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(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

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FILED
NOVEMBER 22, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

RICHARD L. MATHIEU, as Litigation Guardian ad Litem for M.J. and A.J., minors, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, and YAKIMA VALLEY COUNCIL ON ALCOHOLISM, PBC, aka TRIUMPH TREATMENT SERVICES, and KAI MARTINEZ and ROBERTO VALLADARES, Respondents.	)	No. 38190-1-III ORDER GRANTING MOTION TO PUBLISH OPINION IN PART

THE COURT has considered the appellant's motion to publish the court's opinion of September 15, 2022, and the record and file herein, and is of the opinion the motion should be granted in part. Therefore,

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IT IS ORDERED, the motion to publish is granted in part. The opinion filed by the court on September 15, 2022 shall be modified on page 1 to designate it is a published in part opinion and on page 24 after the first paragraph by adding the following language:

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 having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PANEL: Judges Staab, Fearing, Pennell

FOR THE COURT:

LAUREL H. SIDDOWAY, Chief Judge

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FILED
SEPTEMBER 15, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

RICHARD L. MATHIEU, as Litigation Guardian ad Litem for M.J. and A.J., minors,	)	No. 38190-1-III
Appellant,	)	
v.	)	UNPUBLISHED OPINION
STATE OF WASHINGTON, DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES, and YAKIMA VALLEY COUNCIL ON ALCOHOLISM, PBC, aka TRIUMPH TREATMENT SERVICES, and KAI MARTINEZ and ROBERTO VALLADARES,	)	
Respondents.	)	

STAAB, J. — In December 2013, the Yakama Tribal Court returned twin seven-year-old children, A.J. and M.J., to their mother's care after a lifetime in foster care through a tribal court dependency serviced by the Washington State Department of Children, Youth & Families (Department). The mother had recently enrolled in the Parent-Child Assistance Program (PCAP) through Yakima Valley Council on

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Alcoholism, PBC (d/b/a Triumph Treatment Services) (Triumph), and obtained suitable housing through Triumph. The tribal court dismissed the dependency in May 2014, and the Department closed its file shortly thereafter.

In February 2015, a relative discovered that the mother had severely abused and neglected the twins. Through their guardian ad litem, Richard Mathieu, the twins sued the Department for negligence for placing them in their mother's custody and care. They also sued Triumph, which housed the mother and the twins, for negligently monitoring and supervising that placement. The Department and Triumph each successfully moved for summary judgment dismissing all claims against them.

We affirm the trial court's dismissal of Mathieu's claims against the Department and Triumph. Recognizing that the dependency in this case was under the exclusive jurisdiction of the Yakama Tribal Court, Mathieu fails to identify a statutory duty under Yakama law that required the Department to investigate the mother absent a report of neglect or abuse. Nor did the Department have a common law duty to monitor the mother after the tribal dependency was dismissed. Similarly, we hold that Mathieu has failed to demonstrate that Triumph, as either the landlord or the provider of social services to the mother, had a common law duty to protect the twins from the criminal acts of their mother.

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BACKGROUND

In June 2006, Kai Martinez gave birth to drug-affected twins, A.J. and M.J. The children were immediately removed from Martinez's care due to her ongoing use of methamphetamine and the twins' positive toxicology screen at the time of birth. A dependency was opened in Yakama Nation Tribal Court. The tribal court entered a fact-finding hearing order that found A.J. and M.J. to be neglected and dependent Indian children pursuant to tribal and federal law. It awarded custody and supervision of the twins to the Department and authorized the Department to place the children in foster or relative care. A.J. and M.J. were ultimately placed in foster care with a non-Native family from June 2006 to December 2013. Martinez had little involvement in the dependency from June 2006 to May 2013.

In September 2012, Martinez enrolled in a program offered by Yakima Valley Council on Alcoholism, PBC (d/b/a Triumph Treatment Services) called the PCAP after discovering she was pregnant with A.J.'s and M.J.'s younger sibling. According to PCAP literature:

> The primary goals of PCAP are to help mothers with substance abuse disorders
>
> - Achieve and maintain recovery
> - Build healthy family lives
> - Prevent the births of subsequent alcohol/drug exposed infants
>
> We do this by building trusting relationships with mothers, connecting clients with comprehensive, relevant community services, and teaching them to believe in themselves.

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Clerk's Papers (CP) at 978. The PCAP client service agreement signed by Martinez states in part:

> While you are in PCAP, your case manager will be in touch with you many times a month, including home visits. She will ask about what kinds of goals and needs you have, and develop a plan of care and services that will meet your needs and help you reach your goals. She will review this plan with you every few months. During the program, your case manager will help link you with the community services that are just right for you. She will offer transportation and childcare for some of your important appointments. Based on your needs, she will help you with supplies, activities, and incentives while you are in the program. If you sign release forms to coordinate services with other providers, your case manager will talk with those other service providers (such as DSHS, probation, medical) when she needs to.

CP at 1072. Martinez had also enrolled in a methadone program.

At a May 2013 review hearing, the tribal court reinstated visitation for Martinez, but rejected Martinez's request to relinquish her parental rights. To further reunification efforts, the Department recommended that Martinez be ordered to engage in mental health counseling and family preservation services; however, the tribal court did not order Martinez to engage in these services.

Martinez began attending Department-supervised visits with A.J. and M.J. in July 2013. Between July 2013 and December 2013, Martinez canceled eight of 22 visits for various reasons. After a visit in early September 2013, A.J. told her foster mother that Martinez had squeezed her hand hard. The foster mother saw no injury but reported A.J.'s statement to the assigned social worker, Michelle Betts. Betts asked Martinez

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what happened at the visit, and Martinez said A.J.'s hand had been "scrunched up" while working with beads during the visit. CP at 1338. The foster mother's report was "screened out" for no specific child abuse, neglect allegation, or risk.

Throughout 2013 and part of 2014, Martinez was in a methadone program through Central Washington Comprehensive Mental Health. As part of this program, Martinez was tested for drug use. In July 2013, when Martinez began visitations with A.J and M.J., she began struggling with her sobriety. On June 3, Martinez failed to show up for a psychological evaluation as part of her treatment. On June 4, she tested positive for amphetamines. On June 10, she failed to show up for therapy, and her counselor was unable to reach Martinez to set up another therapy appointment. Although Martinez had signed releases to allow the Department to access her methadone program records, Betts did not request these records.

In October 2013, the tribal court ordered that A.J. and M.J. start transitioning back to Martinez's care and custody, first through a relative care placement and then with Martinez for an in-home dependency. While still enrolled in Triumph's PCAP, Martinez signed a clean and sober housing agreement (Agreement) with Triumph Treatment Services in November 2013 to become a resident at one of its Transitional Housing Program units. The Agreement does not require Martinez to pay rent. Instead, by signing the Agreement, Martinez stipulated to several policies and rules in order to live in one of Triumph's Transitional Housing Program units. One of the rules or policies was

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Triumph's inspection procedures, i.e., weekly, mandatory inspections performed "in order to provide a safe and healthy environment" and "with the intention of assuring that premises are in good conditions and to report any damage or repairs to the Maintenance Department." CP at 1076. Martinez's presence in the home was not necessary during inspections.

Martinez moved into her Triumph apartment unit in mid-November 2013. A.J. and M.J. transitioned to an in-home dependency with Martinez on December 20. The Department conducted monthly health and safety checks on the twins for the next five months and noted no concerns.

Unbeknownst to the Department and the tribal court, in December, Martinez told her methadone treatment counsel that she had relapsed on methamphetamine after moving to her new apartment and was unable or unwilling to re-engage with the clinic. However, by April 4, 2014, Martinez's methadone counsel told Betts that Martinez was compliant with the program and doing "amazing," and the counselor had no concerns.

On April 30, 2014, Betts received a call from the children's school stating that the school had early release and Martinez had not picked up the twins from school. The school could not reach Martinez or her boyfriend. Betts picked up the twins from school and eventually took them home. Martinez explained that she did not realize it was an early release day.

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Yakama Nation Children's Court dismissed A.J.'s and M.J.'s dependency proceeding in May 2014, and the Department closed its file on the matters in June 2014. Unknown to the court and the Department, Martinez was in active relapse on methamphetamine when the dependency was dismissed. For the next several months, Martinez continued to abuse methamphetamine and heroin.

Martinez's PCAP case manager, Andrea Ross, never visited Martinez inside her apartment and never observed Martinez interact with A.J. and M.J. during her visits with Martinez. Martinez expressed to Ross that she was struggling and depressed, but Ross never suspected Martinez had relapsed or was abusing her children. She did not see A.J. or M.J. between September 2014 and February 2015.

Triumph's housing manager, Sophia Sanabria, inspected Martinez's apartments at various times. She observed the apartment to be clean but not spotless and once smelled urine in the apartment and was told by Martinez that one of the kids had had an accident. Sanabria received no reports of concern in December 2014 and never saw A.J. and M.J. at the apartment.

In February 2015, concerned that they had not seen A.J. and M.J., Martinez's sisters entered her apartment. Martinez's children were home alone. A.J. and M.J. were in extremely poor health, malnourished, emaciated, and skeletal. Their room smelled strongly of urine. Martinez's sisters and mother took A.J. and M.J. from the apartment and called 911. Due to their extreme health conditions, including severe malnutrition,

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torture, and starvation, the children were ultimately admitted to Seattle Children's Hospital. The ensuing investigation into A.J.'s and M.J.'s conditions revealed that Martinez and her boyfriend had subjected the children to torture, including physical assaults; psychological maltreatment, such as death threats, terrorization, degradation, and humiliation; and restrictions on basic necessities of life, such as food, basic hygiene, isolation from others, and medical neglect.

Procedural History

Richard L. Mathieu was appointed the litigation guardian ad litem for A.J. and M.J. On their behalf, he sued the Department and Triumph for damages arising from the abuse and neglect the twins suffered at the hands of their mother after they were returned to her care following a seven-year-long dependency in Yakama Nation Children's Court. (complaint for damages filed March 11, 2019).

Mathieu alleged the Department breached its common law and statutory duties to keep its file open; provide services; investigate and monitor Martinez before and after placement; monitor A.J.'s and M.J.'s health, safety, and school attendance; and hold periodic hearings. These breaches, alleged Mathieu, proximately caused harm to A.J. and M.J.

Similarly, Mathieu alleged that Triumph breached its duties to supervise Martinez by failing to provide her with services, follow up on her participation in its PCAP program, report suspected child abuse or neglect, conduct home visits to ensure the

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children's welfare, communicate with A.J.'s and M.J.'s school, and monitor A.J.'s and M.J.'s care. He further alleged that Triumph's breaches were the proximate cause of harm to A.J. and M.J.

Following discovery, the Department and Triumph moved for summary judgment. Both defendants argued that they either had no duty to protect the twins or their duty to protect was not triggered under the circumstances. The superior court entered orders granting the Department's and Triumph's respective motions for summary judgment, dismissing all of A.J.'s and M.J.'s claims against the two agencies with prejudice. On behalf of the twins, Mathieu appeals.

ANALYSIS

1. DID THE DEPARTMENT OWE A.J. AND M.J. STATUTORY AND COMMON LAW DUTIES DURING AND AFTER DISMISSAL OF THE DEPENDENCY PROCEEDINGS?

The superior court dismissed all of the claims against the Department on summary judgment. This court reviews summary judgment decisions de novo. *Turner v. Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 284, 493 P.3d 117 (2021). A claim of negligence requires the plaintiff to show (1) the existence of a duty to the plaintiff, (2) breach of that duty, (3) proximate cause, and (4) resulting injury. *Id*. A defendant moving for summary judgment on a negligence claim has the initial burden of demonstrating the absence of an issue of material fact or that the plaintiff lacks competent evidence of an essential element of the claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). The

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primary issues in this case concern the existence and scope of any duty owed by either the Department or Triumph to A.J. and M.J. "The existence and scope of a duty is a threshold inquiry in a negligence action, and it is a question of law we review de novo." *Turner*, 198 Wn.2d at 284. Whether a legal duty exists "depends on mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quoting *Lords v. N. Auto Corp*., 75 Wn. App. 589, 596, 881 P.2d 256 (1994).

Mathieu argues that the Department owed various duties of care to A.J. and M.J. during and after the dismissal of the dependency. He asserts that during the dependency the Department owed A.J. and M.J. a statutory duty under RCW 26.44.050 to investigate reports of abuse and neglect. Specifically, Mathieu contends that the reports that Martinez squeezed A.J.'s hand during a supervised visit and that Martinez failed to pick up the children after school one day are sufficient to trigger the duty to investigate. He further asserts that the Department owed a statutory duty under RCW 13.34.138 and *Babcock v. State*, 116 Wn.2d 596, 608, 809 P.2d 143 (1991) to investigate Martinez before recommending an in-home dependency to the tribal court. He argues the Department had a duty to A.J. and M.J. to provide accurate information to the court, relying on *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 83-84, 1 P.3d 1148 (2000). Finally, Mathieu contends that, after the dependency was dismissed, the Department owed a common law duty of reasonable care to protect A.J. and M.J. from

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Martinez's abuse and neglect based on a continuing special relationship between the Department and the twins. He relies on *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018), to support his special relationship argument. Each alleged duty will be analyzed in turn.

1. Duty to investigate reports of abuse under chapter 26.44 RCW

Mathieu contends that the Department had a statutory duty to investigate reports that Martinez abused and neglected her children. "Under RCW 26.44.050, [the Department] has a statutory duty to investigate reports of child abuse. The purpose of RCW 26.44.050 is to protect children." *Albertson v. State*, 191 Wn. App. 284, 299, 361 P.3d 808 (2015). The statute requires the Department to investigate a report alleging abuse upon receipt of the report and to refer the report to the court "where necessary":

> Except as provided in RCW 26.44.030(11), upon the receipt of a report alleging that abuse or neglect has occurred, the law enforcement agency or the department 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.

RCW 26.44.050. However, the duty is limited to "conducting an investigation that was not biased or faulty and leading to a harmful placement decision under RCW 26.44.050." *Albertson*, 191 Wn. App. at 301.

The Department does not deny its duty to investigate under this statute. Instead, the Department argues that its duty to investigate was not triggered because neither the

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report of hand squeezing nor the report of failing to pick up the children once after school rose to the level of abuse or neglect.

The Department's duty to investigate is not invoked until it receives a report of abuse or neglect. RCW 26.44.050; *Wrigley v. State*, 195 Wn.2d 65, 71, 455 P.3d 1138 (2020). "[N]ot all communications made to [the Department] qualify as duty-triggering 'reports.' Only a specific class of reports will warrant [the Department's] duty to investigate—those involving alleged abuse or neglect." *Wrigley*, 195 Wn.2d at 73. In other words, to trigger the Department's duty to investigate, the report must allege "past or current sexual abuse, sexual exploitation, or injury of a minor child, constituting abuse or neglect as provided in former RCW 26.44.020(1)" or "identify an act, a failure to act, or a pattern of behavior evidencing a 'clear and present danger to a child's health, welfare, or safety,' to constitute negligent treatment or maltreatment under former RCW 26.44.020(14)." *Id*. at 77.

The questions presented are whether a parent's singular failure to pick up her children from school on an early release date constitutes neglect, or whether the alleged act of a parent squeezing a child's hand that results in no observed injury constitutes "injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100." RCW 26.44.020(1) (defining "abuse or neglect"). Under these circumstances, the Department's duty to investigate was not triggered.

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"Negligent treatment or maltreatment" is defined as "an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100." RCW 26.44.020(19). We have previously interpreted this definition as requiring serious misconduct rather than mere negligence. *Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 590, 360 P.3d 875 (2015).

Similarly, "injury" is "hurt, damage, or loss sustained." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1993); *see In re Welfare of Dodge*, 29 Wn. App. 486, 493, 628 P.2d 1343 (1981) (observing that the term "injury" should be given its ordinary definition and meaning). "[T]he nonaccidental infliction of physical injury or physical mistreatment on a child that harms the child's health, welfare, or safety" is "physical abuse" and includes "any . . . act that is likely to cause and that does cause bodily harm greater than transient pain or minor temporary marks or that is injurious to the child's health, welfare or safety." WAC 110-30-0030(1)(f); *See* RCW 9A.16.100. "Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child." WAC 110-30-0030(2).

The report in this case does not allege abuse or neglect. Neither A.J. nor her foster parent described Martinez's alleged act of squeezing A.J.'s hand as nonaccidental or an

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unreasonable act of discipline. Moreover, A.J.'s foster parent testified that she "did not observe anything hurt," such as bruising or any other injury. CP at 1973. Based on the facts in the record, the alleged act did not cause bodily harm greater than transient pain or leave minor temporary marks. Nor does a singular instance of forgetting to pick up a child from school on early release date constitute serious misconduct. Mathieu's assertion that these incidents nonetheless trigger the Department's duty to investigate is insufficient to overcome summary dismissal.

Citing *Wrigley*, Mathieu also contends that the two reports should be viewed in the context of the entire history of the dependency, and when done so, the incidents are more serious than they would ordinarily appear. *Wrigley* does not support Mathieu's indirect attempt to expand the statutory duty to investigate reports of abuse or neglect. Instead, *Wrigley* reaffirms that the statutory duty to investigate is a "narrow exception" that carefully balances familial rights with the need to protect children. *Wrigley*, 195 Wn.2d at 76.

Because the Department did not receive a report of past or current conduct indicating abuse or neglect by Martinez against A.J., its statutory duty to investigate under RCW 26.44.050 was not triggered. The trial court, therefore, did not err by dismissing Mathieu's negligent investigation claim on summary judgment.

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2. *Duty to investigate proposed in-home placement under RCW 13.34.138 and Babcock*

Mathieu contends that the Department has a statutory duty to investigate any residential placement, including an in-home dependency, that might cause harm to the child. RCW 13.34.138(2) establishes in-home placement requirements. The subsection provides, "A child shall not be returned home at the review hearing unless the court finds that a reason for removal as set forth in RCW 13.34.130 no longer exists." If the court orders that the child be returned home under these circumstances, then "[p]rior to the child returning home, the department must" "conduct background checks on" "all adults residing in the home"; "determine whether [any person who may act as a caregiver is] in need of any services"; and "[n]otify the parent with whom the child is being placed that he or she has an ongoing duty to notify the department of all persons who reside in the home or who may act as a caregiver." RCW 13.34.138(2)(b)(i)-(iii).

Mathieu argues that the Department had an affirmative duty to investigate the proposed in-home placement with Martinez *before* recommending such a placement to the tribal court. The plain language of the statute and its subparts expressly indicates that the Department's obligation to conduct background checks occurs only *after*—not before—the court orders that the child be returned home. Moreover, Mathieu assumes without citation to authority that a private right of action for negligent investigation is available under RCW 13.34.138. "Washington law does not recognize a general tort

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claim for negligent investigation." *Albertson*, 191 Wn. App. at 299. And Mathieu offers no argument or analysis in favor of recognizing a new private right of action for negligent investigation under RCW 13.34.138.

The Department argues that RCW 13.34.138 did not apply to the dependency proceedings in this case. It maintains that Yakama Nation Children's Code (chapter 80.02 RYC)[1] applied and that the tribal code contains no code provision parallel to RCW 13.34.138. We agree.

The Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Indian Reservation is a federally-recognized Indian Tribe pursuant to the Treaty of 1855 (Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859)) with the United States of America, possessed of sovereign rights and powers. It is a self-governing Indian tribe that operates under its own laws. It maintains a court system that includes the Yakama Nation Children's Court. The Yakama Nation Children's Court determined, pursuant to its tribal code, that it possessed exclusive jurisdiction over A.J.'s and M.J.'s dependency proceedings after a fact-finding hearing.

The Supreme Court of Washington has previously stated:

> We agree with the court in *Wakefield v. Little Light*, [276 Md.333, 348,] 347 A.2d [228 (1975),] that "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . (t)ribe to govern themselves than to interfere with tribal control over the custody

[1] Revised Yakama Nation Code (RYC).

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> of their children . . .". . . "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right . . . to provide for the care and upbringing of its young, a Sine qua non to the preservation of its identity." *Wisconsin Potowatomies v. Houston*, 393 F.Supp. 719, 730 (W.D. Mich. 1973).

In re Adoption of Buehl, 87 Wn.2d 649, 662, 555 P.2d 1334 (1976) (some alterations in original).

The Yakama Nation Children's Code allows an investigation into family history and environment of a child within its jurisdiction only upon the tribal court's request: "Upon request of the Court, . . . any other Agency or person so designated may investigate the personal and family history and environment of any child coming within the jurisdiction of the Court under Section 80.02.03 and file a report of its findings with the Court." Br. of Resp't, App. A at 9 (RYC 80.05.07). The record on appeal includes no request by the tribal court to investigate Martinez. Applying RCW 13.34.138 here would conflict with RYC 80.05.07 by substantially expanding the Department's authority to investigate the parent of a child within the tribal court's jurisdiction. Such a result would infringe on the tribe's right to govern itself, interfere with tribal control over the custody of their children, and create a substantial risk of conflicting adjudications affecting child custody and eroding tribal court authority. *Buehl*, 87 Wn.2d at 662. The trial court did not err by dismissing Mathieu's claim for negligent investigation of Martinez under RCW 13.34.138 and *Babcock*.

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3. Duty to provide accurate information to the court under Tyner

Next, Mathieu contends the Department had a specific duty to provide relevant information to the tribal court during the dependency action and breached this duty when it failed to seek out information on Martinez's compliance with her methadone program and provide this information to the tribal court. He argues that *Tyner* held that "the Department's undisputed duty to investigate included the duty to accurately inform courts that are involved in child custody proceedings, and breach of those duties was actionable." Appellant's Opening Br. at 39.

In *Tyner*, a father suspected of child abuse successfully sued the Department for negligent investigation that resulted in a four and one-half month separation from his children during an investigation for child abuse. Notably, the case worker's final report—completed three weeks after the investigation began—concluded that the allegations against the father were unfounded. *Tyner*, 141 Wn.2d at 73-74. Neither the report nor its contents were provided to the court. *Id*. at 74-75. The Supreme Court concluded that the Department's statutory duty to investigate extended to the parent of a dependent child, even a parent suspected of abusing their own children. *Id*. at 82.

Turning to the issue of legal causation, the Court "agree[d] . . . that the conduct of a [Department] caseworker may, in some circumstances, be the legal cause of a parent's separation from a child, even when the separation is imposed by court order" because, without a contested fact-finding hearing, the Department caseworker controls the flow of

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information to the court upon which dependency decisions are made. *Id*. at 83. The court's decisions may be impacted by the caseworker's concealment of information or negligent failure to discover material information. *Id*. at 83-84. On the other hand, "if all material information is presented to the judge, cause in fact will not be found if the complained of action is linked to the judge's decision." *Id*. at 86.

Tyner held that the Department's statutory duty to investigate extends to a parent, and exists apart from any action that the court may take. As we noted above, however, in a dependency under the exclusive jurisdiction of the tribal court, state statutes do not govern the procedure. To preserve tribal sovereignty, RCW 13.34.138 must yield to tribal law in a tribal court dependency.

Mathieu argues that the Department had a duty to investigate Martinez as the children's custodian. But the Department's duty to investigate, as recognized in *Tyner*, does not come from its status as custodian, but rather from the statute. While acknowledging that Yakama Tribal Court had exclusive jurisdiction over the dependency in this case, Mathieu fails to point to a similar statutory duty to investigate under the Yakama Nation Children's Code. Nor does Mathieu point to any order by the tribal court directing the Department to investigate Martinez and provide information to the court.

To the extent that Mathieu argues that RCW 26.44.050 implies a concomitant duty to report accurate information concerning placement decisions to the court, the argument must also fail. *Tyner* did not involve a placement decision, and neither RCW 26.44.050

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nor its duty to investigate applies to placement decisions. As then Chief Justice Stephens explained in her concurring opinion in *Wrigley*:

> The State's duty to evaluate the suitability of a potential placement is separate and distinct from the State's duty to investigate allegations of child abuse under former RCW 26.44.050. These duties arise in different contexts and at different times during the dependency process. The State's duty to investigate under former RCW 26.44.050 triggers the State's intervention into an allegedly abusive family unit and so necessarily precedes the placement decision process. The duty to investigate under former RCW 26.44.050 cannot arise within the dependency and placement process itself. Rather, once the State has investigated a report under former RCW 26.44.050 and concluded the child should be removed and placed elsewhere, its investigation into potential placement options must be conducted pursuant to RCW 13.34.065 and other portions of Washington's comprehensive child welfare laws.

195 Wn.2d at 87 (Stephens, C.J., concurring). Thus, the Department had no duty under RCW 26.44.050 to provide accurate information concerning Martinez to the tribal court. Accordingly, the court did not err by dismissing Mathieu's negligence claim based on an alleged duty to provide accurate information.

4. Common law duty of protection based on a continuing special relationship

Mathieu's final claim against the Department is that it had a common law duty, even after the dependency was dismissed, to supervise and control Martinez's conduct and to use reasonable care to protect A.J. and M.J. from Martinez's abuse and neglect because the Department had a continuing special relationship with the children.

Common law does not recognize a duty to protect others from a third party's criminal acts, except where "'a special relationship exists between the defendant and

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either the third party or the foreseeable victim of the third party's conduct.'" *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994) (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)). This special relationship exception is described in *Restatement (Second) of Torts* § 315 (AM. L. INST. 1965):

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

In *H.B.H.*, our state Supreme Court recognized that the Department's "legal duty under the principles of § 315(b) furthers the overarching purpose of Washington's child welfare laws 'to safeguard, protect, and contribute to the welfare of the children of the state,'" and held that the Department "stands in a special relationship with foster children in its charge." 192 Wn.2d at178, (quoting RCW 74.13.010). "Under the theory of *Restatement* § 315(b), this special relationship supports recognition of a duty in tort to protect foster children from foreseeable harms at the hands of *foster parents*." *Id*. (emphasis added).

The Department argues that during the tribal court dependency, A.J. and M.J. were wards of the tribal court, not the Department, so the Department could not have had a special relationship with the children. This argument is not convincing. Although the tribal court's March 2007 order entered after a fact-finding hearing found that A.J. and

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M.J. were wards of Yakama Nation, it also ordered that "[c]ustody and supervision of the child[ren] is awarded to: [Department of Children and Family Services]" and that the Department "has authority to place the child[ren] in foster/relative care." CP at 2012. Because the children were removed from their parent and entrusted to the care of the Department, the Department's argument that it did not have a special relationship with A.J. and M.J. during the dependency fails.

Nevertheless, the holding in *H.B.H.* is limited to the preadoption period of a dependency or termination proceeding. *See* 192 Wn.2d at 161 (stating, "On appeal, the foster children argued that the trial court erred in dismissing their claims of negligence by [Department of Social and Health Services] concerning the preadoption period."). Neither *H.B.H.* nor any other Washington case law has extended the holding in *H.B.H.* to the period following adoption or dismissal of a dependency or termination proceeding. And no Washington case law has applied *H.B.H.* to a negligence action arising out of tribal court dependency proceedings.

While Mathieu contends the Department's special relationship to A.J. and M.J. did not end with the dismissal order, he offers no supporting authority for the contention. Although imposing such a duty under the circumstances of this case is appealing, such a duty would have unintended consequences. Parents have a fundamental, constitutional right to the care and custody of their children—a right that yields to the State's parens patriae right to intervene and remove children from their homes and place them into

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foster care only "[w]hen a child's health, safety, and welfare are seriously jeopardized by parental deficiencies[.]" *H.B.H.*, 192 Wn.2d at 163-64. Once the State exercises its parens patriae right to intervene, it "has a statutory and constitutional duty to ensure that those children are free from unreasonable risk of harm . . . while under the State's care and supervision." *Id*. at 164.

That duty is no longer triggered after dismissal of a dependency because the children are no longer entrusted to the Department or under the State's care and supervision. They are under their parent's care and supervision. Therefore, the dismissal of a dependency proceeding restores the primacy of a parent's fundamental constitutional right to rear their children without State interference. And the State may not intervene again unless a child's health, safety, and welfare are again seriously jeopardized. Indeed, *H.B.H.* acknowledges that the Department "retains legal custody of the child [only] throughout the *duration of the dependency*," not after the dependency has been dismissed. *Id*. at 174 (emphasis added). RCW 13.34.020 declares a legislative purpose of nurturing the family unit and keeping a family intact unless the parents jeopardize a child's right to basic nurture, health, and safety. Thus, *H.B.H.* does not support Mathieu's negligence claim based on an alleged postdismissal special relationship between the Department and the twins. The claim fails for lack of a duty. Accordingly, the trial court did not err by dismissing it.

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Because we hold that the Department did not owe a statutory duty to investigate Martinez during the dependency, or a common law duty to supervise Martinez after the dependency was dismissed, we do not decide whether disputed issues of fact pertaining to breach and causation should prevent summary judgment.

2. DID TRIUMPH OWE A COMMON LAW DUTY TO THE CHILDREN?

We next consider whether Triumph owed A.J. and M.J. common law duties to protect them from the abuse and neglect inflicted by Martinez based on the existence of a special relationship. Mathieu asserts that a special relationship exists because Triumph received public funds to provide services to women like Martinez and her children through Triumph's PCAP and to Martinez as a tenant in one of Triumph's apartments in its clean and sober housing program.

As we explained above, we review de novo the summary judgment dismissal of claims against Triumph. *Turner*, 198 Wn.2d at 284. The existence and scope of a duty in a negligence action is a threshold question of law reviewed de novo. *Id*. Whether a legal duty exists "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Snyder*, 145 Wn.2d at 243 (quoting *Lords*, 75 Wn. App. at 596.)

An exception to the general rule that there is no duty to prevent a third party from causing injury to another is the development of a special relationship. *Lauritzen*, 74 Wn. App. at 438. A legal duty may arise in two ways: when a special relationship develops between the defendant and either a third party or the foreseeable victim of the third

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party's conduct. *Id*. Though special relations depend largely on context, all share in common (1) the presence of a relationship, (2) the entrustment of one party's well-being to the other, and (3) a financial benefit to the party entrusted with the care of the other. *Id.* at 439-41.

Although not entirely clear, Mathieu argues that both exceptions apply: Triumph developed a special relationship with both Martinez and the twins giving rise to a duty to protect the twins from their mother's conduct. Mathieu's briefing does not treat the two exceptions separately and tends to blend the theories. We address the exceptions in turn.

1. § 315(a) Special Relation with Martinez

Under § 315(a) of the *Restatement*, Triumph would have a duty to protect the children from Martinez's criminal conduct if there was a special relationship between Triumph and Martinez that imposed a duty upon Triumph to control Martinez's conduct. The *Restatements* give examples of a parent's duty to control their child's conduct, an employer's duty to control the conduct of its employee even when acting outside the scope of employment, and the duty of a possessor of land to control the conduct of a licensee. RESTATEMENT §§ 316, 317, 318 (AM. L. INST. 1965). Our Supreme Court has also held that a special relationship exists between psychiatrists and their inpatient and

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outpatient patients. *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983); *Volk v. DeMeerleer*, 187 Wn.2d 241, 262-63, 386 P.3d 254 (2016).[2]

Mathieu does not cite any cases from Washington or any other jurisdiction that have recognized a special relationship between a social services nonprofit and its client sufficient to create a duty to third parties under *Restatement* § 315(a). Mathieu is correct that a defendant need not exert physical control over a third person to create a special relation under this exception, *see Taggart v. State*, 118 Wn.2d 195, 219, 223, 822 P.2d 243 (1992). However, some type of control is still a necessary element of a special relation under *Restatement* § 315(a), and Mathieu does not articulate the type or degree of control needed to create a special relationship under these circumstances. Instead of addressing control, Mathieu argues that Triumph's business model, along with the fact it contracts with Martinez and the State created goals and contractual obligations. Appellant's Opening Br. at 54.

Martinez had two connections with Triumph: (1) she was enrolled in Triumph's PCAP; and (2) she was a tenant in a Triumph-owned apartment. Triumph contends that neither connection afforded Triumph any ability to control Martinez's actions, especially with respect to her children. We agree. PCAP is an advocacy and research program that

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[2] Mathieu does not argue that Triumph's caseworkers are mental health professionals pursuant to the Supreme Court's decision in *Volk*. We do not address this issue because it was not raised.

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utilizes advocates who engage with and help pregnant or new mothers with a history of substance abuse connect to relevant community services; it is not a social work or child protection program. A mother's participation in PCAP is voluntary. PCAP advocates are not social workers, clinical professionals, or treatment providers; they have no authority to control the mother or to compel her to participate. PCAP's voluntary engagement model is inconsistent with the characteristics of a special relationship.

Nor did Martinez's residence in a Triumph-owned apartment create the ability to control Martinez. That Agreement was independent of Martinez's participation in the assistance program. And though the Agreement required Martinez to remain clean and sober, Triumph would generally not evict a tenant who relapsed. The apartment was not a residential treatment facility, and rules relating to Martinez's expected conduct did not legally obligate Triumph to ensure or investigate her sobriety. The Agreement gave Triumph the right to inspect the apartment for damage, but neither Martinez nor her children were required to be present during this inspection.

For the first time on appeal, Mathieu argues that a special relationship between Triumph and Martinez developed under *Restatement (Second) of Torts*, § 318 (AM. L. INST. 1965), which requires a landowner to prevent a *licensee* from intentionally harming another. Appellant's Opening Br. at 57-60. Mathieu did not allege the existence of a duty under § 318 of the *Restatement* either in his complaint or on summary judgment, and

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the trial court did not rule on the issue. We decline to address the issue. RAP 2.5(a)[3]; RAP 9.12[4]. Mathieu does not establish that Triumph could exert control of Martinez's conduct and thus fails to establish a special relationship between Triumph and Martinez under *Restatement* § 315(a).

2. § 315(b) Special Relation with the Children

Triumph would also have a duty to protect the twins from the criminal conduct of their mother if it had a special relation with the twins, which gives the twins a right to protections. RESTATEMENT § 315(b). The protective duty imposed by this special relation is based on an element of entrustment. *Turner*, 198 Wn.2d at 287. In the context of vulnerable children, the special relationship is one of parens patriae. *H.B.H.*, 192 Wn.2d at 171. "Rather than physical custody or control, vulnerability and 'entrustment for the protection of a vulnerable victim . . . is the foundation of a special protective relationship,'" under this exception. *Turner*, 198 Wn.2d at 287 (alteration in original) (quoting *H.B.H.*, 192 Wn.2d at 173). "[I]n all the situations where a special relationship has been recognized, the party that has been found to have a legal duty was in a position to provide protection from foreseeable criminal acts of third parties because he or she had

[3] "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a).

[4] "On review of an order granting . . . a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12.

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control over access to the premises that he or she was obliged to protect." *Lauritzen*, 74 Wn. App. at 440-41. "Furthermore, most of the existing special relationships involve situations where the prospective defendant (employer, innkeeper, business owner) is benefiting financially from the prospective plaintiff (employee, guest, business invitee)." *Id*. at 441.

Examples under this exception include the Department's duty to protect preadoption children in foster care from the criminal acts of foster parents. *H.B.H.*, 192 Wn.2d at 178; *see also McLeod v. Grant County. Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953) (school has duty to protect its students from reasonably foreseeable dangers); *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (group home has duty to its vulnerable residents); *Caulfield v. Kitsap County*, 108 Wn. App. 242, 256, 29 P.3d 738 (2001) (county has a duty to disabled adults when county provides in-home caregivers); *R.N. v. Kiwanis Int'l*, 19 Wn. App. 2d 389, 407, 496 P.3d 748 (2021)(group care facility had a duty to protect foster children in its care from intentional torts of third persons).

Mathieu misconstrues the special relation under *Restatement* § 315(b) by arguing that the Triumph's business model constitutes "entrustment and assumption of a protective duty" to "drug-addicted mothers who may foreseeably harm their children." Appellant's Reply Br. at 34. Essentially, Mathieu claims that Triumph was entrusted with the care of Martinez and this relation created a duty for Triumph to protect the

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children from their mother. This exception, however, is based on a relationship between the defendant (Triumph) and the vulnerable person (the children); not with the third party (Martinez).

In *McLeod*, the relationship between the plaintiff and defendant was that of a school district and school child. 42 Wn.2d at 319. The Court described the relationship as follows:

> It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. The result is that the protective custody of teachers is mandatorily substituted for that of the parent.

Id. (internal citations omitted).

Here, Mathieu does not attempt to describe the relationship between Triumph (in its PCAP capacity) and A.J. or M.J. Nor does he offer any evidence that the twins were entrusted to the care and protection of Triumph. He merely offers the conclusory argument that Triumph had a protective relationship with A.J. and M.J. because its PCAP staff was responsible for conducting home visits and developing a safety plan for A.J.'s and M.J.'s protection.

A review of the record regarding Triumph's PCAP and housing program shows Triumph had no relationship with A.J. or M.J. of the nature described in *McLeod*. A.J. and M.J. were not compelled to attend Triumph programming or obey Triumph's rules and authority. Triumph did not have custody of A.J. or M.J. at any time or act as a

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substitute parent. Instead, Triumph had a relationship with Martinez. She was an enrolled client in Triumph's PCAP program and a tenant of one of Triumph's clean and sober housing apartments. *See* CP at 1072.

Mathieu also suggests that whether a special relation existed is a disputed factual issues and the parties' disagreement about whether the PCAP model sets forth mandatory duties or simply best practices raises a genuine issue of material fact for trial. This argument disregards how Washington courts determine whether a duty exists. Again, the "existence of a legal duty is a question of law and 'depends on mixed considerations of logic, common sense, justice, policy, and precedent.'" *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (internal quotation marks omitted) (quoting *Snyder*, 145 Wn.2d at 243). The determination of the issue does not depend on the PCAP model's mandatory or optional nature. The two factors to be considered when determining a defendant's legal duty are (1) "the relationship between the parties," and (2) "the general nature of the risk." *McLeod*, 42 Wn.2d at 319.

Mathieu produced no evidence that Triumph/PCAP was entrusted with A.J.'s and M.J.'s well-being. When A.J. and M.J. were living in Triumph housing, A.J. and M.J. were entrusted to and in the custody of either the Department or Martinez.

Mathieu has failed to demonstrate that Triumph had a special relation with either Martinez or the children sufficient to give rise to a duty on Triumph's part to protect the

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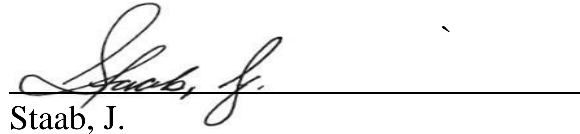
children from the criminal acts of their mother. The trial court did not err by dismissing Mathieu's negligence claims against Triumph.

Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.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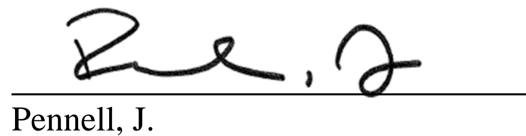
WE CONCUR: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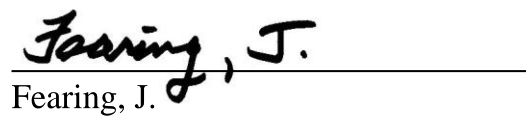
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