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NO. 33720-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

RONALD JAY BIANCHI

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before

The Honorable John F. Nichols

OPENING BRIEF OF APPELLANT

Ronald Jay Bianchi, Pro se
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326

pm 6/27/06

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A. ASSIGNMENTS OF ERROR

1. The Superior Court judge erred when he wrongly granted the States Defendants motion for Summary Judgment on the grounds of Collateral Estoppel.

2. The Superior Court Judge erred when he wrongly granted the States Defendants motion for Summary Judgment on the grounds of Res judicata.

3. The Superior Court Judge erred when he wrongly granted the States Defendants motion for summary Judgment on the grounds of Absolute Immunity.

4. The Superior Court erred when he wrongly granted the States Defendants motion for Summary Judgment on the grounds of Qualified Immunity.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the States Defendants provide sufficient evidence to have the appellants civil suit barred by Collateral Estoppel, when the appellant has not had a full and fair opportunity to present his case, (the issues he raised in his July 16th, 2002 tort claims)? Assignment of Error No.1.

2. Did the States Defendants provide sufficient evidence to have the appellants civil suit barred by Res judicata, when the appellant raised the violation of his parental rights two and a half months before the court

entered it's dependency order regarding the appellant, and sixteen months before the State filed a petition to terminate the appellants' parental rights? Assignment of Error No. 2.

3. Did the State Defendants provide sufficient evidence to receive Absolute Immunity from tort liability? Assignment of Error No. 3.

4. Did the State Defendants provide sufficient evidence to enjoy Qualified Immunity, when they failed to (1) carry out their statutory duties, (2) according to procedures dictated by statute or superiors, and (3) act reasonably? Assignment of Error No. 4.

C. STATEMENT OF THE CASE

On June 20, 2005, Michael E. Johnston, Assistant Attorney General, Counsel for the States Defendant filed a Motion for summary judgment in the Superior Court in and for Clark County Washington. (CP Page No. 1). On the grounds of: Collateral Estoppel, Res Judicata, Absolute Immunity, and Qualified Immunity.

The Appellant filed a Motion for extension of Time To Respond To Defendant's Motion for Summary Judgment. (CP Page No. 3). If the Judge would have granted the Appellants Motion for Extension of Time, the appellant would have been able to properly argue against the States Defendants Motion for

D. ARGUMENT

1. THE STATE DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE GROUNDS OF COLLATERAL ESTOPPEL.

'Collateral Estoppel (or issue preclusion)' means simply that when an issue of ultimate facts has once been by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. 'Tili, 148 Wn.2d at 360 (citing Ashe, 397 U.S. at 443).

Application of the doctrine of Collateral Estoppel requires the States Defendants to prove the following:

(1) identity between the issue decided in the prior adjudication; (2) a final judgment on the merits; (3) that the against whom the plea is asserted be a party or in privity with a party to the prior adjudication; and (4) that the application of the doctrine not work an injustice on the party against whom it is asserted. See Shoemaker v. Bremerton, 109 Wa.2d 504, 507-08, 745 P.2d 858 (1987); State v. Cleveland, 58 Wash. App. 634, 639, 794 P.2d 546, review denied, 115 Wash. 2d 1029 (1990); Cer. denied, U.S. 113 L.Ed. 2d 468, 11 S.Ct. 1415 (1991). (quoting Hanson v. City of Snohmish, 65 Wash. App. 441, 828 P.2d 1133.)

[1] The party asserting the doctrine of collateral estoppel bears the burden of proving that the issues in both cases were identical. Beagles v. Seattle-First Nat'l Bank. 25

Wash. App. 925, 929, 610 P.2d 962 (1980). See also State Farm Mut. Auto. Ins. Co. v. Amirpanahi, 50 Wash. App. 869, 871, 751 P.2d 329, Review denied, 111 Wa.2d 1012(1988).

The States defendants are claiming that the issues raised in this civil suit are the same as the issues presented in the termination of the Appellants' parental rights. They are not.

The issues presented in the prior adjudication "petition for termination of parental rights" where: (1) the child has been found dependent; (2) the court has entered a dispositional order; (3) the child has been removed from the custody of a parent for at least 6 months; (4) the services capable of correcting parental deficiencies have been offered or provided; (5) "That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future."; and (6) "That continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home".

To prove Tertious Interference with parental rights and Alienation of Affection the following must be proven:

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(1) An existing family relationship; (2) A interference with the relationship by a third person; (3) An intention on the part of the third person that such interference results in the loss of affection or family association; (4) A causal connection between the third party's conduct and the loss of affection; (5) That such conduct resulted in damages.

Thus, the two are not the same. One was the termination of parental rights, the other is a intentional tort claim for the tortious interference with parental rights and alienation of affection which caused the appellant to suffer server emotional distress and mental anguish, before the State Defendants even filed a petition to terminate the Appellants parental rights.

Collateral Estoppel will only apply if the court finds that the party to be collaterally estopped has had a full and fair opportunity to present his or her case. Clausing, 47 Wn. App. at 680. Which the Appellant has not had that opportunity.

This is a lawsuit in continuance of the Tort Claims filed on July 16th, 2002. Which have not been litigated to a final judgment. Those tort claims were filed on the grounds that the States Defendants' had not done their statutory duty to notify the appellant, and where denying him of his parental right to have a parent-child relationship with his children. Which caused the alienation of affection, loss of

companionship, an impaired relationship with his children, all of which caused the appellant to suffer severe emotional distress and mental anguish.

The appellant was entitled to the damages claimed in those tort claims under RCW 4.56.250(1)(b). And it would work an injustice to deny compensation for the damages suffered just because the States Defendants were able to get his parental rights terminated before he was able to file this civil suit after the State department of risk Management denied his tort claims.

2. THE STATES DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE GROUNDS OF RES JUDICATA

A party asserting res judicata must establish "a concurrence of identity" in (1) subject matter, (2) cause of action, (3) person and parties, and (4) quality of the person for or against whom the claims is made. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn.App. 401, 401-11, 54 P.3d 687 (2002), review granted, 149 Wn.2d 1017, 72 P.3d 761 (2003).

To determine whether two causes of action are the same. The following four factors are examined:

(1) whether rights or interests in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is

presented in the two actions, (3) whether they arise out of the same transactional nucleus of facts. Hayes v. City of Seattle, 131 Wn.2d 706, 713, 934 P.2d 1179 (1997) (quoting Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983)).

Although both the dependency/termination petition and this Intentional tort, have to do with parental rights, they are not the same. The Intentional tort is over the emotional distress and mental anguish that the appellant suffered as a direct result of the denial of his parental rights to have a parent-child relationship by the State Defendants before a dependency/termination petition was filed. The original tort claims were filed on July 16th, 2002. A whole two and a half (2½) months before the court entered its dependency order regarding the appellant on October 1, 2002. And almost sixteen (16) months before the State filed a petition to terminate the appellants' parental rights. The State Defendants are not allowed to violate some-one's parental rights just because they think they might be able to later terminate those same rights. And the dependency/termination petition of the appellants' parental rights were not a civil suit at all.

The Appellant was entitled to the damages he requested in those July 16th, 2002, Tort Claims under RCW 4.56.250(1)(b). The State Defendants had not even filed a dependency petition with regards to the appellant at that time. The

States Defendants should not be able to benefit just because the Office of Risk Management denied the claims, and the States Defendants were later able to get the appellants parental rights terminated before he was able to figure out how to file a Civil Suit on those same grounds.

3. THE STATES DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE IMMUNITY

The States Defendants in this case are not shielded by absolute immunity. *Babcock v. State*, 116 Wash. 2d 596, 809 P.2d (1991) (*Babcock II*). In its analysis, the *Babcock II* court first considered whether the case workers were entitled to quasijudicial absolute immunity. The *Babcock II* court rejected such a notion, recognizing that under absolute immunity, a caseworker could deliberately put a child in a foster placement with a known rapist and escape tort liability. *BabcockII*, at 606.

The case at hand is not about whether the case worker knowingly placed a child in danger. It is about the States Defendants knowingly, willfully, and deliberately violating the appellants rights to have a parent-child relationship with his child before the States Defendants got the court to limit or deny those rights. The States Defendants can't claim they didn't know that the appellant wanted to have a

parent-child relationship "as the appellant wrote three letters requesting one, and the Stated Defendants clearly chose to not respond to those requests".

Noting that the Legislature has extended only a qualified immunity under RCW 26.44.056 to caseworker who must remove children from their homes in emergency situation, RCW 26.44.056(3) states: "A child protective services employee, an administrator, doctor, or law enforcement officer shall not be held liable in an civil action for the decision for taking the child into custody, if done in good faith under the section." The Babcock II court stated that where the Legislature has not seen fit to grant absolute immunity, it would be inappropriate for the court to do so for politically unaccountable caseworker. Babcock II, at 607.

No where has Legislature given absolute immunity, or even qualified immunity for the Tortious Interference with parental rights or Alienation of Affection with caseworker just simply refused to respond to the parents request to have contact with their child. The States Defendants should not be allowed to deprive a parent of a relationship with their child just because at some point the State might be able to terminate that parents parental rights.

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4. THE STATES DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE GROUNDS OF QUALIFIED IMMUNITY

In-order for the States Defendants to enjoy qualified immunity for their actions during the course of investigating child abuse/neglect cases they must:

(1) carry out a statutory duty, (2) according to procedures dictated by statute or superiors, and (3) act reasonably. Babcock, 116 Wash. 2d at 618.

The States Defendants did not carry out their statutory duties to notify the appellant as set fourth in RCW 13.34.060, or allow him to have any type of contact with his children as set fourth in RCW 13.34.136. They did not act according to the procedures of the Department of Child and Family Services Manual Section 26.53, which provides: "That DCFS staff have a statutory duty to notify the child's parents at the earliest point of time that will not jeopardize the safety and protection of the child and the course of the investigation." And the States Defendants did not act reasonable when they chose to not respond to the written requests from the appellant, asking for his parental right to have a parent-child relationship with his children.

The Legislature established the right to sue the state for common law tort when it waived sovereign immunity. The law of 1963, ch. 159, § 2, codified at RCW 4.92.090 ("the

state of washington... shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation"). The state and its subdivisions have since been held to the same general duty of care to which private individuals are held - that of a reasonable person under the circumstances. See *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.d 845 (2002).

A reasonable person would have notified the appellant when they took custody of his children and were investigating the possibility of child abuse/negenct, and would have responded to the appellants letters requesting to have a parent-child relationship with his children.

Washington Court have ruled that the State and its employees are not immune from suit for their negligent or tortious actions during the course of investigating cases of child abuse/negent. Here are just a few such cases: *Tyner v. State of Washington Dep. of Social & Health Services*, 141 Wash. 2d at 68 (2000); *M.W. v. Department of Health Services*, No. 26377-7-II (2002); *Babcock v. The*, 116 Wash. wd 596, 809 P.2d 143 (1991); *Lesley v. State*, 921 P.2d 1066, 83 Wash. App. 263 (1996); *Giliam v. State*, 89 Wash. App. 569, 950 P.2d 20 (1998); *Yorker v. State*, 930 P.2d 958, 85 Wash. App. 71 (1997).

In *Lesley v. State* 921 P.2d 1006, 83 Wash. App. 263. The Court noted that, in any case, the State does not enjoy the

qualified immunity of its employees in this context. See *Savage v. State*, 127 Wash. 2d 434, 438, 447, 899 P.2d 1270 (1995) (State did not share its parole officers' qualified immunity even when liability was based solely on respondent superior); *Babcock*, 116 Wash. 2d 620 (declining to extend the qualified immunity afforded to DSHS caseworker to the state agency).

So even if for some unforeseen reason this court granted the caseworkers some-type of immunity, The State and DSHS would not share that immunity and are still liable for the appellants server emotional distress and mental anguish in this case.

RCW 4.92 is entitled "Actions and Claims Against the State", and RCW 4.92.090 provides that the State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

In a lawsuit based on negligent investigation, a case worker may be legally responsible for a parent's separation from a child, even when the separation is imposed by court order, but only if the court has been deprived of a material fact due to the case worker's faulty investigation. *Tyner*, 141 Wn. 2d at 86.

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The States Defendants investigation in this case was so negligent that they did not even investigate their own statutory duties to act reasonable. They did not notify the appellant that they were investigating the possibility that his children were the victim of child abuse/neglect; that his children were taken into DSHS/CPS custody; or when DSHS/CPS filed a dependence petition even after the appellant wrote to the DSHS/CPS case worker. The States Defendants negligently investigated the appellants' right to have a parent-child relationship before refusing to respond to his request to have one, and they negligently investigate the appellants passed parent-child relationship which would have established that he did in fact have a parent-child relationship with both his daughter and step-son before the appellant wrote DSHS/CPS's case worker requesting to be allowed to write to his children. The States Defendants even negligently investigated their own duty to have the court limit or deny the appellant of his parental right to have a parent-child relationship before choosing to deny him one. This negligence clearly deprived the court of a material fact and deprived the court of its authority to decide whether or not to limit or deny the appellant of his parental right to have a parent-child relationship.

The Appellant argues that the States Defendants negligent investigation and tortious conduct deprived him of his

constitutional liberty interest in family unity. The Supreme Court has recognized an abstract fundamental liberty interest in family integrity. *Lehr v. Roberton*, 463 U.S. 248, 258, 103 S.Ct. 2985, 77 L.Ed. 2d 614 (1993); *Santosky v. Kramor*, 455 U.S. 745, 748, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982). A parent may not be deprived of the companionship of his child without due process of the Law. *Santosky*, 455 U.S. at 747-48.

E. CONCLUSION

The Appellant, is not collaterally attacking the termination of his parental rights, he is continuing the intentional tort claims that was raised two and a half (2½) months before a dependency petition was entered. So his issues are not barred by Collateral Estoppel.

The issues raised in the Appellants' Tort are not the same issues presented in the termination of his parental rights and would not destroy or impair that ruling. So the Appellants' claims should not be barred by Res Judicata.

The States Defendants do not enjoy either Absolute nor Qualified Immunity for their knowingly, willfully, and deliberately violating the appellant's parental rights during the course of investigating the possibility of child abuse/neglect.

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For the foregoing reasons, The Appellant respectfully request that this Court vacate the order granting Summary Judgment and to reinstate his civil suit in this matter.

RESPECTFULLY SUBMITTED, this 26 day of June 2006.


Ronald Jay Bianchi # 729044

APPENDIX "A"

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STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT

RONALD JAY BIANCHI,

Plaintiff,

v.

THE STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, CHILD
PROTECTIVE SERVICES, et al.,

Defendants.

NO. 04-2-04151-5

DEFENDANTS' MEMORANDUM
IN SUPPORT OF SUMMARY
JUDGMENT

Defendants State of Washington, Department of Social and Health Services (DSHS), Child Protective Services (CPS), Tyrone Fritz, Jane Doe Fritz, Kevin Storm, and Jane Doe Storm (collectively State Defendants), submit the following memorandum of authorities in support of their motion for summary judgment of dismissal of all of plaintiff's claims.

I. STATEMENT OF UNDISPUTED FACTS

A. Plaintiff Is Serving a 72-Year Prison Sentence

On October 17, 1997, the plaintiff was arrested for his participation in a violent bank robbery and car chase that left his two accomplices dead. Declaration of Bonnie Y. Terada, ¶ 5, Exhibit D, Finding of Fact 1.10. The plaintiff subsequently pleaded guilty to 13 felonies, including multiple counts of first degree robbery, and attempted murder. Declaration of Ross

1 Brown, ¶ 3, Exhibit A at 1-3. The trial court imposed a standard-range sentence, with
2 enhancements, of 864 months (72 years). Decl. of Brown, *supra*, ¶ 3, Exhibit A at 9.

3 At the time of the plaintiff's arrest, Rachel Barnes was pregnant with F.W.B., his
4 daughter.¹ Decl. of Terada, *supra*, ¶ 5, Exhibit D, Finding of Fact 1.1. F.W.B. was born on
5 February 15, 1998, approximately four months after the plaintiff's arrest and confinement. *Id.*
6 F.W.B. and the plaintiff have never met face-to-face. Decl. of Terada, *supra*, ¶ 5, Exhibit D,
7 Finding of Fact 1.9.

8 **C. Plaintiff Not The Father of J.B., F.W.B.s' Half- Brother**

9 Ms. Barnes also has a son, J.B., born March 13, 1995, fathered by a man other than the
10 plaintiff. Decl. of Brown, *supra*, ¶ 4. There is no evidence that plaintiff had legal custody of
11 J.B., paid child support for J.B., or adopted J.B.

12 **D. F.W.B. And J.B. Found To Be Dependent Pursuant to Agreed Order**

13 On January 4, 2002, Ms. Barnes' boyfriend placed F.W.B. and J.B. into State custody
14 while Ms. Barnes was hospitalized for drug and mental health issues. Decl. of Brown, *supra*,
15 ¶¶ 4-5. On January 7, 2002, Ms. Barnes signed a voluntary agreement placing F.W.B. and
16 J.B. into foster care. Decl. of Brown, *supra*, ¶ 5, Exhibit B. She renewed the voluntary
17 placement agreement on May 6, 2002. *Id.* The child welfare caseworker assigned to the
18 matter was Tyrone Fritz. *Id.*

19 The State filed dependency petitions with regard to both F.W.B. and J.B., and, on
20 October 1, 2002, the Court entered an agreed dependency order regarding F.W.B. Decl. of
21 Brown, *supra*, ¶ 6, Exhibit C. The plaintiff consented to the order via signature of his
22 appointed counsel. *Id.* The plaintiff did not appeal the dependency order.

23 On September 12, 2003, subsequent to Ms. Barnes' petitions to relinquish her parental
24 rights, the Clark County Superior Court entered findings of fact, conclusions of law, and

25 ¹ In accordance with GR 31, this memorandum will reference the concerned minor children solely by
26 their initials, F.W.B. and J.B..

1 orders terminating the parent-child relationships between Ms. Barnes and both F.W.B. and
2 J.B. Decl. of Brown, *supra*, ¶ 7, Exhibit D.

3 **E. This Court Terminated Plaintiff's Parental Rights As To F.W.B.**

4 On November 4, 2003, the State filed a petition to terminate the plaintiff's parental
5 relationship with F.W.B.. Decl. of Terada, *supra*, ¶ 2, Exhibit A. On December 19, 2003, the
6 Court appointed counsel to represent Mr. Bianchi in the termination proceeding. Decl. of
7 Terada, *supra*, ¶ 3, Exhibit B.

8 With the aid of appointed counsel, the plaintiff contested the termination matter with
9 respect to F.W.B. at a March 5, 2004 evidentiary hearing. Decl. of Terada, *supra*, ¶ 4, Exhibit
10 C. The plaintiff alleged at the evidentiary hearing, among other things, that Tyrone Fritz and
11 Kevin Storm, the caseworker who took over the dependency and termination matters from Mr.
12 Fritz, had failed to give him notice of the foster care placement, failed to respond to his letters,
13 and prevented him from having contact with F.W.B. and J.B.. *Id.*

14 On March 5, 2004, the termination court entered findings of fact, conclusions of law,
15 and an order terminating the parent-child relationship between the plaintiff and F.W.B. Decl.
16 of Terada, *supra*, ¶ 5, Exhibit D. The court found, among other things, "Ronald Jay Bianchi is
17 unfit to continue the parent-child relationship." *Id.* at 2, Finding of Fact 1.14. The court also
18 found, "[t]ermination of parental rights is in the best interests of the child." *Id.* at 2, Finding
19 of Fact 1.15.

20 **F. Plaintiff Appealed The Termination Order And Lost**

21 The plaintiff appealed the order terminating his parental right to F.W.B., challenging
22 solely the termination court's finding and conclusion as to lack of available services. Decl. of
23 Terada, *supra*, ¶ 6, Exhibit D at 2, Finding of Fact 1.11. On November 3, 2004, a
24 commissioner of the Washington State Court of Appeals, Division II, affirmed the order
25 terminating the plaintiff's parental rights with regard to F.W.B. Decl. of Terada, *supra*, ¶ 7,
26 Exhibit E. The plaintiff did not move to modify the commissioner's ruling. Decl. of

1 Terada, *supra*, ¶ 8. The Court of Appeals' mandate was filed in the Clark County Superior
2 Court on December 17, 2004. Decl. of Terada, *supra*, ¶ 8, Exhibit F.

3 **G. Plaintiff Filed This Lawsuit Against State Defendants**

4 On August 16, 2004, the plaintiff filed a summons and complaint against the State
5 Defendants in the Clark County Superior Court. Docket Sub. # 3.

6 **II. ISSUES**

- 7 1. Does the plaintiff lack standing to seek injunctive relief?
- 8 2. Do the doctrines of collateral estoppel and res judicata bar the plaintiff's attack on
9 the superior court's termination orders?
- 10 3. Did the State Defendants have an actionable duty to notify the plaintiff, who is
11 serving a 72-year prison sentence, of the custodial parent's voluntary placement of her
12 children into foster care?
- 13 4. Does the plaintiff establish a prima facie claim of negligent investigation?
- 14 5. Does the plaintiff establish a prima facie claim of outrage?
- 15 6. Does the plaintiff establish a prima facie claim of alienation of affections?
- 16 7. Does the plaintiff establish a prima facie claim of abuse of process?
- 17 8. Does the plaintiff establish a prima facie claim of disparate treatment?
- 18 9. Does the plaintiff establish a prima facie claim of constitutional violations?
- 19 10. Did the State Defendants violate the Consumer Protection Act in their handling of
20 the dependency and termination matters?

21 **III. EVIDENCE RELIED UPON**

- 22 1. Declaration of Bonnie Y. Terada and exhibits A through F attached thereto.
- 23 2. Declaration of Ross Brown and exhibits A through D attached thereto.

24 **IV. STANDARD OF REVIEW**

25 "The purpose of summary judgment is to avoid a useless trial when there is no genuine
26 issue of any material fact." *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611

1 P.2d 737 (1980) (citing *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979)).
2 Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories
3 and admissions on file, together with the affidavits, if any, show that there is no genuine issue
4 as to any material fact and that the moving party is entitled to judgment as a matter of law.”
5 CR 56 (c).

6 A material fact is one upon which the outcome of the litigation, in whole or in part,
7 depends. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004);
8 *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). The
9 party seeking summary judgment bears the initial burden of demonstrating by uncontroverted
10 facts that no genuine issues exist. *Olympic Fish Products*, 93 Wn.2d at 602. After the moving
11 party has met that initial burden, the non-moving party may not rest on mere allegations or
12 speculation in its pleadings, but must respond by affidavit or other proper methods setting forth
13 specific facts showing there is a genuine issue for trial. *Brame v. St. Regis Paper Co.*, 97 Wn.2d
14 748, 752. “Speculation does not generate factual issues.” *Diamond Parking v. Frontier Bldg.*,
15 72 Wn. App. 314, 319, 864 P.2d 954 (1993).

16 In deciding the summary judgment motion, the court will view “all facts and
17 reasonable inferences in the light most favorable to the nonmoving party.” *Hisle*, 151 Wn.2d
18 at 860 (citing *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001)).
19 The court should grant summary judgment if reasonable persons could reach but one
20 conclusion. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998).

21 **V. SUMMARY OF ARGUMENT**

22 The plaintiff lacks standing to bring this lawsuit to force the State to allow contact
23 with the concerned children because he has no legally recognized parental relationship with
24 those children. The doctrines of collateral estoppel and res judicata bar the plaintiff’s
25 collateral attack on the Court’s properly entered termination orders. The State Defendants
26 were under no duty to notify the plaintiff that the custodial parent had voluntarily placed her

1 children in foster care. He cannot base a negligent investigation claim on a correct child
2 placement decision. The plaintiff failed to set forth facts supporting his claims of outrage and
3 alienation of affections. The plaintiff cannot show abuse of process. The plaintiff's argument
4 fails to establish disparate treatment and due process violations. The State and its agencies are
5 not persons amenable to suit under 42 U.S.C. § 1983. The plaintiff has failed to state an
6 actionable § 1983 claim against the individually named defendants. The Consumer Protection
7 Act does not apply to child dependency and parental rights termination cases.

8 VI. LAW AND ARGUMENT

9 A. The Plaintiff Lacks Standing to Seek Injunctive Relief With Regard to the 10 Concerned Children.

11 The plaintiff lacks standing to seek injunctive relief with respect to F.W.B. and J.B.
12 He asks the Court to restrain the State Defendants from denying or limiting his parental
13 relationship with those children.²

14 The plaintiff's parental rights with regard to F.W.B. no longer exist because of the
15 termination order that has now become final and no longer subject to appeal. That final
16 termination order is res judicata as to the plaintiff's total lack of a parental relationship with
17 F.W.B. "Under the express language of RCW 13.34.200, termination of parental rights
18 deprives a parent of standing to appear in all legal proceedings concerning his or her child."
19 *In re Dependency of G.C.B.*, 73 Wn. App. 708, 716-17, 870 P.2d 1037 (1994) (footnote
20 omitted).

21 By depriving a terminated parent of standing in all future legal
22 proceedings concerning the child, the Legislature recognized that
23 entry of a valid termination order severing the relationship
between the child and parent constitutes a final, unassailable

24 ² The plaintiff asks to withdraw his claim for injunctive relief at paragraph 5.1 of his "response" to the
25 defendants' answer. However, the defendants have also moved to have the plaintiff's reply stricken because it
26 was not ordered by the court pursuant to CR 7(a). Accordingly, the defendants address the injunctive relief issue
in response to the plaintiff's Complaint.

1 determination that such permanent termination is in the best
2 interest of the child.

3 *Id.* at 717 (footnote omitted).

4 Consequently, once a termination order entered pursuant to RCW 13.34.180-.190 becomes
5 final, the “parent whose rights have been terminated may not relitigate that issue through a
6 petition for adoption, *or through any other legal proceeding.*” *Id.* at 717 (citation omitted)
7 (emphasis added).

8 In *G.C.B.* Division One of the Court of Appeals held a woman whose parental rights
9 were terminated could not maintain a petition to adopt the child subject to the termination
10 order. *Id.* at 718. *G.C.B.* is persuasive by analogy. Here, the Court entered a proper order
11 terminating the plaintiff’s parental rights as to F.W.B. The Court of Appeals affirmed that
12 order, and further appeal is no longer possible. The plaintiff cannot relitigate the placement of
13 F.W.B. through this lawsuit. *See G.C.B.* at 717-18.

14 With regard to J.B., there is no evidence that the Plaintiff had any legally recognized
15 parental relationship with that child at any time. There is no evidence of a genetic relationship
16 between himself and J.B. There is no evidence that the Plaintiff ever had a parental
17 relationship with J.B. by adoption. And there is no evidence that the Plaintiff ever had a
18 lawful right to physical custody of J.B. *See Dependency of J.W.H.*, 147 Wn.2d 687, 696, 699-
19 701, 57 P.3d 266 (2002) (holding that persons having legal temporary custody of children
20 could intervene in a dependency action with regard to those children).

21 Finally, the plaintiff cannot show that, as a prisoner serving the front end of a very
22 long sentence, he is a viable custody option for either J.B. or F.W.B. *See generally Custody of*
23 *RRB*, 108 Wn. App. 602, 31 P3d 1212 (2001) (recognizing standing of biological parent who
24 had relinquished parental rights at time of adoption to later petition for custody of his child
25 under chapter 26.10 RCW).

1 In sum, the plaintiff lacks any standing whatsoever to bring an action seeking to
2 challenge termination of his parental rights.³ Accordingly, this court should dismiss the
3 plaintiff's claim for injunctive relief.

4 **B. The Plaintiff's Claims Arising From Properly Entered Child Placement**
5 **Orders are Barred by Collateral Estoppel and Res Judicata.**

6 Fundamentally, the plaintiff is waging an impermissible collateral attack on the
7 Court's valid termination order in the guise of a tort claim. His claims are barred by the
8 doctrines of collateral estoppel and res judicata.

9 **1. The Plaintiff is Collaterally Estopped from Relitigating Factual Issues**
10 **Arising From the Dependency and Termination Cases**

11 The plaintiff's claims must necessarily fail in the face of the doctrine of collateral
12 estoppel.

13 For collateral estoppel to bar a claim, the following requirements
14 must be met: identity of issues between the original and
15 subsequent action; a final judgment on the merits; the same party
or in privity with the prior party; and absence of injustice against
the party against whom the doctrine is being applied.

16 *Petcu v. State*, 121 Wn. App. 36, 71, 86 P.3d 1234 (2004) (citing *Rains v. State*, 100 Wn.2d
17 660, 665, 674 P.2d 165 (1983)).

18 "Collateral estoppel precludes a party from relitigating an issue of fact that the party
19 has already litigated to final judgment, so long as injustice does not result." *Miles v. Dep't of*
20 *Social & Health Servs.*, 102 Wn. App. 142, 153, 6 P.3d 112 (2000) (quoted with approval in
21 *Petcu*, 121 Wn. App. at 71). "Collateral estoppel is meant to provide finality to judgment
22 once a party has had the full opportunity to litigate an issue to conclusion." *Petcu*, 121 Wn.
23 App. at 71 (citing *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d
24 300 (2002)).

25 ³ These matters are moot as well; because the parental rights termination and adoption Orders are now
26 final and unappealable, this court can no longer provide any effective means of relief to the plaintiff.

1 The elements of collateral estoppel apply readily to this case. One of the central issues
2 common both to this case and the underlying termination action is the status of the plaintiff's
3 parental rights with respect to F.W.B. The prior action resulted in a final judgment
4 terminating the plaintiff's parental rights with regard to that child. The plaintiff was
5 necessarily a party to both the dependency and termination matters, and the State was a prior
6 party or a party in privity in the previous action by virtue of its *parens patriae* interest in the
7 matter. See *In re Dependency of T.R.*, 108 Wn. App. 149, 159, 29 P.3d 1275 (2001)
8 (discussing the State's *parens patriae* interest in a termination proceeding). And there is no
9 injustice in asserting the collateral estoppel against the plaintiff because he had a full and fair
10 opportunity to contest the termination matter and his allegations of improper handling of the
11 matter by Mr. Fritz and Mr. Storm. See *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648
12 (2002) (noting that the injustice element of collateral estoppel turns on whether the party to be
13 estopped had a full and fair opportunity to litigate the matter in the previous action).

14 Consequently, the plaintiff is collaterally estopped from relitigating the issue of
15 termination of his parental rights with regard to F.W.B., as well as the procedural handling of
16 that matter, following a termination judgment that is final and no longer appealable. See
17 *Petcu*, 121 Wn. App. at 71.

18 As noted, the plaintiff appealed the Court's termination order and lost. He is thus
19 "bound to the proposition" that termination of his parental rights was proper in all respects.
20 *Miles*, 102 Wn. App. at 153. Under these facts, the Court must not disturb the finality of the
21 termination court's judgment through the plaintiff's separate tort claim. See *id.* Accordingly,
22 it is most appropriate to summarily dismiss the plaintiff's complaint with respect to the
23 termination of his parental rights.

24 2. Res Judicata bars the Plaintiff's claims

25 "Res judicata occurs when a prior judgment has a concurrence of identity in four
26 respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of

1 The plaintiff litigated termination of his parental rights with the aid of appointed counsel and
2 lost. He appealed and lost again. He did not seek further review. Further appeal is not
3 possible. The plaintiff cannot revive that settled issue through this tort action.

4
5 **C. The State has no Actionable Duty to Notify the Non-Custodial Parent**
6 **When Children are Voluntarily Placed into Foster Care by the Custodial**
7 **Parent.**

8 The plaintiff incorrectly claims the State Defendants breached an alleged duty to
9 notify him of the foster care of the children and an investigation of child abuse and neglect.
10 The plaintiff chooses to ignore the fact that Ms. Barnes placed her children into foster care
11 voluntarily. The plaintiff was not a viable placement option. And there is no evidence that
12 acceptable placement options other than foster care for both children were available.

13 The applicable statute and regulation do not require notification to the non-custodial
14 parent when children are placed into foster care voluntarily. RCW 13.34.060(2)⁴; Former
15 WAC 388-15-134(2)(a)(2001)⁵. Here, there was neither a court order nor a formal child abuse
16 or neglect investigation involved in this placement; DSHS took custody of the children at the
17 request of Ms. Barnes. Later, both biological parents stipulated to facts necessary to support

18 ⁴ RCW 13.34.060(2) reads:

19 Whenever a child is taken into custody by child protective services pursuant to a court order
20 issued under RCW 13.34.050 or when child protective services is notified that a child has been
21 taken into custody pursuant to RCW 26.44.050 or 26.44.056, child protective services shall
22 make reasonable efforts to inform the parents, guardian, or legal custodian of the fact that the
23 child has been taken into custody, the reasons why the child was taken into custody, and their
24 legal rights under this title as soon as possible and in no event shall notice be provided more
25 than twenty-four hours after the child has been taken into custody or twenty-four hours after
26 child protective services has been notified that the child has been taken into custody. The notice
of custody and rights may be given by any means reasonably certain of notifying the parents
including, but not limited to, written, telephone, or in person oral notification. If the initial
notification is provided by a means other than writing, child protective services shall make
reasonable efforts to also provide written notification.

⁵“(a) The department shall notify noncustodial parents when a child is taken into custody pursuant to
RCW 26.44.050 or 13.34.050 and placed into the custody of the department.” Former WAC 388-15-
134(2)(a)(2001).

1 dependency. Accordingly, there are no genuine issues of material fact to support the
2 plaintiff's contention that the State Defendants owed him a duty to notify him of the foster
3 care placement of the children.

4 In any event, even if there was a violation of a statutory or regulatory notice
5 requirement, the plaintiff has not shown violation of a duty. In general, a statute or regulation
6 does not give rise to a duty actionable in tort unless such a remedy is inferable from the
7 statutory language. *See, e.g., Melville v. State*, 115 Wn.2d 34, 37, 793 P.2d 952 (1990);
8 *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). A tort remedy is not stated
9 expressly in the notice statute at issue here. RCW 13.34.060. Rather, a parent who asserts he
10 or she has not had proper notification of his or her child's custody can seek redress through
11 juvenile court proceedings. *See generally* chapter 13.34 RCW.

12 Here, the plaintiff participated actively in an extensive judicial process from
13 dependency to termination. The plaintiff had ample opportunity to notify the juvenile court of
14 his complaints about lack of notice. Nevertheless the court found it appropriate to ultimately
15 terminate the plaintiff's parental rights. Given the unassailable correctness of the court's
16 placement decision, the plaintiff cannot rely on lack of notice as a basis for his tort claim.
17 Accordingly, this Court should dismiss the plaintiff's claim based on lack of notice.

18 **D. The Plaintiff Fails to Establish a Claim For Negligent Investigation.**

19 The plaintiff's allegation that the State Defendants negligently failed to investigate his
20 parental rights is devoid of merit. There is no generally recognized negligent investigation
21 cause of action as described by the plaintiff. *See, e.g., M.W. v. Dep't of Social & Health*
22 *Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003); *Petcu v. State*, 121 Wn. App. 36, 58, 86 P.3d
23 1234 (2004). But courts have recognized a narrow cause of action for negligent investigation
24 arising from the state's statutory duty to investigate allegations of child abuse. RCW
25 26.44.050; *M.W.*, 149 Wn.2d at 595; *Petcu*, 121 Wn. App. at 58. In the child abuse context, a
26 negligent investigation cause of action "arises when the state conducts an incomplete or

1 | biased investigation that results in a harmful placement decision, such as wrongfully removing
2 | a child from a non-abusive home, placing a child into an abusive home, or allowing a child to
3 | remain in an abusive home.” *Petcu*, 121 Wn. App. at 59 (citing *M.W.*, 149 Wn.2d at 597-98).

4 | Under the foregoing authorities, the plaintiff claiming negligent investigation of a
5 | child dependency and parental rights termination matter must show that the State’s placement
6 | decision was “harmful.” *M.W.*, 149 Wn.2d at 597-98; *Petcu*, 121 Wn. App. at 59. But here,
7 | the plaintiff cannot establish any harmful placement decision. He signed an agreed
8 | dependency order. And there is not a shred of evidence the children were harmed by foster
9 | placement.

10 | Additionally, the court’s properly decided and subsequently affirmed termination
11 | order acted as a superseding intervening cause of the plaintiff’s separation from his children,
12 | thus cutting off any alleged liability of the State and its employees in the way the dependency
13 | and child termination matters were handled. *See Tyner v. Dep’t of Social & Health Servs.*,
14 | 141 Wn.2d 68, 88, 1 P.3d 1148 (2000). There is no evidence the termination court lacked
15 | material information that would have altered the result. *See id.* In short, the plaintiff
16 | contested termination and lost. The court’s dependency and termination orders are res
17 | judicata as to the validity of the children’s placement. Because no factual basis exists for the
18 | plaintiff’s negligent investigation claim, this court should dismiss it with prejudice.

19 | **E. The Plaintiff Fails to State a Claim for Outrage.**

20 | There is absolutely no merit to the plaintiff’s allegation that the State Defendants
21 | “negligently, maliciously, and willfully chose to recklessly inflict severe emotional distress
22 | and mental anguish upon the plaintiff.” A plaintiff asserting outrage, otherwise known as
23 | intentional infliction of emotional distress, must prove “(1) extreme and outrageous conduct;
24 | (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff
25 | of severe emotional distress.” *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278
26 | (1995) (citation omitted). The defendants’ conduct must be “so outrageous in character, and

1 | so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
2 | atrocious, and utterly intolerable in a civilized community.” *Grimsby v. Samson*, 85 Wn.2d
3 | 52, 59, 530 P.2d 291 (1975). Moreover, “liability in the tort of outrage does not extend to
4 | mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.*
5 | “[T]he trial court must initially determine if reasonable minds could differ on whether the
6 | conduct was extreme enough to result in liability.” *Dicomes v. State*, 113 Wn.2d 612, 630,
7 | 782 P.2d 1002 (1989).

8 | Here, the evidence, viewed in a light most favorable to the plaintiff, fails to remotely
9 | approach the threshold of egregious behavior applicable to the tort of outrage. To the
10 | contrary, the evidence shows the State Defendants properly exercised their discretion in
11 | helping the children transition to a safe, loving, and supportive home environment. The
12 | plaintiff’s utter lack of prospects for meaningful parenthood was obvious throughout the
13 | dependency and termination process. It soon became clear any contact between the plaintiff
14 | and F.W.B. would be detrimental to the child’s emotional well-being, and the State
15 | Defendants acted accordingly. Termination became the sole viable option and is now an
16 | unassailable fact. In light of the foregoing, the Court should summarily dismiss the Plaintiff’s
17 | claim of outrage.

18 | **F. The Plaintiff Fails to State a Claim for Alienation of Affections**

19 | Under the headings of “alienation of affections” and “tortious interference with
20 | parental rights,” the plaintiff erroneously claims the State Defendants willfully and
21 | maliciously interfered in the relationship between himself and F.W.B. and J.B. In practical
22 | terms, plaintiff alleges alienation of affections. A plaintiff alleging the tort of alienation of
23 | affections of a minor child must prove the following elements: (1) the plaintiff had an
24 | existing family relationship with the affected child or children; (2) a third person (the
25 | defendant) wrongfully interfered with plaintiff’s relationship with the affected child or
26 | children; (3) the third person intended that such wrongful interference resulted in a loss of

1 affection or family association; (4) there is a causal connection between the third person's
2 wrongful conduct and the loss of affection; and (5) that the third person's conduct resulted in
3 damages. *Waller v. State*, 64 Wn. App. 318, 338, 824 P.2d 1225 (1992); *Strode v. Gleason*, 9
4 Wn. App. 13, 14-15, 510 P.2d 250 (1973).

5 The first element may be satisfied with respect to F.W.B.; nevertheless, the plaintiff
6 had at most a nominal relationship with F.W.B., a child he never met face-to-face. And there
7 is no evidence plaintiff had an actionable family relationship at the relevant time with J.B., a
8 child fathered by another man.

9 The plaintiff's alienation claim must necessarily fail under the second element; there is
10 no evidence to create a genuine issue of material fact as to whether any of the State
11 Defendants "wrongfully" interfered with plaintiff's relationship with the concerned children.
12 To the contrary, the record, viewed in a light most favorable to the plaintiff, indicates
13 defendants Fritz and Storm were looking out for the welfare of the concerned children, "the
14 paramount concern" underlying the purpose of the controlling statute. RCW 13.34.020.

15 Regarding the third element, there is no evidence either defendant Fritz or Storm
16 wrongfully intended loss of affection or family association. The record evidences an intent to
17 serve the needs of the children for a safe and nurturing environment. Further, the state actors
18 were motivated by the best interests of the affected children pursuant to their statutory
19 mandate to serve the best interests of the child where that interest conflicts with family
20 reunification. RCW 13.34.020. Viewing the record in a light most favorable to the plaintiff,
21 it cannot be said the state actors' actions were egregious or undertaken in bad faith. *See*
22 *Adoption of B.T.*, 150 Wn.2d 409, 421, 78 P.3d 634 (2003) (declining to award attorneys fees
23 where it appeared DSHS' actions were "misguided" but were also motivated by what the
24 agency believed were the affected child's best interests). Given the correctness of the
25 termination orders and the adoption of the children, the plaintiff cannot validly claim the
26

1 individual defendants acted in bad faith or wrongfully interfered with his parental rights. *See*
2 *Miles v. State*, 102 Wn. App. 142, 156, 6 P.3d 112 (2000).

3 With respect to the fourth element, causation is cut off by a number of events,
4 including the plaintiff's lengthy incarceration, the agreed dependency Order, and the
5 subsequent termination Order. Two years of dependency and termination proceedings
6 established the correctness of the State Defendants actions.

7 Even when the record is viewed in a light most favorable to the plaintiff, the plaintiff
8 cannot establish a prima facie claim of alienation of affections.

9 **G. The Plaintiff Fails to State a Claim of Abuse of Process**

10 The plaintiff's contention that the State Defendants committed abuse of process in
11 violation of RCW 13.34.136(b)(ii) is wholly without merit. Once again, collateral estoppel
12 defeats this claim. RCW 13.34.136(b)(ii) addresses visitation in connection with the elements
13 of a permanency care plan. The superior court supervised visitation matters during the
14 dependency and review proceedings. The plaintiff did not appeal the dependency order or the
15 review orders. He contested termination and lost. The placement of the children and all the
16 issues related thereto are final and no longer subject to challenge. Consequently, the plaintiff
17 cannot now manufacture an abuse of process claim out of his dissatisfaction with lack of
18 visitation while he is incarcerated.

19 Moreover, a claim of abuse of process requires evidence of (1) the defendant's ulterior
20 purpose to accomplish an objective not within the proper course of the process employed; and
21 (2) an act in the use of the legal process that is improper in the regular prosecution of such
22 proceedings. *Mark v. Williams*, 45 Wn. App. 182, 191, 724 P.2d 428 (1986). A claim of
23 abuse of process will not lie if the defendant employed the process for no other purpose than
24 that intended by law. *Batten v. Abrams*, 28 Wn. App. 737, 746, 626 P.2d 984 (1981). In
25 essence, the tort of abuse of process requires both an ulterior motive and a willful act to apply
26 process improperly to fulfill that motive. *Id.*

1 A fair minded person, looking at the record in a light most favorable to the plaintiff
2 would not find a genuine issue of material fact in support of the elements of abuse of process.
3 Accordingly, the plaintiff's claim fails as a matter of law.

4 H. The Plaintiff Cannot Show Disparate Treatment

5 The plaintiff's allegation of disparate treatment and an equal protection violation
6 because he was treated differently than Ms. Barnes is meritless. "A denial of equal protection
7 may occur when a law is administered in a manner that unjustly discriminates between
8 similarly situated persons." *State v. Veazie*, 123 Wn. App. 392, 98 P.3d 100, 105 (2004)
9 (citing *State v. Handley*, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990)). By contrast, there is no
10 violation of equal protection where the government treats a dissimilarly situated person in a
11 dissimilar manner. *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996); *Women Prisoners of*
12 *the Dist. Of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 924
13 (D.C.Cir. 1996).

14 The latter situation applies here. The gravaman of the plaintiff's complaint is that he
15 was treated differently from Ms. Barnes because he was a prisoner, and she was not. But
16 under the facts of this case, such differential treatment is justified. The plaintiff is
17 incarcerated for a period of 72 years for committing several violent intentional felonies. The
18 plaintiff began his confinement several months before F.W.B. was born, and the two have
19 never met. By contrast, Ms. Barnes had custody of her children until she voluntarily placed
20 them into foster care. The stark facts of this case inevitably required dissimilar treatment of
21 the plaintiff and Ms. Barnes. Because the plaintiff was not similarly situated with Ms. Barnes,
22 his equal protection claim fails as a matter of law. *See Keevan*, 100 F.3d at 648-50 (holding
23 that male and female prisoners were not similarly situated for purposes of equal protection
24 analysis).

25 In any event, Ms. Barnes, the custodial parent, ultimately relinquished her parental
26 rights. By contrast, the plaintiff energetically exercised his right to contest termination with

1 the aid of able counsel, and lost. He appealed and lost again. In fact, both parents' parental
2 rights were terminated. Given the facts before the Court, the plaintiff cannot claim to have
3 been the victim of disparate treatment. The plaintiff's complaint on this point is subject to
4 summary dismissal.

5
6 **I. The Plaintiff Fails to State a Claim For Constitutional Violations**

7 The plaintiff's sweeping allegations of state and federal constitutional violations are
8 devoid of merit.

9 **1. An Alleged Violation of the State Constitution is Not Actionable in
10 Tort.**

11 The Plaintiff mistakenly contends he is entitled to tort relief for an alleged violation of
12 Article I, Section 3 of the Washington Constitution. Article I, Section 3 of the State
13 Constitution provides "No person shall be deprived of life, liberty, or property, without due
14 process of law."

15 Washington has no civil rights act comparable to 42 U.S.C. § 1983 and alleged
16 violations of the State Constitution are not independently actionable torts. *Reid v. Pierce*
17 *County*, 136 Wn.2d 195, 213, 961 P.2d 333 (1998); *Spurell v. Bloch*, 40 Wn. App. 854, 861-
18 62, 701 P.2d 529 (1985); *Systems Amusement v. State*, 7 Wn. App. 516, 518-19, 500 P.2d
19 1253 (1972). Rather, the due process clause of the State Constitution "is a protection against
20 arbitrary action by the state; but if a person has his day in court, he has not been deprived of
21 due process." *Systems Amusement*, 7 Wn. App. at 518 (citing *State v. Cater's Motor Freight*
22 *System, Inc.*, 27 Wn.2d 661, 179 P.2d 496 (1947)). Accordingly, Article I, Section 3 is not
23 "an affirmative mandate to create new causes of action." *Systems Amusement*, 7 Wn. App. at
24 519.

25 Here, the record amply demonstrates that the plaintiff had his many days in court with
26 respect to the child dependency and termination issues. Consequently, the plaintiff's fleeting

1 allegation that the State Defendants violated Article I, Section 3 of the Washington
2 Constitution does not state a valid cause of action and should be dismissed as a matter of law.

3 **2. The State, Its Agencies, and Its Subagencies Are Not "Persons"**
4 **Amenable to Suit Under 42 U.S.C. § 1983.**

5 The plaintiff alleges generally a violation of the Fifth and Fourteenth Amendment of
6 the United States Constitution. Interpreted most liberally, the plaintiff's Complaint can be
7 analyzed as a vague civil rights claim under 42 U.S.C. § 1983, directed in part against The
8 State of Washington Department of Social and Health Service, Child Protective Services.

9 It is well settled that a state and its individual agencies and subagencies are not subject
10 to suit under § 1983 because neither a state nor its agency are "persons" as defined under 42
11 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105
12 L.Ed.2d 45 (1989); *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986). The
13 Washington Supreme Court has also held that the State, its agencies, and employees in their
14 official capacities are not subject to suit under 42 U.S.C. § 1983. *Rains v. State*, 100 Wn.2d
15 660, 667, 674 P.2d 165 (1983); *Edgar v. State*, 92 Wn.2d 217, 221, 595 P.2d 534 (1979)
16 (waiver of sovereign immunity did not subject state to suit under 42 U.S.C. § 1983).
17 Consequently, to the extent the plaintiff's Complaint sets forth a 42 U.S.C. § 1983 claim
18 against the State and its agencies, it should be dismissed with prejudice.

19 **3. The Plaintiff Has Not Established a Claim Against the Individual State**
20 **Defendants Under 42 U.S.C. § 1983.**

21 Moreover, the Plaintiff has not stated a valid 42 U.S.C. § 1983 claim against either of
22 the individual State Defendants, Fritz and Storm. Again, the plaintiff anchors his claim on the
23 Fifth and Fourteenth Amendments, alleging that Mr. Fritz and Mr. Storm "interfered without
24 due process" with the plaintiff's "basic parental rights." Complaint at 12, ¶ 3.12.
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a. Absolute Immunity Shields the Individually Named Defendants

State social workers are entitled to absolute immunity for the decision to file a dependency petition and for their investigation leading up to the decision to file the dependency. The plaintiff's factual allegations touch upon the period of time from the pre-dependency filing investigation through the termination proceedings. However, for the acts of conducting an investigation pursuant to dependency and actual filing of a dependency petition, State defendants enjoy absolute immunity. *Doe v. Lebbos*, 348 F.3d 820, 826 (9th Cir. 2003); *Miller v. Gammie*, 335 F.3d 889, 897, 898 (9th Cir. 2003).

"[T]he Supreme Court has recognized that when congress enacted §1983, it was aware of a well-established common-law tradition that extended absolute immunity to individuals performing functions necessary to the judicial process." *Miller v. Gammie*, 335 F.3d 889, 895-96 (9th Cir. 2003) (citations omitted). At common law judges, prosecutors, trial witnesses and jurors were absolutely immune for their roles in the judicial process. *Id.* at 896. In describing the general scope and rationale for prosecutorial immunity, the Supreme Court reasoned that prosecutors are absolutely immune for the initiation and presentation of the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). The same type of immunity has been extended to social workers for investigation actions taken leading up to and the initiation of dependency proceedings because these decisions are integral to the judicial process. *Doe*, 348 F.3d at 826; *Miller*, 335 F.3d at 896-898; *Meyers v. Contra Costa County Department of Social Services*, 812 F. 2d 1154, 1157-58 (9th Cir. 1987).

The foregoing authorities are persuasive here. The allegations in the plaintiff's complaint against DSHS and the individually-named defendants implicate the investigation leading to the initiation of the dependency action and the subsequent termination proceedings. For their actions in connection with these proceedings, the State Defendants have absolute

1 immunity. *Doe*, 348 F.3d at 826; *Miller*, 335 F.3d at 896-898; *Meyers*, 812 F. 2d at 1157-58.

2 Consequently, summary dismissal of the plaintiff's federal constitutional claims is warranted.

3 **b. Qualified Immunity Shields the Individually Named Defendants**

4 The doctrine of qualified immunity shields government workers such as Mr. Fritz and
5 Mr. Storm from civil liability for performing discretionary functions "insofar as their conduct
6 does not violate clearly established statutory or constitutional rights of which a reasonable
7 person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.
8 Ed. 2d 396 (1982); *see also Robinson v. City of Seattle*, 119 Wn.2d 34, 64-65, 830 P.2d 318
9 (1992). Accordingly, a plaintiff cannot maintain an action under 42 U.S.C. § 1983 unless he
10 or she demonstrates that the law during the time of the alleged misconduct was so clearly
11 established that any reasonable official would have known that the official's conduct was
12 unconstitutional. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001);
13 *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Determining
14 whether there was a clearly established constitutional right requires the court to "survey the
15 legal landscape" at the time of the alleged misconduct. *Trevino v. Gates*, 99 F.3d 911, 916
16 (9th Cir. 1996).

17 Very recently, the Supreme Court reemphasized that the alleged constitutional
18 violation must be based on the specific facts, not merely in the general sense. *Brosseau v.*
19 *Haugen*, ___ U.S. ___, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004). In other words, the
20 particular asserted right applicable to the facts of the specific case must be so "clearly
21 established" that the state official would be on notice that his or her actions would violate that
22 right. *Id.* In *Brosseau*, the general Fourth Amendment right to be free from the use of
23 excessive force was held to be insufficient to overcome a police officer's qualified immunity
24 after shooting a fleeing suspect in the back where others in the immediate area were at risk
25 from that flight. *Id.* at 599-600. Applying *Brosseau* by analogy, the plaintiff in this case must
26 show that at the time of the defendants' actions, it was "clearly established" under the specific

1 facts of this case that defendants were violating the plaintiff's constitutional rights. *See id.* at
2 599-600.

3 Here, the relevant period of time is unclear, but arguably extends from January 2002,
4 when the children were placed into foster care, to May 2004, when the plaintiff's parental
5 relationship was terminated. The State has thus far failed to locate a single authority in either
6 State or Federal jurisdictions that hold that a noncustodial parent residing in prison has a
7 clearly established constitutional right to notice of the custodial parent's voluntary foster care
8 placement of the affected children. Similarly, there is no authority holding that the
9 incarcerated parent has a clearly established constitutional right to correspondence from the
10 social workers responsible for protecting the best interests of the concerned children.

11 To the contrary, a non-custodial parent cannot craft a federal due process right solely
12 out of his biological link with the concerned child. *See generally Lehr v. Robertson*, 463 U.S.
13 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). The key consideration is whether there is a
14 genuine and meaningful parent child relationship worthy of due process protection. *Id.* at
15 260-61. In other words, there is a "clear distinction between a mere biological relationship
16 and an actual relationship of parental responsibility." *Id.* at 259-260. In this case, it is a verity
17 that the plaintiff had no meaningful parental relationship with F.W.B. In light of that
18 background, the plaintiff cannot stake a claim to a clearly established constitutional right to
19 notice from and correspondence with the defendant social workers.

20 Moreover, assuming solely for the sake of argument that the individually-named State
21 Defendants violated a state law or regulation in their conduct toward the plaintiff, the
22 violation of such a law or regulation alone neither creates a cause of action under § 1983, nor
23 deprives a defendant of qualified immunity to such a claim. *Davis v. Scherer*, 468 U.S. 183,
24 194, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); *Doe v. Connecticut Dep't of Child & Youth*
25 *Services*, 911 F.2d 868, 869 (2nd Cir. 1990). "Neither federal nor state officials lose their
26 immunity by violating the clear command of a statute or regulation--of federal or state law--

1 With respect to Defendant Fritz, it has already been shown that there is no statutory or
2 regulatory requirement that the plaintiff be notified of Ms. Barnes' voluntary foster placement
3 of the children. RCW 13.24.060(2); WAC 388-15-134. Moreover, even if Defendant Fritz
4 failed to follow state statutory or regulatory procedures, the plaintiff has not shown that the
5 alleged lack of communications regarding the foster care of the concerned children deprived
6 him of any clearly established federal constitutional or statutory rights. Consequently,
7 assuming without conceding a statutory violation, qualified immunity shields Defendant Fritz
8 from the plaintiff's obscure § 1983 claims.

9 With regard to Defendant Storm, the plaintiff has not alleged any acts approaching
10 violations of state or federal statutes or regulations. The acts complained of fit within Mr.
11 Storm's broad statutory mandate to protect the welfare of the children. RCW 13.34.020.
12 Assuming without conceding that some sort of statutory violation occurred, the plaintiff has
13 not shown that Defendant Storm's discretionary decision to limit the plaintiff's contact with
14 the children during the dependency and termination process deprived him of any clearly
15 established federal or statutory rights. Accordingly, even if the plaintiff stated a prima facie
16 §1983 claim, qualified immunity protects Defendant Storm.

17 In any event, even if the individually-named defendants had communicated more
18 frequently with the plaintiff, and had they allowed him greater contact with the children, the
19 applicable statutes did not mandate a particular substantive outcome. *See Tony*, 71 F.3d at
20 1185-86. The substantive outcome the plaintiff sought here was a continuation of his parental
21 rights. The termination Order rendered that desired outcome illusory. In light of the
22 foregoing, this Court should dismiss the plaintiff's civil rights claims in summary judgment.

23 **J. The Plaintiff Cannot Seek Relief Through the Consumer Protection Act,**
24 **Chapter 19.86 RCW.**

25 The plaintiff's reliance on the Consumer Protection Act (CPA), chapter 19.86 RCW is
26 wholly without merit. There is no legal authority that holds the CPA to be applicable in the

1 child welfare context. The stated purpose of the CPA is to protect Washington State
2 consumers of goods and services from unfair practices "in the conduct of any trade or
3 commerce[.]" RCW 19.86.020. Trade or commerce for purposes of the CPA means "the sale
4 of assets or services, and any commerce directly or indirectly affecting the people of the state
5 of Washington." RCW 19.86.010. DSHS and CPS, government agencies providing
6 protective services to children and vulnerable adults, do not engage in sales or commerce in
7 such services. Accordingly, the child welfare activities affecting the plaintiff do not fall
8 within the protective sweep of the CPA. Hence, the plaintiff's CPA claim is frivolous and
9 deserving of summary dismissal with prejudice.

10 **VII. CONCLUSION**

11 Given all, the record shows there are no genuine issues of material fact to support the
12 plaintiff's obscure claims. There is not an iota of evidence that the plaintiff ever had a legally
13 recognized parental interest in J.B. Plaintiff cannot relitigate the placement of F.W.B. And
14 no reasonable person looking at this record can say that the defendant social workers acted
15 tortiously. Consequently, the Court has ample grounds to grant summary judgment of
16 dismissal with prejudice.

17 DATED this 20th day of June, 2005.

18 ROB MCKENNA
19 Attorney General

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21 MICHAEL E. JOHNSTON, WSBA No. 28797
22 Assistant Attorney General
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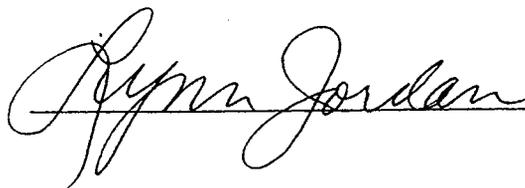
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