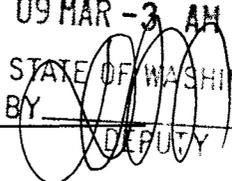


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DIVISION II

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STATE OF WASHINGTON
BY _____



**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

THOMAS L. RAGLIN and CECELIA M. RAGLIN, husband and wife,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

APPELLANTS' REPLY BRIEF

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I. THIS COURT CAN REVIEW BOTH SUMMARY JUDGMENTS

The State spends much of its brief contending that the appellate court should consider nothing but the release issue raised by the State's cross motion for summary judgment. By so doing, the years of less than clean DSHS hands, the violations of statute and its own codes, the obfuscation, all become trivial irrelevancies. But if the court considers the evidence in support of the Raglins' wrongful adoption liability motion, then the full context becomes completely relevant to determining whether the release was valid. The trial court entered an Order denying Plaintiffs' Motion for Summary Judgment. CP at 451-453. The trial court had inherent authority to include supplemental materials and complete the record. RAP 7.2 (b); *State v. Perala*, 132 Wn.App. 98, 107 (2006).

An appellate court has authority to review a denial of Plaintiffs' motion for summary judgment when the granting of Defendant's motion for summary judgment is being reviewed on appeal. *Ruff v. County of King*, 72 Wn.App. 289 (1993) reversed on other grounds, 125 Wn.2d 697 (1995) citing *Waller v. State*, 64 Wn.App. 318, 338, *rev. denied*, 119 Wn.2d 1014 (1992). Also *Firth v. Lu*, 103 Wn.App. 267, 278 (2000) reversed on other grounds, 146 Wn.2d 608 (2002). Similarly, an appellate court "may review a denial of summary judgment where it is accompanied by a final order

disposing of all issues before the district court and where the record has been sufficiently developed to support meaningful review of the denied motion". *Jones-Hamilton Co. v. Beazer Materials & Serv.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992). See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 n. 11 (9th Cir. 1990). ("[B]ecause we have jurisdiction to decide [defendant's] appeal from the granting of plaintiffs' motion for summary judgment, we exercise our discretion to decide their claim of error in the denial of their summary judgment motion as well.").

II. FAILURE TO CITE CR 59

The State argues that the Raglins' motion to reconsider was inherently flawed because it did not "cite or discuss CR 59". Brief of Respondent, p. 5. But CR 59 does not, by its language, require its citation. Rather, the court at the first summary judgment hearing invited additional briefing; Respondent so concedes on page 2 of Respondent's brief. "After ordering briefing and hearing argument..."

The additional briefing and argument was before the trial court and is now before this appellate court.

The appellate court reviews summary judgment on a de novo basis, meaning that the appellate court engages in the same inquiry as the trial court. *Parkins v. Colocysis*, 53 Wn.App. 649 (1989).

III. THE WRONGFULLY OBTAINED WAIVER BECAME THE

BASIS FOR THE WRONGFULLY OBTAINED RELEASE

The State characterizes the bargaining between the Raglins and DSHS, on pages 9 and 10 of Respondent's brief, as two equal, arms length entities in a fair fight. The reality is closer to Manhattan being sold for \$24 worth of glass beads and a box of trinkets.

The whole treatment of the Raglins by DSHS was unreasonable from the beginning. The State argues, for example, on page 17 of Respondent's brief, that the Raglins had waived adoption support, knowingly, because they received a pamphlet and the waiver itself said the Raglins were told all about it. The reality was far different. No documents were presented to the Raglins at that time "...that would have very easily supported approval of the adoption support application in Olympia." Linda Klein, CP at 190.

Prospective adoptive parents cannot be expected to fill out the adoption support paperwork. CP at 93, Linda Klein. The Raglins were not told about the child's mother's history, or family history; the form was marked information "unavailable". CP at 93, Linda Klein. This was untrue, the records were available. CP at 93, Linda Klein. This is important because it is the case worker's obligation to warn the prospective adoptive parents about the potential problems a parent could reasonably expect as the child grows up. CP at 94. Adoption support should have been requested. DSHS saved itself the expense of support. CP at 94. Linda Klein placed a note in

the file for the next case worker to pursue adoption support. CP at 189. Lori Whitaker admits that with the child's family history she would have "absolutely" encouraged the Raglins to apply for post-adoption support. CP at 117-118. She felt there was a likelihood that the boy would develop special needs. CP at 117. She was the one that had the Raglins sign the post-adoption support waiver. CP at 117. She argues that the file she saw had nothing about the mother's substance abuse and she never requested those records. CP at 118. Even the promise to pay the adoption lawyer's fees by DSHS was illusory consideration as DSHS *always* paid the adoption legal fees. CP at 118. The Raglins were told, after being ignored for many years, that they now had to hurry up and adopt or the child could be snatched away and placed elsewhere. CP at 131.

With an infant child that may not have any current problems but would likely manifest problems in the coming years, the adoptive parents would need to have post-adoption support explained to them. CP at 119.

The above demonstrates the waiver of post-adoption support was wrongfully obtained. Absolutely all the knowledge and bargaining power was on the side of DSHS. Procedural unconscionability exists where there is a lack of a meaningful choice. Apparently all other parents in the position of the Raglins were given support. CP at 191. The Court should consider all the circumstances surrounding the transaction including the manner in

which the contract was entered, and whether the party had a reasonable opportunity to understand the terms of the contract. *Al-Safir v. Circuit City Stores, Inc.*, 394 F.3d 1254 (C.A. 9 Wash. 2005) applying Washington law.

The "unavailable" disclosure form (13-041) signed by Lori Whitaker on May 16, 1997, the day of adoption, indicates on page 3 that the child exhibited a "learning disability, for example, neurological, organic brain dysfunction" with an onset age of 4.5 years. CP at 102. Four and one-half years old was about six months before the adoption and would have been a clear sign to the adoption worker that the child was going to have problems in the future. CP at 96. Yet Lori Whitaker did not counsel the Raglins about post-adoption support availability; instead, gave them a waiver to sign even though she knew there was a likelihood that the child would develop special needs. CP at 117.

The State argues at page 10 that actual payment of post-adoption support was not conditioned upon the Raglins releasing DSHS from a tort suit. The Raglins clearly thought the whole process in which they were involved was to receive post-adoption support for the child. CP at 437-438. This belief was vehemently reinforced when DSHS through Jan Spears made support payments in any amount contingent on no lawsuit. CP at 419-421.

So the Raglins eventually asked for post-adoption support after the

child started manifesting problems. The post-adoption support was opposed because of the waiver. The Raglins were told they could get post-adoption support if they now signed a release. They signed the release and still did not get any support. So they filed a lawsuit to recover for the wrongful adoption and were dismissed from court because of the release.

Given the overwhelming evidence, it is difficult to understand how the Raglins would not have been entitled to post-adoption support. The uninformed waiver of support can hardly be characterized as "knowing"; DSHS had a pre-existing duty to provide it. The State's argument that the Raglins avoiding the hearing was sole consideration from the State in return for no tort action is simply nonsensical. The analysis in *Basin Paving, Inc. v. Port of Moses Lake*, 48 Wn.App. 180 (1987) should apply here.

IV. UNCONSCIONABLE AND VALUELESS AGREEMENT

On page 16 the State argues that the release was not unconscionable because it was not in fine or hidden print. This argument ignores the fact that the Raglins had not gone through the lengthy process of seeking post-adoption support through DSHS up to the administrative hearing level in order to give up a tort claim; they were seeking support for the child. Rather, the bureaucratic denial of post-adoption support had no basis in law or fact. Procedural unconscionability involves far more than fine print. Unequal bargaining power and the tangled circumstances leading up to the

release should be considered. See *Al-Safir, supra*, where an arbitration agreement was substantively unconscionable because the rules could be changed at will by the employer. See also *Nagrampa v. Mail Coups, Inc.*, 469 F.3d 1257 (C.A. 9 Cal. 2006) where a franchise agreement was procedurally unconscionable because of overwhelming disparate bargaining power and take it or leave it basis. Essentially it was a frivolous denial by DSHS. Frivolous defenses are sanctionable precisely because they have no value and do nothing other than delay, discourage, frustrate, and waste resources. It was unconscionable to deny the support request when witness after witness testified that post-adoption support was appropriate. This means that the "consideration" the State claims has value (removal of a frivolous defense) is what the Raglins accepted in return for losing a tort claim and still failing to receive support. This is unconscionable and a failure of consideration.

The State claims that the release was simply to avoid the travails of an administrative hearing and not to actually receive post-adoption support. Nothing in the record ever indicated DSHS told the Raglins, before signing, the amount of support in contention, or at least its meager limits. When the Raglins asked for enough monthly income sufficient to actually care for the child they were laughed at. CP at 440. Yet Jan Spear had no reason to doubt that the child needed all the services the Raglins wanted for him. CP

at 79. The State's case would certainly be more compelling if they could show that when the Raglins signed the release and attempted to negotiate the monthly post-adoption support, they knew the ceiling amount DSHS would part with was less than a third of what the child actually needed.

Adler v. Fred Lind Manor, 153 Wn.2d 331 (2004) describes substantive unconscionability in a contract as being overly harsh or one sided, exceedingly callous. Procedural unconscionability is: 1) a lack of meaningful choice and can reflect the circumstances surrounding the transaction; 2) the party's reasonable opportunity to understand the terms; and 3) hidden terms and fine print. "These three factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed. *Adler*, at 346. Both substantive and procedural unconscionability do not have to be shown; the outcome of *Adler* was determined on substantive alone; at 346-347.

V. CONFLICT IN DSHS DOCUMENTS

By September 12, 1996, the child was 4 ½ years old and a dependency report to the court was being made, CP at 123-129, submitted by Peggy DeVoy. This was the report used to threaten the Raglins with removal of the child if the adoption was not complete within three months. CP at 189. This, despite the file having fallen through the cracks and no one from DSHS contacting the family for many years. The report admits

that the birth mother had an open CPS case in Vancouver. CP at 127. This case file would have been available to the series of workers on the Raglin case if they had only chosen to look at it. More importantly, the dependency report states the child does not need any services for medical or psychological needs. Further, DCFS will monitor the placement and provide adoption services. CP at 126. Compare this to the 13-041 form, CP at 102, where allegedly the Raglins are being told that the child had a learning disability (eg. neurological, organic brain dysfunction) with an onset at 4.5 years, the same time as the dependency report telling the court the child did not need anything.

VI. INFORMATION REGARDING THE NATURAL FATHER

Respondent's brief, page 2, states the Raglins knew certain unsavory information about the child's family when the adoption took place, citing to the 13-041 form. CP at 100-105. This is apparently an attempt to show the Raglins had enough information to refuse the adoption. The State has yet to deny that DSHS simply failed to comply with their own regulations and the state statute regarding disclosure.

Apparently, the father never lived with the child, CP at 58-59, so his exposure to contraband substances is not particularly relevant to the child's health, certainly not as relevant as the mother's behavior during pregnancy which is marked, on the same form as "unavailable". CP at

100-105. The State has never produced anything showing the natural father's "relationship" with the birth mother was other than a one-night stand.

After the child was placed with the Raglins the natural mother became pregnant with Brandon and continued her contacts with DSHS. For the whole time the Raglins were seeking the mother's health history, DSHS records were filled with what they sought. CP at 127, CP at 186, 189. CP at 411. CP at 87-88, 94, 41.

VII. REGARDLESS OF DISCLOSURE CHILD NEEDED

SUPPORT

In reference to the release, on page 14 the State argues that "...the very dispute that was settled involved the Raglins' claim that the state had not made sufficient disclosure." The Raglins respectfully disagree. The Raglins were painfully aware that disclosure had not taken place, particularly when Mrs. Raglin tried to get information, on May 16, 1997 from Lori Whittaker and in September 2003 from Jan Spear, because of the multiple behavioral problems. CP at 435-436. "This was the underlying basis of their administrative appeal." State's brief, page 14. No, it was not. The underlying basis of the appeal was to get support. They wanted a hearing so they could get support. Mrs. Raglin: "The agreement said that if we do not pursue our challenge to the Department's

denial of post-adoption services/support, then the Department and we would work out how much we should receive and even some back support." CP at 438-439.

This is reinforced by Mrs. Raglin's actions from June 2004 to August 2005, over a year, of simply trying to get support so the child could get the services he so badly needed. CP at 439-440. She was seeking support, not a bureaucratic bypass.

VIII. QUESTIONS OF FACT

Summary judgment has often been precluded because the trier of fact needed to determine whether a party had knowledge or notice of certain facts or was mistaken about something. *Tegland/Ende, Wn. Handbook on Civil Procedure*, sec. 69.19 (2008-2009 Ed.); citing *Rigos v. Cheney School District*, 106 Wn.App. 888 (2001); *Hope v. Larry's Markets*, 108 Wn.App. 185 (1001); *Michak v. Transnation Title Ins.*, 108 Wn.App. 412 (2001). The Raglins should be allowed to have a jury decide whether DSHS was overreaching or deliberately letting the Raglins incorrectly believe the release was in return for substantial monthly payments far in excess of what DSHS knew would ever be paid. Similarly, whether DSHS or the Raglins acted reasonably given what each side knew should be a jury question. Summary judgment has often been precluded because the trier of fact needed to determine whether something

was reasonable or someone acted reasonably. *Security State Bank v. Burk*, 100 Wn.App. 94 (2000); *Van Noy v. State Farm*, 98 Wn.App. 487, affirmed, 142 Wn. 2d 784 (2001).

Cases discussing unconscionability seem to deal mostly with employment contracts, arbitration and franchises. While these are undoubtedly important matters they seem to pale when compared to the human damage to individuals and families caused by the explosive effects of damaged infants placed in goodhearted homes and the inevitable results as the child becomes dangerously violent. The Raglins suggest that the severity of the foreseeable potential consequences should be a factor in determining whether unconscionability exists.

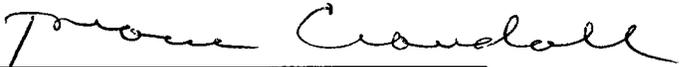
IX. CONCLUSION

It is difficult to conceive of facts more compelling than those in this case. The disparity in knowledge, the ability to reasonably predict future events, the bureaucratic maze, the bargaining power, the education of participants were all overwhelmingly on the side of DSHS. Arrayed against this were an honest mother and father successfully raising two fine boys of their own. The gradual but never ending deterioration of the adopted child, now a young man, has catastrophically changed the people involved. The Raglins respectfully request that this Court reverse the trial court's order of summary judgment based upon a valid release and grant

the Raglins' motion for summary judgment as to liability.

DATED this 2 day of March, 2009.

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Pursuant to RAP 9.6, the undersigned submits the attached Appellants' Reply Brief. The undersigned has caused copies of the attached documents to be served on Respondent's counsel and filed with the Court of Appeals, Division II by service through Federal Express, Overnight Next Morning delivery.

DATED this 7 day of March, 2009.

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