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**SUPREME COURT OF THE STATE OF WASHINGTON**

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C.L., a sexual abuse victim, and Simeon J. Osborn as litigation guardian  
for S.L., a minor child and sexual abuse victim,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, and JANE and JOHN DOES 1-100,

Petitioner.

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**SUPPLEMENTAL BRIEF ADDRESSING EFFECT OF  
*H.B.H. v. STATE OF WASHINGTON*  
ON DISCRETIONARY REVIEW**

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## I. INTRODUCTION

This matter raises issues of substantial public importance regarding the application of the common law special relationship duty announced in this Court's recent decision, *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018). Unlike *H.B.H.*, the Plaintiffs' theories of liability in this case concern foster care licensing and placement, and pre-adoption reporting to adoption courts. As these theories and facts were not present in *H.B.H.*, applying the special relationship duty in this case presents issues of first impression that warrant the Court's review.

In particular, Plaintiffs' theories in this case would put the special relationship duty to protect foster children in direct conflict with statutory directives implementing legislative policy decisions on child welfare. By statute, the Department of Social and Health Services (Department) is prohibited from denying a foster care license based on the unsubstantiated allegation against the Langes' son, which Plaintiffs identify as the source of the Department's breach of duty. RCW 74.15.130(2)(a) ("[N]o unfounded, inconclusive, or screened-out report of child abuse or neglect may be used to deny" a foster care license). Under Plaintiffs' theory, to avoid a breach of duty, the Department would have had to violate that statute.

The Court should take review to ensure the common law duty found in *H.B.H.* functions in harmony with, not contrary to, the comprehensive

statutory scheme the Legislature has enacted to govern the child welfare system. That duty should not require the Department to defy express statutory limits on the use of unsubstantiated allegations of child abuse.

## **II. REASONS WHY REVIEW SHOULD BE GRANTED**

### **A. Review Is Necessary to Confirm Courts Must Harmonize the Department's Common Law Obligations Under *H.B.H.* and the Legislature's Statutory Directives for the Child Welfare System**

Review is necessary in this case to make clear that courts must harmonize the common law duty announced in *H.B.H.* with the Legislature's comprehensive statutory scheme governing child welfare.<sup>1</sup> The Court of Appeals' ruling below on foster care licensing and placement creates a direct conflict between the Department's common law duty and statutory directives. To fulfill the duty, the Department would need to violate the licensing statute, RCW 74.15.130. Liability on that basis contradicts express legislative intent. That cannot be the law: common law tort duties and statutory directives must harmonize.

Plaintiffs' claim that the Department breached its special relationship duty to them arises from an August 2001 referral alleging the Langes' son, Dillon, sexually assaulted a relative. The referral was screened out to law enforcement, which investigated and found no probable cause.

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<sup>1</sup> See RCW 13.32A, 13.34, 13.36, 13.38, 26.18, 26.33, 26.34, 26.44, 43.43, 43.216, 74.13, 74.14A, and 74.15.

CP 441, 573-77, 625. The Department later licensed the Lange foster home. CP 581. Plaintiffs contend the Department breached its duty to protect them when it licensed the Langes and placed Plaintiffs in the Langes' foster home, despite the unsubstantiated referral. *See* Ans. to Pet. 3-6.

However, for the Department to avoid what Plaintiffs contend was its breach of duty, the Department would have been required to violate statute. The Legislature expressly prohibits the Department from denying a foster care license based on certain referrals. “[N]o **unfounded, inconclusive, or screened-out report** of child abuse or neglect **may be used to deny**” a foster care license.<sup>2</sup> RCW 74.15.130(2)(a) (emphasis added). If licensing requirements are met, the Legislature mandates the Department grant the license. RCW 74.15.100. Once a home is licensed, it is appropriate for the Department to place a child there who fits within the license's criteria. Because the unsubstantiated referral on Dillon could not be the basis for denying a license or placement, it cannot be the basis for a breach of the special relationship duty to protect found in *H.B.H.*

The common law cannot require a government agency to ignore its authority and violate statutes. *Roberts v. Dudley*, 140 Wn.2d 58, 80, 993 P.2d 901 (2000), *as amended* (Feb. 22, 2000) (Madsen, J., dissenting)

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<sup>2</sup> The earlier version of the statute in force at the time the Langes applied for a foster care license provided that “no unfounded report of child abuse or neglect [could] be used to deny” a foster care license. Former RCW 74.15.130(2)(a) (2002).

(criticizing “creat[ion of] a common law cause of action using a statute that specifically prohibits it”) (citing *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992)). Thus, the Court should grant review to examine how the alleged breach in licensing and placement in this case falls outside the common law duty to protect announced in *H.B.H.* Whether and how that duty is limited by the statutory authority of the Department presents a question of substantial public interest. RAP 13.4(b)(4).

**B. Review Is Warranted to Address the Appropriate Extent of the Department’s Liability Beyond the End of the Duty Announced in *H.B.H.*, Considering Legal Causation and Foreseeability**

It is equally important to examine the appropriate extent of the Department’s liability under the duty announced in *H.B.H.*, applying the principles of legal causation and foreseeability. First, legal causation cuts off liability when the injury is so distant in time from the breach alleged to have caused it that, as a matter of law, liability does not attach. Here, a minimum of 14 months separated Plaintiffs’ injuries from the alleged breach of duty, during which period Plaintiffs were in foster care and properly monitored by the Department with no indications of any abuse or neglect by the Lange family. Second, the Department’s liability is also limited by foreseeability. *H.B.H.*, 192 Wn.2d at 176. This case raises the question of whether foreseeability is limited by a statute that prohibits using an unsubstantiated referral to deny licensing and placement.



As a threshold matter, this case differs significantly from *H.B.H.* because Plaintiffs were injured after the Department's special relationship duty to them ended. The Department's special relationship duty to protect a dependent child is premised on the State's legal control of the child. *H.B.H.*, 192 Wn.2d at 168-78. That duty to protect cannot be ongoing after the court dismisses the child's dependency, which removes legal custody and entrustment of the child from the Department. When the dependency is dismissed, terminating the State's legal custody, the Department's special relationship duty to that child is necessarily severed.

Here, as Plaintiffs consistently testified at trial and in depositions, the abuse they suffered began after they were adopted by the Langes.<sup>3</sup> Thus, Plaintiffs' injuries occurred after the special relationship duty ended.

Presumably, Plaintiffs will argue that even though their injuries occurred after the Department's duty ended, liability can apply if the breach that proximately caused the injury occurred while the duty was in force. *See generally N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016)

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<sup>3</sup> Plaintiff C.L. was six years old when she and her sister were placed in the Lange home in June 2003. CP 1110. She was seven when they were adopted in August 2004. CP 612-15. At trial, she testified that the abuse began when she was eight and ended when she was twelve. RP (Vol. II) at 113. Her deposition testimony was the same. CP 457-59.

Plaintiff S.L. was three years old when she was placed in the Lange home and four when she was adopted. CP 1084, RP (Vol. III) at 382-83; CP 415, 418. At trial, she testified that Dillon had abused her from the ages of six to eleven, and Colten had abused her one time around when she was eight. RP (Vol. III) at 368, 373. Her deposition testimony was also the same. CP 463, 465.

(holding liability possible for injury occurring outside school's custodial duty). But, as *N.L.* shows, the extent of the Department's liability for breach of a special relationship duty to protect is still limited by two principles: legal causation and foreseeability. *N.L.*, 186 Wn.2d at 436-37. Review is warranted to address issues under each principle in the context of this case.

**1. Does legal causation bar liability here when 14 months separates the alleged breach from the initial injury?**

First, the Department's liability is limited by legal causation, which "involves a determination of whether liability *should* attach as a matter of law." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). It "is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. In deciding whether a defendant's breach of duty is too remote or insubstantial to trigger liability as a matter of legal cause, [courts] evaluate mixed considerations of logic, common sense, justice, policy, and precedent." *N.L.*, 186 Wn.2d at 437. Legal causation dictates that at some point an injury is so distant in time from the breach alleged to have caused it that, as a matter of law, liability does not attach.

Here, the Department's alleged breach in licensing and placement and Plaintiffs' injuries are separated by a minimum of 14 months. Plaintiffs were placed in the Langes' home in June 2003. CP 590-91. While Plaintiffs were in foster care with the Langes, a social worker conducted health and

safety visits at the Lange home every 30 days. CP 471, 547, 556, 558-60, 562-64, 566-68. At no time during the foster care period did either Plaintiff indicate that she was being abused or neglected by any member of the Lange family, nor were any referrals made. CP 471. Plaintiffs were adopted in August 2004, CP 612-15, and consistently testified that the abuse they suffered started after they were adopted. *See* n.3. Because Plaintiffs' injuries began a minimum of 14 months after the Department's alleged breach of duty, legal causation may limit the Department's liability.

**2. May foreseeability be premised on a statutorily impermissible basis for denying licensing & placement?**

Second, the Department's liability is "limited by the concept of foreseeability." *H.B.H.*, 192 Wn.2d at 176. Under Plaintiffs' liability theory regarding licensing and placement, the Department's alleged breach arises from the 2001 referral of abuse against the Langes' son Dillon, which law enforcement determined lacked probable cause. CP 441, 573-77, 625. But the Legislature has enacted in statute its policy decision for Washington's child welfare system that the Department may not deny a foster care license based on an "unfounded, inconclusive, or screened-out report of child abuse or neglect." RCW 74.15.130(2)(a).

This legislative decision calls into question whether an unsubstantiated allegation may permissibly be used to establish that abuse

was foreseeable in a foster home, for purposes of liability. Review is warranted to consider whether foreseeability of injury may be based on a statutorily mandated act, like the Department's licensing decision here.

The Court should also grant review to examine whether legal causation bars liability here, where Plaintiffs' injuries occurred after their adoption terminated the special relationship duty, and where those injuries were separated in time from the alleged breach in licensing and placement by a minimum of 14 months, during which period Plaintiffs were in foster care and properly monitored by the Department with no indications of any abuse or neglect by the Lange family.

**C. Review Is Warranted to Clarify the Duty Announced in *H.B.H.* Does Not Apply to Pre-Adoption Reports, But If It Did Questions of Fact Preclude Summary Judgment on Causation**

Plaintiffs' other theory to support the summary judgment on liability obtained below is that the Department breached its duty to them by failing to include the 2001 referral against Dillon in its reporting to the adoption court regarding Plaintiffs' adoption by the Langes. Review is warranted to address this theory as well, for two reasons. First, the special relationship duty to protect is an inapt mechanism for controlling the Department's pre-adoption reporting obligations, which are statutory in nature. This is especially so where statute is the basis of an analogous duty to pre-adoptive parents. *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998). Second,

if the Department's reporting obligations were the basis for a breach of its special relationship duty, genuine issues of fact on causation precluded the award of summary judgment to Plaintiffs on this basis.

First, the Department's pre-adoption reporting obligations to adoption courts should not be cognizable as a basis for a breach of the duty recognized in *H.B.H.* That duty involves monitoring and protection: while a dependent child is in foster care, the Department has an "ongoing duty" to "monitor" the child to "assure the safety, well-being, and quality of care being provided is within the scope of the intent of the legislature." *H.B.H.*, 192 Wn.2d at 176 (internal quotations omitted). The Department's reporting obligations *to the adoption court* relate to dismissal of the dependency and approval of adoption. Those reporting obligations are distinct from monitoring and protection of dependent children while in foster care.

Further, using the common law duty to govern the Department's reporting obligations to adoption courts would be at odds with the Court's approach in a closely analogous context: the Department's duty to make pre-adoption disclosures to pre-adoptive parents. There, the Court held that the statutes defining the Department's pre-adoption disclosure obligations created an implied statutory cause of action and duty to disclose owed by the Department to pre-adoptive parents. *McKinney*, 134 Wn.2d 388. Likewise, a duty to report information to the adoption court owed to a pre-

adoptive child should properly be found in the statutes, applying the test set forth in *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

Second, if the Department's pre-adoption reporting could be a basis for a breach of the special relationship duty, issues of fact on causation should have precluded summary judgment to Plaintiffs on this theory of liability. Plaintiffs, the moving party on summary judgment, did not carry their burden that, as a matter of law, but-for the Department's failure to disclose the 2001 unsubstantiated referral to the adoption court, the court would have denied Plaintiffs' adoption. *Estate of Borden v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004); *see* Pet. for Review § V.B.3.

**D. Review Remains Warranted on Breach and Causation, as Set Forth in the Department's Petition for Review**

As explained in the Petition for Review section V.B, pages 18-24, review is also warranted because the Court of Appeals' decision affirming summary judgment on breach and causation conflicts with controlling precedent and deprives the Department of its right to have a jury decide genuine issues of material fact. The *H.B.H.* decision has no effect on the reasons the Department articulated for review on these issues, and review remains warranted for the reasons explained in Section V.B of its petition.

**III. CONCLUSION**

For the above reasons, discretionary review is warranted.

RESPECTFULLY SUBMITTED this 8th day of February, 2019.

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## DECLARATION OF SERVICE

I declare under penalty of perjury in accordance with the laws of the state of Washington that on the below date the original of the preceding **SUPPLEMENTAL BRIEF ADDRESSING EFFECT OF *H.B.H.* v. *STATE OF WASHINGTON* ON DISCRETIONARY REVIEW** was electronically filed in the Washington State Supreme Court and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

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DATED this 8th day of February, 2019, at Tumwater, Washington.

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