

TABLE OF CONTENTS

I. NATURE OF THE CASE.....P. 1

II. REPLY TO COUNTERSTATEMENT OF ISSUES.....P. 1

III. REPLY TO COUNTERSTATEMENT OF CASE.....P. 2

IV. SUMMARY OF ARGUMENT.....P. 3

V. ARGUMENT.....P. 4

 A. Standard Of Review.....P. 4

 B. There Are Multiple Grounds for The Court To
 Overturn The Order of Summary Judgment.....P. 4

 1. Any Stipulation By Mr. Bianchi To The
 Dependency Status of F.W.B. Didn't Constitute
 A Knowing Waiver Of Any Claims Based On
 Alleged Procedural Defects Leading Up To The
 Termination Of His Parental Rights.....P. 5

 2. THE STATES DEFENDANTS PRESENTED INSUFFICIENT
 EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE
 GROUNDS OF COLLATERAL ESTOPPEL.....P. 6

 3. THE STATES DEFENDANTS PRESENTED INSUFFICIENT
 EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE
 GROUNDS OF RES JUDICATA.....P. 9

 4. THE STATES DEFENDANTS PRESENTED INSUFFICIENT
 EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE
 GROUNDS OF ABSOLUTE IMMUNITY.....P. 11

 5. THE STATES DEFENDANTS PRESENTED INSUFFICIENT
 EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE
 GROUNDS OF QUALIFIED IMMUNITY.....P. 13

 6. Actionable Tort Duty Arises From
 RCW 13.34.060(2) and 13.34.136.....P. 15

 7. Mr. Bianchi Can State A Claim Of
 Negligence.....P. 17

 8. Mr. Bianchi Did State A Claim For
 Alienation Of Affection.....P. 20

VI. CONCLUSION.....P. 23

TABLE OF AUTHORITES

Cases

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656
P.2d 1030 (1982).....P. 4, 24

Mutual of Enumclaw Ins. Co. v. Jerome, 122 Wn.2d 157,
160, 856 P.2d 1095 (1983).....P. 4

Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507,
745 P.2d (1987).....P. 6

State v. Sherwood, 71 Wn.App. 481, 488, 860 P.2d
407 (1983).....P. 6

Neilson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn2d
255, 263, 969 P.2d 312 (1998).....P. 7

Cloud v. Summers, 98 Wash.App. 1027.....P. 6

Peterson v. Clark Leasing Corp. 451 F.2d 1291, 1992
(9th. Cir. 1971).....P. 7

United States v. Powell, 494 F.Supp. 260, 263
(S.D. Ga. 1980).....P. 7

Clausing, 47 Wn.App. at 680.....P. 8

Bordeaux v. Ingersoll Rand Co., 71 Wash.2d 392, 395-96,
429 P.2d 207 (1967).....P. 9, 10

Bradly v. State, 73 Wash.2d 914, 442 P.2d 1009
(1969).....P. 9

Sanwick v. Puget Sound Title Ins. Co., 70 Wash.2d 438,
441-42, 423 P.2d 624, 38 A.L.R. 3d 315 (1967).....P. 9

Meder v. CCME Copr., 7 Wash.App. 801, 804, 502 P.2d
1252 (1972).....P. 9

Babcock v. State, 116 Wash.2d 596, 809 P.2d (1991)..P. 11, 13

Gilliam v. DSHS, 89 Wn.App. 569, 950 P.2d 20 (1998).P. 11, 13

Bruce v. Wallace, 84 Wn.App. 156, 161, 926 P.2d 339
(1996).....P. 11

Richardson v. McKight, U.S., 117 S.Ct. 2100, 2103, L.Ed.
2d (197).....P. 12

Savage v. State, 127 Wn.2d 434, 441, 445, 899 P.2d
1270 (1995).....P. 12

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 105, 829 P.2d 746 (1992).....	P. 12
Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002).....	P. 12, 17
Tyner v. State of Washington Dep. of Social & Health Services, 141 Wash.2d at 68.....	P. 12, 13
M.W. v. Department of Health services, No. 26377-7-II (2002).....	P. 13
Lesley v. State, 921 P.2d 1066, 83 wash.App. 263 (1996).....	P. 13, 14
Yonker v. State, 930 P.2d 958, 85 Wash.App. 71 (1997).....	P. 13, 18
Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.ed. 2d 272 (2001).....	P. 13, 14
Trevino v. Gates, 99 F.3d 911, 917 (9th. Cir. 1996), cert. denied, 520 U.S. 1117 (1997).....	P. 14
Lehr v. Roberton, 463 U.S. 248, 258, 103 S.Ct. 2985, 77 L.Ed. 2d (1982).....	P. 14
Santosky v. Kramer, 455 U.S. 745, 748, 102 S.Ct. 1388, 71 L.Ed. 2d (1982).....	P. 14
Bennett v. Hardy, 113 Wn.2d 912, 919, 784 P. 2d 1258 (1990).....	P. 16, 17
In re Wash. Pud. Power Supply Secs. Litig, 823 F.2d 1349, 1353 (9th. Cir. 1987).....	P. 17
Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 128, 875 P.2d 621 (1994).....	P. 17
Hartley v. State, 103 Wn.2d 768, 781-82, 698 P.2d 77 (1985).....	P. 18
Chambers-Castanes 100 Wn.2d at 284-85.....	P. 18
Donaldson v. City of Seattle, 65 Wn.App. 661, 666-67, 831 P.2d 1098 (1992).....	P. 18
McCuaskey v. Manorff-Sgerman, 125 Wash.2d 1, 6, 882 P.2d 157 (1994).....	P. 18
Taylor v. Steven Cy., 111 Wash.2d 159, 163, 759 P.2d 447 (1988).....	P. 18

Taggart v. State, 118 Wash.2d 195, 217, 822 P.2d 243
(1992).....P. 19

Bailey v. Forks, 108 wash.2d 262, 268, 737 P.2d 1257
(1987).....P. 19

Funk v. United states, 290 U.S. 371, 78 L.ed. 369,
54 S.Ct. 212, 93 A.L.R. 1136 (1937).....P. 22

Russick v. Hicks, 85 F.Supp. 281, (W.D. Mich. (1949)....P. 22

Miller v. Monsen, 28 Minn. 400, 37 N.W. 2d 543 (1949)...P. 22

Daily v. Parker, 152 F.2d 174, 162 A.L.R. 819 (7th. Cir.
1945).....P. 23

Statutes

RCW 4.92.090.....P. 17, 20

RCW 13.34.025.....P. 23

RCW 13.34.050.....P. 20

RCW 13.34.060.....P. 14, 15, 16, 20

RCW 13.34.136.....P. 14, 20

RCW 26.44.010.....P. 18

RCW 26.44.050.....P. 2, 20

RCW 26.44.100.....P. 18

RCW 26.44.120.....P. 15, 20

Rules

WAC Rule 388-15-134.....P. 15, 16, 20

CR 56(c).....P. 4, 17

I. NATURE OF THE CASE

Plaintiff Ronald Jay Bianchi, appeals a summary judgment order dismissing with prejudice his Intentional tort claims against Respondents, the State of Washington, Department of Social and Health Services (DSHS) and Two of its social worker, Tyrone Fritz and Kevin Strom. Mr. Bianchi contends that the respondents acted tortiously and negligently in denying him his legal right to have a parent-child relationship without first getting the courts permission to do so, before and after the dependency petition was filed. This outrageous conduct was done negligently, maliciously, and willfully when they chose to intentionally deny Mr. Bianchi his right to have a parent-child relationship without the permission of the court to do so. All of which negligently and intentionally inflicted severe emotional distress and mental anguish upon the plaintiff. Which, was so extreme as to go beyond all possible bounds of decency.

II. REPLY TO COUNTERSTATEMENT OF ISSUES

1. Did the States Defendants provide sufficient evidence that the appellant, waived, relinquished or abandoned the issues in his complaint? Assignment of Error No. 1.

2. Did the States Defendants provide sufficient evidence to have the appellants civil suit barred by Collateral Estoppel? Assignment of Error No. 2.

3. Did the States Defendants provide sufficient

evidence to have the appellants civil suit barred by Res Judicata? Assignment of Error No. 3.

4. Did the States Defendants provide sufficient evidence to receive Absolute Immunity from tort liability? Assignment of Error No. 4.

5. Did the States Defendants provide sufficient evidence to enjoy Qualified Immunity? Assignment of Error No. 5.

III. REPLY TO COUNTERSTATEMENT OF THE CASE

On June 30, 1998, Appellant Ronald Jay Bianchi was sentenced to a 72-year term of confinement for multiple felonies based upon a plea agreement. CP at 77-97. At the June 30, 1998, sentencing hearing Judge James Ladley clarified the understanding of that plea agreement, which was that Mr. Bianchi was gaining certain things by pleading guilty and one of those was the right to continue to have contact with his child. (See VRP page 12, line 24 - page 13, line 5). Mr. Bianchi's biological daughter F.W.B. was born to Rachael Barnes on February 15, 1998. CP at 156. Mr. Bianchi may not have met F.W.B. in person. CP at 157. However he did have a parent-child relationship with F.W.B. through letter's, card's and picture's up until the time she was taken into DSHS/CPS custody. CP at 141.

F.W.B. was taken into custody and placed into foster care pursuant to RCW 26.44.050, on January 4, 2002. CP at 122.

The State of Washington Department of Social and Health

Services, social worker Tyrone Fritz did not get Ms. Barnes to sign a voluntarily placement agreement until some three days later on January 7th, 2002. CP at 99.

On July 16, 2002. Mr. Bianchi first raised the issues that are in this intentional tort, when he filed his tort claims with the Office of Risk Management against the State of Washington, DSHS/CPS, and Tyrone Fritz.

On October 1, 2002, the court entered a order of dependency with respect to F.W.B.. CP at 102-107. That order of dependency stated that F.W.B. should be placed or remain in the home of the mother. CP at 103, 105. The Respondents in this tort claim did not ask the court at that time to limit or deny Mr. Bianchis' contact with F.W.B. CP at 102, 107. Mr. Bianchi did not appeal that order of dependency and it did not limit or deny any of Mr. Bianchis' parental rights.

IV. SUMMARY OF ARGUMENT

Mr. Bianchi is not trying to mount a collateral attack on the termination of his parental rights. He is just continuing with the tort claims that he filed with the office of risk management on July 16, 2002, for the violation of his right to have a parent-child relationship with his daughter. CP at 40, 47-50, and VRP 7-10 and 23.

Mr. Bianchi was entitled to the relief he requested in those original July 16th, 2002, tort claims. However the Washington State Office of Risk Management denied those claims. So Mr. Bianchis' claims had not been argued to a

final judgment.

This civil suit (complaint) was filed while the termination of his parental rights was under appeal. So there is no way that this civil suit could be collaterally attacking the termination of his parental rights.

V. ARGUMENT

A. Standard of Review

The standard of review for summary judgment is well-settled. When reviewing a trial court's order of summary judgment, the appeals court must engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See CR 56(c): *Mutual of Enumclaw Ins. Co. v. Jerome*, 122 Wn.2d 157, 160, 856 P.2d 1095 (1983) A summary judgment motion should be granted only if a reasonable person could reach but only one conclusion, after considering the evidence in the light most favorable to the non-moving party.

B. There are Multiple Grounds For The Court TO Overturn The Order Of Summary Judgment

Mr. Bianchi challenges the summary judgment order to the extent that it relies on insufficient evidence to support it on the grounds of: Collateral Estoppel, Res Judicata, Absolute Immunity, and Qualified Immunity.

//

1. Any Stipulation By Mr. Bianchi To The Dependency Status of F.W.B. Didn't Constitute A Knowing Waiver Of Any Claims Based On Alleged Procedural Defects Leading Up To The Termination Of His Parental Rights.

The Black's law Dictionary says: Waiver; The voluntary relinquishment or abandonment - expressed or implied - of a legal right or advantage < waiver of notice >. The party alleged to have waived a right and intention of foregoing it. Demonstrated to the trial court see, CP at 48-49.

Mr. Bianchi has never relinquished or abandoned his claims that he raised in his complaint. From the beginning of finding out that DSHS/CPS had taken custody of his child he wrote asking why he had not been notified and requested his parental right to have a parent-child relationship with his child, even before the department notified him that a dependency petition was filed. CP at 66-72. So there is no way that the States Defendants can show that Mr. Bianchi ever voluntarily relinquished or abandoned his claims that his parental rights had been violated. CP at 48-49.

The order of dependency that the Respondents speak of, CP at 102-107. Which was filed Oct. 01, 2002, was filed 2½ months after Mr. Bianchi originally filed his tort claims with the Washington State Office of Risk Management on July 16, 2002. CP at 40, 47-50, and VRP 7-10, and 23. The October 01, 2002, order of dependency did not place any limitations on Mr. Bianchis' right to have a parent-child contact and stated that the F.W.B. should be placed or remain in the home

of the mother. CP at 103 and 105. So there was nothing in that order of dependency that put any stipulation on Mr. Bianchi or for him to object to, or that would later constitute a knowing waiver of any claims made in his tort claims. CP at 102 and 105.

2. THE STATES DEFENDANTS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT SUMMARY JUDGMENT ON THE GROUNDS OF COLLATERAL ESTOPPEL

The doctrine of collateral estoppel which is also referred to as issue preclusion which bars relitigation of a particular issue of determinative facts. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d (1987). The purpose of this doctrine are "to avoid the burdens and potentially disruptive consequences of permitting a second and possibly inconsistent determination of matters that have been once decided," 18 Charles Alan Wright et al., *Federal Practice and Procedure* see. 4420, at 182 (1981), and "to prevent relitigation of determined causes, curtail multiplicity of actions, prevent harassments in the courts, and inconvenience to the litigants, and promote judicial economy." *State v. Sherwood*, 71 Wn.App. 481, 488, 860 P.2d 407 (1983). (Quoting *Cloud v. Summers* 98 Wn.App. 1027).

The party seeking the application of collateral estoppel has the burden of proving that:

(1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on

the merits, (3) the party against whom the plea is asserted was a party in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice. *Neilson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 263, 969 P.2d 312 (1998).

But collateral estoppel does not apply where a substantial difference in applicable legal standards differentiates identical issues of mixed law and facts. *James W.M. Moore et al.*, *Moore's Federal Practice* 0.443 [2], at 763-64, 766 (2d ed. 1991); See also *Peterson v. Clark Leasing Corp.* 451 F.2d 1291, 1292 (9th. Cir. 1971) (explaining that issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits is the same); *United States v. Powell*, 494 F.Supp. 260, 263 (S.D. Ga. 1980) ("[I]ssue identity is insufficient to invoke collateral estoppel if the two actions involve different legal standards.").

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 disposition 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 prospect for early integration into a stable and permanent home".

The issues presented in this civil suit are for the Tortious Interference with parental rights and Alienation of Affection. To prove Tortious interference with parental rights and Alienation of Affection the following must be proven;

(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 of 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 actions are not the same! One was the termination of future parental rights, the other is a intentional tort claim for the tortious interference with parental rights and alienation of affection which caused Mr. Bianchi to suffer server emotional distress and mental anguish, before the States Defendants even filed a petition to terminate Mr. Bianchi 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 Mr. Bianchi has not had.

Mr. Bianchi demonstrated to the trial court that his tort

claims (Civil Suit) are not barred by Collateral Estoppel. CP at 48-49.

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

The doctrine of res judicata bars the relitigation of a cause of action because of an identity of parties and issues culminating in a final judgment. *Bordeaux v. Ingersoll Rand Co.*, 71 Wash. 2d 392, 395-96, 429 p.2d 207 (1967); Restatement of Judgment § 68, comment a (1942). For the doctrine of res judicata to apply, the matters must have been, decided in the prior cause. E.g., *Bradly v. State*, 73 Wash.2d 914, 442 P.2d 1009 (1969); *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wash. 2d 438, 441-42, 423 P.2d 624, 38 A.L.R. 3d 315 (1967); *Meder v. CCME Corp.*, 7 Wash. App. 801, 804, 502 P.2d 1252 (1972). Res Judicata requires a concurrent identity of subject matter, claim for relief, persons and parties, and the quality of the person for or against whom the claim is made. *Meder v. CCME Corp.*, supra at 805.

Although both the dependency/termination petition and this Intentional Tort, have to do with parental rights, they are not the same! This Intentional Tort is over the Outrage/Intentional infliction of emotional distress and mental anguish, and the negligent infliction of emotional distress and mental anguish that the States Defendants caused to Mr. Bianchi as a direct result of their intentional violation of his parental right to have a parent-child

relationship with F.W.B. before the State filed a petition to terminate his parental rights. Which was first raised in his July 16th, 2002, tort claims (filed as on going) that was filed with the Office of Risk management. CP at 40, 47-50, and VRP 7-10, and 23.

Neither the doctrine of res judicata nor collateral estoppel are intended to deny a litigant his day in court. The purpose of both doctrines is only to prevent relitigation of that which has previously been litigated. 2 A Freeman, law of Judgment § 625 at 1317-18 (5th. ed 1925). The doctrine of res judicata is intended to prevent relitiation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation. *Bordeaux v. Ingersoll Rand Co.*, 71 Wash.2d 392, 429 P.2d 207 (1967).

By the trial court granting the States Defendants motion for summary judgment Mr. Bianchi waas denied his day in court for the intentional violaation of his right to have a parent-child relationship. With out getting the courts permission to limit or deny his right to have contact with F.W.B..

Mr. Bianchi did demonstrate to the trial court that his tort claims (civil suit) was not barred by Res Judicata. CP at 48-49.

//

4. 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 quasi-judicial 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. *Babcock II*, at 606.

The Court ruled in *Gilliam v. DSHS*, 89 Wn.App. 569, 950 P.2d 20 (1998). Which has already held that the State is not protected by absolute immunity as a participant in the judicial process for its acts or omissions occurring after the filling of a dependency petition. *Gilliam v. DSHS* 89 Wn.App. 569, 950 P.2d 20 (1998).

DSHS/CPS investigation did not act because a potential litigant had retained them in anticipation of the need for expert testimony at judicial proceedings. They conducted their investigation because it was their statutory duty to do so. Their duty to investigate exists independently of the possibility that they may eventually testify about the results of their investigation. See *Bruce v. Wallace*, 84 Wn.App. 156, 161, 926 P.2d 339 (1996). Mr. Bianchi is suing the States Defendants for their negligent actions regarding

the violation of his right to have a parent-child relationship before getting the court permission to limit or deny him of a parent-child relationship. Mr. Bianchi is not suing for negligence in providing expert testimony.

An immunity "frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson v. McKight*, U.S., 117 S.Ct. 2100, 2103, L.Ed. 2d (1997). Absolute Immunity protects the State as well as its agents, in contrast to the qualified personal immunity of a State employee, which does not extend to the State. *Savage v. State*, 127 Wn.2d 434, 441, 445, 899 P.2d 1270 (1995). "Absolute Immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d 746 (1992).

To give the States Defendants Absolute immunity, would be leaving Mr. Bianchi, "who has been wronged" without a remedy for the violation of his parental rights before the State even asked a court to limit or deny his contact with F.W.B..

Washington Courts have ruled that the State and its employees are not immune from suits for their negligent or tortious actions during the course of investigating case of child abuse/neglect. 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.2d 596, 809 P.2d 143 (1991); Lesley v. State, 921 P.2d 1066, 83 Wash.App. 263 91996); Giliam v. State, 89 Wash.App. 569, 950 P.2d 20 (1998); Yonker v. State, 930 P.2d 958, 85 Wash.App. 71 (1997).

Mr. Bianchi demonstrated to the trial court that the State Defendants were not entitled to Absolute Immunity. CP at 52-56.

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

When asked to rule on the issue of qualified immunity, the court must first consider whether, after viewing the facts in the light most favorable to the plaintiff, the alleged facts amount to a violation of a plaintiff's constitutional rights. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001). If the facts do not constitute a violation of a constitutional right, the inquiry end. Saucier, 533 U.S. at 201. If they do, then our next step is to determine if the violated constitutional right was clearly established at the time of the alleged violation. Saucier. 533 U.S. at 201.

A constitutional right is clearly established where the contours of the right have been defined with specificity and sufficient clarity, as a result of a decisional law or

statute, so that a reasonable official would have known that his conduct violated the constitutional right. *Saucier*, 533 U.S. at 202. In determining whether a clear right exists, a court should consider the legal landscape at the time of the alleged violation in order to determine if a constitutional right was clearly established. *Trevino v. Gates*, 99 F.3d 911, 917 (9th. Cir. 1996), cert. denied, 520 U.S. 1117 (1997).

RCW 13.34.136 is a statute that establishes the Constitutional right which the States Defendants clearly violated. CP at 43-44.

The Plaintiff argues that the States Defendants negligence willfully and tortiously 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 (1983); *Santosky v. Kramer*, 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.

For the caseworker to have qualified immunity they must '(1) carry out a statutory duty, (2) according to procedures dictated by statute or superiors, and (3) act reasonably.' *Lesley v. DSHS*, 83 Wn.App. 263, 921 P.2d 1066 (1996).

The caseworkers in this case did not carry out their statutory duties directed by RCW 13.34.060 or 13.34.136. They did not act according to 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 parent 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 reasonably when they chose to not respond to the first three letters from Mr. Bianchi which asked for his right to have a parent-child relationship. CP at 41-44.

Mr. Bianchi has presented evidence that the caseworkers failed to carry out their statutory duties, follow proper procedures and did not act reasonably under the circumstances.

Mr. Bianchi demonstrated to the trial court that the States Defendants were not entitled to qualified immunity. CP at 52-56.

6. Actionable Tort Duty Arises From RCW 13.34.060(2) and 13.34.136

RCW 13.34.060(2) states the States Defendants statutory duty that they did not follow.

RCW 26.44.120, Information About Rights -- Notice to Noncustodial Parent. Which supports the duty to notify of RCW 13.34.060(2).

WAC Rule 388-15-134, Also created a duty to notify the parent, and supports 13.34.060(2).

F.W.B. was taken into custody on January 4, 2002, by the police pursuant to RCW 26.44.050. The States Defendants did

not get the first voluntary placement agreement signed until January 7th, 2002. CP at 99. They did not notify Mr. Bianchi that his child was taken into custody as dictated by RCW 13.34.060(2) or WAC Rule 388-15-134 within the time which those statute give. Which violated the statute and Mr. Bianchi rights.

RCW 13.34.136(1)(b) Also created a duty for the States Defendants to encourage and maintain parent-child ties.

The States Defendants clearly breached all of these statutory duties with no regard for Mr. Bianchi rights. Even after he wrote letters requesting to have a parent-child relationship. DSHS/CPS took custody of F.W.B. on January 4, 2002. They filed a dependency petition on April 16, 2002. But failed to even notify the Plaintiff until the end of May 2002. Even after he had written two letters to Tyrone Fritz and DSHS/CPS. CP at 45.

The Bennett court recognized that when the legislature creates a duty, we may provide a remedy for its breach, if the remedy is appropriate to further the purposes of the statute and is needed to assure its effectiveness. *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990). To determine whether an implied cause of action was warranted, the Bennett court adopted the approach used by federal courts, which requires us to determine (1) whether the plaintiff is within the class of persons for whose benefit the statute was enacted; (2) whether the legislative intent supports creating

a remedy; (3) whether the underlying purpose of the legislature is consistent with inferring a remedy; Bennett, 113 Wn.2d at 920 (citing In re Wash. Pud. Power Supply Secs. Litig., 823 F.2d 1349, 1353 (9th. Cir. 1987)).

The Legislature established the right to sue the State for common law tort when it waived sovereign immunity. 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.3d 845 (2002).

7. Mr. Bianchi Can State A Claim of Negligence

The threshold determination in a negligence action is a question of law, Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 128, 875 P.2d 621 (1994), which we review de novo. When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

When a duty is owed to a specific individual or class of

individuals, that person or persons may bring an action in negligence for breach of that duty. See *Hartly v. State*, 103 Wn.2d 768, 781-82, 698 P.2d 77 (1985); *Chambers-Castanes*, 100 Wn.2d at 284-85. 'It is well established that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action where the statute is violated and the injured party was one of the persons designed to be protected.' *Yonker v. Department of Social & Health Servs.*, 85 Wn.App. 71, 78, 930 P.2d 958 (1997) (quoting *Donaldson v. City of Seattle*, 65 Wn.App. 661, 666-67, 831 P.2d 1098 (1992)).

RCW 26.44.010 states: The bond between a child and his or her parent... is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent.

RCW 26.44.100 states: The legislature reaffirms that all citizens, including parents, shall be afforded due process, that protection of children remains the priority of the legislature, and that this protection includes protecting the family unit from unnecessary disruption.

A defendant is liable for negligence only for breach of a duty of care owed to the plaintiff, not the public at large. *McCluskey v. Manorff-Sgerman*, 125 Wash.2d 1, 6, 882 P.2 157 (1994). When a governmental agency is the defendant, this rule is known as the public duty doctrine. *Taylor v. Stevens Cy.*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988). Thus, a

governmental official's negligent conduct does not expose the government to liability unless the plaintiff can show that a duty was owed to the plaintiff, as opposed to the public in general. *Taggart v. State*, 118 Wash.2d 195, 217, 822 P.2d 243 (1992). In other words, "a duty to all is a duty to no one," *Taggart*, 118 Wash.2d at 217 (quoting *Taylor*, 111 Wash.2d at 163).

Washington Courts have recognized numerous exceptions to the public duty doctrine. *Taggart*, 118, Wash.2d at 217-18. Those exceptions are found in traditional negligence principles, and determine the existence of a duty. In *Bailey v. Forks*, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987), The court identified four such exceptions: (1) when the Legislature expresses by Statute "an intent to identify and protect a particular and circumscribed class of person (legislature intent)"; (2) when a governmental agent has a responsibility to enforce statutory requirements and the plaintiff is within the class the statute was intended to protect, but the agent fails to take corrective action, despite actual knowledge of a statutory violation (failure to enforce); (3) when a governmental agent assumes a duty to exercise reasonable care (rescue doctrine); and (4) when the injured plaintiff is set off from the general public by a relationship between him or her and the governmental agent, and the agent gives explicit assurances to the plaintiff or assurances are inherent in a duty vested in the government

entity, and the plaintiff relies upon those assurances (special relationship).

(1) Legislature did intent for the States Defendants in this case to act in a certain way when they crated RCW 13.34.060, 13.34.136, 26.44.120, and WAC Rule 388-15-134, at which time the legislature was aware of the fact that the State of Washington had waived sovereign immunity under, Law 1963, ch. 159, § 2, codified at 4.92.090.

(2) The States defendants be came liable when they failed to enforce the statutes and rules of RCW 13.34.060, 13.34.136, and WAC Rule 388-15-134.

(3) The States defendants assumed a duty to warn or come to Mr. Bianchis' aid when they took custody of his daughter F.W.B. on January 4, 2002, pursuant to RCW 26.44.050. CP at 122.

(4) Mr. Bianchi was set off from the general public by a relationship between him and the States Defendants. As the parent of a child (F.W.B.) in DSHS/CPS custody. Assurances were inherent in the duties vested in the government entity (the States Defendants), and Mr. Bianchi relied upon those assurances when he wrote requesting his right to have a parent-child relationship with his daughter F.W.B.

Mr. Bianchi demonstrated these exceptions that demonstrate a claim of negligence. CP at 41-47.

8. Mr. Bianci Did State A Claim For Alienation Of Affection

Alienation of affection and/or direct interference with family relations is characterized as an intentional tort. Basically to establish a prima facie cause of action for these torts the complaining party must show the following:

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

(1) Mr. Bianchi did have an existing family relationship with his daughter F.W.B. through letters, cards, drawings, and phone-calls. See CP at 62.

(2) The States Defendants wrongfully interfered with that relationship when they chose to deny Mr. Bianchi contact with his daughter F.W.B. without first getting the permission from the court to do so. "If the States Defendants believed like they are now claiming, that keeping Mr. Bianchi from having any type of a parent-child relationship with F.W.B. was protecting her welfare." Then they should have fallowed the statutes and asked the court to limit or deny Mr. Bianchi contact with his daughter, instead they violated the statutes and Mr. Bianchi parental right by denying him contact without the court permission to do so.

(3) It was the intention of the States defendants that

the denial of contact between Mr. Bianchi and F.W.B. would result in the loss of affection or family association. As they for some reason did not want Mr. Bianchi to associate with his daughter F.W.B., or F.W.B. to associate with her father Mr. Bianchi.

(4) There is at a minimum a causal connection between the States Defendants conduct and the loss of Affection. As Mr. Bianchi and F.W.B. both lost the affection of each other for some twenty months, because the States Defendants denied Mr. Bianchi his right to have a parent-child relationship without the courts permission.

(5) The States Defendants conduct did result in the damages of server emotional distress and mental anguish to Mr. Bianchi.

Mr. Bianchi try to assert his parental right to have a parent-child relationship with F.W.B. when he wrote to Tyrone Fritz and DSHS/CPS. See Cp at 64-72.

The novelty of an asserted right and the lack of precedent are not valid reasons for denying relief to one who has been injured by the conduct of another. The common law has been determined by the needs of society and must recognize and be adaptable to contemparay conditions and relationship. *Funk v. United States*, 290 U.S. 371, 78 L.Ed. 369, 54, S.Ct. 212, 93 A.L.R. 1136 (1937); *Russick v. Hicks*, 85 F.Supp. 281 (W.D. Mich. 1949); *Miller v. Monsen*, 28 Minn. 400, 37 N.W. 2d 543 (1949).

The trend of the law as we perceive it would recognize a cause of action in a parent for the alienation of the affection of a child. *Daily v. Parker*, 152 F.2d 174, 162 A.L.R. 819 (7th. Cir. 1945).

We must assume that the legislature knows that some of the children that are taken into DSHS/CPS custody come from single parent homes, and that part of those absent parents are in prison for one reason or another. If the legislature had intended in denying those parents in prison their right to have contact with their children then legislature would have clearly stated that in a statute of some kind. However they have not, instead they wrote the findings contend in RCW 13.34.025.

Mr. Bianchi had the same type of a parent-child relationship with his daughter F.W.B. as most of our overseas soldiers have with their children, through letters, cards, drawings, and phone calls.

VI. CONCLUSION

Mr. Bianchi has shown that the trial court erred when it granted the States Defendants motion for summary judgment on the grounds of: Collateral Estoppel, Res Judicata, Absolute Immunity, and Qualified Immunity.

Mr. Bianchi has established a cognizable tort or constitutional claim for the violation of his parental rights which caused him to suffer severe emotional distress and mental anguish. Accordingly, the Appellant respectfully asks

this Court to reverse the order of summary judgment dismissing Mr. Bianchi's claims, and reinstate his intentional tort (civil suit) against the States Defendants.

DATED this 26 day of September, 2006.


RONALD JAY BIANCHI # 729044 A-F/07
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326

PROOF OF SERVICE

I certify that I served a copy of these documents; (REPLY BRIEF) on all persons listed below:

David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Ste 300
Ms TB-06
Tacoma, WA. 98402-4427

Michael E. Johnston
Attorney General's Office
Torts Division
629 Woodland Square Loop SE.
PO Box 40126
Olympia, WA. 98504-0126

BY U.S. Mail Postage Prepaid

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

Dated this 26 day of September 2006.


Ronald Jay Bianchi # 729044 A-F/07
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326

BY _____
SIGNATURE

STATE OF WASHINGTON

06 SEP 29 PM 12:07

FILED
COURT OF APPEALS
DIVISION II