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)

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiff Kelsey Breitung sought to hold CCI liable for a sexual relationship between herself and her former counselor Andrew Phillips that (1) started more than six weeks after Plaintiff discharged from CCI; (2) started after CCI instructed Phillips to have no further contact with Plaintiff; and (3) occurred off CCI premises after Plaintiff had been placed in foster care with Phillips and his wife.

It is undisputed that the foster placement and the subsequent sexual relationship occurred without any knowledge by CCI that (1) Plaintiff was being considered for placement with Phillips; (2) Plaintiff had been placed with Phillips; or that (3) Phillips and Plaintiff were continuing to have any contact. In addition, the Superior Court approved placement of Plaintiff with Phillips, and during a court hearing Plaintiff did not divulge any sexual abuse and misled the Court.

Under those facts, CCI had no duty to protect Plaintiff from that relationship, and Plaintiff could not establish that any actions of CCI were a legal cause of that relationship and any damages flowing from it.

Accordingly, the Trial Court granted CCI's summary judgment motion, and that decision should be affirmed.

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II. RESPONSE TO ASSIGNMENTS OF ERROR

The Trial Court was correct in granting summary judgment and that decision should affirmed.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Duty is limited by the concept of foreseeability. Here, there was no past history of any sexual abuse by Phillips, Plaintiff testified that Phillips never flirted with her or showed sexual interest in her while she was at CCI, the sexual relationship happened more than six weeks after Plaintiff was discharged from CCI, happened in Phillips' home, and happened after CCI had instructed Phillips to cease contact with Plaintiff. Should the dismissal of Plaintiff's claims against CCI be affirmed on the grounds that CCI had no duty to protect Plaintiff from that sexual relationship with Phillips?

2. A plaintiff must establish legal causation, and the presence of a superseding cause can prevent legal causation. Here, there was a confluence of superseding causes, including court intervention, between any actions of CCI and the sexual relationship that happened more than six weeks after Plaintiff was discharged from CCI and after Plaintiff was placed in foster care with Phillips. Should the dismissal of Plaintiff's claims against CCI be affirmed on the grounds that Plaintiff cannot establish legal causation?

IV. STATEMENT OF THE CASE

The criminal history and background check done in connection with CCI's hiring of State-licensed Registered Counselor Andrew Phillips did not show any history of sex crimes or violent crimes.[1] Mr. Phillips, a

[1] CP 484-486: Rapsheet for Candidate Andrew Phillips.

registered counselor, received training and instruction in the CCI program and its policies and procedures.[2]

In February 2009, Plaintiff Kelsey Breitung was referred to CCI for Early Intervention Education services.[3] On February 27, 2009, CCI assigned Mr. Phillips to counsel Plaintiff.[4]

In July 2009, Ms. Breitung left her home to live with a family friend.[5] In August 2009, this family friend complained to Mr. Phillips' CCI supervisor (William James, Ph.D.) that Mr. Phillips disclosed information to his wife that he obtained from Ms. Breitung during a counseling session.[6] CCI reported Mr. Phillips' disclosure of confidential information to the Department of Health's Licensing Department, which opened an investigation.[7] The investigation was closed without findings when the Legislature then terminated the Registered Counselor licensure program.[8]

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[2] CP 487-506: CCI documents including Orientation to Agency (CP 488-489); Job Description-Chemical Dependency Professional Trainee (CP 491); Counselor Registration (CP 492); Addiction Counseling Competencies Documentation (CP 493-499; Confidentiality Agreement (CP 500); New Employee Orientation (CP 501-502); Personnel File Contents (CP 503); Addiction Counseling Competencies: Professional and Ethical Responsibilities (CP 504); Addiction Counseling Competencies: Transdisciplinary Foundations (CP 505); First 50 Hours of Any Face to Face Client Contact (CP 506).

[3] CP 2: Complaint at paragraph 3.1.

[4] CP 2: Complaint at paragraph 3.1.

[5] CP 3: Complaint at paragraph 3.3.

[6] CP 3: Complaint at paragraph 3.4.

[7] CP 3: Complaint at paragraph 3.6.

[8] CP 3: Complaint at paragraph 3.6.

On August 13, 2009, Plaintiff was placed in a group home by the State of Washington to await foster care placement.[9] On August 30, 2009, CCI terminated counseling services for Ms. Breitung at its facility.[10] When counseling services were terminated between Plaintiff and CCI on August 30, 2009, CCI directed Mr. Phillips to have no further contact with Plaintiff.[11]

On September 16, 2009, there was a dependency hearing held where placement of Plaintiff in Andrew Phillips' home was discussed.[12] In that hearing, the Court asked Plaintiff how she knew Phillips, and Plaintiff stated, "Well first Andrew was my counselor for a brief period of time, and then we started to go to church together and that's where I met his wife.[13]" In that hearing, the attorney for Plaintiff's mother, April Breitung, raised concerns about the potential placement of Plaintiff with Phillips:

> Just one other issue, Your Honor, my client has some concerns about suitable adult placement that the child has raised in that she believes the counselor has like stepped over his job and –she doesn't feel comfortable. She's not sure what is going on in the relationship.[14]

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[9] CP 3: Complaint at paragraph 3.7.
[10] CP 3: Complaint at paragraph 3.8.
[11] CP 518-519: William James Dep. at page 117-118; CP 524:Phillips Dep. at page 131 line 18 to page 132 line 13.
[12] CP 527-532: Verbatim Legal Proceedings 9-16-09.
[13] CP 530: Verbatim Legal Proceedings 9-16-09 at page 10.
[14] CP 531: Verbatim Legal Proceedings 9-16-09 at page 16.

The judge told Plaintiff's mother's lawyer that she should bring those concerns to the attention of the social worker.[15]

In the course of investigating whether Plaintiff would be placed with Mr. Phillips, DSHS social worker Gabrielle Rosenthal was concerned that that there could be an ethical conflict regarding Phillips serving as a foster parent to a former client. She asked him about whether there would be a conflict, and Phillips told her that he had checked and there would be no conflict.[16] Social worker Rosenthal did not contact CCI regarding the potential placement.[17] Phillips did not notify CCI of the potential placement of Plaintiff with him.[18]

On October 16, 2009, DSHS placed Plaintiff in Mr. Phillips' home for foster care.[19] No one at CCI was informed that Plaintiff was being considered for placement with Mr. Phillips, and CCI was not informed that Plaintiff was placed in Phillips' home for foster care, and CCI did not learn that Plaintiff was living with Phillips until after the sexual relationship was disclosed.[20]

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[15] CP 531: Verbatim Legal Proceedings 9-16-09 at page 16.
[16] CP 535: Deposition of Gabrielle Rosenthal at page 28 lines 13-25.
[17] CP 535: Deposition of Gabrielle Rosenthal at page 29 lines 4-14.
[18] CP 525: Deposition of Andrew Phillips at page 133 lines 1-9.
[19] CP 8: Complaint at paragraph 3.13.
[20] CP 517: James Deposition at page 37.

On November 3, 2009, there was a court dependency hearing regarding continuing the placement with Phillips and his wife.[21]

At that hearing, Plaintiff's mother's attorney relayed the mother's concerns about an "unhealthy attachment" between Plaintiff and Phillips and told the Court, "Kelsey's at an age where there can be confused emotions with older men and her mother is very concerned about that and would rather see her in a different placement.[22]" In addition, Plaintiff's mother filed papers with the Court objecting to placement of Plaintiff with Phillips. Her attorney filed a written objection that told the Court that Plaintiff had dreams about Phillips and had an unhealthy attachment to him.[23] In addition, she filed a supporting declaration from Rose Sialana that stated Plaintiff was "obsessed" with Phillips and raised the concern that Phillips' emotions were clouding his judgment.[24] She also filed a declaration from Debra Jones that declared that placement with Phillips would be unhealthy for Plaintiff.[25]

At that hearing, Plaintiff's own attorney advocated for Plaintiff's placement with the Phillips, and Plaintiff told the Court that the placement was going well and that there was no reason for her to be moved:

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[21] CP 537-542: Verbatim Legal Proceedings11-3-09.
[22] CP 539:Verbatim Legal Proceedings 11-3-09 at page 9.
[23] CP 544-545: Contested IPR.
[24] CP 547-548: Declaration of Rose Sialana.
[25] CP 550-551: Declaration of Debra Jones.

> I agree with everything my lawyer said. Everything is going really well. There is no reason for me to be moved or anything like that. It's been more of a family environment, best one I've ever had so far.[26]

DSHS social worker Gabrielle Rosenthal addressed the Court and stated, "I don't have any concerns about the placement.[27]"

The Court stated, "I don't have any concerns about the placement either,[28]" and held, "the Court approves the placement where you are.[29]"

In her complaint, Plaintiff alleged that on November 25, 2009, she disclosed a sexual relationship with Mr. Phillips that had started after October 17, 2009, over six weeks after she had been discharged from treatment by CCI.[30] On November 29, 2009, CCI learned of the relationship and suspended Phillips, and on November 30, 2009, CCI terminated Mr. Phillips' contract.[31]

On April 17, 2012, Plaintiff initiated this action.

On June 28, 2013, the Trial Court granted CCI's motion for summary judgment and dismissed Plaintiff's claims against CCI.[32]

V. ARGUMENT

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[26] CP 539: Verbatim Legal Proceedings 11-3-09 at page 6.
[27] CP 540: Verbatim Legal Proceedings 11-3-09 at page 12 line 3 to page 13 line 3.
[28] CP 540: Verbatim Legal Proceedings 11-3-09 at page 12, lines 4-5.
[29] CP 540: Verbatim Legal Proceedings 11-3-09 at page 13, lines 16-17.
[30] CP 5: Complaint at paragraph 3.15.
[31] CP 5: Complaint at paragraph 3.14.; CP 516, 520: James Deposition at pages 17 & 148.
[32] CP 1126-1127.

When reviewing an order on summary judgment, the Court of Appeals makes the same inquiry as the trial court, and considers all legal questions de novo.[33] A showing that there are no genuine issues of material fact can only be rebutted by specific factual matters presented by the non-movant, which requires more than conclusory allegations or argumentative assertions.[34] When reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.[35] And when it is shown that there is insufficient evidence to establish an essential element of a plaintiff's claim, then a defendant's summary judgment will be granted.[36]

Here, the summary judgment granted to CCI should be affirmed because (A) CCI had no duty to protect Plaintiff from sexual contact that happened in Phillips' home over six weeks after Plaintiff was no longer a CCI client; because (B) Plaintiff submitted no evidence showing that Plaintiff could recover on claims of negligent hiring, negligent retention, or negligent supervision; and because (C) Plaintiff cannot establish legal causation as to CCI.

A. The Trial Court did not err in granting CCI summary judgment because CCI had no duty to protect Plaintiff from

[33] *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006).
[34] *Ruffer v. St. Cabrini Hospital,* 56 Wn. App. 625, 628, 784 P.2d 1288 (1990), *review denied,* 114 Wn.2d 1023, 792 P.2d 535 (1990).
[35] *Id.*
[36] *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 225-27, 770 P.2d 182 (1989).

sexual contact that happened in Phillips' home over six weeks after Plaintiff was no longer a CCI client as such contact was not foreseeable.

In granting summary judgment to CCI, the trial court judge honed in on the issue of the foreseeability and correctly reasoned that it was not foreseeable that Plaintiff would be placed by the State with Andrew Phillips and that a sexual relationship would commence:

> What they did was terminate the young lady from - - the plaintiff here from their facility and said Look, no more contact. Did both, with Andrew. Don't do it anymore.
>
> Some two months later, roughly, unbeknownst to CCI she ends up asking for and being placed with the Phillips, with Andrew, after a court hearing.
>
> That was not foreseeable. It's hard for me to understand at this point; there is no evidence, I think, to put it another way, to base it on other than just pure rank speculation that they should have taken some actions they didn't take. I mean, to keep the girl there and to counsel her further was an option, I suppose. But that is not the basis for liability here.
>
> They terminated the relationship. And beyond that this action doesn't happen for another two months, roughly. The sexual contact doesn't happen. To foresee that is a bit of a stretch.[37]

1. **The law set forth in the *Smith* and *Kaltreider* decisions controls and shows that the Trial Court was correct to find a lack of reasonable foreseeability.**

[37] RP 49.

Two cases in particular show that the Trial Court's correctly found that the sexual relationship between Plaintiff and Andrew Phillips was not reasonably foreseeable as to CCI, that CCI had no duty to protect Plaintiff from the sexual relationship with Phillips that happened over six weeks after Plaintiff was discharged from CCI, and that there was no error in dismissing the claims against CCI on summary judgment.

First, in *Smith v. Sacred Heart Med. Ctr.*,[38] the Washington Court of Appeals upheld dismissal of a hospital on summary judgment in a case where a nursing assistant contacted two psychiatric patients at the hospital (kissing one and hugging the other), suggested they have sex, and then had sexual activity at the assistant's home.[39] In dismissing the claims, the Court held that (1) the hospital had no vicarious liability for the employee's actions because the employee's conduct was not serving the hospital's purposes and was outside the scope of his employment;[40] that 2) there was no claim for negligent supervision because there was no showing that the hospital knew or should have known that the employee

[38] 144 Wn.App. 537, 184 P.3d 646 (2008).
[39] *Smith*, 144 Wn.App. at 540.
[40] *Smith*, 144 Wn.App. at 543-544.

was a danger to patients;[41] and (3) that there was no negligent failure to protect because the sexual relationship was not foreseeable.[42]

In affirming dismissal of the hospital on summary judgment, the Court explained that the plaintiffs had made no showing that the hospital could have eliminated the sexual contact which had occurred after the plaintiffs were discharged:

> Second, the Smiths and Ms. Hamilton make no showing, by expert or lay testimony, as to what Sacred Heart should or could have done to eliminate the contact here, most of which (and most significant of which), occurred after Ms. Smith and Ms. Hamilton were discharged.[43]

Moreover, the Court held that the hospital did not have a duty to protect the plaintiffs because it was not foreseeable that the hospital's employee would commit sexual assaults against the plaintiffs:

> And, moreover, any special duty the hospital may have had to protect Ms. Hamilton and Ms. Smith is limited by the concept of foreseeability. *Christen v. Lee,* 113 Wash.2d 479, 492, 780 P.2d 1307 (1989). While "sexual assault by a staff member is not a legally unforeseeable harm," *Niece,* 131 Wash.2d at 51, 929 P.2d 420, there must be something more than just speculation and possibility. *See Id.* at 49, 929 P.2d 420 ("an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator"); *see also Schooley v. Pinch's Deli Market, Inc.,* 80 Wash.App. 862, 869, 912 P.2d 1044 (1996) ("[F]oreseeability means foreseeability from the point of view of a reasonable person

[41] *Smith*, 144 Wn.App. at 544.
[42] *Smith*, 144 Wn.App. at 544-546.
[43] *Smith*, 144 Wn.App. at 546.

> *who knows what the defendant's conduct will be,* but who does not know the specific sequence of events that ultimately will ensue therefrom" (emphasis added)), *aff'd,* 134 Wash.2d 468, 951 P.2d 749 (1998). Specifically, the question here is whether it was foreseeable that Mr. Judici would commit a tort against Ms. Hamilton and Ms. Smith. *Niece,* 131 Wash.2d at 51 n. 10, 929 P.2d 420.
>
> The sexual assaults alleged by the Smiths and Ms. Hamilton happened after the hospital discharged them and after Mr. Judici had abandoned his employment with the hospital. They claim, nevertheless, that Mr. Judici laid the ground work for these sexual encounters by his making comments to and hugging Ms. Hamilton and by his hugging and kissing Ms. Smith while he was an employee. This is legally insufficient to predicate a cause of action against Sacred Heart absent some showing that it knew or should have known of the potential for sexual abuse. And that showing is absent here. *Id.* at 52, 929 P.2d 420.
>
> The superior court properly dismissed this suit against Sacred Heart.[44]

Second, a similar result was reached in *Kaltreider v. Lake Chelan Cmty, Hosp.,*[45] where the Washington Court of Appeals upheld a summary judgment dismissal of a hospital in a case where a plaintiff was a resident at the hospital for inpatient drug and alcohol treatment, and one of the hospital's nurses had sex with her at the hospital. In affirming the dismissal, the Court of Appeals held that the hospital had no duty to protect the plaintiff from the nurse because (1) the plaintiff was not a

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[44] *Smith*, 144 Wn.App. at 546-547.
[45] *Kaltreider v. Lake Chelan Community Hosp.*, 153 Wn.App. 762, 224 P.3d 808 (2009).

disabled person unable to protect herself;[46] and (2) the nurse's actions were not foreseeable.[47]

In holding that dismissal was proper due to the unforeseeable nature of the employee's actions in having sex with a patient, the *Kaltreider* court echoed the reasoning of the *Smith* court in noting that an employer does not have a duty to guard against the possibility that one of its employees was an undisclosed sexual predator and that the employee's sexual conduct was not reasonably foreseeable:

> Moreover, Mr. Menard's actions were not foreseeable. In *Smith*, the court noted that sexual misconduct and resulting harm must be "reasonably foreseeable," and the foreseeability must be based on more than speculation or conjecture. *Smith*, 144 Wash.App. at 546, 184 P.3d 646. The employer " 'generally does not have a duty to guard against the possibility that one of its employees may be an [undisclosed] sexual predator.' " Id. (quoting *Niece*, 131 Wash.2d at 49, 929 P.2d 420). In determining whether sexual misconduct by a staff member is foreseeable, this court may look to whether there were prior sexual assaults at the facility or by the individual in question. *Niece*, 131 Wash.2d at 50, 929 P.2d 420. Here, LCCH did not have knowledge of prior misconduct at the hospital or by Mr. Menard. Further, Mr. Menard's actions were outside the scope of his duties. Without evidence that Mr. Menard's conduct was known or reasonably foreseeable to LCCH, there was no duty to protect.[48]

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[46] *Kaltreider,* 153 Wn.App. at 766.
[47] *Kaltreider,* 153 Wn.App. at 766-767.
[48] *Kaltreider,* 153 Wn.App. at 766-767.

The *Smith* and *Kaltreider* cases control and show that CCI was properly dismissed on summary judgment. The same foreseeability analysis undertaken by the *Smith* and *Kaltreider* courts is applicable to the present case. Just as was true in the *Smith* and *Kaltreider* cases, it was not reasonably foreseeable that Phillips would engage in sexual contact with Plaintiff.

The *Smith* case in particular stands for the proposition that there must be something more than speculation and possibility to charge an employer with foreseeability for an employee's sexual activities. In *Smith*, the Court of Appeals held, as a matter of law, that there was no such foreseeability even when the plaintiff claimed that the hospital employee "laid the ground work for these sexual encounters by making comments and to and hugging Ms. Hamilton and by his hugging and kissing Ms. Smith while he was an employee.[49]" The present case lacks even such a speculative basis for arguing that Phillips' sexual contact with Plaintiff was foreseeable, and the evidence does not show that sexual contact between Plaintiff and Phillips was reasonably foreseeable.

2. <u>There is no evidentiary basis that could establish that sexual contact between Plaintiff & Phillips was reasonably foreseeable to CCI.</u>

[49] *Smith*, 144 Wn.App. at 546-547.

First, unlike in *Smith* where there was evidence that the employee had laid the ground work for sexual encounters by hugging and kissing the plaintiff, there was no evidence of any such inappropriate physical contact between Plaintiff and Phillips at CCI. By contrast, at his deposition, Phillips testified that he never hugged Plaintiff while she was his client at CCI, and that the first time they hugged was "after she moved into my house.[50]"

Second, Plaintiff's own testimony and her own statements to the police indicate there is no basis for finding that the sexual relationship was foreseeable to CCI.

In her deposition, Plaintiff testified that she and Phillips never had any sexual activity while she was at CCI, testified that neither she nor Phillips flirted with each other while she was at CCI, and testified that Phillips never did anything to indicate that he had a sexual interest in Plaintiff while she was at CCI:

> 23 Did you ever have any sexual activity with Andrew
> 24 Phillips when you were still at CCI?
> 25 A No.
> 1 Q When you were at CCI, what were your feelings regarding
> 2 Andrew Phillips?
> 3 A Just -- just that he could help me. He was a role model
> 4 figure to me.
> 5 Q When you were at CCI, did you ever spray perfume in

[50] CP 523: Phillips deposition at page 24 lines 18-25.

Andrew
Phillips' office?
A No.
Q When you were at CCI, did you ever flirt with Andrew Phillips?
A No.
Q When you were at CCI, did you ever do anything to indicate that you had a sexual or romantic interest in Andrew Phillips?
A No.
Q When you were at CCI, did Andrew Phillips ever flirt with you?
A Not that I'm aware of.
Q When you were at CCI, did Andrew Phillips ever do anything to
indicate he had a sexual interest in you?
A Not that I'm aware of.[51]

Further, the statement that Plaintiff provided to the police on December 16, 2009 confirms that Phillips had done nothing at CCI to indicate a sexual interest in Plaintiff as she was in shock when Phillips expressed sexual interest in her after she was placed in his home. In that statement, Plaintiff describes an October 17, 2009 interaction where Phillips indicated some sexual feelings toward her, she was "in shock" and had "absolutely no idea" that Phillips felt that way:

> UM...this is already messed up and I just got my stuff, I just...am gonna move in with them and everything was messed up, but I mean I was in shock. I wasn't expecting that at all. I feel totally comfortable around Andrew and I ...I had absolutely no idea he felt that way.[52]

[51] CP 1031: Excerpts of Kelsey Breitung Deposition at page 217 line 23 to page 218 line 17.
[52] CP 988: Statement to Police in Supplemental Incident Report.

Third, as discussed in the Statement of Facts above, a criminal history and background check was done when Mr. Phillips was hired and did not show any history of sexual abuse. And there is no evidence of any prior sexual assaults by Phillips, and no evidence of any prior sexual assaults at CCI.

Fourth, the fact that, as in *Smith*, the sexual contact took place after Plaintiff was no longer a CCI client and at the employee's home, further undermines any argument that the sexual contact between Plaintiff and Phillips was reasonably foreseeable to CCI. There is no evidence that CCI would have any reason to foresee that Plaintiff would be placed in foster care with Phillips or that Phillips would start a sexual relationship with Plaintiff over a month and half after CCI had instructed him to not have any contact with Plaintiff.

Moreover, the fact that the sexual contact took place well after Plaintiff was no longer a client of CCI is further relevant because, as was noted by the *Smith* court, the fact that the contact occurred after the treatment relationship had ended and off the facility grounds indicates that the plaintiffs could make no showing that the facility could have prevented the sexual contact. In this case, there is a similar lack of showing that CCI could have done anything to prevent the sexual contact that occurred in the Phillips' home over a month and a half after Plaintiff was discharged from

CCI. CCI had instructed Phillips not to have contact with Plaintiff, and CCI was never informed that Plaintiff was being considered for foster placement with Phillips or had been placed with Phillips.

3. Plaintiffs' summary judgment submissions offered no facts showing that Phillips' sexual misconduct was reasonably foreseeable.

Conversely, Plaintiffs' summary judgment submissions offered no facts showing that Phillips' sexual misconduct was reasonably foreseeable. As noted by the *Smith* and *Kaltreider* courts, "sexual misconduct and resulting harm must be 'reasonably foreseeable,' and the foreseeability must be based on more than speculation or conjecture.[53]"

In the Trial Court and in the Appellant's brief, Plaintiff sought to create an issue as to foreseeability, by arguing that (1) CCI knew that Phillips had violated therapeutic boundaries when it discharged Plaintiff; (2) Plaintiff's guardian had complained about the relationship between Plaintiff and Phillips; and (3) Plaintiff's expert Sharon Fenton testified that within the chemical dependency industry it is foreseeable that a personal relationship with a client may become sexual.[54] But none of those arguments could create an issue of fact as to reasonable foreseeability.

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[53] *Kaltreider,* 153 Wn.App. at 766 (citing *Smith*, 144 Wn.App. at 546).
[54] See Brief of Appellant at 25-26.

As to the allegation of crossing boundaries, even if actions like Phillips providing Plaintiff with his cell phone number and encouraging her to participate in a church sponsored recovery group were construed as crossing boundaries, there was, as admitted in Plaintiff's own testimony, no boundary crossing of any sexual nature. As such, allegations of crossing boundaries would amount to no more than the kind of speculation and conjecture which the *Smith* court held could not establish foreseeability.

Further, when on August 30, 2009 CCI terminated counseling services with Plaintiff and on the same day directed Phillips to have no further contact with Plaintiff, there is no tenable argument that pre-termination boundary crossing would make a future sexual relationship foreseeable. Once Plaintiff was discharged and Phillips had been explicitly instructed to have no further contact with Plaintiff there was no reason for CCI to foresee additional contact of any kind between Plaintiff and Phillips, much less to foresee a future sexual relationship.

As to the complaint by Plaintiff's guardian Rose Sialana[55], there was no allegation from Sialana that Phillips had made any sexual advances toward Plaintiff. By contrast, at her deposition, Bietler she that she

[55] The Brief of Appellant refers to her as "Rose Beitler."

expressed a belief that Plaintiff had a sexual interest in Phillips.[56] Allegations that Plaintiff was sexually interested do not indicate that Phillips was interested in Plaintiff such that a sexual relationship was foreseeable. Further, as with the allegations of boundary crossing, CCI's discharge of Plaintiff and instruction to Phillips to have no further contact with Plaintiff eliminated any potential that a future sexual relationship could be reasonably foreseeable.

As to Ms. Fenton's opinion that within the chemical dependency industry it is foreseeable that a personal relationship with a client may become sexual, that is not evidence that could rise above the level of speculation and possibility which was found insufficient by the *Smith* court.

Ms. Fenton's opinion is a blanket statement that would apply to all persons and institutions in the substance abuse treatment industry. The result of accepting Plaintiff's argument would be to find that sexual misconduct is always foreseeable in regard to the substance abuse treatment industry. Plaintiff has provided no case law that would support imposition of such a blanket standard.

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[56] CP 947.

Further, finding the necessary foreseeability to ground a duty to protect Plaintiff from the relationship with Phillips on the blanket assertion that "the potential for sexual abuse within the substance treatment industry is well known" would be in direct conflict with the *Kaltreider* case. *Kaltreider* also involved a claim in the substance abuse treatment industry as the plaintiff there was a resident at a hospital for in-patient drug and alcohol treatment. As quoted above, the *Kaltreider* court looked to case specific particular facts such as whether there were prior instances of sexual misconduct, refused to find foreseeability based on speculation and conjecture, and determined there was no foreseeability in the absence of such case specific facts. Plaintiff's blanket argument that sexual misconduct is always foreseeable in the substance treatment industry is in direct conflict with *Kaltreider* where sexual misconduct was not found foreseeable in a substance abuse treatment setting.

4. <u>This case cannot be tenably distinguished from the *Smith* and *Kaltreider* decisions.</u>

When the evidence and arguments of the parties are viewed as a whole, there is no tenable way to distinguish the present case from the *Smith* and *Kaltreider* cases. Just as it was proper to dismiss the defendants in those cases on summary judgment, it was likewise proper to enter a summary judgment dismissal of the claims against CCI in the present case.

In both of those cases, the courts found that no duty attached to protect the plaintiff from sexual contact with the defendants' employees when those sexual contacts were not foreseeable. Plaintiff fails to offer any tenable factual distinction between the present case and the situations in *Smith* and *Kaltreider.*

The relationship between CCI and Plaintiff was similar to the relationships between the defendants and plaintiffs in *Kaltreider* and *Smith.* In the present case, Plaintiff was a client at CCI for chemical dependency counseling. In *Smith*, the two plaintiffs were psychiatric in-patients at the defendant's hospital.[57] In *Kaltreider*, the plaintiff was a resident at the defendant's facility for drug and alcohol treatment.[58] The present case, *Smith*, and *Kaltreider* all involved claims based on the plaintiffs engaging in sexual contact with an employee of the defendant.

The only real distinction Plaintiff raises is that the plaintiffs in *Smith* and *Kaltreider* were adults. That distinction is insufficient to distinguish the present case from *Smith* and *Kaltreider.* While Plaintiff Breitung was not an adult, she was over seventeen and, at that age, she was above the age of consent, which is sixteen in Washington.[59] Given Plaintiff's age and given that she was not a resident at CCI, there are no

[57] *Smith*, 144 Wn.App. at 540.
[58] *Kaltreider*, 153 Wn.App. at 764.
[59] *State v. Scott*, 150 Wn.App. 281, 293, 207 P.3d 495 (2009).

grounds to consider her as being more vulnerable than the plaintiffs in *Smith* and *Kaltreider,* who were receiving in-patient psychiatric and treatment and in-patient drug addiction treatment. Further, the foreseeability analysis engaged in by the *Smith* and *Kaltreider* courts did not turn on the plaintiffs' ages.

In addition, Plaintiff's attempt to avoid *Smith* and *Kaltreider* by arguing that the facts of this case are more analogous to *Ruschner v. ADT, Sec. Systems Inc.,*[60] lacks merit. As discussed above, the facts of the present matter dovetail closely with *Smith* and *Kaltreider,* while, by contrast, *Rucshner* is distinguishable. In *Rucshner*, the Court of Appeals held that (1) a security company had voluntarily assumed a duty of care not to hire employees with criminal records by warranting in a contract that it would do conduct criminal background checks before hiring an employee; (2) that it had breached that duty of care by hiring a person with a criminal record; and (3) that there were questions of fact regarding whether that breach caused Plaintiff's injuries.[61]

Those considerations in *Rucshner* are absent here. There was no contractually assumed duty to not hire persons with criminal records and

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[60] 149 Wn.App. 665, 204 P.3d 271 (2009).
[61] *Rucshner*, 149 Wn.App. at 679.

CCI did a criminal background check.[62] *Rucshner* is not applicable and this case is controlled by *Smith* and *Kaltreider.* Just as it was proper to dismiss the defendants in *Smith* and *Kaltreider* on summary judgment, it was likewise proper to enter a summary judgment dismissal of the claims against CCI in the present case, and that order should be affirmed.

B. The Trial Court did not err in granting CCI summary judgment because Plaintiff submitted no evidence showing that Plaintiff could recover on claims of negligent hiring, negligent retention, or negligent supervision.

As discussed above, the absence of evidence showing that it was reasonably foreseeable to CCI that Phillips would start a sexual relationship with Plaintiff more than six weeks after Plaintiff had been discharged from CCI, acts to prevent CCI from having any duty as to that relationship, and that lack of foreseeability is fatal to Plaintiff's claims for negligent hiring, negligent retention, and negligent supervision. But, in addition, there are reasons beyond the lack of foreseeability that also prevent recovery on those claims.

Negligent hiring

In regard to negligent hiring, there is no evidence that would support such a claim because the evidence shows that CCI performed a pre-hiring investigation that was sufficient as a matter of law.

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[62] CP 484-486.

The Court of Appeals decision in *Peck v. Siau*[63] is controlling. In *Peck*, the plaintiff was a high school student who engaged in sexual acts with a teacher and then sued the school district asserting claims for negligent hiring, negligent supervision, and negligent retention. The *Peck* court affirmed an order of summary judgment dismissing the District. In its decision, the *Peck* court noted that the District checked the teacher's certification and his background, and, in those circumstances, the court held there was no reasonable inference that the District failed to exercise reasonable care at the time of hiring:

> Peck does not have a valid claim against the District for negligent hiring. The record is not clear on when the District hired Siau, but it was at least seven years before the events in question here. It is undisputed that the District checked his teaching certification and his background when it hired him. There is no evidence that the District, at the time of hiring, knew or in the exercise of ordinary care should have known that he was unfit for employment as a school librarian. Thus, there is no reasonable inference that the District failed to exercise reasonable care at the time of hiring. *See Scott v. Blanchet High School, supra.*[64]

Per *Peck,* the evidence in this matter likewise shows that there can be no reasonable inference that CCI failed to exercise reasonable care in the hiring of Phillips. Just as the District in *Peck* checked the teacher's certification, here CCI checked and verified that Phillips was certified as a

[63] 65 Wn.App. 285, 827 P.2d 1108 (1992).
[64] *Peck*, 65 Wn.App. at 288-289.

registered counselor.[65] CCI did a Washington State Patrol background check on Phillips' criminal history and that check found no history of sexual misconduct and nothing other than a 1995 misdemeanor conviction for possession of stolen property.[66] In addition, CCI director Dr. William James interviewed Phillips,[67] and Dr. James also checked the references provided by Phillips.[68] The steps taken by CCI in the hiring of Phillips were thus even more extensive than those documented in *Peck.*

Further, the factors that led to questions of fact in the *Carlson v. Wackenhut*[69] and *Rucshner v. ADT Sec Systems, Inc.*[70] cases are absent in the present case.

In *Rucshner*, the Court of Appeals found a question of fact regarding negligent hiring when the employer had a contractual duty to conduct a criminal background check and failed to do so.[71] By contrast, CCI did a criminal background check.

In *Carlson*, the Court of Appeals likewise found a question of fact when a concert security guard was hired without a criminal background

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[65] See CP 492: Phillips' Counselor Registration.
[66] See CP 484-486: Criminal Background Check; CP 1039-1040: William James Deposition at pages 56-57.
[67] See CP 1034-1038: William James Deposition at pages 47-51.
[68] See CP 1041-1047: William James Deposition at pages 70-76.
[69] 73 Wn.App. 247, 868 P.2d 882 (1992).
[70] 149 Wn.App. 665, 204 P.3d 271 (2009).
[71] See *Ruschner,* 149 Wn.App. at 681-684.

check, without a reference check, and without the level of investigation undertaken in *Peck*:

> Wackenhut cites *Peck, supra,* as support for its position that, as a matter of law, it was not negligent in hiring Futi. In *Peck,* this court determined that a trial court did not err in determining on summary judgment that a school district was not negligent in hiring a high school librarian who later wrongfully engaged in sexual relations with a student. We concluded that, because the school district had checked the librarian's teaching certificate and background when it hired him, there was no evidence that at the time of hiring the school district knew or, in the exercise of ordinary care, should have known that he was unfit for employment as a librarian. *Peck,* 65 Wash.App. at 289, 827 P.2d 1108.
>
> In our judgment, *Peck* is of little help to Wackenhut. Unlike the employer in *Peck,* Wackenhut did not check into Futi's background after receiving his applications. It did not, for example, contact Futi's references to determine if he had a criminal record.[72]

In the present case, CCI did conduct a criminal background check and did check Phillips' references. Given that CCI took those steps, and given that nothing in Phillips' criminal background check or references disqualified him, there is, as in *Peck*, no reasonable inference that CCI failed to exercise reasonable care at the time of hiring.

Negligent retention

There is a similar lack of support for any claim for negligent retention. As discussed in the *Peck* case, the "negligence" in negligent

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[72] *Carlson*, 73 Wn.App. at 254-255.

hiring or retention "consists of hiring or retaining an employee who is incompetent or unfit," and "it is necessary to establish such negligence as the proximate cause of the damage to the third person.[73]" As stated by the *Peck* court, "the difference between negligent hiring and negligent retention is the time at which the employer's negligence occurs.[74]"

In this case, Plaintiff alleges negligent retention based on CCI's not terminating Phillips when it learned that he had divulged confidential information about Plaintiff to his wife. That allegation is untenable for at least the following reasons.

First, there is no logical inference that Phillips divulging information about Plaintiff to his wife indicates that Phillips had the potential to enter into a sexual relationship with Plaintiff.

Second, there is no potential causal nexus between CCI's not terminating Phillips and the sexual relationship that happened later. After Phillips made the disclosure to his wife, CCI instructed Phillips not to have contact with Plaintiff, and Plaintiff was discharged from CCI. Those actions severed any CCI related ties between Plaintiff and Phillips. Plaintiff argues that Plaintiff would never have been placed with Phillips for foster care if Phillips had been terminated, but that assertion is nothing

[73] *Peck*, 65 Wn.App. at 288.
[74] *Peck*, 65 Wn.App. at 288.

more than hypothetical speculation. It is particularly speculative because it is undisputed that (1) no one contacted CCI about Plaintiff being placed in foster care with Phillips; and (2) Phillips did not tell the Court or DSHS that he had been instructed to not have contact with Plaintiff.

Negligent supervision

In regard to negligent supervision, that claim must also fail because there is no evidence that CCI was aware, or should have been aware, that Phillips was dangerous to CCI clients.

In the *Smith* case, the Court of Appeals held that Plaintiff's claim for negligent supervision was properly dismissed when there was no showing that the employer knew or should have known that the employee was a danger to patients:

> Mr. Judici worked as a nursing assistant for Sacred Heart. But there is no showing here that Sacred Heart knew or should have known that Mr. Judici was a danger to its patients. There is no showing that he had engaged in similar acts before he committed the intentional torts alleged here. Ms. Hamilton and the Smiths have not established that Sacred Heart negligently supervised Mr. Judici. The court then properly dismissed the negligent supervision claim against Sacred Heart.

Dismissal on the same grounds is appropriate here. Plaintiff has put forth no evidence that CCI knew or should have known that Phillips was a danger to Plaintiff. Phillips' criminal background check showed no sexual offenses. Phillips had no history of engaging in similar acts at CCI.

And, as is documented by Plaintiff's own deposition testimony, Phillips did not express any sexual interest in Plaintiff while she was at CCI, and Phillips did not flirt with Plaintiff while she was at CCI.[75]

In addition, the negligent supervision claim also must fail because it is undisputed that in August of 2009, CCI instructed Phillips not to have further contact with Plaintiff, and the sexual relationship happened in October and November 2009 at Phillips' home over six weeks after Plaintiff had been discharged from CCI. Plaintiff's Brief cites WAC 246-16-100 which has a requirement that counselors not engage in sexual conduct with a former patient for two years. That WAC provision would be binding on Phillips, but it is not relevant to foist any liability on CCI. The sexual contact between Plaintiff and Phillips was against CCI policy and done without CCI's knowledge or approval. Given that CCI had explicitly directed Phillips not to have contact with Plaintiff and given that CCI had no reason to know that such contact was continuing, there is no basis to fault CCI for any violation of that WAC or for any alleged failure to supervise Phillips.

C. The Trial Court did not err in granting CCI summary judgment because Plaintiff could not establish legal causation as to CCI.

[75] See CP 1031: Kelsey Breitung Deposition at page 217 line 23 to page 218 line 17.

As set forth by the Washington Court of Appeals in *Beltran v. DSHS*, legal causation is an element of proximate cause separate from cause in fact, and is a legal question for the Court that is dependent on policy considerations such as whether the connection between the acts of the defendant and the whether result complained of is too remote or insubstantial to impose liability:

> Legal causation is an element of proximate cause that is distinct from cause in fact. Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. *Tyner v. State,* 92 Wash.App. 504, 515, 963 P.2d 215 (1998). "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Schooley v. Pinch's Deli Market,* 134 Wash.2d 468, 478, 951 P.2d 749 (1998). This determination depends upon "mixed considerations of logic, common sense, justice, policy, and precedent." *Schooley,* 134 Wash.2d at 479, 951 P.2d 749 (citation omitted); *Tyner,* 92 Wash.App. at 515, 963 P.2d 215 (citing *Taggart v. State,* 118 Wash.2d 195, 226, 822 P.2d 243 (1992)).[76]

Legal causation is a question for the court.[77]

The presence of a superseding cause can act as a bar to imposing legal causation on a defendant. For example, in *Petcu v. State*[78] the Court of Appeals held that a court's decision that a father had sexually abused his

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[76] 98 Wn.App. 245, 253-254, 989 P.2d 604 (1999).
[77] *Petcu v. State*, 121 Wn.App. 36, 56, 86 P.3d 1234 (2004).
[78] 121 Wn.App. 36, 86 P.3d 1234.

child was a superseding cause that broke any causal connection between any DSHS negligence and the separation of the father from his child. In explaining that decision, the *Petcu* court noted that in a lawsuit based on claims of negligent investigation, court intervention operates as a superseding cause that cuts off liability so long as the Court had not been deprived of a material fact due to the caseworker's faulty investigation:

> In a lawsuit based on negligent investigation, a caseworker may be legally responsible for a parent's separation from a child, even when the separation is imposed by court order, but only if the court has been deprived of a material fact due to the caseworker's faulty investigation. *Tyner,* 141 Wash.2d at 86, 1 P.3d 1148. Otherwise, court intervention operates as a superseding intervening cause that cuts off the caseworker's liability. *Tyner,* 141 Wash.2d at 88, 1 P.3d 1148.[79]

The *Petcu* court then applied that rule to a situation where a father was seeking damages for an allegedly negligent investigation by DSHS which allegedly led to his child being separated from him. The *Petcu* court upheld dismissal of that claim on the grounds that the dependency court's findings were a superseding intervening cause:

> However, in evaluating whether an alleged breach of duty was a cause in fact of Petcu's court-ordered separation from his children, we examine all of the information before the trial court to determine whether, but for the faulty investigation, the court would not have decided as it did. *Tyner,* 141 Wash.2d at 88, 1 P.3d 1148 (if a judge is given all material information and

[79] *Petcu*, 121 Wn.App. at 56.

> reasonable minds could not differ, the court order will be a superseding intervening cause of the complaint of action).[FN5]
>
> FN5. We reject Petcu's argument that the trial court gives more weight to information DSHS presents than to information he presents. We assume that the trial court reviews all credible material properly submitted without giving undue weight to one side.
>
> Here, Petcu fails to identify material information that was not before the dependency court. Because, as noted below, he cannot show that the dependency court lacked material information, the trial court properly ruled that Judge Sheldon's dependency findings operated as a superseding intervening cause.[80]

The Washington Supreme Court decision in *Bishop v. Miche*[81] also illustrates the general principal that superseding intervening causes can act to prevent legal causation, and illustrates the specific application that a court decision can be such a superseding intervening cause that breaks the causal connection between a defendant's actions and a plaintiff's injuries.

The *Bishop* case involved a situation where the parents of a child killed in an auto accident caused by an intoxicated King County probationer brought a wrongful death suit against the County alleging that the County negligently supervised the probationer.[82] The *Bishop* court held that the county probation officer owed a duty to exercise reasonable care to control

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[80] *Petcu*, 121 Wn.App. at 59-60.
[81] 137 Wn.2d 518, 973 P.2d 465.
[82] *Bishop*, 137 Wn.2d at 521.

the probationer to prevent reasonably foreseeable harm to others.[83] Despite finding that such a duty existed, the Washington Supreme Court affirmed summary judgment dismissal of the County on the grounds that a judge's action in not revoking the probationer's parole in a hearing that happened two days before the accident was an independent cause that broke any causal connection between the County and the accident such that proximate cause was lacking as a matter of law.[84]

In making that holding, the Supreme Court noted that the District Court had information that the probationer had an alcohol problem and had driven while his license was suspended, and held that, "in light of the information before the district court judge at that hearing and his decision not to revoke probation, as a matter of law proximate causation is lacking.[85]" The Supreme Court then went on to explain that the District Court judge's decision was a new independent cause that broke any causal connection between the County's actions and the accident, to hold that proximate cause was lacking as a matter of law, and to affirm summary judgment dismissal of the County:

> As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal

[83] *Bishop*, 137 Wn.2d at 531.
[84] *Bishop*, 137 Wn.2d at 531-532.
[85] *Bishop*, 137 Wn.2d at 531.

> connection between any negligence and the accident. *See Schooley v. Pinch's Deli Market, Inc.,* 134 Wash.2d 468, 482, 951 P.2d 749 (1998) (a defendant's negligence is the proximate cause of the injury only if such negligence, unbroken by any new independent cause, produces the injury complained of). The judge's actions, of course, are shielded by judicial immunity.[FN3] Accordingly, summary judgment in favor of the County was proper because as a matter of law proximate causation is lacking.
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> We agree with the Court of Appeals' holding that the County owed a duty to control Miche, but hold that as a matter of law proximate cause is lacking. Therefore, summary judgment in favor of the County was proper. The Court of Appeals is reversed.[86]

When the law set forth in the *Petcu* and *Bishop* cases is examined in conjunction with the evidence as to CCI and other entities, that examination shows that the presence of other superseding intervening causes apart from CCI breaks any causal connection between CCI's actions and the sexual relationship of which Plaintiff complains such that CCI was entitled to summary judgment on the grounds that there is no legal causation as a matter of law.

Common to the present case, the *Petcu* case, and the *Bishop* case are court interventions that act to break any causal chain between the plaintiffs' injuries and the defendants' actions. In both *Petcu* and *Bishop,* the courts' rulings broke any causal chain between a defendant's alleged negligence and

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[86] *Bishop,* 137 Wn.2d at 532.

a plaintiff's injuries. Likewise, in the present the case, the action of the Pierce County Court in the dependency hearings of September 16, 2009 and November 3, 2009 broke any causal chain between CCI's actions and the sexual relationship between Plaintiff and Phillips.

As discussed in the Statement of Facts above, the placement of Plaintiff for foster care with Mr. Phillips was at issue in both of those hearings.[87] The Court was made aware that Phillips was Plaintiff's former counselor,[88] that there was a possible ethical conflict regarding whether Phillips could serve as a foster parent for Plaintiff,[89] and that Plaintiff's mother and other declarants had objected to Plaintiff's placement with Phillips due to concerns such as Plaintiff being "obsessed" with Phillips, Plaintiff having an "unhealthy attachment" to Phillips, and Phillips' emotions clouding his judgment.[90] Even with the full knowledge of that information, the Judge approved placing Plaintiff with Phillips.

As in the *Petcu* and *Bishop* cases, that approval operates as an independent superseding cause that breaks any causal connection from between CCI's acts and the sexual relationship that began when Plaintiff was

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[87] CP 527-532: Verbatim Legal Proceedings of 9-16-09; CP 537-542:Verbatim Legal Proceedings of 11-3-09.
[88] CP 530: Verbatim Legal Proceedings of 9-16-09 at page 10-11.
[89] CP 530: Verbatim Legal Proceedings of 9-16-09 at page 11.
[90] See CP 544-545: Contested IPR; CP 547-548: Sialena Declaration; CP 550-551: Jones declaration; CP 531: Verbatim Legal Proceedings 9-16-09 at page 16; and CP 539: Verbatim Legal Proceedings of 11-3-09 at page 9.

in foster care with Phillips. Per the law set forth in *Petcu* and *Bishop,* there are at least two particular reasons that the judge's decision to allow Plaintiff to be placed with Phillips operates as such an independent superseding cause.

First, just as in the *Bishop* and *Petcu* cases, the judge determining whether to allow Plaintiff to be placed with Phillips had access to the material facts. The judge was informed that Phillips was Plaintiff's former counselor and that the Plaintiff's mother and others had raised objections to the placement based on concerns about the potential for an inappropriate relationship between Plaintiff and Phillips.

Second, even if it were argued that the judge did not have all the material facts, any lack of material facts would not operate to make the judge's decision any less an independent and superseding cause as to CCI. As the *Petcu* court noted in its discussion of the *Tyner* case, "if the court has been deprived of a material fact **due to the caseworker's faulty investigation**," then court intervention does not operate as a superseding cause.[91] That limitation could not apply to CCI because there is no evidence that CCI did anything to prevent the Court from having all the material information. Indeed, it was not possible for CCI to prevent the Court from

[91] *Petcu*, 121 Wn.App. at 56. (emphasis added)

having any material information because CCI was never notified that Plaintiff was being considered for foster placement with Phillips.

Accordingly, the intervention of the Court to allow Plaintiff to be placed with Phillips, standing alone, acts as a superseding cause that breaks any causal connection between CCI's actions and the sexual relationship that happened after Plaintiff was placed in foster care with Phillips.

Moreover, while that Court intervention is sufficient to break any causal connection between CCI's actions and that sexual relationship, that Court intervention is only one of multiple superseding causes that act to break any causal connection between CCI and the sexual relationship that happened over a month and a half after Plaintiff was discharged from CCI.

In particular, any possible negligence of CCI was superseded as a matter of law due to a confluence of superseding causes including at least (1) Phillips' failure to follow CCI's instructions to cease contact with Plaintiff; (2) Phillips' actions in seeking to become Plaintiff's foster parent; (3) the failure of either Phillips or DSHS to notify CCI that Plaintiff was being considered for foster care placement in Phillips' home; (4) DSHS's actions in recommending Plaintiff for placement in the Phillips' home and in placing Plaintiff in Phillips' home; (5) the Court's approval of placing Plaintiff in Phillips' home over the objections raised by Plaintiff's mother and other

declarants; and (6) Phillips' own actions in participating in a sexual relationship after Plaintiff had been placed in Phillips' home for foster care.

Further, Plaintiff's own actions in choosing to participate in a sexual relationship with Phillips and to provide false information to the court during a hearing about her placement with Phillips also acted as a superseding cause. In her deposition testimony, Plaintiff admitted that at the time she was engaged in the sexual relationship with Phillips, she knew that the relationship was wrong.[92] Plaintiff also testified that Phillips never threatened her or forced her into any sexual activity,[93] and Plaintiff testified that she had a choice whether or not to have sex with Phillips.[94]

Plaintiff's own choice to engage in a sexual relationship which she knew was wrong, in conjunction with all of the other superseding causes discussed above have combined to create a situation where it would be contrary to law to find that Plaintiff could establish legal causation against CCI.

Given the confluence of superseding causes, the connection between any actions of CCI and the sexual relationship that happened in Phillips'

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[92] CP 1030: Kelsey Breitung Deposition at page 214 lines 14-19.
[93] CP 1032: Kelsey Breitung Deposition at page 228 lines 6-11.
[94] CP 1032: Kelsey Breitung Deposition at page 228 lines 12-14.

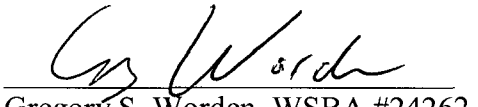
home over a month a half after Plaintiff was discharged from CCI is too remote or insubstantial to impose liability on CCI and there was no error in the summary judgment dismissal of the claims against CCI.

VI. CONCLUSION

The summary judgment order dismissing the claims against CCI should be affirmed. Plaintiff failed to establish that CCI had a duty to protect her from sexual relationship that happened well after Plaintiff was discharged from CCI, that happened after CCI had instructed Phillips to have no further contact with Plaintiff, that happened in Phillips' home, that happened after – without consultation with CCI – the State placed Plaintiff with Phillips, and that happened after a judge allowed that placement. In addition, given the confluence of superseding causes discussed above, Plaintiff cannot establish that CCI's actions were a legal cause of the sexual relationship between herself and Phillips.

DATED THIS 14th day of January, 2014.

Lewis Brisbois Bisgaard & Smith LLP



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 14th, 2014, I caused service of the foregoing **Brief of Respondent** by email and legal messenger to:

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