herself from a malpractice suit based on negligent diagnosis or treatment.

Wynn, 163 Wn.2d at 376. The State argues that the witness immunity shields every action in the case which would, of course, insulate DCFS from any liability for negligence regarding dependent children. This argument goes too far.

D. The Juvenile Court's Dependency Orders Are Not A Superseding Cause

The State and CCI argue that the juvenile court dependency orders operate as a superseding cause thereby breaking the chain of causation

between their negligence and harm to Kelsey.[5] Respondents' argument fails because the juvenile court's dependency orders never ordered DSHS to place Kelsey with Phillips.

Petcu v. State, 121 Wn. App. 36, 86 P.3d 1234 (2004) and *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999), illustrates the difference. In *Bishop*, a King County court expressly ordered the tortfeasor to "[b]e placed on probation with the King County District Court Probation Department for 24 months and abide by all terms, conditions, rules, and regulations of the Probation Department ... during this period." *Bishop*, 137 Wn. 2d at 522. The tortfeasor's probation officer petitioned the district court for revocation of the tortfeasor's probation after multiple violations of the district court's initial order. *Id.* at 523. After a hearing, the district court refused to revoke probation. *Id.* Two days later the tortfeasor caused an accident, killing plaintiff's son. *Id.* The plaintiffs alleged that King County negligently supervised the tortfeasor causing their son's death. *Id.* at 523-24. Under these facts, the Washington Supreme Court found that the probation officer had a duty to exercise reasonable care to control the tortfeasor. *Id.* at 531. However, on the issue of proximate cause, "the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident." *Id.* at 532 (citing *Schooley,* 134 Wn.2d at

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[5] CCI also identified other superseding causes, which Kelsey addresses at pages 14-16 herein.

482). *Bishop* is fundamentally different from the facts of this case. In *Bishop*, the harm occurred after the district court refused to revoke the tortfeasor's probation. Here, Phillips' improper relationship with Kelsey began well before any dependency hearings occurred.

In *Petcu*, a babysitter reported alleged abuse to Child Protective Services ("CPS"). *Petcu*, 121 Wn. App. at 43. A lengthy criminal and CPS investigation, including a dependency hearing, was set in motion by this report. *Id.* at 43-55. Ultimately, the plaintiff's children were removed from his custody by a CPS caseworker when the investigating detective indicated his belief that the children should be taken into protective custody. *Id.* at 43. In the course of her investigation, the caseworker formed a belief that plaintiff was the perpetrator. *Id.* at 44-45. During a dependency hearing, a judge made factual findings, including a determination that "based on a preponderance of the evidence, Petcu sexually abused the children." *Id.* at 51. The judge then ordered the children dependent effectively separating the plaintiff from his children. *Id.* Later, Mr. Petcu filed a lawsuit alleging, amongst other things, that the caseworker's negligent investigation proximately caused his separation from his children. *Id.* at 56. *Petcu* held that the dependency order, under those circumstances, was a superseding intervening cause because Petcu failed to identify any material information that was withheld from the court. *Id.* at 59-60. Indeed, the dependency hearing involved taking live testimony of many witnesses, including the victims, experts, and law

enforcement officers. Based on that rigorous process, and not just on the caseworker's representations, the judge issued a 33-page findings of fact and conclusions of law. *Id.* at 60.

The State also argues they are immune for the consequences of Kelsey's placement because they were "following court orders." State's Resp. Br. at 2. As argued in Kelsey's opening brief, none of the court orders issued during the dependency proceedings placed Kelsey with Phillips – DSHS did. The State claims this argument is "silly." *Id.* at fn.11. But, noticeably, the State does not say when exactly it was "ordered" to place Kelsey with Phillips. Following the State's logic, the first mention of Phillips as a potential placement in court, was tantamount to a court "ordering" Kelsey's placement with Phillips. Accordingly, because Phillips' name was mentioned on September 16, 2009, at a shelter care hearing (CP 649-651), the juvenile court effectively ordered DSHS to place Kelsey with Phillips as of that date. However, Kelsey did not move into Phillips' home until a few days before the October 16, 2009, dependency hearing (CP 361). If the State's logic is followed, then DSHS was not complying with the "court's order" from September 16, 2009 through at least October 16, 2009. The State's logic is fundamentally flawed. Simply put: the State cannot have it both ways. It cannot use the juvenile court dependency orders as both a shield and a sword, as it seeks to do in this case. Either the juvenile court ordered DSHS to place Kelsey with the Phillips as of September 16, 2009 (pursuant to its flawed logic),

or DSHS retained placement discretion from September 16, 2009 until such time that Kelsey aged out of the foster care system.

The logical conclusion, which is supported by admissible evidence, is that the juvenile court dependency orders in 2009 **never** ordered Kelsey's placement with Phillips. As Kelsey's expert, Barbara Stone, testified Kelsey remained in DSHS's custody, care and supervision and DSHS retained full discretion as to her placement even after the November 3, 2009, hearing. CP 744. Indeed, once Kelsey disclosed Phillips' sexual abuse, DSHS removed Kelsey from his home without the need of a court order directing them to do so. Was DSHS in contempt of the court's order for doing so? It was not. DSHS was exercising its discretion to immediately remove Kelsey from placement with Phillips precisely because Kelsey continuously remained in DSHS's custody and care, as Ms. Stone attested. Neither the State or CCI offered evidence to rebut Ms. Stone's testimony below nor do they now.

The trial court erred in ruling that the juvenile court dependency orders dated between September and November 2009, operated as superseding causes as to CCI's and the State's negligence.

E. Kelsey Is Not Judicially Estopped From Pursuing This Claim

The State and CCI assert Kelsey repeatedly lied to the court about her sexual relationship with Phillips. This ignores the actual facts. Though it was clear to many people that Kelsey had a crush on Phillips, warranting concern about the relationship, it was not a physical sexual

relationship until after Kelsey's placement with Phillips by caseworker Rosenthal, on October 16, 2009. CP 989-999. Kelsey denied the sexual relationship on a single occasion during the November 3, 2009, hearing. CP 439-440. She disclosed the relationship to her recovery group on November 24, 2009. CP 703. This is not a factual scenario to which judicial estoppel should fairly be applied.

Miller v. Campbell, 137 Wn. App. 762, 155 P.3d 154 (2007), observed that judicial estoppel was generally applied only if there was a finding of manipulative intent, *i.e.*, deliberate or intentional manipulation. This manipulation was present in *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005), where the plaintiff filed a lawsuit for injuries 11 days after the bankruptcy court discharged all debt. On the other hand, Miller was suing for more serious emotional issues that arose after his bankruptcy discharge several years earlier. The Supreme Court did not reverse this holding.

The State can produce no evidence that when Kelsey testified about the positive aspects of the placement with Phillips on November 3, 2009, that she was doing so in order to manipulate a placement that she could then sue over.

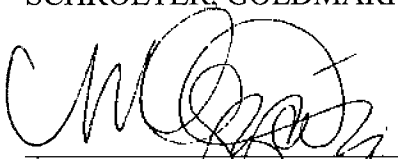
Because of the unique dynamic of child sexual abuse, this Court, as in *Miller*, should reverse the application of the doctrine here. The State and CCI will still be able to make their arguments to a jury on inconsistency, causation and damages.

II. CONCLUSION

The trial court, misconstruing the duties that CCI and DSHS owed Kelsey and deciding issues of fact instead of permitting the jury to do so, dismissed Kelsey's claims as unforeseeable and/or superseded by a commissioner's ruling approving DSHS's placement recommendation. The trial court did so contrary to the law, and despite genuine issues of material fact raised by the evidence, including unrebutted expert testimony, that Kelsey presented. Accordingly, Appellant Kelsey Breitung asks this Court to reverse the summary judgment dismissals and remand for trial, because genuine issues of material fact exist as to her claims.

RESPECTFULLY SUBMITTED this 18th day of February, 2014.

SCHROETER, GOLDMARK & BENDER



REBECCA J. ROE, WSBA #7560
M. LORENA GONZÁLEZ, WSBA# 37057
Counsel for Appellant Kelsey Breitung

SCHROETER GOLDMARK BENDER

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