WASHINGTON STATE SUPREME COURT
NO. 93280-8

COURT OF APPEALS (DIV. II) NO. 46347-4-II

FEARGHAL MCCARTHY, CCM MCCARTHY and CPM MCCARTHY,

Plaintiffs/Appellants,

-vs-

CLARK COUNTY, CITY OF VANCOUVER and STATE OF WASHINGTON,

Defendants/Respondents.

APPELLANT FEARGHAL MCCARTHY'S PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

REVISED CODE OF WASHINGTON

COURT RULES

OTHER

I. IDENTITY OF PETITIONER

Petitioner is Fearghal McCarthy, a father falsely accused of abusing his own children.

II. CITATION TO THE COURT OF APPEALS DECISION

Petitioner seeks review of McCarthy v. Cty. of Clark, 46347-4-II, 2016 WL 1448352, at *1 (Wash. Ct. App. Apr. 12, 2016)(Appx. A).

III. ISSUES PRESENTED FOR REVIEW

3.1 Should this Court clarify the relation between its precedent in *Tyner v. DSHS* and *M.W. v. DSHS* because Appeals Court precedent now departs significantly from the Supreme Court's decision in *Tyner v. DSHS* and undermines the statutory policies set forth in RCW 26.44.050?

3.2 Should this Court give effect to RCW 26.44.050's legislative intent that the relationship between a child and her parent should not be interfered with and disrupted?

3.3 If this Court accepts review, should this Court also review the related issue of whether, based on *Gilliam v. DSHS*, the Court of Appeals invaded the province of the jury in determining whether the City of Vancouver has legal liability for negligent investigation under RCW 26.44 and malicious interference?

IV. STATEMENT OF THE CASE

For a detailed statement of the case, please review the appellate briefs and the Petition for Review filed on behalf of the plaintiff children.

V. ARGUMENT

Review should be accepted in this case because under RAP 13.4(b), considerations 1, 2, and 4 apply. First, the decision of Division Two is in

conflict with a decision of the Supreme Court. Second, there is conflict among published Court of Appeals decisions. Third, this petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A. The Decision in this case alters Supreme Court Precedent and conflicts with a Division One decision.

This decision by Division Two conflicts with and alters this Court's decision in *Tyner v. DSHS.*[1] The decision also conflicts directly with a decision from Division One in *Rodriguez v. Perez.*[2] Finally, claims involving the tort of negligent investigation are very often high profile claims involving serious injury to children, and therefore of substantial public interest. Preventing injuries to children involve the highest priorities in public policy. In that regard, this Court has stated:

> The *Babcock* court noted that "[t]he existence of some tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility that those injured by DSHS's negligence can recover." *Babcock,* 116 Wash.2d at 622, 809 P.2d 143. "Accountability through tort liability ... may be the only way of assuring a certain standard of performance."

Tyner, 141 Wn.2d 68, 80-81, 1 P.3d 1148, 1155 (2000).

By judicial feat, the Court of Appeals in this case has all but eliminated the tort of negligent investigation, and subverted the strong

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[1] 141 Wn.2d 68, 71, 1 P.3d 1148, 1150 (2000).
[2] 99 Wn. App. 439, 442, 994 P.2d 874, 876 (2000)

public policies underlying RCW 26.44.050. By stating that law enforcement cannot be held liable unless the agency makes a harmful placement decision, the court immunizes law enforcement, which does not make "placement" decisions under any circumstances. That task is left to DSHS. And yet, by immunizing law enforcement, contrary to the clear terms of RCW 26.44.050, the court in this case further immunizes DSHS, which will simply leave the investigations to law enforcement and then make "placement" decisions based on law enforcement's investigations. This is specifically the danger envisioned by Division One in *Rodriguez v. Perez.*

The origin of Division Two's error can be found in this Court's holding in *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003). That decision has caused unnecessary confusion, and deprived injured Washington children of remedies that should have been available to them. Therefore, this Court must clarify its holding in *M.W.* and return to core tort principles so that the appellate courts and trial courts can more appropriately and justly assess negligent investigation claims. For these reasons, this Court should accept review.

B. The history of the negligent investigation claim in Washington

The claim for negligent investigation first arose in Washington with this Court's 1991 decision in *Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143, 157 (1991). While not specifically addressing the issue of duty, this Court did address issues of immunity. The *Babcock* decision was followed by a number of appellate court decisions dealing with a variety of factual circumstances involving negligent investigation claims against DSHS. Courts struggled with the tort and the various defenses raised by the State. Frequently tort principles were jumbled or misapplied.

In *Lesley for Lesley v. Dep't of Soc. & Health Servs.*, 83 Wn. App. 263, 273, 921 P.2d 1066 (1996), the appellate court explicitly recognized that DSHS owed a duty to investigate allegations of child abuse in a non-negligent manner pursuant to RCW 26.44.050. Although the court in *Lesley* referenced RCW 26.44.050, it did not explicitly hold that the statute created an implied cause of action.

A year later, the court of appeals examined the argument raised by the State that the public duty doctrine prevented liability in negligent investigation claims. *Yonker By & Through Snudden v. State Dep't of Soc. & Health Servs.*, 85 Wn. App. 71, 81, 930 P.2d 958 (1997). The court reasoned that the legislative intent exception to the public duty doctrine

permitted claims against the State. *Yonker*, 85 Wn. App. at 81. Thus, the court recognized that the duty was owed to a particular class of individuals rather than to the public as a whole. *Id.*

In *Gilliam v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 89 Wn. App. 569, 587, 950 P.2d 20, 29 (1998), a father who was falsely accused of abusing his children brought an action against DSHS. He asserted that he had been separated from his children for a lengthy period as a result of the flawed and biased investigation of DSHS. The trial court however dismissed his case on a directed verdict because of absolute immunity. The court of appeals reversed. The concurring opinion of Judge Baker is remarkable in that it raises the question of proximate cause and the appropriate measure of damage recoverable in such a claim for really the first time. *Gilliam,* 89 Wn. App. at 587.

Finally, this Court decided unequivocally that DSHS and law enforcement owe a duty to both children and their parents accused of abusing them to non-negligently investigate claims of suspected child abuse. *Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 73, 1 P.3d 1148, 1151 (2000). The facts in *Tyner* are important to the discussion of this case.

Starting on January 11, 1993, Mrs. Tyner initiated conversations with her two young children about their father. Within several days Mrs.

Tyner was in civil court seeking a protection order against Mr. Tyner. To obtain the protection order, she requested and received assistance from a DSHS social worker. The social worker wrote a detailed declaration indicating that he would file in the future a dependency proceeding but that in the meantime the father should only have supervised visitation. The civil court entered a protection order prohibiting Mr. Tyner from seeing his children on January 15, 1993. *Tyner*, 141 Wn.2d at 74.

The State did not file a dependency petition until January 26, 1993, and a court hearing was not held until January 29, 1993. *Tyner*, 141 Wn.2d at 74. The social worker had at around the time of the shelter care hearing prepared a pre-printed report that determined the allegations against Mr. Tyner were unfounded but did not share the information with the dependency court. *Id.* The dependency was dismissed in June of 1993. Eventually, Mr. Tyner was awarded joint custody with no restrictions in the dissolution proceeding. *Id.*

The Court first addressed whether the State owes a duty of care in conducting an investigation of parental child abuse to the parent suspected of such abuse. Mr. Tyner contended that he had an implied cause of action pursuant to RCW 26.44.050. *Id.* 141 Wn.2d 68, 76. In footnote 4, this Court noted that the test set forth in *Bennet v. Hardy* is borrowed from the

federal courts and is similar to § 874A of the Restatement (Second) of Torts, which reads:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Tyner, at 78, footnote 4, (quoting, Restatement (Second) of Torts § 874A (1979)).[3] In accordance with the Restatement and *Bennet v. Hardy*, this Court recognized that DSHS owed a duty of care to both the children suspected of abuse, and the parent suspected of abusing them. *Id.*

The Court in *Tyner* then assessed the impact of the various protection orders entered in Mr. Tyner's case that prohibited him from seeing his children. In doing so, this Court did not make such an assessment under the rubric of whether a duty was owed, or even the scope of the duty owed by DSHS, but whether the entry of the protection orders constituted a superseding intervening cause that broke the chain of causation thereby preventing liability from attaching to the State's negligent acts. Specifically, this Court held:

> We hold that a judge's no-contact order will act as superseding intervening cause, precluding liability of the State for negligent

[3] Twenty two Washington cases cite this provision of the Restatement with approval.

> investigation, only if all material information has been presented to the court and reasonable minds could not differ as to this question.

Tyner, 141 Wn.2d at 88. However, in many respects the *Tyner* decision is inconsistent with general tort principles regarding whether a cause is a superseding, intervening cause. As an example, generally the chain of proximate causation is not broken when the defendant, in the exercise of ordinary care, should reasonably have anticipated that the independent intervening cause, force, or act was likely to happen. *Adamson v. Traylor*, 60 Wn.2d 332, 373 P.2d 961 (1962). "If the acts are ... within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence." *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 870 P.2d 999 (1994).

WPI 15.05 sets forth the basic tort principles regarding superseding causes. [4] The *Tyner* court ignored this fundamental basis for assessing

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[4] A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an *injury*.

If you find that the defendant was negligent but that the sole proximate cause of the *injury* was a later independent intervening *cause* that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the *injury*. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening *cause that cause* does not supersede defendant's original

whether a court order is a new independent cause, or simply a cause that should have been anticipated. When DSHS or law enforcement negligently investigate allegations of abuse, the general field of danger created by a faulty investigation includes interference with the parent-child relationship. When a parent and a child are suddenly separated without adequate explanation both the child and the parent are injured. Thus, most of the factual circumstances where there is any interference between the parent-child relationship should not be considered an independent cause, but rather the foreseeable and natural consequence of a negligent investigation.

In most of the negligent investigation cases, protection orders are put into place separating the parent suspected of abuse and the child. WPI 15.05 makes it clear that whether such orders are independent causes unrelated entirely to the negligent investigation is properly a question of fact for the jury to resolve, and not a court to consider.

> negligence and you may find that the defendant's negligence was a proximate cause of the *injury*.
> It is not necessary that the sequence of events or the particular resultant *injury* be foreseeable. It is only necessary that the resultant *injury* fall within the general field of danger which the defendant should reasonably have anticipated.

WPI 15.05

While ignoring the controlling WPI and instead imposing a standard emanating from the defense of probable cause in false arrest claims, this Court in *Tyner* nonetheless acknowledged that whether a court order constitutes a superseding cause is a question of fact for the jury to resolve, and not appropriate to resolve on summary judgment.

C. *M.W. v. DSHS*; the origin of error

In this case, the Court of Appeals jumbles the analysis, switching frequently between issues of duty, scope of duty and proximate cause. The court decides as a purported matter of "first impression" that a criminal court protection order separating a non-abusive father from his children does not constitute a "harmful placement decision." In reaching this bizarre result the court relies chiefly on this Court's holding in *M.W. v. Dep't of Soc. & Health Servs.,* 149 Wn.2d 589, 70 P.3d 954 (2003). No case has created more confusion and mischief than has *M.W.* in recent years. Like this Court's holding in *Tyner,* the facts of *M.W.*, and this Court's analysis merit detailed analysis given the appellate court's reliance on *M.W.*

The facts of *M.W.* are hopefully unique. In that case, a biological father alleged that the foster parents of his child were sexually abusing her. As a result of the allegation, the foster parents were directed to bring the child to a DSHS office, where social workers took the child into a

conference room. The unqualified social workers then "examined" the infant's vaginal area by touching it. The foster mother's description of the "exam" sounds like a sexual assault. *M.W.*, 149 Wn.2d at 592. The infant was later taken to Mary Bridge to be examined by appropriate professionals who found no evidence of sexual abuse. M.W., the foster father and his wife, then sued the State on behalf of J.C.W. alleging negligent investigation. *Id.*

This Court begins its analysis by discussing the scope of the duty owed to J.C.W. The Court explained:

> This case requires us to define the scope of the duty of the Washington State Department of Social and Health Services (DSHS) while investigating child abuse allegations. We must determine whether the statute requiring DSHS to investigate reported child abuse allows a claim against DSHS for negligent investigation under the facts of this case.

M.W. at 591. However, the Court did not assess the scope of the duty at all. The scope of a duty owed is generally governed by principles of foreseeability. Where harm to a person protected by a statute is a foreseeable result of the statute's violation, liability may be imposed. *Schooley v. Pinch's Deli Mkt., Inc.,* 134 Wn.2d 468, 477, 951 P.2d 749 (1998). Foreseeability is used to limit the scope of the duty owed because actors are responsible only for the foreseeable consequences of their acts. *Schooley*, at 477. Foreseeability is normally an issue for the trier of fact

and will be decided as a matter of law only where reasonable minds cannot differ. *Id.* Certainly the Court could have concluded that it was not foreseeable that a social worker would sexually assault an infant as part of sexual abuse investigation. Had this Court analyzed the case pursuant to these basic tort principles little confusion would have been engendered by its holding.

But the Court in *M.W.* did not assess issues of foreseeability at all. Rather, the Court reexamined the *Bennet v. Hardy* elements, apparently to determine whether RCW 26.44.010 created an implied cause of action, something the Court had already decided in *Tyner*. Predictably, the Court again explicitly determined that the first two elements of the *Bennet*t test had been met. In its analysis the Court exclusively focused on the third *Bennett* factor. The Court's analysis was not consistent with the purpose of the final element, and resulted in the bizarre and confusing adoption of the term "harmful placement decision."

The third *Bennett* factor is intended to determine whether implying a remedy is consistent with the purpose and intent of the legislation. That a tort remedy is consistent with the intent of the legislature was already decided in *Tyner* when this Court stated:

> An implied tort remedy in favor of a parent is also consistent with the underlying purposes of RCW 26.44.050, thereby satisfying the

> third prong of the *Bennett* test. RCW 26.44.050 has two purposes: to protect children and preserve the integrity of the family.

Tyner, 141 Wn.2d at 80-81.

The analysis the Court should have performed in *M.W.* was whether a battery during the course of a sexual abuse allegation was foreseeable. If the Court was going to again assess the *Bennett* factors, then it should have assessed the first element, whether the statute intended a cause of action for the particular plaintiff involved in the case, J.C.W., under the circumstances presented. Explanation of this distinction can be found in *Davis v. Passman*, 442 U.S. 228, 239, 99 S. Ct. 2264, 2274, 60 L. Ed. 2d 846 (1979). There the Supreme Court explained:

> In cases such as these, the question is which class of litigants may enforce in court legislatively created rights or obligations. If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a "cause of action" under the statute, and that this cause of action is a necessary element of his "claim." So understood, the question whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive. The concept of a "cause of action" is employed specifically to determine who may judicially enforce the statutory rights or obligations.

Davis v. Passman, 442 U.S. 228, 239, 99 S. Ct. 2264, 2274, 60 L. Ed. 2d 846 (1979). Thus, the Court in *M.W.* could have simply ruled that J.C.W. was not a party that could enforce the statutory cause of action because her relationship with her parents was not interfered with in any way. The better approach would have been to simply recognize that it was not

foreseeable that J.C.W. would be assaulted by the social workers investigating whether she had been abused by her foster parents.

In reaching its decision, the Court relied on the flawed analysis employed by Judge Morgan in his dissenting opinion from the *M.W.* court of appeals decision. In that dissent, Judge Morgan assessed the sorts of factual circumstances that had previously been pled as negligent investigation cases. He reasoned that such factual circumstances should serve to limit what factual circumstances could be pled in the future. Such a flawed analysis ignores the construct adopted by this Court in *Tyner*, and imposes an illogical basis for limiting the tort of negligent investigation.

Proof of the flawed analysis is seen in how Judge Morgan dealt with the case of *Dunning v. Parcerelli* in his dissent. In *Dunning*, filed as a negligent investigation case, child care workers who worked at the notorious OK Boys Ranch were allegedly improperly labeled as child abusers on a DSHS database. The child care workers sued DSHS for negligent investigation. The *Dunning* court held that the child care workers had such a claim. *Dunning v. Pacerelli*, 63 Wn. App. 232, 243, 818 P.2d 34, 40 (1991). Rather than the adding the facts of *Dunning* case to his compilation, Judge Morgan asserted that *Dunning* was properly construed as a defamation case and could therefore be ignored. Yet, it was

from the ruins of Judge Morgan's logic that this Court adopted the term "harmful placement decision." The Court in *M.W.* stated:

> Therefore, a claim for negligent investigation against DSHS is available only to children, parents, and guardians of children who are harmed because DSHS has gathered incomplete or biased information that results in a ***harmful placement decision.***

M.W., 149 Wn.2d at 602 (emphasis added).

The court in this case took this Court's holding in *M.W.* to mean that the requirement of a "harmful placement decision" becomes an element of the tort, even though the term is wholly made up and unrelated to the plain language of RCW 26.44.010. In fact, RCW 26.44.010 uses much broader language that was adopted by this Court in *Tyner*. RCW 26.44.010 states that:

> The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian…

RCW 26.44.010. The term used by the statute is intervention. It is further broadened by saying "any intervention." Thus, when David Tyner was prevented from seeing his children because of various protection orders, the Court held that such an intervention gave rise to a cause of action.

The court in this case, relying on the language from *M.W.* held:

> The negligent investigation cause of action based on RCW 26.44.050 is designed to be a narrow exception to the rule that

> there is no general tort claim for negligent investigation. As a result, we interpret the "harmful placement decision" requirement narrowly. There is no indication in the limited case law in this area that a no-contact order issued in criminal proceedings that is not designed to address the parent-child relationship and the child's residence can trigger liability under RCW 26.44.050. We hold that a "harmful placement decision" for purposes of RCW 26.44.050 negligent investigation liability does not include a no-contact order issued pursuant to RCW 10.99.040(2)(a) at the arraignment of a parent on domestic violence charges. Accordingly, we hold that Clark County cannot be liable for negligent investigation under RCW 26.44.050 and the trial court did not err in granting summary judgment.

McCarthy v. Cty. of Clark, 46347-4-II, 2016 WL 1448352, at 9.

Thus, the term "harm placement decision" has been elevated to an element of the tort. Worse, the term is being narrowly construed by the court. Yet the term "harmful placement decision" appears in no statute.[5] In particular it does not appear in RCW 26.44.010, one of the statutes that give rise to the tort. RCW 26.44.015 is the definition section of the statute and does not reference harmful placement decision.

This Court needs to accept review to clarify that the tort of negligent investigation does not require proof of a harmful placement decision or even a child placement decision, or really any sort of decision at all. Rather, as in *Tyner*, the plaintiff must show that DSHS negligently investigated allegations of child abuse, and that negligence resulted in

[5] Interestingly, not even Judge Morgan used the term "harmful placement decision" in his dissent. Rather, Judge Morgan uses the term "child-placement decision." *M.W.*, 110 Wn. App. at 256. Child placement decision is not defined in or referenced in RCW 26.44.010, RCW 26.44.015 or RCW 26.44.050.

some interference with the parent-child relationship. Subsequent courts can examine whether the scope of the duty in a particular case should be limited because the results of the negligence were not foreseeable, as in the *M.W.* case.

In this case, because the court of appeals properly decided that there were issues of fact whether both the County and DSHS negligently investigated, and because it is apparent that there is a further question of fact whether the negligent investigation resulted in an intervention between the parent-child, summary judgment should have been denied.

Stated differently, any interference between the parent and child relationship or bond is actionable if it is the natural product of a negligent investigation—as in this case.

D. Absolute immunity does not apply when a prosecutor steps outside her advocacy role.

The published part of the decision in this case examines the relationship between prosecutorial immunity and RCW 26.44. Decision, p 20-24. The decision also holds that while evidence to support every element of a claim for malicious prosecution was presented, prosecutorial immunity shields the City from this claim. The question at issue is whether Appellants presented sufficient evidence that Prosecutor Petty took investigative actions that were outside the scope of her advocacy function; and if so, prosecutorial

immunity does not apply. The question requires a factual determination as to whether Petty performed investigative acts that could have been performed by a detective or policeman because it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Gilliam v. DSHS*, 89 Wn. App. 569, 583, 950 P.2d 20 (1998). Whether an employee acts inside or outside the scope of their duties is ordinarily a question of fact for the jury. *Gilliam* at 585. The court of appeals invaded the province of the jury by making the factual determination that Petty did not conduct investigative duties as opposed to prosecutorial functions, despite significant evidence to the contrary. Review is necessary because to permit the lower courts to mistakenly invade the province of the jury (1) deprives the protected class of the strong safeguards and remedies implied by RCW 26.44 and (2) permits invasion of a parent's fundamental constitutional right to the care, custody and companionship of the child, contrary to public policy. *In re Welfare of Sumey,* 94 Wn.2d, at 762-63.

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VI. CONCLUSION

This Court should accept review and clarify the contours of the negligent investigation claim in the State of Washington.

DATED this 16th day of June, 2016

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DECLARATION OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that I delivered the foregoing Petition for Review to the following by the means specified:

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Diana Butler

Diana Butler

APPENDIX A

193 Wash.App. 314
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 2.

Fearghal McCARTHY, Conor McCarthy, a minor, by and through **Fearghal** McCarthy, his father; and Cormac McCarthy, a minor, by and through **Fearghal** McCarthy, his father, Appellants,
v.
COUNTY OF CLARK, City of Vancouver, Department of Social and Health Services, Children's Protective Services, Respondents.

No. 46347-4-II.
|
April 12, 2016.

Synopsis
Background: Father and sons brought action against city, county, and Department of Social and Health Services arising from false report by ex-wife that father struck son on the head. The Superior Court, Clark County, Scott A. Collier, J., dismissed the complaint on summary judgment, and father and sons appealed.

Holdings: The Court of Appeals, Maxa, J., held that:

[1] as a matter of first impression, no-contact order issued by court following father's arrest on child abuse charges was not a "harmful placement decision" as required to support negligent investigation claim against county;

[2] social worker's alleged negligent investigation into child abuse allegation was not a proximate cause of any harmful placement decision; and

[3] assistant city attorney did not take actions outside the scope of her duties as a city prosecutor when investigating child abuse allegation.

Affirmed.

West Headnotes (23)

[1] **Infants**
⇐Right of Action, Parties, and Standing
Municipal Corporations
⇐Police and Fire

Parents and children have an implied cause of action against law enforcement and Department of Social and Health Services (DSHS) for negligent investigation of suspected child abuse or neglect under certain circumstances; this cause of action extends to parents who are suspected of abusing their children. West's RCWA 26.44.050.

Cases that cite this headnote

[2] **Infants**
⇐Child Abuse Reports and Investigations
Municipal Corporations
⇐Police and Fire

A negligent investigation of child abuse or neglect claim is available only when law enforcement or Department of Social and Health Services (DSHS) conducts an incomplete or biased investigation that resulted in a harmful placement decision, which includes removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home. West's RCWA 26.44.050.

Cases that cite this headnote

[3] **Infants**
⇐Child Abuse Reports and Investigations
Municipal Corporations
⇐Police and Fire

Harmful placement decision requirement for maintaining negligent investigation of child abuse or neglect claim against law enforcement or the Department of Social and Health Services (DSHS) is strictly applied. West's RCWA 26.44.050.

Cases that cite this headnote

[4] **Infants**
⇐Child Abuse Reports and Investigations
Municipal Corporations
⇐Police and Fire

To prevail on a negligent investigation claim against law enforcement or the Department of Social and Health Services (DSHS) arising out of the investigation into child abuse or neglect allegations, the claimant must prove that the faulty investigation was a proximate cause of a harmful placement. West's RCWA 26.44.050.

Cases that cite this headnote

[5] **Negligence**
⇐Necessity of and Relation Between Factual and Legal Causation

Proximate cause has two elements: cause in fact and legal causation.

Cases that cite this headnote

[6] **Negligence**
⇐"But-For" Causation; Act Without Which Event Would Not Have Occurred

Cause in fact exists when "but for" the defendant's actions, the claimant would not have been injured.

Cases that cite this headnote

[7] **Negligence**
⇐Proximate Cause

Cause in fact generally is a jury question.

Cases that cite this headnote

[8] **Negligence**
⇐Public Policy Considerations
Negligence
⇐Proximate Cause

Legal causation involves a policy determination as to how far the consequences of an act should extend and generally is a legal question.

Cases that cite this headnote

[9] **Infants**
⇐Child Abuse Reports and Investigations
Municipal Corporations
⇐Police and Fire

A negligent investigation of a child abuse or neglect claim by law enforcement or Department of Social and Health Services (DSHS) may be the cause in fact of a harmful placement, supporting a negligent investigation cause of action, even when a court order imposes that placement; liability in that situation depends upon what information law enforcement or DSHS provides to the court. West's RCWA 26.44.050.

Cases that cite this headnote

[10] **Infants**
⇐Child Abuse Reports and Investigations
Infants
⇐Hearing; Counsel

A court order will act as a superseding cause that cuts off liability for negligent investigation of a child abuse or neglect claim only if all material information has been presented to the court; materiality is a question of fact unless reasonable minds could only reach one

conclusion. West's RCWA 26.44.050.

Cases that cite this headnote

[11] **Judgment**
⇐Public Officers and Employees, Cases Involving

Genuine issue of material fact as to whether sheriff deputy's investigation into child abuse allegation by father's former wife was negligent precluded summary judgment for county on that ground in father's and sons' negligent investigation action against county and others. West's RCWA 26.44.050.

Cases that cite this headnote

[12] **Infants**
⇐Child Abuse Reports and Investigations
Municipal Corporations
⇐Police and Fire

Negligent investigation of child abuse or neglect statute describes a law enforcement officer's duty to investigate with broad language and does not limit the officer's required response to certain specified acts or time periods, but provides a general mandatory duty to investigate. West's RCWA 26.44.050.

Cases that cite this headnote

[13] **Infants**
⇐Hearing; Counsel
Municipal Corporations
⇐Police and Fire

Whether an officer has fulfilled the duty to investigate allegations of child abuse or neglect is a question of fact in a negligent investigation action. West's RCWA 26.44.050.

Cases that cite this headnote

[14] **Infants**
⇐Child Abuse Reports and Investigations

No-contact order issued by court following father's arrest on child abuse charges was not a "harmful placement decision" as required to support negligent investigation claim against county; no-contact order was issued as a result of a criminal charge, not a dependency petition, order arose from the district court's arraignment, which was designed to address the criminal charges and not the parent-child relationship, county did not request any placement decision, and court did not conduct a shelter care hearing or any similar hearing to address residency issues. West's RCWA 26.44.050, 10.99.040(2)(a).

Cases that cite this headnote

[15] **Infants**
⇐Child Abuse Reports and Investigations

"Harmful placement decision," as required for liability for negligent investigation of a claim of child abuse or neglect, does not include a no-contact order issued at the arraignment of a parent on domestic violence charges. West's RCWA 26.44.050, 10.99.040(2)(a).

Cases that cite this headnote

[16] **Judgment**
⇐Public Officers and Employees, Cases Involving

Genuine issue of material fact as to whether social worker conducted a negligent investigation into child abuse allegation, including whether investigation complied with certain practices and procedures, precluded summary judgment on that ground on father's

and sons' negligent investigation claim against Department of Social and Health Services (DSHS). West's RCWA 26.44.050.

Cases that cite this headnote

[17] **Infants**
Child Abuse Reports and Investigations

Social worker's alleged negligent investigation into child abuse allegation was not a proximate cause of any harmful placement decision by the superior court, as required for father and sons to maintain negligent investigation claim against Department of Social and Health Services (DSHS), despite claim that father would have been able to use proper DSHS investigation to persuade court to stop and rescind protection and restraining orders in dissolution of marriage action; DSHS was not involved in former wife's petition for a protection order or in her subsequent dissolution proceedings, superior court was not relying on DSHS for information, and DSHS did not have any information that was not already in front of the superior court. West's RCWA 26.44.050.

Cases that cite this headnote

[18] **District and Prosecuting Attorneys**
Liabilities for Official Acts, Negligence, or Misconduct

Prosecutors generally have absolute immunity for initiating and pursuing a criminal prosecution, which means that a prosecutor is shielded from liability even when he or she engages in willful misconduct; this immunity is warranted to protect the prosecutor's role as an advocate because any lesser immunity could impair the judicial process.

Cases that cite this headnote

[19] **District and Prosecuting Attorneys**
Liabilities for Official Acts, Negligence, or Misconduct

A prosecutor's absolute immunity applies only to those actions within the scope of traditional prosecutorial functions.

Cases that cite this headnote

[20] **District and Prosecuting Attorneys**
Liabilities for Official Acts, Negligence, or Misconduct

A prosecutor is subject to liability for negligent investigation of child abuse or neglect if he or she engages in functions outside the scope of prosecutorial duties. West's N.C.G.S.A. § 47C–1–104(c).

Cases that cite this headnote

[21] **District and Prosecuting Attorneys**
Liabilities for Official Acts, Negligence, or Misconduct

Assistant city attorney did not take actions outside the scope of her duties as a city prosecutor when investigating child abuse allegation, and thus city had prosecutorial immunity from father's and sons negligent investigation claims; communications with former wife, who made false abuse allegation, was within scope of attorney's duties, actions in asking for fitness club records and directing former wife to report no-contact order violations were related to charging decisions, attorney did not inject herself into dissolution of marriage proceedings between father and former wife, and alleged improper coaching of former wife during deposition occurred after attorney left prosecutor's office and after father and sons filed complaint. West's RCWA 26.44.050.

Cases that cite this headnote

[22] **District and Prosecuting Attorneys**
⇐Liabilities for Official Acts, Negligence, or Misconduct

Conferring with potential witnesses is within the scope of a prosecutor's traditional duties, for purposes of prosecutorial immunity.

Cases that cite this headnote

[23] **District and Prosecuting Attorneys**
⇐Liabilities for Official Acts, Negligence, or Misconduct

The charging function is intimately related to the judicial process and prosecutorial immunity must apply to the charging function to ensure the independence of the decision-making process.

Cases that cite this headnote

Appeal from Clark Superior Court, Honorable Scott A. Collier, J.

Attorneys and Law Firms

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Taylor Ross Hallvik, Clark County Prosecuting Attorney's Offi, Daniel G. Lloyd, Vancouver City Attorney's Office Vancouver, WA, Allison Margaret Croft, Attorney General's Office, Seattle, WA, Suzanne Marie Liabraaten, Attorney General's Office, Olympia, WA, for Respondent.

PART PUBLISHED OPINION

MAXA, J.

*1 **Fearghal** McCarthy and his sons, CPM and CCM, appeal the trial court's dismissal on summary judgment of their multiple claims against Clark County, the Department of Social and Health Services (DSHS), and the City of Vancouver arising from a report by **Fearghal's** then wife Patricia McCarthy[1] that he had struck two-year-old CCM on the head. Based on the report, a Clark County deputy sheriff arrested **Fearghal**, DSHS investigated for possible child abuse, and Vancouver prosecuted criminal charges. Patricia later admitted that her report was false.

Fearghal, CPM, and CCM filed suit against Clark County, DSHS, and Vancouver. Their primary claim was that all three defendants negligently conducted investigations required under RCW 26.44.050 of Patricia's report that **Fearghal** had struck CCM, which resulted in **Fearghal** and the children being separated for an extended period. **Fearghal** and CPM/CCM also asserted several other causes of action against one or more of the defendants. The trial court granted summary judgment in favor of all three defendants on all claims.

In the published portion of this opinion, we hold that the trial court properly granted summary judgment on the negligent investigation claims under RCW 26.44.050. In the unpublished portion of this opinion, we hold that the trial court properly granted summary judgment on the remainder of **Fearghal's** and CPM/CCM's claims. Accordingly, we affirm the trial court's grant of summary judgment in favor of Clark County, DSHS, and Vancouver on all claims.

FACTS

Fearghal and Patricia married in 1998 and had two sons: CPM, born in 1999, and CCM, born in 2003.

Patricia's Report of Abuse and Deputy Kingrey's Investigation

On the afternoon of June 3, 2005, Patricia called 911 from her church to report that **Fearghal** had struck CCM on the head twice the prior evening, knocking him to the floor. Deputy Ed Kingrey of the Clark County Sheriff's Office was the responding officer.

Kingrey did not meet Patricia in person, but he spoke with her about the incident over the phone. Patricia told

Kingrey that over the past year **Fearghal** had been physically and emotionally abusive to her and her small boys, and a week earlier he had shoved her and grabbed her by the neck in a fit of rage. Patricia said that the previous evening CCM was crying "Mommy, mommy" during dinner time and **Fearghal** told her to "make him shut-up o[r] else I will." Clerk's Papers (CP) at 241. According to Patricia, when CCM continued to cry **Fearghal** whacked him twice on the head, causing CCM to hit his head on the table and fall off of his chair onto the floor. Kingrey asked Patricia if CCM had any injuries, and she said that there were no visible marks.

Kingrey also talked with Patricia's mother, Regina Greer, over the phone. Greer said that CPM had told her that he had seen **Fearghal** physically abuse Patricia and had told her about the incident when **Fearghal** hit CCM. Kingrey did not ask to speak with CPM, who at that time was five years old. He also did not ask to examine CCM for injuries.

***2** Kingrey went to the McCarthys' residence and spoke with **Fearghal** in person. **Fearghal** denied that the incident had happened and denied striking CCM. According to **Fearghal**, he told Kingrey that Patricia was abusing pain medications and had been high on prescription medications the night before, that she had been reporting delusions in the last year since her sister committed suicide, and that she was taking medication for anxiety and other mental health issues. He also showed Kingrey the various prescription medications that Patricia was taking. **Fearghal** submitted declarations stating that Kingrey was dismissive and refused to listen to his attempts to explain Patricia's history of anxiety, panic attacks, and drug use, and that Kingrey let him know that the information he provided about Patricia did not matter.

***Fearghal's** Arrest and First No–Contact Order*

Kingrey arrested **Fearghal** for fourth degree assault-domestic violence against both CCM and Patricia and booked him into jail. Kingrey subsequently submitted a declaration of probable cause to support his arrest of **Fearghal** without a warrant. The declaration recited what Patricia had told him about **Fearghal's** assault of her and the incident where he struck CCM, and Greer's statement that CPM had told her that he had seen **Fearghal** strike Patricia and CCM. The declaration stated that **Fearghal** had denied abusing any member of his family, but it did not mention **Fearghal's** statements that Patricia had been high on prescription medications on the night of the incident or that she had been reporting delusions and was taking medication for mental health issues. The declaration also did not state that there was no physical evidence that **Fearghal** had hit CCM. Based on Kingrey's declaration, the district court found there was probable cause to arrest.

On June 6, the district court arraigned **Fearghal** on the fourth degree assault charges. At the arraignment, the district court issued a no-contact order because domestic violence was involved. The order prevented **Fearghal** from having any contact with CCM, including by telephone and writing, and prohibited him from coming within 500 feet of CCM's residence and daycare. This order remained in effect until March 20, 2006.

Investigation of Child Protective Services

The day after **Fearghal's** arrest, Greer took CCM to the emergency room. She told the doctor about **Fearghal** hitting CCM, and the doctor referred the incident to Child Protective Services (CPS). The case was assigned to social worker Patrick Dixson for investigation.

On June 13, Dixson met with Patricia, and she told him about **Fearghal** hitting CCM on June 2 and other incidents of abuse. Patricia agreed to a voluntary safety plan suggested by Dixson. The safety plan provided that Patricia would (1) not allow **Fearghal** to have contact with the children until the no-contact order was lifted, (2) seek domestic violence counseling, and (3) keep the children safe from domestic violence.

***3** Dixson claimed that he also met with CPM and CCM when he met with Patricia. However, CPM said he did not remember meeting Dixson and CCM's daycare records indicate that CCM was at daycare at the time of the alleged meeting. Dixson did not speak to **Fearghal** during his investigation because he believed **Fearghal** was out of the country and also that interviewing him would interfere with the law enforcement investigation.

Dixson did not receive any further information about the incident after his meeting with Patricia on June 13. However, he did not issue a report concerning his investigation for another 10 months. Dixson finally closed his investigation on April 12, 2006, concluding that the initial referral was "founded," and sent his report to his supervisor.

Initial Involvement of City Attorney Petty

After **Fearghal's** arrest for fourth degree assault, the case was assigned to Vancouver assistant city attorney Jill Petty, who was part of the Domestic Violence Prosecution Center (DVPC). Petty first contacted Patricia about the

case on June 6, 2005. Petty had a few phone calls and one face-to-face meeting with Patricia. Patricia claims that in those conversations she told Petty that she "was reticent about the allegations within the police report and wanted to recant." CP at 411. Patricia claims that Petty pressured her into cooperating by making various threats, including telling Patricia that if she recanted she likely would lose custody of the children in a dissolution action, Petty would notify CPS and they would take away her children, and Patricia would be prosecuted for making a false police report.

Patricia also claims that Petty told her to file a petition for a protection order that would eject **Fearghal** from the family home and prevent him from seeing the children, and that Petty encouraged her to file for a divorce.

On July 8, Petty filed an information in district court charging **Fearghal** with fourth degree assault-domestic violence against CCM.

Superior Court Protection Order
On July 28, Patricia petitioned the superior court for a temporary protection order requiring **Fearghal** to vacate the family home and prohibiting **Fearghal** from contacting her, CPM, and CCM. The superior court issued the temporary protection order. The original order was to be in effect until August 10, but was extended until August 31. DSHS was not involved in this proceeding.

Temporary Mutual Restraining Order
On August 9, Patricia filed a petition for dissolution of her marriage with **Fearghal**. On August 31, the family court entered a temporary mutual restraining order preventing **Fearghal** from contacting Patricia and preventing Patricia from contacting **Fearghal** .[2] The restraining order allowed **Fearghal** limited supervised contact with CPM.

The restraining order prohibited both **Fearghal** and Patricia from "assaulting, harassing, molesting or disturbing the peace of the other party or of any child" and from "going onto the grounds of or entering the home of the other party." The restraining order also indicated that violation of the order was a criminal offense under chapter 26.50 RCW and would subject the violator to arrest. DSHS was not involved in this proceeding.

*Patricia's Report of **Fearghal's** No–Contact Order Violations*
***4** Patricia claims that Petty asked her about what other criminal charges could be filed against **Fearghal**. Petty told her that the more charges that were filed against him the easier it would be to convict him and have him deported because he was not a United States citizen. Petty also told Patricia to obtain and bring to her fitness club records to show that **Fearghal** had violated the no-contact order by going to a fitness club when Patricia was there with the children. Then Petty directed Patricia to report the violation.

On August 12, Patricia reported to the police that **Fearghal** had violated the June 6 no-contact order three times. Vancouver Police Officer Kortney Langston took Patricia's report and forwarded his report to the DVPC. On November 10, Petty filed new charges against **Fearghal** for the three violations of the no-contact order.

***Fearghal's** Second No–Contact Order*
On December 8, the district court in the criminal action entered a domestic violence no-contact order preventing **Fearghal** from coming within 250 feet of CCM's residence for five years. This no-contact order remained in effect until terminated on October 6, 2006.

CPM's Denial of Abuse
On January 11, 2006, Petty and **Fearghal's** criminal defense attorney jointly interviewed CPM. CPM was emphatic that **Fearghal** did not hit CCM. There is no indication that this information was conveyed to DSHS at this time.

Additional Charges and Transfer to Superior Court
Patricia reported to law enforcement that **Fearghal** had given her a three-page letter with detailed instructions for her to follow to help him have the charges dropped. The letter included instructions that Patricia delete emails from **Fearghal** and use a calling card to contact him. It also included a detailed account of **Fearghal's** version of events and how Patricia should align her story with his. A Vancouver detective investigated and forwarded her report to the DVPC with the recommendation that **Fearghal** be charged with witness tampering.

Petty transferred the case to the Clark County Prosecuting Attorney's Office to charge **Fearghal** with felony witness tampering. On January 31, the prosecutor filed an amended information charging **Fearghal** with witness

tampering and fourth degree assault-domestic violence of CCM in the superior court.

On March 20, the district court dismissed **Fearghal's** fourth degree assault charge and rescinded the initial no-contact order that had been issued when **Fearghal** was arraigned.

Dissolution Restraining Order
On February 15, the superior court commissioner handling the dissolution action issued an order terminating all contact between **Fearghal** and CPM until further notice by the court. DSHS was not involved in this proceeding.

***Fearghal's** Third No–Contact Order*
On February 21, the superior court in **Fearghal's** new criminal case entered a pretrial domestic violence no-contact order preventing **Fearghal** from coming within 500 feet of Patricia's or CCM's residence, school, or place of employment for two years.

"Founded" Finding by DSHS
***5** On April 21, Dixson's supervisor sent **Fearghal** a letter informing him that the investigation concluded that the allegation that **Fearghal** struck CCM was "founded." **Fearghal** appealed the finding on May 8. In June, a DSHS area administrator reviewed **Fearghal's** appeal, and upheld the "founded" finding.

***Fearghal's** Guilty Plea and Fourth No–Contact Order*
Fearghal eventually agreed to plead guilty to a reduced charge of disorderly conduct. On August 1, **Fearghal** entered a guilty plea to disorderly conduct for the incident with CCM. He was sentenced to 15 days in custody with credit for four days served, and with the remainder to be served on a work crew.

The superior court entered a post-conviction domestic violence no-contact order as a result of **Fearghal's** disorderly conduct conviction. The order prohibited **Fearghal** from coming within 500 feet of the residence, school, or place of employment of Patricia or CCM for two years. This no-contact order remained in effect until April 6, 2007.

"Inconclusive" Finding by DSHS
In October 2006, the same DSHS area administrator who had upheld the "founded" finding revised the finding to "inconclusive." The change was made in light of new information provided by **Fearghal**, including that CPM stated that **Fearghal** had not hit CCM, indications that Patricia had coached CPM, new information that called into question Patricia's credibility, and **Fearghal's** plea deal that reduced the fourth degree assault to disorderly conduct.

Rescission of Fourth No–Contact Order
On April 6, 2007, the superior court rescinded its August 1, 2006 post-conviction domestic violence no-contact order. The superior court entered a new order that imposed prohibitions only with respect to Patricia.

Custody Issues Resolved
In October 2008, Patricia and **Fearghal** agreed to a parenting plan making **Fearghal** the primary parent and sole decision maker. In a lengthy "Stipulated Findings of Fact" drafted and signed by Patricia and **Fearghal** in their dissolution proceeding, Patricia admitted to fabricating allegations against **Fearghal**, including the June 3, 2005 report that **Fearghal** had struck CCM.

Procedural History
Fearghal and CPM/CCM filed suit against Clark County, DSHS, and Vancouver in August 2008. The complaint asserted multiple causes of action on behalf of both **Fearghal** and CPM/CCM.

The defendants filed several summary judgment motions during the litigation, and the trial court eventually entered orders granting summary judgment in favor of all defendants and dismissing all claims. **Fearghal** and CPM/CCM appeal the summary judgment orders.

ANALYSIS

Fearghal and CPM/CCM allege that questions of fact exist as to whether Clark County, DSHS, and Vancouver conducted negligent investigations of Patricia's report that **Fearghal** struck CCM, which resulted in **Fearghal** being separated from his children. We hold that (1) questions of fact exist as to whether Kingrey was negligent in his

investigation, but Clark County is not subject to liability under RCW 26.44.050 because Kingrey's alleged negligence did not result in a "harmful placement decision;" (2) questions of fact exist as to whether Dixson was negligent in his investigation, but DSHS is not subject to liability under RCW 26.44.050 because **Fearghal** failed to show that Dixson's alleged negligence was the proximate cause of any harmful placement decision; and (3) Petty has prosecutorial immunity and therefore Vancouver is not subject to liability under RCW 26.44.050 because **Fearghal** failed to create a genuine issue of material fact regarding whether Petty acted outside her role as a prosecutor.

A. STANDARD OF REVIEW

***6** We review a trial court's order granting summary judgment de novo. *Lyons v. U.S. Bank NA,* 181 Wash.2d 775, 783, 336 P.3d 1142 (2014). We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Lakey v. Puget Sound Energy, Inc.,* 176 Wash.2d 909, 922, 296 P.3d 860 (2013).

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Dowler v. Clover Park Sch. Dist.,* 172 Wash.2d 471, 484, 258 P.3d 676 (2011). If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *Failla v. FixtureOne Corp.,* 181 Wash.2d 642, 649, 336 P.3d 1112 (2014).

B. NEGLIGENT INVESTIGATION—LEGAL PRINCIPLES

[1] RCW 26.44.050 provides that law enforcement and DSHS must investigate reports of abuse or neglect of a child:

> Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

Based on this statutory duty, parents and children have an implied cause of action against law enforcement and DSHS for negligent investigation under certain circumstances. *M.W. v. Dep't of Soc. & Health Servs.,* 149 Wash.2d 589, 595, 70 P.3d 954 (2003). This cause of action extends to parents who are suspected of abusing their children. *Tyner v. Dep't of Soc. & Health Servs.,* 141 Wash.2d 68, 82, 1 P.3d 1148 (2000).

[2] [3] The negligent investigation cause of action based on RCW 26.44.050 is a "narrow exception" to the rule that there is no general tort claim for negligent investigation. *M.W.,* 149 Wash.2d at 601, 70 P.3d 954. A negligent investigation claim is available only when law enforcement or DSHS conducts an incomplete or biased investigation that "resulted in a harmful placement decision." *Id.* A harmful placement decision includes "removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *Id.* at 602, 70 P.3d 954. This "harmful placement decision" requirement is strictly applied. *See Roberson v. Perez,* 156 Wash.2d 33, 46–47, 123 P.3d 844 (2005) (rejecting a "constructive placement" argument and holding no harmful placement decision occurred when parents voluntarily sent child to live with grandparents during abuse investigation).

[4] [5] [6] [7] [8] To prevail on a negligent investigation claim, the claimant must prove that the faulty investigation was a proximate cause of the harmful placement. *Petcu v. State,* 121 Wash.App. 36, 56, 86 P.3d 1234 (2004); *see also Tyner,* 141 Wash.2d at 82, 1 P.3d 1148. Proximate cause has two elements: cause in fact and legal causation. *Tyner,* 141 Wash.2d at 82, 1 P.3d 1148. Cause in fact exists when "but for" the defendant's actions, the claimant would not have been injured. *Id.* Cause in fact generally is a jury question. *Id.* Legal causation involves a policy determination as to how far the consequences of an act should extend and generally is a legal question.[3] *Id.*

***7** [9] [10] A negligent investigation may be the cause in fact of a harmful placement even when a court order imposes that placement. *Id.* at 83, 1 P.3d 1148. Liability in this situation depends upon what information law enforcement or DSHS provides to the court. *Id.* at 86, 88, 1 P.3d 1148. A court order will act as a superseding cause that cuts off liability "only if all material information has been presented to the court." *Id.* at 88, 1 P.3d 1148. Materiality is a question of fact unless reasonable minds could only reach one conclusion. *Id.* at 86, 1 P.3d 1148.

C. CLARK COUNTY LIABILITY

Fearghal and CPM/CCM argue that the trial court erred in granting summary judgment in favor of Clark County because Kingrey conducted a negligent investigation of Patricia's allegation of child abuse, which was a proximate cause of his separation from his children. We agree that there is a question of fact regarding whether Kingrey's investigation was negligent, but hold as a matter of law that the no-contact orders issued in **Fearghal's** criminal proceedings do not constitute "harmful placement decisions" for the purpose of a negligent investigation claim under RCW 26.44.050.[4]

1. Negligent Investigation

[11] **Fearghal** and CPM/CCM argue that there is a genuine issue of material fact as to whether Kingrey's investigation was negligent. We agree.

[12] [13] RCW 26.44.050 describes a law enforcement officer's duty to investigate with broad language and does not "limit the officer's required response to certain specified acts or time periods, but provides a general mandatory duty to investigate." *Rodriguez v. Perez,* 99 Wash.App. 439, 448, 994 P.2d 874 (2000). Whether an officer has fulfilled the duty to investigate is a question of fact. *See Yonker v. Dep't of Soc. & Health Servs.,* 85 Wash.App. 71, 76, 930 P.2d 958 (1997) ("Once a duty is established, whether the defendant breached the duty and whether that breach was a proximate cause of the plaintiff's injuries are normally questions of fact.").

Here, Kingrey did not meet with Patricia in person, examine CCM for injury, or interview CPM about **Fearghal's** alleged abuse. Kingrey did interview **Fearghal**, but there was evidence that he was dismissive and refused to listen when **Fearghal** told him that Patricia was high on prescription medications the night before, that she had been reporting delusions, and that she was taking medication for anxiety and other mental health issues. Kingrey did not ask Patricia about her prescription drug use or ask her why **Fearghal** would say she was delusional.

Fearghal and CPM/CCM also submitted a declaration from Bruce Hall, a retired lieutenant with the Vancouver Police Department. Hall testified that Kingrey's investigation was "rife with many errors, and it displays a predisposition toward arrest that was not warranted under the circumstances." CP at 1852.

Viewing the facts in the light most favorable to **Fearghal** and CPM/CCM, we hold that a genuine issue of fact exists whether Kingrey's investigation was incomplete or biased.

2. Harmful Placement Decision

*8 [14] **Fearghal** and CCM/CPM argue that the no-contact order issued by the district court following **Fearghal's** arrest was a harmful placement decision, which is required for RCW 26.44.050 liability. We disagree.

The district court issued the initial no-contact order pursuant to RCW 10.99.040(2)(a), which states:

> Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim.

The question here is whether such a no-contact order issued in a criminal proceeding constitutes a placement decision for purposes of negligent investigation liability under RCW 26.44.050. This is a question of first impression.

As discussed above, a harmful placement decision includes "removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *M.W.,* 149 Wash.2d at 602, 70 P.3d 954. The only possible placement decision in this case is removing a child from a nonabusive home.

Two cases have addressed a claim for removing a child from a nonabusive home.[5] In *Tyner,* a DSHS caseworker submitted a declaration in support of a motion for a temporary protective order filed by the plaintiff's wife, in which he recommended that the court prohibit all contact between the plaintiff and his children. 141 Wash.2d at 73, 1 P.3d 1148. The trial court granted the wife's motion. *Id.* A few days later, DSHS filed a dependency petition that following a shelter care hearing resulted in a court order prohibiting all contact between the plaintiff and his children. *Id.* at 74, 1 P.3d 1148. In *Petcu,* DSHS took the plaintiff's children into protective custody and then filed a dependency petition that resulted in the children being placed with their mother in Portland. 121 Wash.App. at 44–46, 48, 86 P.3d 1234.

The courts in *Tyner* and *Petcu* assumed that a harmful placement decision had occurred. *See Tyner,* 141 Wash.2d at 89, 1 P.3d 1148 (affirming a jury's finding of liability against DSHS when the negligent investigation resulted in a court orders limiting contact between a parent and his children); *Petcu,* 121 Wash.App. at 61, 86 P.3d 1234 (affirming summary judgment in favor of DSHS because the there was no proximate cause between the investigation and the court's dependency order). However, both cases involved dependency proceedings specifically designed to determine whether to maintain the parent-child relationship and where the children should live. *Tyner,* 141 Wash.2d at 74, 1 P.3d 1148; *Petcu,* 121 Wash.App. at 48, 86 P.3d 1234. In both cases, DSHS actually requested a placement decision. *Tyner,* 141 Wash.2d at 74, 1 P.3d 1148; *Petcu,* 121 Wash.App. at 46, 86 P.3d 1234. And in both cases, the trial court conducted shelter care hearings to address residency issues. *Tyner,* 141 Wash.2d at 74, 1 P.3d 1148; *Petcu,* 121 Wash.App. at 46, 86 P.3d 1234.

***9** Here, the facts are completely different. The district court's June 6, 2005 no-contact order was issued as a result of a criminal charge, not a dependency petition. The order arose from the district court's arraignment, which was designed to address the criminal charges and not the parent-child relationship. Clark County did not request any placement decision. The district court did not conduct a shelter care hearing or any similar hearing to address residency issues.

The negligent investigation cause of action based on RCW 26.44.050 is designed to be a narrow exception to the rule that there is no general tort claim for negligent investigation. *M.W.,* 149 Wash.2d at 601, 70 P.3d 954. As a result, we interpret the "harmful placement decision" requirement narrowly. *See Roberson,* 156 Wash.2d at 46–47, 123 P.3d 844. There is no indication in the limited case law in this area that a no-contact order issued in criminal proceedings that is not designed to address the parent-child relationship and the child's residence can trigger liability under RCW 26.44.050.

[15] We hold that a "harmful placement decision" for purposes of RCW 26.44.050 negligent investigation liability does not include a no-contact order issued pursuant to RCW 10.99.040(2)(a) at the arraignment of a parent on domestic violence charges. Accordingly, we hold that Clark County cannot be liable for negligent investigation under RCW 26.44.050 and the trial court did not err in granting summary judgment in favor of Clark County on this claim.

D. DSHS LIABILITY

Fearghal and CPM/CCM argue that the trial court erred in granting summary judgment in favor of DSHS because Dixson's untimely and negligent investigation of **Fearghal** regarding the incident with CCM prolonged **Fearghal's** separation from his children by impeding his efforts to convince the courts to remove the no-contact and restraining orders that were in place. We agree that there is a question of fact regarding whether Dixson's investigation was negligent, but hold that **Fearghal** failed to show that the investigation was the proximate cause of a harmful placement decision.

1. Dixson Investigation

Fearghal and CPM/CCM argue that there is a genuine issue of material fact as to whether Dixson's investigation was negligent. We agree.

[16] **Fearghal** asserts that Dixson's investigation did not comply with CPS practices and procedures in various ways. He claims that Dixson failed to contact the referring emergency room doctor. And **Fearghal** asserts that Dixson failed to interview the children within 10 days and instead falsely reported meeting with CPM and CCM on June 13, 2005. Dixson also did not interview **Fearghal** or even notify **Fearghal** of his investigation. Nevertheless, Dixson made a "founded" finding regarding Patricia's allegations.

In addition, there is evidence that Dixson failed to comply with other CPS practices and procedures. For example, Dixson failed to complete his report within 90 days as required by CPS, and he entered his notes into the DSHS records system up to 10 months after conducting his interviews.

***10** Viewing the facts in the light most favorable to **Fearghal** and CPM/CCM, we hold that a genuine issue of fact exists whether Dixson conducted a negligent investigation.

2. Proximate Cause

[17] A successful negligent investigation claim must show that the investigation caused a harmful placement decision. *M.W.,* 149 Wash.2d at 601, 70 P.3d 954. Here, **Fearghal** and CPM/CCM argue that Dixson's investigation was a proximate cause of the ongoing protection orders against him in the civil proceedings.[6] They claim that if Dixson had conducted a proper

investigation, **Fearghal** would have been able to use the DSHS investigation to persuade the superior court to stop issuing new protection and restraining orders and to rescind existing protection orders. We hold that Dixson's negligent investigation was not a proximate cause of any harmful placement decision by the superior court.

Initially, there is no evidence that any court relied on or was aware of the DSHS investigation when making the decision to enter or extend a protection order. Unlike in *Tyner,* DSHS was not involved in Patricia's petition for a protection order in July 2005 or in her subsequent dissolution proceedings, and the superior court was not relying on DSHS for information. Therefore, there was no direct causal connection between Dixson's conduct and issuance of the initial temporary protection order or the subsequent restraining orders issued in the dissolution proceedings.

Fearghal argues that DSHS caused a placement decision because it failed to present a timely inconclusive finding to the courts. But the facts here are different than those in *Tyner,* where the court affirmed the jury's finding of causation because the caseworker controlled the flow of information to the trial court that entered the no-contact order. 141 Wash.2d at 88–89, 1 P.3d 1148. The caseworker initially recommended that the court remove the father from the home, but then he failed to inform the court when he ultimately concluded the allegations of abuse were unfounded. *Id.* at 73–74, 1 P.3d 1148. The court noted that negligence investigation liability arises from the concealment of information or the negligent failure to discover material information. *Id.* at 83–84, 1 P.3d 1148.

Here, DSHS did not control the flow of information to the court. First, as noted above and unlike in *Tyner,* DSHS was never involved in the superior court proceedings. And there is no evidence that any court relied on information from DSHS, sought any information from DSHS, or considered the DSHS investigation in any way. Second, there is no evidence that DSHS had any information that was not already in front of the superior court.[7] Third, there is no evidence that an "inconclusive" finding would have caused the superior court to change its decision to issue a protection or restraining order or caused the termination of an existing order.

Reasonable minds could not conclude that Dixson's negligent investigation was the proximate cause of the superior court's protection and restraining orders. Accordingly, we hold that DSHS cannot be liable for negligent investigation under RCW 26.44.050 and that the trial court did not err in granting summary judgment in favor of DSHS on this claim.

E. VANCOUVER LIABILITY

***11** **Fearghal** and CPM/CCM argue that the trial court erred in granting summary judgment in favor of Vancouver because although a prosecutor generally is immune from liability, Petty lost her immunity when she stepped outside of her role as prosecutor and took an investigative role in **Fearghal's** case. We disagree.

1. Prosecutor's Liability/Immunity Under RCW 26.44.050

RCW 26.44.050 states that a "law enforcement agency" must investigate a report of child abuse. Prosecuting attorneys fall within the definition of "law enforcement agency." Former RCW 26.44.020(2) (2000). Therefore, Vancouver potentially is subject to liability for negligent investigation under RCW 26.44.050.

[18] However, prosecutors generally have absolute immunity for initiating and pursuing a criminal prosecution. *Musso–Escude v. Edwards,* 101 Wash.App. 560, 570, 4 P.3d 151 (2000). Absolute immunity means that a prosecutor is shielded from liability even when he or she engages in willful misconduct. *Id.* at 568, 4 P.3d 151. This immunity is warranted to protect the prosecutor's role as an advocate because any lesser immunity could impair the judicial process. *Id.* at 573, 4 P.3d 151.

[19] [20] But a prosecutor's absolute immunity applies only to those actions within the scope of traditional prosecutorial functions. *Rodriguez,* 99 Wash.App. at 450, 994 P.2d 874. A prosecutor is subject to liability under RCW 26.44.050 if he or she "engages in functions outside the scope of prosecutorial duties." *Id.*

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. (quoting *Gilliam v. Dept. of Soc. & Health Servs.,* 89 Wash.App. 569, 583, 950 P.2d 20 (1998)).[8]

2. Petty's Immunity

[21] The question here is whether **Fearghal** and CPM/CCM have presented sufficient evidence that Petty took investigative actions outside the scope of her duties as a prosecutor to create a genuine issue of material fact. If so, absolute immunity does not apply. But if Petty did not exceed the scope of her duties as a prosecutor, then absolute immunity shields her from the claim.

Fearghal and CPM/CCM rely on various allegations by Patricia regarding her interactions with Petty. First, in the lengthy "Stipulation to Findings of Fact" written and signed by Patricia and **Fearghal** in 2008 for the family court, Patricia alleges that she initially expressed reluctance about pursuing **Fearghal's** prosecution. Patricia claims that Petty told her that (1) it was not Patricia's decision to drop charges, (2) **Fearghal** fit the profile of a typical abuser, (3) Patricia fit the profile of the typical domestic violence victim, (4) Petty was outraged by the police report, (5) Patricia should be fearful of **Fearghal**, (6) Patricia would lose credibility in any divorce action if she recanted, which would likely result in her losing custody, (7) if Patricia recanted, Petty would notify Child Protective Services (CPS) who would take the children from Patricia and put them in foster care, and (8) if Patricia recanted she would be prosecuted for making a false police report. Patricia also alleges that Petty told her to file for divorce and to petition for an order of protection that would remove **Fearghal** from the home and prohibit his contact with the children.

***12** [22] However, Petty allegedly made each of these statements while conferring with Patricia, a witness, in preparation of her case against **Fearghal**. Conferring with potential witnesses is within the scope of a prosecutor's traditional duties. *Rodriguez,* 99 Wash.App. at 450, 994 P.2d 874. The fact that Petty's conduct allegedly was improper or wrongful is immaterial to the question of whether immunity applies.

Second, Patricia alleges that Petty told her that she needed more charges against **Fearghal** to strengthen her case and enable her to convict and deport **Fearghal**. Petty told Patricia to obtain and bring to her fitness club records to show that **Fearghal** had violated the no-contact order by going to a fitness club when Patricia was there with the children. Then Petty directed Patricia to report the violation. **Fearghal** and CPM/CCM argue that this conduct involved case investigation and fact-finding that is outside the prosecutor's function.

[23] Again, these allegations do not indicate that Petty acted outside her scope as a prosecutor. Her actions in asking for the fitness club records and directing Patricia to report no-contact order violations are related to her duty to make charging decisions. The charging function is intimately related to the judicial process and prosecutorial immunity must apply to ensure the independence of the decision-making process. *Hannum v. Friedt,* 88 Wash.App. 881, 886–87, 947 P.2d 760 (1997).

Third, Patricia alleges that Petty strategized with Patricia's dissolution attorney regarding dissolution matters. But Patricia admits that she was not part of any conversations between her dissolution attorney and Petty and that her knowledge of them is based only on her dissolution attorney's hearsay statements to her. And Patricia's dissolution attorney stated in her deposition that she talked to Petty once and asked her if she wanted to cooperate with the divorce, but Petty said no. As a result, there is insufficient evidence to create a genuine issue of material fact regarding whether Petty injected herself into the dissolution proceedings.

Finally, Patricia alleges that during her deposition in September 2009, Petty met with her during breaks in the bathroom to give her instructions on what to say. However, we need not consider whether Petty coaching Patricia during a deposition falls outside the scope of Petty's immunity. **Fearghal** and CPM/CCM filed their complaint in January 2009, months before these events allegedly occurred. They did not take any action to incorporate these allegations into their complaint. Therefore, they cannot use the events surrounding the September 2009 deposition to support their claim here. Further, Petty left the Vancouver City Attorney's office in early 2006. As a result, Petty's conduct at the September 2009 deposition was outside her scope of employment with Vancouver and could not subject Vancouver to liability.

Even viewing all of the facts alleged by **Fearghal** and CPM/CCM in the light most favorable to them, there is no genuine issue of material fact whether Petty stepped outside of her role as prosecutor. Accordingly, we hold that Petty is entitled to absolute prosecutorial immunity and that the trial court did not err in granting summary judgment in favor of Vancouver on this claim.

CONCLUSION

***13** Clark County, DSHS, and Vancouver are not subject to negligent investigation liability under RCW 26.44.050. We consider and reject **Fearghal's** and CPM/CCM's remaining claims in the unpublished portion of this

opinion. Accordingly, we affirm the trial court's grant of summary judgment in favor of Clark County, DSHS, and Vancouver on all claims.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Unpublished Text Follows

Fearghal and/or CPM/CCM asserted a number of other causes of action against Clark County, DSHS, and/or Vancouver: (1) false arrest/false imprisonment (Clark County), (2) negligent supervision/training/retention of case investigator (DSHS), (3) malicious interference with the parent/child relationship (Vancouver), (4) negligent investigation under RCW 26.44.050 regarding the failure to investigate **Fearghal's** concerns that Patricia was abusing or neglecting the children (Clark County, DSHS), (5) negligent failure to arrest Patricia (Clark County, Vancouver), (6) gender discrimination (Vancouver), (7) outrage (all defendants), and (8) negligent infliction of emotional distress (all defendants). We hold that summary judgment was appropriate on all these causes of action. We also reject the argument that the trial court erred in granting Vancouver's motion to suppress Patricia's deposition correction pages.

ADDITIONAL FACTS

***Fearghal's** First Report against Patricia for Violating Restraining Order*
On October 5, 2005, **Fearghal** reported to Clark County Sheriff's Deputy Todd Young that Patricia had violated the mutual restraining order issued in the dissolution action. **Fearghal** said that Patricia had called him three times in one evening to yell at him. Young confirmed that the restraining order was in place and spoke with Patricia. Patricia admitted violating the restraining order. Young did not arrest Patricia, but he referred his report to the prosecuting attorney to consider charges. No charges were filed against Patricia.

***Fearghal's** Second Report against Patricia for Violating Restraining Order*
On January 11, 2006, **Fearghal** reported to Clark County Sheriff's Deputy Douglas Paulson that Patricia had violated the restraining order by coming to **Fearghal's** house, opening the front door, and shouting at him. Paulson and Young investigated and spoke with Patricia in person. She admitted to going to **Fearghal's** house and yelling in the doorway. Paulson did not arrest Patricia, but he referred his report to the prosecuting attorney to decide about filing charges. No charges were filed against Patricia.

***Fearghal's** Report to CPS*
Also in January, **Fearghal** reported to CPS concerns that Patricia was not properly supervising CPM and CCM based on things CPM told **Fearghal**. CPM told **Fearghal** that a dog bit CCM on the face while he was in the care of Patricia's boyfriend. CPM also said Patricia allowed him to ride his bike without a helmet along a busy road and that he took baths with the three-year-old daughter of Patricia's boyfriend.

***14** CPS took into account the factors surrounding **Fearghal's** report, including that he and Patricia were in the middle of a custody dispute, that **Fearghal** had no-contact orders prohibiting him from seeing CPM and CCM, and that the doctor who treated CCM's dog bites did not make a referral. CPS listed **Fearghal's** report as information only and did not refer the report for further investigation.

***Fearghal's** Report against Patricia for Check Fraud*
On May 5, **Fearghal** reported to Clark County Sheriff's Deputy Richard Farrell that Patricia had cashed a $5,000 check without his authorization. Farrell contacted Patricia, who said that the check belonged to the business she had started and that her name was on the business license. Farrell told **Fearghal** that because he was still married to Patricia he considered the check a civil issue that **Fearghal** should handle through his dissolution proceedings. Farrell did not arrest Patricia, but he did refer the matter to the prosecuting attorney for review. No charges were filed against Patricia.

***Fearghal's** Report of Concern for CCM*
On December 13, the commissioner in the dissolution case entered an order granting **Fearghal's** request for reunification counseling and also allowed for **Fearghal** to retrieve certain property from Patricia's home. On December 17, pursuant to the court order, **Fearghal** went to Patricia's home to retrieve some personal items. While

there, **Fearghal** alleged that he was harassed by Patricia's boyfriend and father and feared for his safety. **Fearghal** called 911 and Farrell responded.

While **Fearghal** was in the house he saw a chain lock on CCM's bedroom door and became concerned. He told Farrell about the lock and his concerns for CCM's safety. Farrell did not write a report about the incident.

Patricia's False Abuse Allegation
On November 18, 2007, Patricia took CCM to the hospital and alleged that **Fearghal** had hit CCM. Clark County Sheriff's Deputy Erik Zimmerman investigated. According to **Fearghal**, Zimmerman did not believe Patricia's allegations. **Fearghal** told Zimmerman that Patricia's false allegation was a violation of the restraining order, but Zimmerman did not arrest Patricia.

Fearghal's *Third Report against Patricia for Violating the Restraining Order*
On November 29, **Fearghal** took CCM to a medical center for surgery. At that point **Fearghal** and Patricia had shared custody of CCM, but still had the restraining order and a no-contact order that prohibited contact with each other. Patricia arrived at the surgery center on the day of CCM's surgery and held CCM on her lap. **Fearghal** called the police to report her for violating the restraining order by showing up unannounced.

Vancouver Police Officer Tyson Taylor responded. He spoke with Patricia, who told him that the family court judge had given her permission to be at the surgery. However, Patricia did not have any paperwork with her indicating that she had permission. **Fearghal** said that the judge might have given Patricia permission, but he did not remember any final decision and she had not told him that she was coming. Patricia left the surgery center, and Taylor wrote a report about the incident and forwarded it to the DVPC for review. No charges were filed against Patricia.

Patricia Deposition Corrections
***15** In July 2010, Vancouver filed a motion to suppress Patricia's multiple corrections of her earlier deposition testimony submitted in opposition to summary judgment. The trial court granted Vancouver's motion, but allowed the corrected pages to be accepted as a declaration of Patricia.

ADDITONAL ANALYSIS

A. CLARK COUNTY FALSE ARREST/FALSE IMPRISONMENT
Fearghal alleges that questions of fact exist whether Clark County is liable for false arrest and false imprisonment based on Kingrey's arrest of him. We disagree because there is no question of fact that Kingrey had probable cause to arrest **Fearghal** for fourth degree assault.[9]

1. Legal Principles
"A false arrest occurs when a person with actual or pretended legal authority to arrest unlawfully restrains or imprisons another person." *Youker v. Douglas County,* 162 Wash.App. 448, 465, 258 P.3d 60 (2011). False imprisonment occurs whenever a false arrest occurs. *Id.*

The existence of probable cause is a complete defense to false arrest and false imprisonment. *McBride v. Walla Walla County,* 95 Wn.App. 33, 38, 975 P.2d 1029, 990 P.2d 967 (1999). "Probable cause requires a showing that 'the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.' " *State v. Barron,* 170 Wash.App. 742, 750, 285 P.3d 231 (2012) (quoting *State v. Terrovona,* 105 Wash.2d 632, 643, 716 P.2d 295 (1986)). "Probable cause can arise from the report of a crime victim or witness, at least in the absence of circumstances tending to show the report is unreliable." *State v. King,* 89 Wash.App. 612, 624, 949 P.2d 856 (1998).

Whether probable cause exists depends on the totality of the circumstances within the officer's knowledge at the time of arrest. *Barron,* 170 Wash.App. at 750, 285 P.3d 231. The test is reasonableness, "considering the time, place, and circumstances, and the officer's special expertise in identifying criminal behavior." *McBride,* 95 Wash.App. at 38, 975 P.2d 1029.

Kingrey arrested **Fearghal** for fourth degree assault, a misdemeanor. RCW 10.99.030(6)(a) states that "[w]hen a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer shall exercise arrest powers with reference to the criteria in RCW 10.31.100." RCW 10.31.100 generally states that a police officer may arrest

a person without a warrant for committing a misdemeanor only when the offense is committed in the officer's presence. However, an exception exists when the officer has probable cause to believe that a person has committed a misdemeanor involving physical harm. RCW 10.31.100(1). Therefore, Kingrey had statutory authority and a statutory duty to arrest **Fearghal** if he had probable cause to believe that **Fearghal** had physically injured Patricia and/or CCM.

2. Kingrey's Probable Cause to Arrest

***16** The parties do not dispute the facts related to Kingrey's investigation and arrest. Kingrey spoke with Patricia on the phone after she made her initial 911 call. Patricia told Kingrey that **Fearghal** had been mentally and physically abusing her, and as recently as a week prior he physically assaulted her by pushing, shoving, and grabbing her neck and arms. She also told Kingrey that the prior evening **Fearghal** had struck CCM on the head, causing CCM to hit his head on the table and fall off his chair. In addition, Kingrey spoke with Patricia's mother, who told him that CPM had told her that **Fearghal** hit both Patricia and CCM.

Fearghal argues that the prosecutor later dropped the assault charge regarding Patricia, which indicates there was no probable cause. However, even if **Fearghal's** arguments about the arrest for Patricia's assault are accepted, the absence of probable cause to believe a person committed one crime for which he was arrested does not invalidate the arrest if police had sufficient information at the time of arrest to support the arrest on a different charge. *Gurno v. Town of LaConner,* 65 Wash.App. 218, 223, 828 P.2d 49 (1992). Therefore, even assuming there was no probable cause to arrest **Fearghal** for assault against Patricia, the arrest still could be valid if there was probable cause for arrest for the assault against CCM.

Patricia's and her mother's statements provided Kingrey with strong evidence that **Fearghal** assaulted CCM. Patricia was an eyewitness and provided specific details about the incident. Greer provided a hearsay statement from CPM that confirmed what had happened. Based on this information, there is no question that Kingrey had reasonable grounds to believe that **Fearghal** had struck CCM the prior evening.

Fearghal argues that Kingrey lacked probable cause because Kingrey (1) did not speak with Patricia in person, (2) did not interview CPM, (3) did not have any evidence of injury, and (4) ignored **Fearghal's** statements about Patricia's drug use, delusions, and mental health issues. The first two facts may raise questions about the depth of Kingrey's investigation and the third fact may provide some level of uncertainty, but they cannot negate probable cause in the face of a detailed, eyewitness account of the crime. And none of these facts involve exculpatory evidence.

The fourth fact relates to the trustworthiness of Patricia's report, which is a factor in the probable cause analysis. But again, Patricia was an eyewitness to the alleged assault, and an officer is entitled to believe her story even though there may be questions about her account. Some uncertainty regarding the credibility of an eyewitness does not negate probable cause.

The evidence shows that Kingrey had enough information to warrant a belief that **Fearghal** had assaulted CCM. Therefore, there is no genuine issue of material fact that Kingrey had probable cause to arrest **Fearghal** for fourth degree assault against CCM. Because probable cause is a complete defense to false arrest and false imprisonment, we hold that the trial court did not err in granting summary judgment in favor of Clark County on **Fearghal's** false arrest and false imprisonment claims.

B. DSHS SUPERVISION/TRAINING/RETENTION

***17 Fearghal** alleges that questions of fact exist whether DSHS is liable for the supervision, training, and retention of Dixson on both negligence and wanton misconduct theories. We disagree.

Negligent supervision creates a limited duty to control an employee for the protection of third persons, even when the employee is acting outside the scope of employment. *Niece v. Elmview Grp. Home,* 131 Wash.2d 39, 51, 929 P.2d 420 (1997). "If an employee conducts negligent acts outside the scope of employment, the employer may be liable for negligent supervision." *Rodriguez,* 99 Wash.App. at 451, 994 P.2d 874. In addition, an employer may be liable to a third person for negligence in retaining an employee who is incompetent or unfit. *Peck v. Siau,* 65 Wash.App. 285, 288, 827 P.2d 1108 (1992).

However, here there is no allegation that Dixson acted outside the scope of his employment, so the negligent supervision claim is inapplicable. *LaPlant v. Snohomish County,* 162 Wash.App. 476, 479–80, 271 P.3d 274 (2011). In addition, a claim for negligent supervision, training and retention requires some injury to the third person caused by the negligent or wrongful actions of the employee. *Peck,* 65 Wash.App. at 288, 827 P.2d 1108. As discussed above, we hold that Dixson's investigation was not the proximate cause of any harmful placement

decision.[10]

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of DSHS on **Fearghal's** claims for negligent training, supervision, and retention of Dixson.

C. VANCOUVER MALICIOUS INTERFERENCE

Fearghal alleges that questions of fact exist whether Vancouver is liable for malicious interference with the parent-child relationship based on Petty's conduct toward him. We hold that even though a genuine issue of material fact exists regarding Petty's liability for malicious interference, she has absolute immunity for this claim.

The elements of a claim for malicious interference with a parent-child relationship are (1) the existence of a family relationship, (2) a wrongful interference with the relationship by a third person, (3) an intention on the part of the third person that such wrongful interference results in a loss of affection or family association, (4) a causal connection between the third party's conduct and the loss of affection, and (5) that such conduct resulted in damages. *Waller v. State,* 64 Wash.App. 318, 338, 824 P.2d 1225 (1992).

Fearghal asserts that Petty intentionally pressured Patricia to take actions that would separate **Fearghal** from the family, including petitioning for dissolution and a protective order. According to Patricia, the case "got personal" for Petty, CP at 524, and "the concept of **Fearghal** not getting a conviction was intolerable" to Petty, CP at 755. Patricia did petition for dissolution and a protective order, which caused further separation between **Fearghal** and the family. Arguably, **Fearghal** has presented evidence to support every element of a claim for malicious interference.

***18** However, as discussed above Petty is entitled to absolute immunity for her interactions with Patricia because they were within the scope of her function as a prosecutor. Therefore, Petty's absolute immunity protects her from this claim. *Musso–Escude,* 101 Wash.App. at 568, 4 P.3d 151. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Vancouver on this claim.

D. FAILURE TO INVESTIGATE **FEARGHAL'S** CONCERNS

Fearghal argues that Clark County and DSHS are liable for negligent investigation under RCW 26.44.050 because they failed to investigate his reported concerns for the safety of CPM and CCM while in Patricia's care. We disagree.

1. Clark County Liability

Fearghal argues that Paulson, Young, and Farrell conducted negligent investigations by failing to investigate his concerns for his children's safety, which led to the children remaining in Patricia's abusive home. We hold that (1) **Fearghal's** expression of concern on January 11, 2006 regarding Patricia's mental state did not constitute a report concerning possible abuse or neglect triggering a duty to investigate, and (2) there is insufficient evidence to create a genuine issue of fact that Farrell's failure to investigate **Fearghal's** report on December 17, 2006 that there was a chain lock on CCM's bedroom door was a proximate cause of CCM remaining in Patricia's home.

RCW 26.44.050 states that a law enforcement agency must investigate "a report concerning the possible occurrence of abuse or neglect." **Fearghal** claims that he made two "reports" that he feared for the safety of his children.

First, on January 11, 2006, **Fearghal** called 911 and reported that Patricia had come to his home and yelled at him in violation of the mutual restraining order. According to the incident report, **Fearghal** later called back "to report that he was in fear [for] the safety of his two children. He claimed that Patricia was distraught and we needed to check on the kids." CP at 1681. Under these facts, **Fearghal** did not make a report concerning possible abuse or neglect of CPM and CCM. His concern for his children's safety was because Patricia was distraught, not because she was abusing or neglecting them. Further, **Fearghal** only mentioned his concern once over the telephone and did not express any concern to the investigating officers. We hold as a matter of law that **Fearghal's** expression of concern to the 911 operator about Patricia being distraught did not trigger a duty to investigate under RCW 26.44.050.

Second, on December 17, 2006, pursuant to a court order, **Fearghal** went to Patricia's home to retrieve some personal items. While there, **Fearghal** was harassed by Patricia's boyfriend and father and several other men. **Fearghal** called the police and Farrell responded. While **Fearghal** was in the house, he saw a chain lock on CCM's bedroom door. He stated that "I advised Deputy Farrell of my concern about my child's safety and showed him the chain lock." CP at 1795. Farrell did not respond to this concern and did not write a report about the

incident.

*19 The fact that a young child has a chain lock on his bedroom door could constitute evidence of abuse or neglect, depending on the circumstances. Therefore, whether **Fearghal's** statement to Farrell amounted to a "report concerning the possible occurrence of abuse or neglect" presents a genuine issue of material fact. And if **Fearghal's** statements did amount to a report that created a duty to investigate, the fact that Farrell did not investigate at all establishes that there is a question of fact as to whether he breached that duty.

However, in order to avoid summary judgment **Fearghal** was required to come forward with some evidence that any negligence was a proximate cause of CCM remaining in Patricia's home. In other words, **Fearghal** was required to create a genuine issue of fact that but for Farrell's failure to investigate, CCM would have been removed from the home. However, **Fearghal** produced no such evidence. Nothing in the record shows what Farrell would have discovered if he had conducted additional investigation. Patricia may have had an innocent explanation for having the chain lock on CCM's door. And nothing in the record shows that CCM would have been removed from Patricia's home even if the investigation raised some questions about the propriety of placing the lock on CCM's door.

Because there was no evidence supporting a finding of proximate cause, Clark County was entitled to summary judgment on this claim. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Clark County for **Fearghal's** negligent investigation claims related to Paulson, Young, and Farrell.

2. DSHS Liability

Fearghal argues that DSHS was negligent for failing to investigate the report he made to CPS on January 8, 2006 of Patricia's neglect, which led to CPM and CCM remaining in an abusive home. We hold that there was insufficient evidence to create a genuine issue of fact that DSHS's failure to investigate **Fearghal's** report was a proximate cause of CCM remaining in Patricia's home.

Under WAC 388–15–017(3), "CPS must assess or investigate all reports of alleged child abuse or neglect that meet the definitions of child abuse or neglect." Here, **Fearghal** reported that CPM had told him that CCM was bitten on the face by a dog while the care of Patricia's boyfriend. CPM also told **Fearghal** that he was allowed to ride his bike without a helmet along a busy road and that he took baths with the three-year-old daughter of Patricia's boyfriend. CPS designated the report as "information only" and did not order an investigation or family assessment.

Even if there is a question of fact regarding DSHS's negligence in failing to investigate, once again **Fearghal** was required to come forward with some evidence of proximate cause—that but for DSHS's failure to investigate, CPM and CCM would have been removed from the home. However, **Fearghal** produced no such evidence. Nothing in the record shows what DSHS would have discovered if it had conducted more investigation. Because CPM's statements to **Fearghal** were hearsay, there was no admissible evidence that **Fearghal's** allegations were even true. And there is no evidence that a DSHS investigation would have revealed information that would have caused the children to be removed from Patricia's home.

*20 Because there was no evidence supporting a finding of proximate cause, DSHS was entitled to summary judgment on this claim. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of DSHS for **Fearghal's** negligent investigation claims related to his report of neglect to CPS.

E. NEGLIGENT FAILURE TO ARREST

Fearghal alleges that questions of fact exist whether Clark County and Vancouver are liable for negligence based on the failure of Young, Paulson, Farrell, and Zimmerman (Clark County) and Taylor (Vancouver) to arrest Patricia for her protective order violations. We disagree.

1. Legal Principles

RCW 10.99.030(6)(a) states that "[w]hen a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer shall exercise arrest powers with reference to the criteria in RCW 10.31.100." RCW 10.31 .100 generally states that a police officer may arrest a person without a warrant for committing a misdemeanor only when the offense is committed in the officer's presence.

However, RCW 10.31.100(2) provides a list of situations when "[a] police officer shall arrest and take into custody ... a person without a warrant." One such situation is if there is probable cause that a person has knowledge of a restraining order issued under RCW 26.09 and the person has violated the terms of the order restraining the person

by (1) acts or threats of violence, or (2) going onto the grounds of or entering a residence, workplace, school, or day care, or (3) knowingly coming within, or knowingly remaining within, a specified distance of a specified location. RCW 10.31.100(2)(a).

Generally, when an officer has legal grounds to make an arrest he has considerable discretion to do so. *Donaldson v. City of Seattle,* 65 Wash.App. 661, 670, 831 P.2d 1098 (1992). The rule is different with regard to domestic violence. If the officer has legal grounds to arrest pursuant to RCW 10.31.100(2)(a), he or she has a mandatory duty to make the arrest. *Id.*

2. Clark County Liability

Fearghal claims Clark County breached statutory duties owed to him because Young, Paulson, Farrell, and Zimmerman failed to enforce the dissolution restraining order when **Fearghal** made reports of Patricia's violations. We hold that there is evidence that Paulson and Young breached the duty to arrest Patricia for the January 11, 2006 incident, but that there is no evidence that the failure to arrest caused any damages. We also hold that the officers had no duty to arrest for the other incidents **Fearghal** references.[11]

On August 31, 2005, the trial court in the dissolution case issued a restraining order pursuant to RCW 26.09.060. The mutual restraining order restrained and enjoined **Fearghal** and Patricia from "assaulting, harassing, molesting or disturbing the peace of the other party or of any child" and from "going onto the grounds of or entering the home of the other party." CP at 1264. Because the restraining order was an order issued under RCW 26.09, the mandatory arrest provision of RCW 10.31.100(2)(a) applied.

***21** **Fearghal's** failure to arrest claim against Clark County involves five incidents: (1) Young's investigation when Patricia called **Fearghal** three times in one evening to yell at him on October 5, 2005, (2) Paulson's and Young's investigation when Patricia came to **Fearghal's** residence, opened the front door, and shouted at him on January 11, 2006; (3) Farrell's investigation of **Fearghal's** report that Patricia forged his signature to cash a $5,000 check on May 5, 2006, (4) Farrell's investigation when Patricia's father and boyfriend harassed **Fearghal** when he was at her residence pursuant to a court order on December 17, 2006, and (5) Zimmerman's investigation when Patricia made a false allegation of abuse against **Fearghal** on November 11, 2007.

Although incidents (1), (3), (4) and (5) could amount to violations of the restraining order's provision restraining the parties from "harassing, molesting, or disturbing the peace of the other party," they did not meet the mandatory arrest criteria under RCW 10.31.100(2)(a). Because none of these incidents involved acts or threats of violence or going onto restricted grounds or remaining in a prohibited area, Young, Farrell, and Zimmerman were under no statutory duty to arrest Patricia.

The January 11, 2006 incident, which involved Patricia violating the restraining order by going onto the grounds of **Fearghal's** residence, did meet the requirements for mandatory arrest under RCW 10.31.100(2)(a). During their investigation, Paulson and Young spoke with Patricia in person. She admitted to going to **Fearghal's** house and yelling in the doorway. But Paulson and Young did not arrest Patricia. Therefore, **Fearghal** produced evidence that Paulson and Young breached their duty under RCW 10.31.100(2)(a) by failing to arrest Patricia in January 2006.

However, **Fearghal** presents no evidence that this failure to arrest Patricia caused him any damages. Nothing in the record shows that the children would have been removed from Patricia's home if she had been arrested. **Fearghal** does not even allege that this failure to arrest harmed him in any way.

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Clark County on this claim.

3. Vancouver Liability

On November 29, 2007, **Fearghal** called the police to report Patricia for violating the restraining order by showing up unannounced to CCM's surgery. Taylor responded, but he did not arrest Patricia.

Although Patricia may have violated the restraining order, she did not commit any acts or threats of violence or go onto the grounds or enter the home of **Fearghal.** And there was no provision in the restraining order that restrained her from coming within any specified distance of **Fearghal.** Therefore, as a matter of law Patricia's actions did not constitute a violation requiring mandatory arrest under RCW 10.31.100(2)(a).

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Vancouver on this claim.[12]

F. VANCOUVER DISCRIMINATION

***22 Fearghal** alleges that questions of fact exist whether Vancouver is liable for violation of the Washington Law Against Discrimination (WLAD) based on Petty's conduct toward him and Taylor's failure to arrest Patricia at the hospital. We disagree.

The WLAD establishes the right to be free from discrimination because of sex, and provides a right of action against anyone deeming himself injured by an act in violation of chapter 49.60 RCW. RCW 49.60.030(1), (2). However, the WLAD does not interfere with common law immunities. *See Kelley v. Pierce County,* 179 Wash.App. 566, 574–77, 319 P.3d 74 (2014) (considering whether guardian ad litem was acting within his duties and acknowledging that if he was, he would be entitled to claim quasi-judicial immunity to shield him from WLAD claim for sexual harassment and gender discrimination).

First, **Fearghal's** claim against Petty is based on actions she took while executing her duties as prosecutor. **Fearghal** argues that Petty's motives in charging him and prosecuting him were gender based and discriminatory, but he fails to show any reason why Petty's absolute prosecutorial immunity would not apply. As explained above, prosecutors enjoy absolute immunity for actions they take in initiating and pursuing a criminal prosecution, even when willful misconduct is alleged. *Musso–Escude,* 101 Wash.App. at 568, 4 P.3d 151.

Second, **Fearghal** claims that Taylor failed to execute his statutory duties to protect **Fearghal** based on gender bias. However, as discussed above, Taylor had no duty to arrest Patricia for her violation of the restraining order because the violation was not of any type described in RCW 10.31.100(2)(a). Therefore, **Fearghal's** claim fails to establish all the necessary elements.

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Vancouver on **Fearghal's** WLAD claims.

G. OUTRAGE

Fearghal and CPM/CCM allege that questions of fact exist whether Clark County, DSHS, and Vancouver are liable for the tort of outrage. We disagree.

1. Legal Principles

A claim for outrage (also known as intentional infliction of emotional distress) requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to the plaintiff of severe emotional distress. *Trujillo v. NW Tr. Servs., Inc.,* 183 Wash.2d 820, 840, 355 P.3d 1100 (2015).

To establish extreme and outrageous conduct, a plaintiff must show that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Id.* The question of whether the conduct is sufficiently outrageous is ordinarily for the jury, but the court makes an initial determination whether reasonable minds could differ about whether the conduct was sufficiently extreme to result in liability. *Id.*

***23** We may consider a number of factors in determining whether conduct is sufficient to support an outrage claim, including (1) the position the defendant occupied, (2) whether the plaintiff was particularly susceptible to emotional distress and the defendant was aware of the susceptibility, (3) whether the defendant's conduct was privileged, (4) whether the degree of emotional distress was severe as opposed to merely annoying, inconvenient, or embarrassing, and (5) whether the defendant was aware of a high probability that his or her conduct would cause severe emotional distress and consciously disregarded that probability. *Sutton v. Tacoma School Dist. No. 10,* 180 Wash.App. 859, 870, 324 P.3d 763 (2014).

2. Clark County Liability

Clark County argues that summary judgment was appropriate because **Fearghal's** and CPM/CCM's claim for outrage fails to establish any extreme or outrageous conduct on the part of Kingrey, Paulson, Young, or Farrell. We agree.

Fearghal and CPM/CCM argue that Kingrey's conduct was outrageous because "in a civilized society, no one expects law enforcement to make arrests solely to separate a father from a child." However, Kingrey's arrest of **Fearghal** was not outrageous or extreme. As discussed above, Kingrey's arrest was based on Patricia's eyewitness account of **Fearghal** striking CCM, which was corroborated by Patricia's mother. Even if Kingrey had no probable cause to arrest **Fearghal**, reasonable minds could not differ that Kingrey's conduct was not beyond the bounds of decency or intolerable in a civilized community.

Fearghal and CPM/CCM argue that Paulson, Young, and Farrell acted outrageously because they failed to arrest Patricia for her admitted violations of the temporary

mutual restraining order. However, even though we hold that there is evidence that Paulson and Young breached their duty to arrest Patricia on one occasion, reasonable minds could not differ that Young, Paulson, and Farrell did not act beyond the bounds of decency or in a way intolerable to civilized society.

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Clark County on **Fearghal's** outrage claims against Kingrey, Paulson, Young, and Farrell.

3. DSHS Liability

Fearghal alleges that DSHS is liable for outrage based on Dixson's fabrication of reports and DSHS's retention of Dixson despite knowing that he was fabricating reports. However, **Fearghal's** attorney wrote a letter to DSHS that stated "[b]y this letter, we can deem plaintiffs' Complaint amended by interlineations to strike the following claims against the State ... Intentional infliction of emotional distress." CP at 1434. DSHS never moved for summary judgment on outrage and the trial accordingly never heard argument or ruled on the claim. CPM and CCM agree that the outrage claim was abandoned at trial.

Because **Fearghal** represented to DSHS that he intended to strike his outrage claim against DSHS, we hold that the argument was abandoned and the appeal on this issue fails.

4. Vancouver Liability

***24 Fearghal** argues that his outrage claim against Vancouver should withstand summary judgment because reasonable minds could differ about whether Petty and Taylor acted with sufficient intent and recklessness. We disagree.[13]

Fearghal's outrage claim based on Petty's conduct fails because Petty's actions are covered by absolute prosecutorial immunity, as explained above. Even if Petty's conduct was outrageous, she was acting in her role as prosecutor in initiating and developing charges and therefore has absolute immunity.

Fearghal claims that Taylor's conduct was outrageous because no person in civilized society expects an officer to ignore admitted violations of a restraining order. But Taylor investigated the incident, interviewing both Patricia and **Fearghal**. He made a police report and forwarded his report to the DVPC. In addition, as explained above, Taylor was not under a mandatory duty to arrest Patricia for her violation. Therefore, reasonable minds could not differ that Taylor did not act beyond the bounds of decency or in a way intolerable to civilized society.

Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Vancouver on the outrage claims.

H. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Fearghal alleges that questions of fact exist whether Clark County, DSHS, and Vancouver are liable for negligent infliction of emotional distress based on their alleged negligent investigation and negligence. We disagree.

A successful claim for negligent infliction of emotional distress requires proof of negligence (duty, breach of the standard of care, proximate cause, and damage) and objective symptomatology. *Strong v. Terrell,* 147 Wash.App. 376, 387, 195 P.3d 977 (2008).

Objective symptomology requires emotional distress that is susceptible to medical diagnosis and proved through medical evidence. *Haubry v. Snow,* 106 Wash.App. 666, 678–79, 31 P.3d 1186 (2001). Nightmares, sleep disorders, intrusive memories, fear, and anger may be sufficient, but they must constitute a diagnosable emotional disorder. *Id.* at 679, 31 P.3d 1186. There must be objective evidence regarding the severity of the distress and the causal link between the actions complained of and the emotional reactions. *Id.*

Fearghal alleges that he suffered greatly from feelings of fear, anxiety, and depression, which made functioning normally difficult for him. However, the only allegation that potentially involves an objective manifestation of emotional distress is his statement that "[o]ftentimes, I had nightmares." CP at 1792.

Fearghal has insufficient medical evidence to support his claim. He relies on a declaration from Dr. James Boehnlein that **Fearghal** displayed elements of multiple diagnosable mental health conditions and **Fearghal's** testimony showed strong indicators that he may have significant depression or anxiety. However, Dr. Boehnlein never saw **Fearghal**—he made these statements after reviewing **Fearghal's** declaration. And Dr. Boehnlein's declaration also notes that "any reliable diagnoses cannot be made without further history and direct interviews." CP at 1787. Without a diagnosis based on objective symptoms and evidence of causation, **Fearghal** fails to

meet the objective symptomology requirement to support a negligent infliction of emotional distress claim.

***25** Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Clark County, DSHS, and Vancouver on the negligent infliction of emotional distress claim.

I. HANDLING OF DEPOSITION CORRECTIONS

Fearghal and CPM/CCM argue that the trial court erred in granting Vancouver's motion to suppress Patricia's correction pages regarding her deposition testimony.[14] We decline to address this issue because the trial court accepted Patricia's correction pages as her declaration, and those correction pages were part of the summary judgment record.

CR 30(e) provides that a deposition witness can make changes in form or substance to his or her testimony before signing the deposition. However, the rule also provides that if the witness does not sign the deposition within 30 days after it is submitted to the witness, the deposition may be used as fully as though signed. CR 30(e).

Here, Patricia's deposition was taken over five sessions between September 2009 and March 2010. At some point, Patricia prepared 17 pages of corrections that made 244 separate changes to her testimony. She claimed that many of the changes were necessary to correct answers that were given after coaching from Petty and Miles. The parties submitted conflicting evidence regarding when the court reporter submitted the transcript of Patricia's deposition to her and whether Patricia provided the correction pages to the court reporter within 30 days of that date.

The trial court granted Vancouver's motion to suppress the correction pages, finding that those correction pages were not submitted in compliance with CR 30(e). However, the trial court order stated: "The 'correction pages' are accepted as a declaration of Patricia McCarthy." CP at 1098. And the trial court listed the declaration of Megan Holley, which attached Patricia's corrections, as a pleading considered in granting summary judgment to Vancouver on outstanding claims.

Fearghal and CPM/CCM argue that the trial court erred because it suppressed Patricia's correction pages without considering the three *Burnet*[15] factors as required in *Keck v. Collins,* 184 Wash.2d 358, 368, 357 P.3d 1080 (2015). In *Keck,* the Supreme Court held that a trial court must consider the *Burnet* factors before excluding untimely disclosed summary judgment evidence. *Id.* However, here the trial court did not exclude Patricia's correction pages; it expressly stated that it was accepting the correction pages as Patricia's declaration. Therefore, even if *Keck* did apply to deposition corrections that were untimely under CR 30(e), that case would not apply here.

Fearghal and CPM/CCM also argue that even though the trial court accepted the correction pages as Patricia's deposition, the trial court's refusal to enter the pages as a deposition correction pursuant to CR 30(e) was prejudicial because it allowed the defendants to rely on Patricia's uncorrected testimony as substantive evidence. However, in the summary judgment context a trial court must view all evidence in a light most favorable to the nonmoving party. When a witness submits a declaration contradicting earlier deposition testimony and provides an explanation for that contradiction, the declaration can raise a genuine issue of material fact that precludes summary judgment. *See State Farm Mutual Auto. Ins. Co. v. Treciak,* 117 Wash.App. 402, 408–11, 71 P.3d 703 (2003). Therefore, the trial court's ruling does not affect consideration of the summary judgment motions at issue in this appeal.

***26** In addition, at trial whether Patricia's corrections actually change her deposition testimony or are a separate explanation of that testimony would be immaterial. Both the original, uncorrected deposition testimony and the corrected deposition testimony could be used at trial, either as substantive evidence (if admissible) or for impeachment. *See Seattle–First Nat'l Bank v. Rankin,* 59 Wash.2d 288, 293–94, 367 P.2d 835 (1962). If Patricia testified, the defendants would be able to use her uncorrected deposition testimony for impeachment purposes regardless of whether she made her corrections in a timely manner under CR 30(e). And Patricia would be able to explain why she believes her original deposition testimony was incorrect regardless of whether she complied with CR 30(e) in making her corrections.

We hold that we need not resolve whether the trial court properly suppressed Patricia's correction pages.

J. COSTS AND ATTORNEY FEES

1. Trial Court Costs

Fearghal argues that the trial court erred in awarding Vancouver $827.05 in costs for the expense of deposition transcripts, because Vancouver did not rely on factual arguments from the depositions in successfully arguing that prosecutorial immunity entitled the city to summary judgment as a matter of law. We hold that the trial court

did not err in awarding the expense of deposition transcripts to Vancouver.

2. Frivolous Appeal
Vancouver seeks attorney fees under RAP 18.9(a), arguing that **Fearghal's** and CPM/CCM's appeals are frivolous. An appeal is frivolous if there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim. *West v. Thurston County,* 169 Wash.App. 862, 868, 282 P.3d 1150 (2012).

Vancouver argues that the appeals brought by **Fearghal** and CPM/CCM are frivolous because the law of prosecutorial immunity is well settled. However, **Fearghal** and CPM/CCM raised legitimate questions regarding whether Petty was acting within her prosecutorial function. We hold that **Fearghal's** and CPM/CCM's appeals against Vancouver are not frivolous.

3. Costs on Appeal
Fearghal and CPM/CCM seek costs and statutory attorney fees under RCW 4.84.030 and 4.84.080. Because **Fearghal** and CPM/CCM are not prevailing parties, they are not entitled to costs on appeal.

DSHS seeks costs on appeal under RAP 18.1 and RCW 4.84.060. Because DSHS is a prevailing party, it is entitled to recover costs on appeal along with Clark County and Vancouver.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of Clark County, DSHS, and Vancouver on all claims asserted by **Fearghal**, CPM, and CCM.

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We concur: WORSWICK and JOHANSON, JJ.

All Citations

--- P.3d ----, 193 Wash.App. 314, 2016 WL 1448352

Footnotes

1 Because they have the same last name, we refer to **Fearghal** McCarthy and Patricia McCarthy by their first names. We mean no disrespect.

2 The record is unclear regarding how long the restraining order actually remained in effect. The original order expired after one year, but the parties and law enforcement treated the restraining order as in effect after August 31, 2006.

3 **Fearghal** and CPM/CCM argue that we should apply the substantial factor test to evaluate proximate cause. The respondents argue that (1) the argument cannot be raised on appeal because it was not properly raised below and (2) the substantial factor test has never been applied to negligent investigation and there is no compelling reason to extend the test to such situations. We decline to apply the substantial factor test, but we note that applying the substantial factor test would not alter the conclusions of this opinion.

4 Nothing in the record indicates that the superior court protection and restraining orders issued in the dissolution actions were based on Kingrey's investigation. Therefore, our analysis of Clark County's liability focuses only on the no-contact orders issued in **Fearghal's** criminal cases.

5 In a third case, *Roberson,* the plaintiffs voluntarily relinquished guardianship of their child and claimed that DSHS's conduct had resulted in a "constructive placement" decision. 156 Wash.2d at 46, 123 P.3d 844. The Supreme Court held that DSHS had not caused a harmful placement decision. *Id.* at 47, 123 P.3d 844.

6 **Fearghal** and CPM/CCM make the same argument regarding the no-contact orders issued in **Fearghal's** criminal proceedings. But as discussed above, we hold that no-contact orders issued in criminal proceedings are not "harmful

placement decisions" for purposes of negligent investigation liability under RCW 26.44.050. Because our ruling above controls the outcome, we do not address this argument in the context of DSHS's liability.

7 DSHS notes that it was **Fearghal** who provided the information that caused its "founded" finding to be amended to "inconclusive," and argues that he likely communicated that information to the courts as well.

8 *Gilliam* quotes *Buckley v. Fitzsimmons,* 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993).

FN9. Clark County argues that **Fearghal's** false arrest and imprisonment claims must be dismissed because he filed his complaint after the applicable statute of limitations expired. However, Clark County did not raise this argument in the trial court summary judgment proceedings. Therefore, we decline to address it.

FN10. **Fearghal** also alleges wanton misconduct. However, wanton misconduct technically is not a separate cause of action, but a level of intent that negates certain defenses which might be available in an ordinary negligence action. *Rodriguez v. City of Moses Lake,* 158 Wash.App. 724, 730–31, 243 P.3d 552 (2010). Willful and wanton behavior is linked to specific standards of duty. *Id.* at 732, 243 P.3d 552. Therefore, to the extent that **Fearghal** argues DSHS intentionally acted with reckless disregard, that is part of the larger negligence claim, not a stand-alone cause of action.

FN11. Clark County also argues that RCW 10.99.070 provides Young, Paulson, Farrell, and Zimmerman with statutory immunity. Because we find no liability, we do not address this immunity argument.

FN12. **Fearghal** also argues that Vancouver is liable for failing to charge Patricia with restraining order violations. However, as discussed above, Vancouver has prosecutorial immunity regarding charging decisions. Therefore, we reject this claim.

FN13. Vancouver argues that **Fearghal** abandoned his claim for outrage by failing to argue it during summary judgment below. Based on the record below, we disagree that **Fearghal** abandoned this claim.

FN14. **Fearghal** assigned error to the trial court's ruling. CPM/CCM did not assign error to this ruling, but did address the issue in their brief.

FN15. *Burnet v. Spokane Ambulance,* 131 Wash.2d 484, 495–96, 933 P.2d 1036 (1997).

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