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COURT OF APPEALS

10/20/2017 4:19:46

STATE OF WASHINGTON  
BY: *[Signature]*  
CITY

No. 40510-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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VIRGIL WEAR, et al.,  
Appellants/Plaintiffs,

**ORIGINAL**

v.

MAUREEN WEAR, LEE GILES, JANE DOE GILES, CITY  
OF TACOMA et al.  
Defendants/Respondents

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Brief of Appellants

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## **Assignments of Error**

### Assignment of Error No. 1:

The Court below erred in granting summary judgment of dismissal.

### Assignment of Error No. 2:

The Court below erred in granting Defendant City's motion to strike.

## **Issues Pertaining to Assignments of Error**

### Issue No. 1:

Was there sufficient evidence in the record to permit Plaintiff/Appellant to move forward on the question of the City's knowledge of potential danger to JUSTIN WEAR.

### Issue No. 2:

Was there sufficient evidence in the record to permit Plaintiff/Appellant to move forward on the question of whether the City's failure to act enabled MAUREEN WEAR and LEE GILES to inflict injury on JUSTIN WEAR.

### Issue No. 3:

Were Appellant's evidentiary submissions proper.

## **STATEMENT OF THE CASE:**

The basic facts are largely undisputed. JUSTIN WEAR was the victim of sexual molestation by LEE GILES, who was involved with JUSTIN's mother MAUREEN WEAR. JUSTIN's father, VIRGIL, was divorced from MAUREEN and had a very difficult time getting visitation. Eventually the molestation was discovered, GILES and MAUREEN WEAR were convicted of crimes relating to these actions.[Defendant City's brief CP 1]

The record establishes the following:

In 1980 LEE GILES acted in a sexually inappropriate manner at the Daffodil Parade. As a result he was given a psychological examination [CP 54, Deissner Decl. Exh. 6] The examiner found GILES had problems but did not recommend terminating him.

GILES was able to obtain Child Pornography from CITY

criminal evidence sources during the following years. [CP 54, Exh. 2] In 2006 GILES was arrested for molesting JUSTIN WEAR, and a search turned up police evidence videotapes and photos of an inappropriate nature. [CP 54 Exh. 2] The probable cause affidavit states GILES took such materials from drug houses. [CP 54 Exh. 3] But presentence investigation report excerpts show he also took evidence recorded as “destroyed.” [CP 54 Exh. 4]

An email sent to Pierce County Prosecutors in 2004 stated that Mr. GILES had been investigated for sexual misconduct back in the early 60's. [CP 54 Exh. 5]

MAUREEN WEAR worked for the CITY in the Safe Streets program in the late 1990s.

In a background memo dated 9/4/1997 from the TACOMA Police Department, it is noted that MAUREEN WEAR had a ‘long-standing domestic dispute’ with Mr. Wear. [CP 54 Exh. 7] Ms. WEAR was arrested in 1992 for assault;

she in turn obtained restraining orders. The Memo states Mr. WEAR is a 'very negative resource' and is 'very dissatisfied with the fact that his ex-wife has worked closely with Tacoma police during her employ with Safe Streets.' [CP 54 Exh. 7]

WEAR was terminated in 1999 and pornography was found on her computer. [CP 54 Exh. 8]

According to VIRGIL WEAR, he frequently advised persons at the CITY OF TACOMA that there were problems with MAUREEN's care of JUSTIN. He testifies [CP 80, Declaration of Wear p. 1] that JUSTIN was often left unsupervised at Safe Streets functions. CPS reports were made about problems with JUSTIN in 1991. The couple divorced.

VIRGIL WEAR testifies [CP 81] that he actually met with TACOMA officials to complain about the fact that MAUREEN was able to get the police to harass him, such as police cars parking in front of his house. He told the Chief at

this meeting that GILES was involved in an affair with MAUREEN WEAR and that MAUREEN had significant mental illness issues.

In 1998 there was more CPS involvement when JUSTIN acted out sexually with Mr. WEAR's new wife's daughter. [CP 82] WEAR complained that JUSTIN was getting this behavior from somewhere; but nothing happened.

GILES and WEAR were both charged with molesting JUSTIN.

## **ARGUMENT**

### **1. Special Relationship**

The CITY did have a special relationship to JUSTIN due to the fact that both MAUREEN and GILES were City employees.

Plaintiff agrees that Generally, an employer has no duty to protect a third party from the intentional or criminal acts of a third person unless a special relationship exists between the actor and either (1) the third person (which imposes a duty to control the third person's conduct) or (2) the victim (which imposes a duty to protect the victim).

#### **A. Relationship to Victim**

TACOMA's relationship to JUSTIN arose out of MAUREEN's employment with the City, the CITY's access to information suggesting MAUREEN was not properly caring for JUSTIN, and MAUREEN's ability to manipulate the CITY to give her an advantage in her custody dispute with VIRGIL.

The CITY should be found to have a duty to any child of an employee where the CITY has notice of information tending to suggest the employee may be abusing the child. RCW 26.44.050 provides:

Upon the receipt of a report concerning the possible occurrence of abuse or neglect, it shall be the duty of the law enforcement agency or the department of social and health services to investigate and provide the protective services section with a report in accordance with the provision of chapter 74.13 RCW, and where necessary to refer such report to the court.

*Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991), recognized that negligent investigation of complaints may support a claim against governmental defendants. Since MAUREEN WEAR worked for a law-enforcement affiliated program, the CITY certainly had a statutory duty to pursue information suggesting child endangerment. TACOMA should have known that MAUREEN failed to properly care for JUSTIN during events, that CPS reports had been made and that VIRGIL WEAR was complaining about MAUREEN's

overall mental stability, but no action was taken to investigate.

### **B. Relationship to Tortfeasor**

When an employee is acting outside the scope of employment, as GILES and MAUREEN were, the relationship between the employer and the employee gives rise to a limited duty, owed by the employer to **foreseeable victims**, "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others." *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999), review denied, 140 Wn.2d 1022 (2000); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997).

There was ample notice to the CITY that GILES posed a potential threat. Yet there was no followup to the Daffodil Parade incident, beyond one psychological evaluation. Mr. GILES was able to obtain child pornography from evidence: the CITY should have had adequate procedures to prevent such actions.

Far more troubling is the possibility that MAUREEN with GILES's aid was able to manipulate the Police into harassing VIRGIL. The facts permit an inference that VIRGIL was subject to unusual scrutiny by the police; that scrutiny 'scared him away' from aggressively pursuing visitation and/or custody. Had he been allowed more time with JUSTIN, it is much more likely that JUSTIN's behavior issues would have triggered inquiry by VIRGIL.

Either way the CITY should have foreseen that GILES posed a danger to others and further monitored his activities. Duty and breach of duty are therefore issues of fact in this case.

## **2. Proximate Cause**

An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries.

*Betty Y. v. Al-Hellou*, 98 Wash.App. 146, 149 n. 3, 988 P.2d 1031 (1999), review denied, 140 Wash.2d 1022, 10 P.3d 403 (2000). Proximate cause consists of two elements: cause-in-fact and legal causation. *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Cause-in-fact is "a cause which in a direct sequence [unbroken by any new independent cause,] produces the [injury] complained of and without which such [injury] would not have happened." 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 15.01, at 181 (2005). Cause-in-fact is generally a question for the jury. *Schooley v. Pinch's Deli Market*, 134 Wash.2d 468, 478-79, 951 P.2d 749 (1998).

The evidence of Mr. WEAR, even if hearsay, is admissible to show that he relayed information to the CITY that the CITY should have used as the basis for further investigation. Had investigation occurred, given the level of JUSTIN's problems at the time, there would certainly have

been further professional evaluation of JUSTIN which would have revealed the abuse he was experiencing.

Legal causation is a question of law, *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wash.2d 190, 204, 15 P.3d 1283 (2001), whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Minahan v. W. Wash. Fair Ass'n*, 117 Wash.App. 881, 890, 73 P.3d 1019 (2003), review denied, 151 Wash.2d 1007, 87 P.3d 1185 (2004). For an employer to be liable for his employee's intentional acts, the association between the victim and the employee must be occasioned by the employee's job. *C.J.C. v. Corp. of the Catholic Bishop*, 138 Wash.2d 699, 723, 985 P.2d 262 (1999).

Here the test is met several ways:

- MAUREEN and GILES met through their work
- MAUREEN was able to 'hold off' VIRGIL from having access to JUSTIN due to her association

with police

- GILES was able to ‘fuel’ his predilection to such actions with access to child pornography through his work

### **3. Summary Judgment**

On summary judgment all disputed facts, and all reasonable inferences from the facts, are resolved in favor of the nonmoving party. *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998); *Attwood v. Albertson's Food Ctrs., Inc.*, 92 Wn.App. 326, 330, 966 P.2d 351 (1998).

In this case a reasonable trier of fact could infer that the CITY of TACOMA should have been aware of JUSTIN’s vulnerability and GILES’s risk of harming him, and taken steps to prevent the same.

### **4. Evidence**

The exhibits that the City sought to strike, CP 54 exhibits:

2. Letters from Pierce County indicating GILES had obtained child pornography from police evidence.

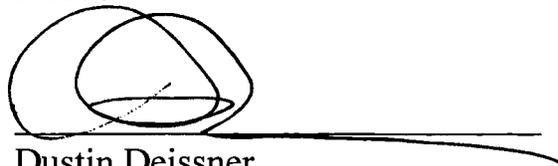
3. Declaration for probable cause in State v. Giles.
4. Excerpt from Pre Sentence investigation on GILES
5. Email provided to Pierce County Prosecutor re: earlier incidents of sexual misconduct.
6. Psychological Evaluation of LEE GILES
7. TACOMA POLICE memo regarding MAUREEN WEAR.
8. CITY OF TACOMA memo re pornography on WEAR computer;

while otherwise hearsay, are admissible to show notice by the City of the various stated therein. ER 801(c).

### **CONCLUSION**

This Court should reverse the summary judgment herein and remand this matter for trial.

August 24, 2010



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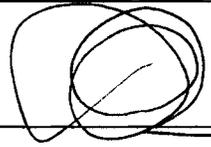
## CERTIFICATE OF SERVICE

DUSTIN DEISSNER certifies upon penalty of perjury:

I have on this date served the foregoing document upon the following parties by the following means:

TO:	BY:
Jean Homan City of Tacoma 747 Market Street R.1120 Tacoma WA 98402-3767	<input checked="" type="checkbox"/> US Mail 1 <sup>st</sup> Class Postage Prepaid <input type="checkbox"/> Delivery Service <input type="checkbox"/> Facsimile to:253-591- 5755 <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

August 24, 2010

  
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