No. _____ 90844-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 45123-9-II

KELSEY BREITUNG,

Appellant-Petitioner,

v.

STATE OF WASHINGTON and COMMUNITY COUNSELING INSTITUTE

Respondents,

PETITION FOR REVIEW

REBECCA J. ROE, WSBA #7560
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I. INTRODUCTION

This case exposes the State's child sexual abuse prevention system gone awry. The trial court and Court of Appeals ignored fundamental summary judgment standards that should have allowed Petitioner Kelsey Breitung's claims against the State and its contracted counseling agency, CCI, to proceed. Substantial public interest concerns exist in the superior court's improper dismissal of the entities that could and should have prevented Petitioner's sexual abuse.

In addition, the Court of Appeals did not address either the trial court's broad extension of immunity to DSHS caseworkers in non-emergent investigations, contrary to the legislative history, nor the unwarranted application of judicial estoppel to a child sexual abuse victim.

II. IDENTITY OF PETITIONER

Kelsey Breitung—Plaintiff in the Superior Court and Appellant in the Court of Appeals--asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part III.

III. COURT OF APPEALS DECISION

Breitung requests review of the Court of Appeals' unpublished decision, *Breitung v. State of Washington, Dept. of Social and Health Servs., and Community Counseling Institute,* No. 45123-9-II (slip op., Sept. 3, 2014). A copy of the decision is at Appendix 1.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals' dismissal of the State as a matter of law conflict with this Court's and the Court of Appeals' standards for summary judgment by resolving the disputed factual questions as to cause in fact against Kelsey Breitung, the nonmoving party? Did the Court violate those summary judgment standards by usurping the jury's role of evaluating the evidence and making factual conclusions?

2. Did the Court of Appeals' decision conflict with this Court's statutory construction principles by applying RCW 4.24.595 to immunize DSHS caseworkers in non-emergent investigations, an issue of substantial public interest that should be determined by this Court?

3. Did the Court of Appeals' decision conflict with this Court's guiding principles by applying judicial estoppel to a child sexual assault victim?

4. Should this Court accept review to provide guidance and clarification of the special relationship duty to child abuse victims, in particular, that foreseeability of sexual abuse is virtually always a factual question? Did the Court of Appeals' decision conflict with this Court's summary judgment standards by determining as a matter of law that CCI had no legal duty to its child-client, Kelsey Breitung, resolving disputed

factual jury questions against her as to the high foreseeability that Phillips would abuse Breitung?

V. STATEMENT OF THE CASE

Andrew Phillips (Phillips), while employed at Community Counseling Institute (CCI), sexually abused Kelsey Breitung when she was 17 years old. CP 988-999. Prior to the sexual abuse, while acting as her drug and alcohol counselor, Phillips started violating therapeutic boundaries, i.e., "grooming," Petitioner while she was his client. CP 841, 847, 852, 908-9, 933, 946, 950, 1010-13, 1120. The grooming culminated in the prohibited sexual relationship when the State negligently investigated Phillips and placed Breitung in Phillips' home, giving him the opportunity for this highly foreseeable abuse. CCI had knowledge of Phillips' improper relationship with Kelsey prior to discharging her from its care. CP 842, 845, 941, 946, 950, 956, 958-9. Indeed, it was the concerns of an inappropriate sexual relationship between Breitung and Phillips that led to CCI's discharge of Breitung from CCI's care. CP 946-7, 950, 965.

DSHS, not a court order, placed Breitung in Phillips' home in October 2009. The Court of Appeals acknowledged the testimony of Barbara Stone, statewide director of foster and childcare licensing in Children's Administration, that placement of Breitung in Phillips' home

violated state law and DSHS policies. The caseworker did not fulfill her investigatory obligations, including checking with CCI on the conflict "dual realtionship" issue. Slip op., at 8. Ms. Stone had further testified that prior to placement with Phillips, caseworker Rosenthal needed to complete a home study, including an extensive interview of the prospective caregivers. CP 743 at ¶10. She testified there were "red flags in Phillips' dual relationship" as Kelsey's counselor and foster parent. CP 744. The fact Rosenthal warned Phillips' wife never to leave Kelsey alone with her husband evidenced awareness of the high risk that improper conduct would occur. CP 744. The Court of Appeals did not explain why these facts were not material nor how the November 3, 2009 ruling could "supercede" a situation that already exitsted [1].

The Court of Appeals erred in ruling that the trial court correctly determined the juvenile court dependency order operated as a superseding cause as to the State's negligent placement.

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[1] No court orders placed Kelsey with Phillips – DSHS did. Kelsey did not move into Phillips' home until a few days before the October 16, 2009 dependency hearing. CP 361. 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. Once Kelsey disclosed Phillips' sexual abuse, DSHS removed Kelsey from his home without the need of a court order directing them to do so. DSHS was exercising its discretion to immediately remove Kelsey from placement with Phillips precisely because Kelsey continuously remained in DSHS's custody and care.

The Court of Appeals also erred in allowing the superior court's misinterpretion of RCW 4.24.595 to expand caseworker immunity far beyond the legislature's clear intent to stand. The application of judicial estoppel to this child victim of abuse is likewise unwarranted.

Denying review will leave the State's and CCI's negligence undeterred and the trial court's legal errors on the immunity and judicial estoppel uncorrected.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Dismissal Of The State Violates Summary Judgment Standards And Fails To Resolve The Misapplication of State Immunity And Judicial Estoppel, And Questions Of Substantial Public Interest.

The Court of Appeals' decision affirming dismissal of the State conflicts with every decision of this Court and the Court of Appeals defining the standard on summary judgment particularly involving cause in fact. RAP 13.4(b)(1), (2).

1. The Court Should Accept Review To Correct The Disregard Of and Conflict With Summary Judgment Standards.

The Court of Appeals affirmed the trial court's summary judgment dismissal of claims against the State arising from her placement with Phillips, on the ground that even viewing the evidence in the light most favorable to Breitung, she could not establish cause in fact. Cause in fact is virtually always a jury question. Yet the Court held that the record

shows DSHS's concerns about Phillips were all brought to the juvenile court's attention, dismissing the omissions in the investigation referenced by Ms. Stone with the comment that "the [juvenile] court had already heard similar concerns from Breitung's mother and had addressed them at the hearing." Slip op., at 20. Again, the Court stated: "The record does not show that DSHS withheld from the juvenile court any material fact it had gathered from its investigation of the Phillips family." *Id.*

The Court of Appeals relied heavily on statements by Breitung's mother introduced at the November 3, 2009 hearing as examples of information the juvenile court was aware of. This suggests that the Court concluded that the mother's "objections"—provided to the juvenile court--were somehow equal in weight to counselor Andrea Venier's omitted concerns, or to concerns CCI would have related to the caseworker had she called them as she said she would. But only the factfinder can weigh evidence in this manner. The juvenile court might well have devalued the mother's objections but found the counselor's concerns significant. The Court of Appeals cannot weigh evidence, trade the two sources off, and find them equivalent. *E.g., Sutton v. Tacoma Sch. Dist. No. 10,* 180 Wn. App. 859, 866-67, 324 P.3d 763 (2014) ("in reviewing a summary judgment order, we do not weigh the credibility of seemingly inconsistent statements"); *Barker v. Advanced Silicon Materials, LLC,* 131 Wn. App.

616, 624, 128 P.3d 633 (2006) (on a motion for summary jdugment, courts do not weigh evidence or assess witness credibility).

Moreover, the State did not legally or factually "place" Breitung in the November 3, 2009 hearing; the purpose of that hearing was to review whether Kelsey continued to be dependent as DSHS could use their discretion to place her with Phillips over her mother's objection. The Court of Appeals affirmed the trial court's usurption of the jurors' role in finding the November 3, 2009 order was a superceding cause because the order merely affirmed DSHS's continuing authority to place Breitung with Phillips.

2. The Court Should Accept Review To Reach The Substantial Public Interest Question In The Unauthorized Expansion Of Caseworker Immunity.

The Court of Appeal's decision also involves an issue of substantial public interest that should be determined by the Supreme Court, but which the Court of Appeals avoided: whether RCW 4.24.595 grants immunity to DSHS caseworkers in non-emergent investigations such as this.

As the plain language and the legislative history demonstrate, RCW 4.24.595 [2] (entitled "Liability immunity--**Emergent placement investigations** of child abuse or neglect--Shelter care and other

[2] RCW 4.24.595 is attached as Appendix 2.

dependency orders") applies only to emergent placement investigations, which this was not. RAP 13.4(b)(4).

In enacting RCW 4.24.595(2), the legislature wished narrowly to free DSHS caseworkers from tort liability for acts or omissions in **emergent** placement investigations of child abuse or neglect. HB2510-Digest; SE-Digest. The Bill Digests for subsection 2 both state, with regard to immunity, "Provides immunity from liability under **certain** circumstances, to governmental entities, and their officers, agents, employees, and volunteers, in tort for acts or omissions **in emergent placement** investigations of child abuse or neglect." HB2510-Digest; HB2510-S.E.-Digest (emphasis added). The Bill Analysis, House and Senate Bill Reports all make clear that the entire purpose of the statute was to ease the "dilemma" of caseworkers in "emergent placement investigations": "The bill's narrow exception creating a gross negligence standard in emergent placement investigations is agreed to because caseworkers need to be able to act quickly in these difficult situations." House Bill Report, ESHB 2510. *See also* House Bill Report HB2510 (same); Bill Analysis, House Judiciary Committee, HB2510 ("Governmental entities, and their officers, agents, employees, and volunteers, are not liable for acts or omissions in **emergent placement investigations** of child abuse or neglect unless the investigation was done

with gross negligence of whether there was reason to believe the child was in danger or neglect."); Senate Bill Reports (same).

In defining emergent investigations, the statute references RCW 13.34.065, the shelter care hearings required to be conducted within 72 hours of removing a child from their parents. The reference to the shelter care statute reinforces the clear legislative intent to encourage caseworkers to err on the side of removing a child to safety by allowing caseworkers a gross negligence standard of liability in deference to the quick decision making required.

DSHS' action in this situation meets none of the RCW 4.24.595 criteria for quasi-immunity (a gross negligence statute). Kelsey was removed from her mother's home in July 2009 and her mother was not contesting the removal. CP 673-4. She was placed with Rose Beitler, then at South King County Youth Services. CP 3 at ¶3.3-3.7. There was no "emergency" to remove her from South King County Youth Services to Phillips'. The hearings at which the caseworker reported her progress on Kelsey's placement, were dependency reviews, not emergency shelter care hearings.

The broad and untenable expansion of immunity is a matter of serious concern to the public.

3. The Court Should Accept Review To Halt The Implicit Policy Of Blaming Child Abuse Victims, As The Trial Court Did In This Case.

The Court of Appeals did not address the judicial estoppel issue. However, the trial court unfairly applied the doctrine contrary to the implicit policy of this Court in prior decisions.

Unlike the Respondents, the legislature and the appellate courts have long understood the dynamics of child sexual abuse that were present in this case. *See* RCW 4.16.340; RCW 9A.44.093; RCW 9A.44.096; RCW 9A.44.010(8); RCW 9A.44.010(9); *State v. Fisher*, 99 Wn. App. 714, 995 P.2d 107 (2000); *State v. Hirschfelder,* 148 Wn. App. 328, 199 P.3d 1017 (2009);[3]S.B. Rep. on S.B. 5309, at 2, 59th Leg., Reg. Sess. (Wash. 2005); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) (rejecting blaming the child; acknowledging the law requires strict liability for sex with minors regardless of "consent"); *Bjerke v. Johnson*, 742 N.W.2d 660, 670-71 (Minn. 2007). Washington child sexual abuse statutes reflect society's recognition of the imbalance of power between adults and children, as well as society's determination that

[3] "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."

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); "A Prevention View of the Compliant Child Victim," 14 The APSAC Advisor 2, 17 (2002);[4] Kenneth V. Lanning,[5] "Law Enforcement Perspective on the Compliant Child Victim," 14 The APSAC Advisor 2, 5 (2002).[6]

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 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."

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[4] "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."

[5] 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).

[6] "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 ...."

Jennifer Ann Drobac, Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws, 79 Wash. L. Rev. 471, 531 (2004).

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 implicitly 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 very shortly thereafter 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. Such 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, 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 should accept review to reverse the trial court's ill-advised application of the doctrine here.

B. Review Should Be Accepted To Clarify Special Relationship Duty To A Victim Of Foreseeable Child Abuse.

The Court of Appeals dismissed Kelsey's negligent hiring, supervision, and retention claims against CCI, reasoning that Phillips' abuse of Breitung was not foreseeable to CCI as a matter of law so that CCI had no legal duty to Breitung. The Court held that Breitung failed to demonstrate CCI knew or should have known of Phillips' unfitness when it hired or retained him. Slip op., at 13-14. Moreover, the Court concluded Breitung could not show Phillips' sexual abuse of her after the counseling relationship ended was foreseeable because the circumstances were so highly extraordinary that they were beyond the range of expectability and could be taken from the jury. The Court held Breitung did not present evidence to create genuine isuse of material fact about whether Phillips' abuse of her was foreseeable or how the absue was

connected to CCI's supervision of Phillips. Slip op., at 14-18. These rulings, all prefaced by the mantra that the Court was "viewing the evidence in the light most favorable to" Breitung, reflect this Court's usurption of the jurors' role and confusion about the role of foreseeability in special relationship duty cases involving child abuse victims. This is an area where it is critically important for this Court to provide guidance regarding the special relationship duty. The harm here was all too foreseeable.

CCI had a special relationship with Breitung 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), Breitung did not need to show CCI's prior specific knowledge that Phillips had a propensity to abuse children sexually. *N.K.,* at 526.

"[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). CCI was aware of the threat Phillips posed to Breitung when they prematurely discharged her from treatment but did nothing to investigate that report. CP 946-947.

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 (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*, at 542, 544-45; *Kaltreider*, 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*, 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.

Here, CCI's knowledge of the danger Phillips posed to Breitung 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

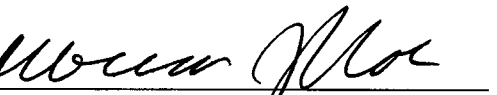
concern, would foreseeably harm Breitung in the future (CP 946-947). That reasonably foreseeable harm was even greater once CCI discharged Breitung but retained Phillips. Based on Ms. Beitler's report of a sexualized relationship between Breitung and Phillips, it was highly foreseeable, not speculation or conjecture, that Phillips would engage Breitung in a sexual relationship. Breitung's evidence created a genuine issue of material fact as to the foreseeable consequence of CCI's failure to take adequate measures to protect her from the threat Phillips posed to her.

VII. CONCLUSION

The Court should accept review of this case becaue of significant legal issues involving the State and CCI's obligations to protect children from forseeable abuse.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

SCHROETER, GOLDMARK & BENDER



REBECCA J. ROE, WSBA #7560
Counsel for Petitioner Kelsey Breitung

CERTIFICATE OF SERVICE

On the 3rd day of October, 2014, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Steve Puz, WSBA #17407 Amanda Bley, WSBA #42450 Assistant Attorney General 7141 Cleanwater Dr. SW P.O. Box 40126 Olympia, WA 98504-0126 Attorney for Defendant State of Washington	☐ Via Hand Delivery – ABC Legal ☒ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email
Gregory S. Worden, WSBA #24262 Lewis Brisbois Bisgaard & Smith LLP 2104 Fourth Ave., Suite 700 Seattle, WA 98121 Attorney for Defendant Community Counseling Institute	☐ Via Hand Delivery – ABC Legal ☒ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email

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

DATED at Seattle, Washington, this 3rd day of October, 2014.

Darla Moran, Legal Assistant

APPENDICES

Appendix A - *Breitung v. State of Washington, Dept. of Social and Health Servs., and Community Counseling Institute,* No. 45123-9-II (slip op., Sept. 3, 2014).

Appendix B - RCW 4.24.595.

APPENDIX A

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KELSEY BREITUNG, Appellant, v. STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and COMMUNITY COUNSELING INSTITUTE, a Washington non-profit corporation, Respondent.	No. 45123-9-II UNPUBLISHED OPINION

HUNT, J. — Kelsey Breitung appeals the superior court's granting (1) the Community Counseling Institute's (CCI) motion for summary judgment, dismissing with prejudice her negligent hiring, supervision, and retention claims; and (2) the Department of Social and Health Services' (DSHS) motion for partial summary judgment, dismissing her claims against DSHS. Breitung argues that the superior court erred in (1) dismissing her claims on summary judgment because they involved genuine issues of material fact; (2) ruling that DSHS was not immune from Breitung's negligent investigation claim under RCW 4.24.595(2); (3) ruling that Breitung was judicially estopped from prosecuting her sexual abuse claims, based on her inconsistent statements in 2009; and (4) ruling that the juvenile court's November 2009 ruling was a superseding cause that absolved DSHS and CCI from liability. We affirm.

FACTS

Community Counseling Institute (CCI) is a nonprofit organization offering walk-in drug assessments, outpatient education, and treatment services for individuals with substance abuse problems. Andrew Bernard Phillips, a certified mental health counselor, applied for a job with CCI in 2008; CCI's director, Dr. William H. James, interviewed Phillips, called Phillips' references, and ran a background check on him. This background check revealed only a 1995 conviction for attempted possession of stolen property. CCI hired Phillips as a counselor.

I. BREITUNG'S COUNSELING RELATIONSHIP WITH CCI AND PHILLIPS

In February 2009, when Breitung was 16 years old, she reported to CCI as required by a juvenile court order issued in connection with her misdemeanor assault while intoxicated. CCI assigned Phillips as Breitung's counselor; their counseling relationship began on February 27. Phillips also facilitated his church's "Celebrate Recovery" program, which he encouraged Breitung to join and through which Breitung met Phillips' wife. Clerk's Papers (CP) at 2. Although CCI was aware that Phillips had encouraged other CCI clients to attend Celebrate Recovery, it had never stopped him from doing so. Phillips routinely gave Breitung rides between Celebrate Recovery and her home; he also gave her his cell phone number, telling her she could call him anytime.

In July 2009, Breitung left her parents' home to live with a friend because of issues with her mother. In August, Breitung started living with Rose Beitler[1], her temporary guardian. On August 11, Breitung told Phillips that she had gone to a party with Beitler, where she drank alcohol and had sex with Beitler's 19-year-old friend. Breitung begged Phillips not to report

[1] Rose Beitler is also referred to as Rose Sialana in the record.

Beitler to Child Protective Services (CPS). Phillips did not file a CPS report, but he did tell his wife about the incident, which she reported to CPS.

During an August 13 meeting with Jessica Chaney, Breitung's DSHS social worker, Beitler explained that she had "some serious concerns" about Phillips. The next day, August 14, DSHS placed Breitung with South King County Youth Shelter (SKCYS).

Around the same time, Beitler also met with Bernie Bell, CCI's associate director, and reported that Phillips had inappropriately shared information about Breitung with his wife. CP at 946-47. On August 14, Bell filed a critical incident report with CCI, documenting her conversation with Beitler and Beitler's concerns about Breitung's relationship with Phillips. CCI director James also filed a critical incident report, noting that Phillips "broke confidentiality" by disclosing information about Breitung to his wife. CP at 956. As remedial measures, on August 30, CCI (1) discharged Breitung as a CCI client and recommended that Breitung attend treatment at another agency, and (2) instructed Phillips to have no further contact with Breitung of any kind. Following her discharge from CCI, Breitung began counseling with Andrea Venier at Auburn Youth Resources.

II. Dependency Petition; Breitung's Placement with Phillips Family

Meanwhile, on August 19, DSHS filed a dependency petition on grounds that it was contrary to Breitung's welfare to remain in or to return home to her mother. On August 19, the juvenile court held a dependency hearing, ruling that Breitung should not return to her parents and that she should remain in shelter care because she had no parent, guardian, or custodian available to provide for her. Around this same time, DSHS assigned Gabrielle Rosenthal as Breitung's social worker.

Breitung repeatedly expressed to Rosenthal her desire to live with the Phillips family. Breitung described the Phillips as a positive, supportive couple who provided her with a safe and stable environment. Rosenthal noted potential professional ethical problems given the counselor-patient relationship between Breitung and Phillips. Nevertheless, Rosenthal contacted the Phillips and explained the steps they needed to take to be considered a placement resource for Breitung.[2] Phillips disclosed a prior conviction for attempted possession of stolen property. Rosenthal ran a criminal background check, which confirmed Phillips' prior conviction and no other conviction or negative action. Rosenthal also searched DSHS's database to determine whether any reports or allegations of child abuse, neglect, or endangerment had been filed against the Phillips; she found none.

Rosenthal also asked Philips to check whether any professional or ethical rule prevented him from serving as a placement resource for Breitung; Phillips responded that he checked and did not find any rule that prevented him from doing so. Rosenthal, however, did not independently contact CCI to inquire about a potential breach of professional or ethical rules that could stem from placing Breitung with Phillips.

Around this same time, on September 16, the juvenile court held a shelter care hearing. Rosenthal reported to the court that (1) she had not seen Breitung display any particular attachment to Phillips, (2) she (Rosenthal) had talked mostly with Phillips' wife, (3) Breitung had a good relationship with the Phillips family, and (4) she (Rosenthal) did not have any concerns about Breitung's proposed placement with the Phillips family.

[2] DSHS required the Phillips to disclose whether they had been convicted of a crime; been accused of sexual abuse, physical abuse, neglect, abandonment, or exploitation of a child; and whether either had any protection orders or restraining orders entered against them.

On September 21, Breitung's new counselor, Venier, submitted a written report to Auburn Youth Resources, expressing her ethical concerns about Breitung's relationship with Phillips. Three days later, on September 24, Rosenthal spoke with Venier, who (1) did "not feel that there [was] an inappropriate relationship" between Breitung and Phillips, and (2) reported Breitung's desire to live with Phillips and his wife, whom Breitung "fe[lt] would be a great support." CP at 637.

On September 30, Breitung's mother filed an objection to Breitung's placement with the Phillips family. Breitung's mother expressed concerns about Breitung's relationship with Phillips given that Breitung had "told people of dreams involving [Phillips]" and that Breitung wanted to spray perfume in his office so that he would think of her. CP at 673. In response, the juvenile court ordered Breitung to remain in DSHS custody and scheduled a hearing for November 3.

On October 15, Rosenthal told Breitung that she would approve Breitung's placement with the Phillips family. Breitung moved in with the Phillips family the next day. Shortly thereafter, Phillips started touching Breitung inappropriately while she was making dinner at the Phillips' home; Breitung ignored him. A few days later, while watching a movie, Phillips started touching Breitung and tried to kiss her; she went back to her room and felt "super awkward" because she wanted to stay with the Phillips family and did not "want [her placement] to be ruined." CP at 710. The next time Phillips tried to kiss Breitung, she did not turn away. After that incident, they kissed "every now and again." CP at 710. And it was not before long before they "just ended up having sex." CP at 711.

On November 3, the juvenile court held a hearing to address Breitung's mother's contested placement of Breitung with the Phillips family. Breitung's mother expressed concerns about Breitung's placement with the Phillips and opined that Breitung should be in a more "neutral setting" where she did not have a lot of confused emotions and an unhealthy attachment to the placement. CP at 539. Rosenthal did not mention Venier's concerns about Breitung's placement with Phillips; instead, she recommended the Phillips placement. Breitung told the court that things were "going really well" with the Phillips family and that this placement was the "best one" she had ever had. CP at 440. The juvenile court stated it had no concerns about the placement, noting that while there is always a risk of improper attachment between an older foster child and a foster parent, such risk was minimal. The juvenile court signed and entered the order placing Breitung with the Phillips family.

On November 16, Phillips' wife called Rosenthal, informing Rosenthal that she and Phillips would be filing for divorce and that Phillips would be moving out of the home because Phillips had told her that he was having an affair. Breitung then told Phillips' wife about her sexual relationship with Phillips. On November 24, Breitung disclosed her sexual relationship with Phillips to her Celebrate Recovery group. The next day, Breitung moved out of the Phillips' home. On November 25, Phillips' wife reported child sexual abuse to DSHS, and Rosenthal placed Breitung back into the SKCYS group home. On November 30, CCI terminated Phillips from his position as counselor.

III. LITIGATION

Breitung sued the State of Washington for negligent placement and negligent failure to protect her; she also sued CCI for negligent hiring, training, and supervision, negligent failure to protect, and corporate negligence. CCI moved for summary judgment on grounds that (1) there was no evidence that CCI was negligent in hiring, training, or supervising Phillips; and (2) CCI owed no duty to monitor Phillips' conduct outside the scope of his employment. The next month, Breitung amended her complaint to name DSHS as a party, alleging negligent investigation and negligent placement.

Responding to CCI's motion for summary judgment, Breitung argued it was foreseeable that an inappropriate sexual relationship would develop between her and Phillips. In support, Breitung submitted a declaration from Sharon Fenton, Clinical Director of Assessment and Treatment Associates, which stated that (1) chemical dependency agencies should be aware of "'boundary' issues"[3] where chemical dependency professionals' ability to empathize and to identify with clients can lead to improper relationships and conflicts of interest; (2) CCI should not have permitted Phillips to encourage or to direct clients to a separate Celebrate Recovery program because it could create a conflict of interest; and (3) CCI violated the standard of care in supervising and retaining Phillips and terminating Breitung's treatment instead of terminating Phillips' employment for disclosing personal information about Breitung to his wife and for admitted inappropriate social interaction with Breitung outside the counselor-patient relationship. Breitung also submitted excerpts of Beitler's deposition, in which Beitler stated she had reported

[3] CP at 1011.

to CCI her concerns of an "inappropriate relationship" between Phillips and Breitung. CP at 270.

DSHS moved for partial summary judgment asserting (1) it was statutorily immune for its placement recommendations to the juvenile court given that the juvenile court had ordered Breitung's placement with the Phillips family; (2) the juvenile court's placement decision was a superseding, intervening act that severed DSHS's liability; and (3) the doctrine of judicial estoppel prevented Breitung from recovering damages in this lawsuit for the placement decision.

Breitung responded to DSHS's motion for partial summary judgment asserting that Rosenthal's investigation of the Phillips family was negligent, and that Rosenthal had failed to inform the juvenile court about her conversations with Venier in which Venier had expressed concerns about Breitung's and Phillips' relationship. Breitung also submitted the declaration of Barbara Stone, statewide director of all foster and childcare licensing in DSHS's Children's Administration. Stone had reviewed Breitung's DSHS file and opined that DSHS's placement of Breitung in the Phillips' home violated state law and DSHS' own policies. Stone stated that a child's expressed preference for a particular placement does not negate DSHS's duty to investigate. Stone also opined that Rosenthal's home study of Phillips did not comply with DSHS policies because she (Rosenthal) did not complete her placement checklist, did not fill out a placement agreement at the time of placement, and did not investigate "boundary issues" between Phillips and Breitung, such as Phillips' giving Breitung his personal cell phone number. CP at 744. Stone further declared that although Rosenthal recognized an ethical conflict for Phillips to have custody of Breitung, Rosenthal did not personally check with CCI about this conflict, relying instead on Phillips' representation that ethical conflict was not a problem.

At the summary judgment hearing, the superior court orally ruled that the main issue with Breitung's claim against CCI was foreseeability: Because Breitung was placed with the Phillips family at her request, Phillips' subsequent sexual conduct was not foreseeable by CCI, especially where CCI had terminated Phillips' counseling relationship with Breitung two months before the sexual contact occurred at Phillips' home. Finding no evidence of foreseeability, the superior court granted CCI's motion for summary judgment. The superior court also orally ruled that (1) RCW 4.24.595[4] has retroactive effect under these circumstances, which provided DSHS with immunity from Breitung's lawsuit; (2) the juvenile court's order placing Breitung with Phillips also cut off DSHS's liability; and (3) Breitung failed to present an issue of material fact to warrant a jury trial. The superior court entered a written order granting DSHS's motion for partial summary judgment, dismissing all of Breitung's claims against DSHS arising from Breitung's placement in the Phillips' home. The superior court also granted CCI's motion for summary judgment, dismissing all of Breitung's claims against CCI with prejudice.[5] Breitung timely appeals.

[4] The record incorrectly references "[RCW 4.]24.959." The correct citation is RCW 4.24.595. *See* Report of Proceedings at 51.

[5] Based on the parties' stipulation, the trial court stayed the following additional claims pending Breitung's appeal: the State of Washington's negligent failure to protect Breitung, negligent investigation into reports of abuse and neglect by Breitung's parents, and negligent placement of Breitung with her mother.

ANALYSIS

I. SUMMARY JUDGMENT FOR CCI

Breitung argues that the superior court erred in granting CCI's motion for summary judgment because (1) CCI owed Breitung a legal duty to prevent foreseeable harm, and (2) Breitung presented sufficient evidence below to establish a genuine issue of material fact about the foreseeability of Phillips' sexual abuse to overcome dismissal of her negligent hiring, supervision, and retention claims.[6] We disagree.

A. Standard of Review

We review summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and any reasonable inferences therefrom in the light most favorable to the non-moving party, here, Breitung. *Associated Petrol. Prods., Inc. v. Nw. Cascade, Inc.*, 149 Wn. App. 429, 433-34, 203 P.3d 1077 (2009). Summary judgment is proper when no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 160-61, 70 P.3d 966 (2003). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). To defeat summary judgment, the non-moving party must assert specific facts and cannot rely on mere speculation. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

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[6] Breitung does not specifically challenge the superior court's ruling on her negligent hiring, retention, and supervision claims individually on appeal, instead, she conflates negligent hiring, supervision, and retention and "collectively refers to [her claims as] negligent supervision" to challenge the issues of duty, foreseeability and proximate cause. Br. of Appellant at 23 n.9.

B. Negligent Hiring, Supervision, and Retention Claims

Breitung argues that CCI owed her a legal duty to prevent foreseeable harm and that she presented sufficient evidence to establish a genuine issue of material fact as to the foreseeability of Phillips' sexual abuse to overcome summary judgment on her negligent hiring, supervision, and retention claims. This argument fails.

It is well settled that an essential element in any negligence action is the existence of a legal duty that the defendant owes to the plaintiff. *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). An individual or entity generally has no legal duty to prevent a third party from intentionally harming another unless a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). Foreseeability limits the scope of duty owed to a plaintiff. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). A plaintiff's harm must be reasonably perceived as within the general field of danger that should have been anticipated. *Id.* A plaintiff alleging sexual misconduct must show that such conduct was "reasonably foreseeable," and such foreseeability must be based on more than speculation or mere conjecture. *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 766-67, 224 P.3d 808 (2009). In general, 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 v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)).

1. Negligent hiring; negligent retention

An employer may be liable to a third person for negligence in hiring or retaining an employee who is incompetent or unfit. *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992). To prove negligent hiring or retention, a plaintiff must demonstrate that (1) the employer knew or, in the exercise of ordinary care, should have known of its employee's unfitness at the time of hiring or retaining such individual; and (2) the negligently hired or retained employee proximately caused the plaintiff's injuries. *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252-53, 868 P.2d 882 (1994); *Peck*, 65 Wn. App. at 288-89. Negligent hiring and negligent retention claims share the same elements; the difference is the timing of the employer's alleged negligence. *Peck*, 65 Wn. App. at 288. With negligent hiring, the negligence occurs at the time of hiring; with negligent retention, the negligence occurs during the course of employment. *Id.*

Breitung mistakenly relies on *Rucshner*[7] for the proposition that CCI's negligent hiring of Phillips "enabled or facilitated" the foreseeable consequence of his pattern of violating ethical boundaries and engaging in sexual relations with her because the facts in *Rucshner* are distinguishable.[8] Br. of Appellant at 32 (emphasis omitted). In *Ruschner* we held that a residential security system company did not perform its contractual duty to conduct a background check before hiring an employee with a criminal record, who raped a girl when

[7] *Ruschner v. ADT Sec. Sys. Inc.*, 149 Wn. App. 665, 686-88, 204 P.3d 271 (2009).

[8] In *Ruschner*, a security company hired Michael Robinson, who raped a 14-year-old after he met her making sales calls for the company at her home. *Ruschner*, 149 Wn. App. at 668. The security company had a contractual duty to perform criminal background checks on its employees and had failed to conduct a criminal background check on Robinson that would have revealed his criminal history of first degree criminal impersonation, third degree theft, possession of drug paraphernalia, and possession of marijuana. *Id.* at 673, 682.

making a sales call to her home. *Ruschner*, 149 Wn. App. at 681, 682. We reversed the superior court's grant of summary judgment to the security company and reinstated the plaintiff's negligent hiring action. *Id.* at 688. Here, in contrast, Breitung failed to demonstrate that CCI knew or should have known of Phillips' unfitness at the time it hired him.

On the contrary, the record shows CCI verified that Phillips was a certified counselor, a qualification required for the job. Further, CCI's director, James, screened Phillips' job application materials, interviewed Phillips, and contacted Phillips' references. One of the conditions of CCI employment was passing a criminal background check to ensure the job applicant did not have any charges for child abuse or solicitation of minors. Unlike the company in *Ruschner*, which completely failed to conduct a background check, CCI did run a background check on Phillips, which revealed only a 1995 misdemeanor conviction for attempted possession of stolen property. At the time of hiring, none of CCI's inquiries revealed any hint of Phillips' propensity for sexual abuse of minor. Thus, even taking the evidence in the light most favorable to Breitung, the record does not support that CCI knew or should have known about Phillips' unfitness to serve as a juvenile counselor at the time it hired him. We hold, therefore, that the superior court did not err in dismissing Breitung's negligent hiring claim on summary judgment.

Breitung bases her negligent retention claim on CCI's failure to terminate Phillips' employment when CCI learned that Phillips had divulged confidential information about Breitung to his wife. But even taken in the light most favorable to Breitung, the facts she presented did not satisfy the elements required to prove her negligent retention claim. The record shows that during the course of Phillips' employment, CCI had no reason to know about his propensity for sexual abuse. On the contrary, during the course of his employment, CCI

learned only that Phillips had inappropriately shared confidential information about Breitung to his wife in August. And CCI responded to this impropriety by (1) filing a critical incident report, (2) asking Phillips to provide a chronology of events around his relationship with Breitung, (3) requesting that Breitung transfer to another treatment agency, (4) reporting the incident to the Department of Health, (5) telling Phillips it had informed Beitler that she could file a complaint against him in her capacity as Breitung's temporary guardian, and (6) ordering Phillips not to have any further contact with Breitung, her caregivers, or any other individuals involved in her care and treatment. At that point in August, CCI had no reason to foresee that Phillips would disobey this order, that Breitung would later move in with Phillips, or that he would engage in a sexual relationship with Breitung in his home. But in November, when CCI later learned about Phillips' sexual relationship with Breitung, CCI promptly terminated Phillips from his position as counselor.

Even taken in the light most favorable to Breitung, her evidence failed to show that CCI knew or should have known about Phillips' unfitness to serve as a juvenile counselor before hiring him or during his period of employment. We hold, therefore, that the superior court did not err in dismissing Breitung's negligent hiring and retention claims on summary judgment.

2. Negligent supervision

Breitung further argues that (1) CCI was aware Phillips had "violated therapeutic boundaries" before it discharged her as a client; and (2) therefore, Phillips' later sexual abuse of her, after her discharge, was foreseeable. Br. of Appellant at 25. Again, even taking the evidence in the light most favorable to Breitung, she does not show that Phillips' later sexual abuse of her, after CCI severed their counseling relationship, was foreseeable.

A negligent supervision claim requires showing that (1) an employee acted outside the scope of his or her employment; (2) the employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care, that the employee posed a risk to others; and (4) the employer's failure to supervise was the proximate cause of injuries to other employees. *Briggs v. Nova*, 135 Wn. App. 955, 966-67, 147 P.3d 616 (2006) (citing *Niece*, 131 Wn.2d at 48-49), *aff'd*, 166 Wn.2d 794, 213 P.3d 910 (2009). Given Breitung's argument, we focus on the foreseeability factor; we conclude that the circumstances in this case were "'so highly extraordinary'" that they were "'beyond the range of expectability,'" which does not create an issue for the jury. *Shepard*, 75 Wn. App. at 206 (quoting *McLeod*, 42 Wn.2d at 323).

Citing *Smith*[9] and *Kaltreider*, CCI contends that an employee's sexual conduct is not reasonably foreseeable and an employer does not have a duty to guard against the possibility that an employee is an undisclosed sexual predator. The *Smith* and *Kaltreider* plaintiffs were both victims of sexual abuse in a hospital: In *Smith*, a nursing assistant engaged in sexual behavior with a patient in the psychiatric unit; in *Kaltreider*, a registered nurse engaged in sexual behavior with a patient in an alcohol dependency unit. *Smith*, 144 Wn. App. at 540-41; *Kaltreider*, 153, Wn. App. at 764. The *Smith* court held that the employee's sexual encounter with a patient in the workplace was legally insufficient to support a cause of action for negligent supervision, absent a showing that the employer knew or should have known of the employee's potential for sexual abuse. *Smith*, 144 Wn. App. at 544. The *Kaltreider* court held that the employee's

[9] *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 184 P.3d 646 (2008).

actions were not foreseeable *absent any evidence* that the employee's conduct was known or reasonably foreseeable to the employer. *Kaltreider*, 153 Wn. App. at 767.

Like the *Smith* and *Kaltreider* plaintiffs, Breitung presented no evidence of the foreseeability of Phillips' later sexual conduct with her in his home, well after CCI terminated their counseling relationship. Rather, she provided Bell's critical incident report, filed with CCI on August 14, which included "concerns" about Phillips' disclosing confidential information about Breitung to his wife and Beitler's expressed concern about Phillips' relationship with Breitung. CP at 950. Similarly, in her deposition, Beitler testified only that she had expressed "concerns"[10] to CCI about an "inappropriate relationship" between Phillips and Breitung, such as Phillips' disclosing Breitung's confidential information to his wife and that Breitung had been spraying perfume in Phillips' office, which behavior was "'not normal for an older man'" who was "'supposed to be [Breitung's] counselor.'" CP at 947 (emphasis omitted).

Breitung also presented the deposition of Fenton, Clinical Director of Assessment and Treatment Associates. Fenton testified in general that (1) chemical dependency agencies should be aware of "'boundary' issues"[11] between chemical dependency professional and their clients because these can lead to improper personal relationships and conflicts of interest; (2) CCI should not have permitted Phillips to encourage or to direct clients to a separate Celebrate Recovery program because it could create a conflict of interest; (3) it is not the best practice in substance abuse treatment to assign male counselors to adolescent girls and, if so, such agencies should train and monitor employees to avoid giving out their personal phone numbers, to restrict

[10] CP at 948.

[11] CP at 1011.

their contact with clients outside the agency, and to recognize flirtatious behavior; (4) CCI violated the standard of care in supervising and retaining Phillips when it terminated Breitung's treatment instead of terminating Phillips' employment after he admitted having disclosed personal information about Breitung to his wife and admitted to engaging in "inappropriate conduct"[12] with Breitung—Phillips' giving Breitung his cell phone number, providing her with transportation, introducing her to his wife, and inviting her to his church fellowship group; and (5) a counselor's duty to a client extends beyond termination of the client because the Washington Administrative Code (WAC) prohibits health care providers from having sexual relationships with clients for two years after terminating a therapy relationship.[13]

Most of Fenton's points emphasized the potential for an improper relationship to develop between a male substance abuse counselor and an adolescent female client and proposed appropriate training to minimize such problems. But none of her points showed (1) how CCI's supervision of Phillips could have prevented his later sexual conduct with Breitung at his home, long after CCI discharged Breitung as a client and forbade Phillips from having any further contact with her; or (2) how Phillips' later sexual conduct with Breitung was foreseeable.

Viewing the evidence in the light most favorable to Breitung, we hold that she did not present sufficient evidence to create a genuine issue of material fact about whether Phillips' later

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[12] CP at 1012.

[13] WAC 246-16-100(3) provides that a health care provider "shall not engage, or attempt to engage, [in sexual misconduct] with a former . . . client . . . within two years after the provider-patient/client relationship ends." The definition of a "health care provider" for purposes of this regulation includes chemical dependency professionals, mental health counselors, mental health counselor associates, social workers, and social work associates. WAC 246-16-020; former RCW 18.130.040(2)(a)(xi), (xvi) (2009).

sexual abuse of Breitung was foreseeable or how this abuse was connected to its earlier supervision of him when he was her CCI counselor. We hold, therefore, that the superior court did not err in dismissing Breitung's negligent supervision claim on summary judgment.

II. PARTIAL SUMMARY JUDGMENT FOR DSHS

Breitung next argues that the superior court erred in granting partial summary judgment to DSHS because (1) the juvenile court's November 2009 placement order was not a superseding cause that absolved DSHS from liability, (2) RCW 4.24.595 does not immunize DSHS from Breitung's negligent investigation claim, and (3) Breitung was not judicially estopped from pursuing her sexual abuse claim based on her November 2009 statements to the juvenile court asking to be placed with the Phillips family. DSHS responds that it is liable for negligent investigation only if Breitung produced admissible evidence that DSHS proximately caused the allegedly harmful placement and that DSHS failed to disclose a material fact to the juvenile court. We agree with DSHS that Breitung did not present evidence to show that DSHS's allegedly negligent investigation was the proximate cause of her placement. Even taking the facts in the light most favorable to Breitung, we hold that she failed to establish a causal connection between the information DSHS brought to the dependency court and Phillips' sexual abuse of her after the court placed her with his family. Thus, we do not address her separate immunity and judicial estoppel arguments.

A claim for negligent investigation arises when the State conducts a biased or incomplete investigation that results in a harmful placement decision. *M.W v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 591, 70 P.3d 954 (2003). To prevail on a claim for negligent investigation, the claimant must prove that the allegedly faulty investigation was the proximate cause of the

harmful placement. *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004). In a negligent investigation claim, proximate cause includes two elements: cause in fact and legal cause. *Ruschner*, 149 Wn. App. at 686. Cause in fact refers to the actual, "but for," cause of injury, which involves a determination of some physical connection between an act and an injury that is generally left to the jury. *Id.* Legal causation rests on policy considerations about how far the consequences of the defendant's acts should extend; and it focuses on whether, as a matter of policy, the connection between the ultimate harm and the defendant's act is too remote or insubstantial to impose liability. *Id.* at 687. In a lawsuit based on negligent investigation, a caseworker may be legally responsible for a child's placement if the court has been deprived of a material fact as a result of the caseworker's faulty investigation. *See Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 86, 1 P.3d 1148 (2000). Otherwise, court intervention operates as a superseding intervening cause that cuts off the caseworker's and his or her agency's liability. *Tyner*, 141 Wn.2d at 88 (no-contact order operates as superseding intervening cause, cutting off agency's liability).

Breitung argues that the November 2009 court placement order was not a superseding cause that absolved DSHS from liability because she presented evidence that her DSHS caseworker, Rosenthal, withheld material information from the court, namely that Breitung's new mental health counselor, Venier, had expressed concerns about Breitung's placement with Phillips. Stone, who testified in support of Breitung's summary judgment motion, had reviewed Breitung's DSHS file and opined that DSHS's proposed placement of Breitung in the Phillips' home violated state law and DSHS's own policies. Stone further opined that Rosenthal's home study of the Phillips family was not in compliance with DSHS policies because Rosenthal did

not complete her placement checklist, did not fill out a placement agreement at the time of placement, and did not investigate Phillips' counselor-patient "boundary issues." CP at 744. Stone stated that Rosenthal recognized it was an ethical conflict for Phillips to have custody of Breitung, that Rosenthal did not personally check with CCI about the conflict, and that she instead relied on Phillips' representation that it was not a problem. Further, although Venier had told Rosenthal in September that she was concerned about Breitung's relationship with Phillips and Breitung's desire to live with Phillips and his wife, Rosenthal did not relate to the court any of her conversation with Venier. Stone also stated that a child's expressed preference for a particular placement does not negate DSHS's duty to investigate.

The record shows, however, that DSHS's concerns about Phillips were brought to the juvenile court's attention.[14] The record does not show that DSHS withheld from the juvenile court any material fact it had gathered from its investigation of the Phillips family. In the end, there were few placement options available for Breitung, and the juvenile court placed Breitung with the Phillips family. Accordingly, there was no genuine issue of material fact about whether Rosenthal's allegedly negligent investigation proximately caused Breitung's placement with the

[14] For example, the juvenile court was aware of Breitung's mother's objection to Breitung's placement with the Phillips family, which matter it addressed at the November 3 hearing. Breitung's mother's objection included: Breitung's telling people that she had dreams about Phillips and wanted to spray perfume in his office so he could think of her; her (Breitung's mother's) belief that Breitung had an unhealthy attachment to Phillips; and her (Breitung's mother's) opinion that placing Breitung with him and his wife would not be stable and would lead to problems. Rosenthal told the juvenile court that she did not see any particular attachment between Breitung and Phillips; but Rosenthal did not tell the court that Venier had expressed concerns about Breitung's placement with Phillips. Nevertheless, the court had already heard similar concerns from Breitung's mother and had addressed them at the hearing.

Phillips family. We hold that the superior court did not err in ruling that the November 2009 court placement order was a superseding cause that absolved DSHS from potential liability.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bjorgen, A.C.J.

Lee, J.

APPENDIX B

APPENDIX B

RCW 4.24.595

Liability immunity — Emergent placement investigations of child abuse or neglect — Shelter care and other dependency orders.

(1) Governmental entities, and their officers, agents, employees, and volunteers, are not liable in tort for any of their acts or omissions in emergent placement investigations of child abuse or neglect under chapter 26.44 RCW including, but not limited to, any determination to leave a child with a parent, custodian, or guardian, or to return a child to a parent, custodian, or guardian, unless the act or omission constitutes gross negligence. Emergent placement investigations are those conducted prior to a shelter care hearing under RCW 13.34.065.

(2) The department of social and health services and its employees shall comply with the orders of the court, including shelter care and other dependency orders, and are not liable for acts performed to comply with such court orders. In providing reports and recommendations to the court, employees of the department of social and health services are entitled to the same witness immunity as would be provided to any other witness.

[2012 c 259 § 13.]

Notes:

Family assessment response evaluation -- Family assessment response survey -- 2012 c 259: See notes following RCW 26.44.260.