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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HAELI HAMRICK, et. al.,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Plaintiffs are five young women who, between 1998 and 2003, were fostered with and then adopted by Scott and Drew Anne Hamrick. In 2011, Drew Anne Hamrick disclosed that Scott Hamrick had been sexually abusing Plaintiffs. Thereafter, Plaintiffs filed suit, claiming that DSHS negligently failed to protect them from abuse in the Hamrick home during two distinct time periods: the pre-adoption period, between 1998-2003, and a post-adoption period in 2008-2010 during which three CPS referrals occurred. Notably, the only available cause of action based on the child welfare statutes for either of these time periods is the narrow, statutorily-based claim of negligent investigation, which requires an incomplete or biased investigation into allegations of child abuse that results in a harmful placement decision.

Regarding the pre-adoption period, the trial court granted DSHS's CR 50 motion to dismiss Plaintiffs' claims, finding that even viewing the facts in the light most favorable to Plaintiffs there had been no allegations or evidence of abuse to trigger a duty on DSHS to investigate, and, therefore these negligent investigation claims failed as a matter of law. On appeal, Plaintiffs challenge that dismissal. But Plaintiffs do not argue that a negligent investigation occurred. Rather, Plaintiffs assert that DSHS social workers had a "special relationship" with the Plaintiffs such that they were required

to unearth evidence of abuse even though there were never any allegations of abuse or neglect made to multiple social workers, guardian ad litems, therapists, or teachers involved in the children's lives. Because Washington law does not recognize such a "special relationship" cause of action in the child welfare context, this Court should affirm.

Regarding the post-adoption period, claims arising from two CPS referrals (2008 and 2010) went to the jury, which returned a verdict in favor of DSHS, finding that it had not been negligent.[1] The Plaintiffs do not appeal that determination.

In addition, Plaintiffs raise various other issues involving vaguely articulated challenges to aspects of the trial proceedings. First, Plaintiffs criticize the special verdict form and the incorporation of language related to Scott and Drew Hamrick being responsible for harming the children. This, however, is irrelevant given that the jury never reached this question having decided that DSHS was simply not negligent. Second, Plaintiffs assert that they are entitled to a new trial because two witnesses were excluded from testifying. However, the exclusion of these witnesses was within the discretion of the trial court and, in any event, because this testimony related to the 2009 CPS referral which the trial court dismissed as a basis of liability,

[1] Plaintiffs do not appeal the trial court's dismissal on CR 50 of the claim based on a 2009 referral because it was a "third-party" referral over which DSHS had no statutory mandate to investigate.

the testimony would have been irrelevant and prejudicial and therefore exclusion of this testimony was harmless. Last, Plaintiffs vaguely cite to cumulative errors, but are not sufficiently explicit as to which errors so as to provide a meaningful opportunity to respond, let alone reverse the jury's decision.

II. ISSUES PRESENTED

A. Did the trial court properly grant the State's CR 50 motion and dismiss Plaintiffs' claims arising from the pre-adoption period, where there were neither allegations nor evidence of abuse or neglect that could have triggered a duty on DSHS to investigate?

B. Was the special verdict form proper where it addressed the liability issues remaining in the case following the trial court's CR 50 ruling and where inclusion of a question segregating damages caused by intentional conduct, even if erroneous, did not prejudice the Hamricks given that the jury never reached any question beyond answering the State was not negligent?

C. Did the trial court act within its discretion when it excluded Plaintiffs' late-disclosed witnesses, where the witnesses would have testified about the 2009 CPS referral that the trial court dismissed on CR 50 because it was a "third-party" referral that DSHS had no statutory mandate to investigate and therefore did not provide a basis of liability?

D. Should a new trial be granted on the basis of cumulative error where Plaintiffs do not articulate which errors accumulated to cause an unfair trial?

III. STATEMENT OF FACTS

A. Beginning in 1998, The Plaintiffs Were Fostered in the Hamrick Home Where They Consistently Indicated They Were Happy and Wanted To Be Adopted By The Hamricks

1. Fosterage and Adoption of Kaeli, Staci, and Haeli (1998-2000)

In February 1998, Kaeli Hamrick was placed in the Hamrick home. She was the first of the Plaintiffs placed in that home. Kaeli's social worker at that time was Amy Page, who first met the Hamricks upon placement of Kaeli. RP (3/4/15) at 55:8-24. According to Page, Kaeli wanted to be adopted by the Hamricks and, as of the spring of 1999, Kaeli did not give any impression or indication that something was wrong in the Hamrick home. Page did not see any evidence that the Hamrick home was harmful, nor did Kaeli's therapist or the Guardian ad Litem report any concerns to Page. RP (3/4/15) at 59:4-60:25. According to Page, Kaeli appeared to be happy. RP (3/4/15) at 61:15-18.[2]

On October 29, 1999, Staci Craney and Haeli Hamrick (periodically hereafter, the "Twins") were placed in the Hamrick home. The Hamricks wanted to adopt the three girls because they fit into the family. Exhibit (Ex.) 115, p. 2, 5. The social worker assigned to Stacey and Haeli at that time was

[2] Kaeli testified she was never sexually abused in the Hamrick home. RP (2/23/15) at 289:9-290:9.

Mary (Wooldridge) Meyer. RP (2/9/15) at 8:11-15. Meyer had been assigned to the Twins since February 1999. RP (3/2/15) at 114:8-9.

Mary Meyer was a career social worker.[3] The Plaintiffs allege that Meyer did not conduct health and safety visits after November 1999, and therefore failed to learn of the abuse.[4] RP (2/5/15) at 35:9-17. But while health and safety visits were not independently documented, Meyer testified that she would not provide the Juvenile Court with updates or submit an Individual Service and Safety Plan (ISSP) to the Court without conducting a cotemporaneous Health and Safety visit. Her first report to the Court was in March 1999. RP (3/2/15) at 114:10-14. The next month Meyer flew with the Twins up to Alaska to visit with prospective adoptive parents. RP (3/2/15) at 114:15-24.[5]

Meyer's next report to the Court, and accordingly the next health and safety visit, came in June 1999, and then another in September 1999. RP (3/2/15) at 115:3-116:9. The goal of placing the Twins in a Native American

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[3] From 1986 to 1992, Meyer worked in a group home for children who were sex offenders. In 1992, Meyer began her employment with DSHS as an after-hours CPS worker. In 1993, she became a social worker in a Child Welfare Services unit, and she also worked in Family Reconciliation Services for a period of time. She started working in the adoption unit in Tacoma in 1997. RP (3/2/15) at 106:18 – 108:18.

[4] However, at trial Haeli Hamrick testified that the abuse did not begin until a year after she was adopted (RP (2/19/15) at 126:10-13), and Staci testified that she did not become aware that the inappropriate touching was sexual abuse until the disclosures occurred in 2011. RP (2/11/15) at 64:10-16. Thus, by their own testimony, prior to the adoption there was no abuse for Meyer to learn of.

[5] The Twins are of Native American heritage specific to a tribe in Alaska, so the first priority for adoption was with that tribe. RP (3/2/15) at 114:3-7.

home was jettisoned and the Twins were placed in the Hamrick home on October 29, 1999. RP (3/2/15) 118:6-8. Meyer met with the children in early November after they arrived in the Hamrick home and they told Meyer they did not want to leave the Hamrick home and in fact begged Meyer to let them stay in that Hamrick home. RP (3/2/15) 118:6-119:8.

In May 2000, Meyer provided another court update in which she reported that the girls were doing well and that they had invited Meyer to a dance recital. She recalls that invitation coming in person during a visit. RP (3/2/15) at 104:18-105:5; 123:12-16; Ex. 114. Meyer also recalls a visit in which the children were told they were going to be adopted and were very happy, gave hugs, jumped up and down, etc. Meyer would not have been able to have this conversation with the Twins prior to the completion of their adoption home study. RP (3/2/15) 124:1-18.[6] So this visit must have occurred after the home study was completed on June 21, 2000. Ex. 115.

Exhibit 121 is a drawing the Twins made for Mary Meyer and presented to her on the day of their adoption. RP (3/2/15) at 124:23-125:19. Meyer kept the picture over the years because the Twins were very important to her and she felt it was such a good home. RP (3/2/15) at 125:21-126:2.

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[6] *See also* Exhibit 112 and testimony of CASA GAL Laura Bentle who testified that as of April, 2000, the twins very much wanted a promise they would be adopted, but because the home study had yet to be completed, such a promise could not be made. RP (2/15/15) at 138:5-139:19.

Laura Bentle (Kellogg) was the Court Appointed Special Advocate Guardian ad Litem (CASA GAL) assigned to the Twins. RP (2/25/15) at 88:1-9. Bentle testified that she saw them on average about once every six weeks over the course of the children's dependency. RP (2/15/15) at 85:22-87:21; 106:21-107:3. As their GAL, Bentle was the only constant person in their lives over the years of their dependency and recalls that they called her their "guardian angel." RP (2/25/15) at 106:6-18. After being placed in the Hamrick home, and settling in, Bentle reported that "in the five years this CASA GAL has been active in the girls' lives, I have never seen them so happy." RP (2/15/15) at 107:19-21; Ex.109; Ex. 112. Kellogg maintained contact with the Twins every four to six weeks while they were placed in the Hamrick home, prior to their adoption. RP (2/25/15) at 109:4-7.

In April 2000, the Twins wanted GAL Bentle to promise they could be adopted by the Hamricks, which is a promise that Bentle could not make until after the Adoption Home Study was complete. RP (2/25/15) at 138:5-139:19; Ex. 112. However, Bentle recalls a subsequent visit where the Twins were very happy when told they would be adopted by the Hamricks. RP (2/25/15) at 138:5-139:19; Ex. 112.

The Twins never reported to Bentle any allegations that they were being inappropriately touched or otherwise gave any indication that something had or was about to go wrong in the Hamrick home. RP

(2/15/15) at 115:23-116:8. In fact, Bentle described the day of their adoption as being a special day during which the Twins presented Bentle with drawings thanking them for the family and the adoption, as they had done for Meyer. RP (2/25/15) at 111:20-112:17; Exs. 217, 217A, 217B, and 217C.

On June 21, 2000, an Adoption Home Study was completed by Social Worker Shannon Nelson. Ex. 115. Nelson's review of the Hamricks and their home for suitability as adoptive parents included a review of the Division of Children and Family Services (DCFS) file, which included GAL reports, reports from therapists and the like, as well as background checks. RP (2/19/15) at 162:15-168:8.

Nelson also conducted interviews of all of the children in the home, including the biological children. Nelson testified that she, like other social workers, always has children's safety in mind, and conducts a safety assessment every time she meets with and interviews a child. RP (2/19/15) at 161:2-23. According to Nelson, during an adoption home study, it does happen that children will say things which raise red flags. RP (2/19/15) at 167:17-23; RP (2/23/15) at 180:1-16.

In this case, none of the children said anything during their interviews which raised red flags or prompted a CPS referral. RP (2/23/15) at 181:3-6. Nelson interviewed the three boys already in the home, Trey, Justin and Aaron, and all reported they were doing well and looking forward

to the adoption. RP (2/19/15) at 166:1-167:19; RP (2/23/15) at 181:15 – 182: 25.

Nelson also interviewed the foster children. The children uniformly informed Nelson that they desired to be adopted by the Hamrick family and were looking forward to it. RP (2/23/15) at 183:7 – 194:19. Furthermore, after a complete review of the children's respective files and communication with the respective social workers, Nelson found nothing in the files which disqualified the Hamricks as adoptive parents or otherwise raised suspicions of abuse. RP (2/23/15) at 183:7 – 194:19.

On October 6, 2000, Kaeli, Haeli and Staci were adopted.

2. Fosterage and Adoption of Kayci and Jessica (2000-2003)

On January 11, 2000, Kayci and Jessica were placed in the Hamrick foster home. They were adopted on January 31, 2003.[7] Three of the social workers assigned during that time testified at trial: Lisa Gilman, Amy Page, and Anna Tran.

Lisa Gilman was the children's social worker when they were placed in January 2000. RP (3/3/15) at 48:4-16. Gilman conducted Health and Safety visits every 90 days and also saw the children at supervised visits and other places. RP (3/3/15) at 34:1-6; 37:8-38:22. Over the course of

[7] Because these children were placed in foster care with the Hamricks prior to the Adoption Home Study, their condition was considered and Kayci was interviewed by Social Worker Nelson (Jessica was pre-verbal).

Gilman's tenure as a social worker, she filed many CPS reports stemming from health and safety visits, but with Kayci, Gilman never saw or heard anything or had any indication that Kayci or Jessica were at risk of harm in the Hamrick home. RP (3/3/15) at 51:3-52:1. On March 8, 2000, during a Health and Safety Visit, Kayci told Gilman that she and her sister wanted to stay with the Hamricks "forever" and she was adamant about that. Ex. 198 at 110. In fact, based on Gilman's contact with Kayci and her discussion with the therapist, Gilman believed that Kayci was "so bonded with her foster parent" that it was making visits with her biological mother difficult. RP (3/3/15) at 49:1-18.

The next social worker assigned was Amy Page. Recall that Page first met the Hamricks in 1998. RP (3/4/15) at 55:15-24. In the spring of 2000, Kayci was in weekly therapy, but that had begun to taper off as she was making improvements. RP (3/4/15) at 66:1-8. According to Page, the children were consistent with their desire to live in the Hamrick home as they indicated to Gilman. RP (3/4/15) at 62:6-63:13. Page conducted health and safety visits as required, saw the children in other settings, and was in contact with the children's therapist and the GAL, neither of whom reported any concerning behavior or comments or other such reports that caused concern. Page never had any concern about the Hamricks. RP (3/4/15) at 67:3-20

Between May 2001, and August 2002, the social worker assigned to Kayci and Jessica was Anna Tran. RP (2/25/15) at 61:15-19. During this period Tran is confident that she saw the children for official health and safety visits at least every 90 days, but also saw the children while transporting them to and from visits or counseling sessions. RP (2/15/15) at 56:10-59:22. Tran described that the children were doing well in the Hamrick home, that Jessica was doing well and that some of the issues Kayci experienced began improving when she was told that she would be adopted by the Hamricks. RP (2/25/15) at 74:20-75:6. Tran testified that her impression of how the children were doing squared with Lisa Gilman's and that Kayci being "adamant" about the Hamrick home was "consistent" with her impression. RP (2/25/15) at 67:8-20. During this period of time, Kayci was in counseling on a weekly basis. RP (2/25/15) at 145:21-24. There were never any reports of abuse made to Tran by counselors.

Kayci and Jessica were adopted on January 31, 2003. Once a child is adopted, DSHS no longer plays a role in the children's life or otherwise maintains any contact. RP (2/9/15) at 41:8-9.

B. Between 2008 and 2010, DSHS Received Three CPS Referrals Regarding the Hamricks, Which It Investigated or Referred to Law Enforcement, as Warranted

Plaintiffs, in their statement of facts, cite to several factual allegations arising from the three CPS referrals which began in 2008, under the general

category that DSHS "continued to drop the ball." Appellants' Opening Brief (Opening Br.) at 8. Therefore, even though the Plaintiffs fail to assign any error related to these factual allegations, a brief discussion is warranted.

1. Facts Pertinent To The 2008 CPS Referral

On April 8, 2008, DSHS received a referral regarding Staci Hamrick from her school counselor. *See* Ex. 129. This referral alleged, in short, that Staci, age 17 at that time, had an argument with her mother that morning, that it escalated to where her mother shoved her at which point Staci fell into a hole in the porch and bruised her knee. The referral further indicated that Staci was planning on talking to her dad about the incident and the contention with her mother, and that she believed her sisters were safe. Ex. 129 at 2 (bates number 01020005). Staci had come to discuss with the school counselor how she was going to graduate given that she was moving out of her parent's house. RP (2/26/15) at 141:7-21.

This referral was screened out, meaning that it was not accepted for an investigation, because, as the defense expert put it, it did not allege child abuse, but rather an accidental injury, and because Staci had expressed no concerns for others in the home. RP (2/26/15) at 141:7-21. The jury found that DSHS was not negligent in response to this referral. CP 636-640.

2. Facts Pertinent To The 2009 CPS Referral

CPS received a second referral in 2009, which alleged that Scott Hamrick had "kissed" the teenage daughter of a neighbor. Ex. 130 at 4-8. According to Plaintiffs' expert witness, this referral was appropriately referred to law enforcement because this was a "third-party referral" which CPS had neither jurisdiction nor legal mandate to investigate. RP (2/9/15) at 78:10-79:9.

The trial court dismissed this referral from the case on DSHS's CR 50 motion. RP (3/5/15) at 20:14-23. Plaintiffs do not appeal that decision.

3. Facts Pertinent To The 2010 CPS Referral

On March 17, 2010, CPS received a third referral which alleged that Kayci was being mistreated by the Hamricks. This referral was assigned to CPS social worker April Alizae. Ex. 148.

Plaintiffs allege DSHS was negligent because April Alizae called Drew Anne Hamrick at home the day before she visited her and alerted her to the investigation, which allegedly allowed Mrs. Hamrick time to get Kayci's room and the house in order. Opening Br. at 8-9. This is incorrect.

April Alizae testified that she did not call in advance but rather that her first contact with the Hamrick home was upon her arrival at the Hamrick home on March 18, 2010. RP (2/23/15) at 311:8-18. Alizae's notes, reflected in Ex. 148, indicate that on March 17, 2010, Alizae contacted a neighbor about the Drew Anne Hamrick referral, but did not contact Drew

Anne Hamrick herself. Alizae's notes further indicate that the first person Alizae spoke with on March 18, 2010, was Haeli Hamrick in the driveway of the Hamrick home.

Alizae interviewed Haeli, who reported that her sister Kayci had very concerning behaviors and was out of control. Alizae also spoke with Kayci's older sibling Trey Hamrick and his wife Kelly Hamrick, both adults, who were living in the Hamrick home along with their newborn. Neither alleged there was abuse or neglect in the home. RP (2/24/15) at 406:5-409:24. Rather, Alizae was informed by Trey that his mom and dad (the Hamricks) were just trying to seek help for Kayci's behavioral issues, and that he was upset that now CPS was involved. RP (2/24/15) at 408:7-15.

Alizae also interviewed Kayci privately in the driveway. Kayci did not indicate there was any physical or sexual abuse in the home, and said that she felt safe. RP (2/24/15) at 410:4-411:15. Alizae also contacted the Catholic Community Services (CCS) worker who had been in the home and that worker did not express any concerns there was abusive behavior going on in the home. RP (2/24/15) at 407:6-408:3; Ex. 148.

Plaintiffs also rely heavily on testimony that Haeli Hamrick spent twelve hours cleaning the bedroom and home in advance of the Alizae's visit. But Plaintiffs ignore the evidence to the contrary presented by a former CCS worker, Catherine Lawrence, who was already working with Kayci and

the Hamrick family. Lawrence was assigned to the case based on a referral from Good Samaritan Hospital where the Hamricks had taken Kayci in February 2010 because they were at their wits' end with Kayci's challenging behaviors. RP (3/2/15) at 140:1-11; Exs. 132; 135. Lawrence visited with Kayci in the Hamrick home frequently before March 18, 2010. See Exs. 131-144. For example, Lawrence spent 150 minutes engaged in individual counseling with Kayci on March 3, 2010. RP (3/2/15) at 145:24-146:14; Ex. 135. Had there been conditions in Kayci's room that warranted a CPS referral, Lawrence would have made that referral. RP (3/2/15) at 146:24-147:20.

In fact, Lawrence visited the home on March 16, 2010, the day before the CPS referral, spending over three hours in the home. RP (3/2/15) at 149:4-16; Ex. 139. Lawrence was again in the home for over an hour on March 19, 2010. In addition, other members of CCS were present in the home and spent significant time one-on-one with Kayci. RP (3/3/15) at 14:23-15:8; Exs. 138, 140. In total, Lawrence and other members of CCS spent dozens of hours with Kayci in and away from the Hamrick home during the spring of 2010.

Rather than simply close the file, DSHS and the Hamricks agreed to engage in Family Voluntary Services, a service offered by DSHS Children's Administration. The social worker assigned was Cyndy McDonald. RP

(2/25/2015) at 151:19-152:5. McDonald had previously served as a CPS social worker investigator and had conducted interviews of children who had been the subject of sexual and physical abuse for about eight or nine years. RP (2/26/15) at 40:8-17. McDonald estimated that she conducted 15-20 child interviews per month. RP (2/26/15) at 42:3-5. Even after McDonald left CPS for different types of social work, she brought with her to child interviews the skills she learned from her years in CPS and, like Nelson, conducted a safety assessment of sorts during any child interview. RP (2/26/15) at 44:4-45:1.

McDonald visited with the three children remaining in the Hamrick home, Kaeli, Kayci, and Jessica, on several occasions over the summer of 2010 (by 2008, the older twins had moved out). *See* RP (2/26/15) at 47:4-22; 48:5-15; 50:19-52:17. Then, on September 29, 2010, McDonald interviewed Kaeli, Kayci, and Jessica individually, including two at their school.

McDonald spoke with Kayci alone at Kayci's school. RP (2/25/15) at 154:7-19. McDonald met with her at school, a safe setting, to discuss how things were going at home and to ask if she felt safe at home. Kayci did not express any concerns, report any abuse or neglect, said she felt safe, and had somebody she could talk to. McDonald left Kayci her business card. RP (2/25/15) at 155:8-14; RP (2/26/15) at 54:3-55:2. McDonald also met with

Kaeli at school, for the same reasons. RP (2/25/15) at 156:15-158:10. Kaeli reported that the problems with Kayci's behavior had ended and that things were going better, that she felt safe at home, had others she could talk to, and did not report abuse. RP (2/26/15) at 55:3-58:11. McDonald next spoke with Jessica. RP (2/26/15) at 58:13-14. Jessica also reported that things were going better at home, that she had her older brother to talk to, and that she felt safe at home. RP (2/26/15) at 58:15-59:14. At the conclusion of her interviews, McDonald had no reason to refer this matter to CPS for further investigation because there were no disclosures and no reason to do so. RP (2/26/15) at 61:13-24.

As mentioned, the jury concluded that DSHS was not negligent in its investigation into the 2010 CPS referral, and the Plaintiffs do not assign error in any meaningful way to the jury's decision.

IV. PROCEDURAL HISTORY

Plaintiffs filed their complaint on October 27, 2011. At the conclusion of discovery, DSHS moved for summary judgment asserting, in short, that 1) there were no reports of abuse or neglect prior to the children's respective adoptions and therefore there was no cause of action available, and 2) in regards to the later CPS referrals, Plaintiffs could not prove that DSHS had violated any duty to avoid a harmful placement decision because

the investigations did not reveal any disclosure of sexual or physical abuse. The trial court denied the motion.

The case proceeded to trial and was tried over the course of roughly six weeks. At the conclusion of the case, while discussing instructions and the verdict form, the trial court ruled on DSHS's motion to dismiss pursuant to CR 50. The trial court granted the motion as it related to the 2009 CPS referral because the evidence showed it was a third-party referral and there was "no legal obligation for DSHS to investigate a third-party complaint." RP (3/5/15) at 20:11-23.

The trial court also granted the motion as to the claims based on pre-adoption social work because there were no reports of abuse and neglect. Specifically, the trial court held that "the only possible bit of evidence you can argue is the placement was negligent is Kayci at age three stripping in the therapist's office." RP (3/5/15) at 75:24-76:14.[8] But because there was no report from the therapist, a mandatory reporter, and the behavior itself was considered normal behavior, "there was nothing to trigger a duty on DSHS to investigate it, therefore, it couldn't be deemed to be a harmful placement decision." RP (3/5/15) at 76:3-77:13; 79:3-10. In addition, the trial court ruled that "there were so many people involved that were handling this prior to the adoption, all of these other voices that were coming in

[8] Plaintiffs do not raise this theory on appeal, even though it was argued extensively in response to the CR 50 motion. RP (3/5/15) at 75:24-77:18.

saying, no, there was nothing to show there was any abuse." RP (3/5/15) at 83:2-12.

Accordingly, the only claims which went to the jury were claims for negligent investigation based on the 2008 and the 2010 CPS referrals. The jury returned a verdict in favor of DSHS regarding both claims.

V. ARGUMENT

A. The Trial Court Properly Granted Defendants' CR 50 Motion To Dismiss All Pre-Adoption Claims Because There Were Neither Disclosures Nor Evidence Of Abuse

The central issue on appeal is whether the trial court was correct in dismissing, pursuant to CR 50, the Plaintiffs' claims based on the social work prior to the children's respective adoptions. CR 50 provides in pertinent part:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

CR 50(a).

A motion for judgment as a matter of law must be granted when the trial court "finds, after viewing the evidence in the light most favorable to the nonmoving party, that there was no legally sufficient evidence or

reasonable inference to support the jury's verdict in favor of the nonmoving party." *Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163, 165 (1997), *as amended on denial of reconsideration* (Feb. 14, 1997) (citing CR 50; *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995)). Appellate review is de novo—the "appellate court applies the same standard of review as the trial court when it reviews the grant of a judgment as a matter of law." *Crisman*, 85 Wn. App. at 19 (citing *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 915, 792 P.2d 520 (1990)).

The trial court granted DSHS's CR 50 motion on Plaintiffs' claims alleging negligence by DSHS prior to the children's adoptions because "there was nothing to trigger a duty on DSHS to investigate it, therefore, it couldn't be deemed to be a harmful placement decision." RP (3/5/15) at 76:3-14. The trial court correctly recognized that because there were neither allegations nor evidence of abuse or neglect, there was nothing to trigger a duty on DSHS to investigate, and consequently *as a matter of law* there could be no negligent investigation leading to a harmful placement. Plaintiffs do not contest the trial court's conclusion that no duty to investigate was triggered.

Rather, Plaintiffs assert that DSHS social workers had a "special relationship" with the Plaintiffs, as set forth by the court in *Caulfield v.*

Kitsap County, 108 Wn. App. 242, 29 P.3d 738 (2001). However, the statutes underlying DSHS in dependency matters do not impose the sort of custodial relationship required to create a special relationship as contemplated in *Caulfield.* As such, the trial court's interpretation of the law as applied to the facts of this case was correct and Plaintiffs' claims were properly dismissed.

1. Under Washington law, a claim for negligent investigation is a narrow, statutory cause of action based on RCW 26.44.050

The only recognized cause of action based on the child welfare statutes is a statutory claim for negligent investigation. "In general, a claim for negligent investigation does not exist under the common law of Washington. That rule recognizes the chilling effect such claims would have on investigations." *Pettis v. State,* 98 Wn. App. 553, 558, 990 P.2d 453 (1999); *see also, Blackwell v. Dep't of Soc. & Health Serv.,* 131 Wn. App. 372, 375, 127 P.3d 752 (2006). The sole exception to this broad ban is a narrow claim for negligent investigation which can arise when DSHS social workers or law enforcement officers investigate allegations of abuse and neglect pursuant to RCW 26.44.050. *M.W. v. Dep't of Soc. & Health Serv.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003) (citing *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000)).

"Because the cause of action of negligent investigation originates from the statute, it is necessarily limited to remedying the injuries the statute was meant to address." *M.W.*, 149 Wn.2d at 598. The purpose of RCW 26.44.050 and .010 encompasses two concerns: the integrity of the family and the safety of children within the family. *M.W.*, 149 Wn.2d at 597 (citing *Tyner*, 141 Wn.2d at 80). As the *M.W.* Court explained:

> [A] claim for negligent investigation against DSHS is available only to children, parents, and guardians of children who are harmed because DSHS had gathered incomplete or biased information that results in a harmful placement decision, such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home.

M.W., 149 Wn.2d at 602.

The RCW 26.44.050 duty only arises <u>after</u> the police or DSHS receive a report of child abuse or neglect. *See* RCW 26.44.050 ("Upon the receipt of a report .... . ."). *See also, e.g.,* RCW 26.44.030(4) ("Upon receiving a report .... . ."); RCW 26.44.030(10) ("Upon receiving reports .... . ."); RCW 26.44.030(11) ("Upon receiving a report .... . ."); RCW 26.44.030(14) ("Upon receipt of a report.... . ."); RCW 74.13.031(3) ("Investigate complaints .... . ."). The Court "decline[d] to expand this cause of action beyond these bounds because the statute from which the tort of negligent investigation is implied does not contemplate other types of harm." *M.W.*, 149 Wn.2d at 602.

As such, efforts to expand this narrow cause of action beyond its statutory confines have been repeatedly rejected by Washington courts. *See, e.g., M.W.,* 149 Wn.2d at 600, 602 (rejecting argument that "DSHS has a general duty of care to act reasonably when investigating child abuse, which includes following correct procedures"); *Roberson v. Perez*, 156 Wn.2d 33, 46-48, 123 P.3d 844 (2005) (rejecting request to enlarge the negligent investigation cause of action to include harms caused by "constructive placement decisions"); *Blackwell v. Dep't of Soc. & Health Serv.* 131 Wn. App. 372, 378-79, 127 P.3d 752 (2006) (rejecting effort to expand class who can sue for negligent investigation to include foster parents).

Outside of RCW 26.44.050, Washington courts have consistently refused to imply tort duties from other child welfare statutes. *E.g., Braam v. State,* 150 Wn.2d 689, 711-712, 81 P.2d 851 (2003) (no private cause of action can be implied from RCW 74.13.250, RCW 74.13.280, or RCW 74.14A.050); *Aba Sheikh v. State*, 156 Wn.2d 441, 457-58, 128 P.3d 574 (2006) (no private cause of action can be implied from three WAC regulations pertaining to dependent children). These cases uniformly hold that child welfare statutes other than RCW 26.44.050 provide "no evidence of legislative intent to create a private cause of action, and that implying one is inconsistent with the broad power vested in DSHS to

administer these statutes." *Braam,* 150 Wn.2d at 712 (quoted in *Aba Sheikh*, 156 Wn.2d at 458 n.5). *See also Linville v. State*, 137 Wn. App. 201, 211-13, 151 P.3d 1073 (2007) (no implied legislative intent in daycare insurance statutes to create a remedy against the State for child sexual abuse victims who allegedly were abused in licensed daycare facilities). As such, the only recognized cause of action based on the child welfare statutes is a claim for negligent investigation under RCW 26.44.050 and limited to the narrow confines of that statute. This cause of action is based on a failure to properly investigate reports of abuse and neglect, but in no way creates an obligation to unearth potential abuse or neglect where those allegations are not made.

2. As the trial court properly determined, Plaintiffs failed to establish that any duty to investigate was triggered during the pre-adoption period

The Plaintiffs do not allege that prior to their adoptions there were disclosures of abuse in the Hamrick home that social workers failed to investigate.[9] Nor was there any other evidence of abuse that could potentially have triggered a duty on DSHS to investigate, as the trial court properly determined in granting the DSHS's CR 50 motion dismissing Plaintiffs' claims regarding the pre-adoption period.

[9] Plaintiffs' claims of negligent investigation regarding the 2008 and 2010 CPS referrals went to the jury, which found no negligence by DSHS. Plaintiffs have not appealed that verdict.

In the trial court below, as a basis for their pre-adoption claims, the Plaintiffs attempted to rely on a case note of social worker Amy Page which indicated that Kayci, at age three, wanted to strip off her clothes at a therapy session. RP (3/5/15) at 63:14-64:5. Plaintiffs asserted that this should have resulted in a CPS investigation and as such DSHS was negligent for not conducting such an investigation. The trial court rejected this when dismissing the pre-adoption claims, holding that "the only possible bit of evidence you can argue is the placement was negligent is Kayci at age three stripping in the therapist's office," but there was no report from the therapist, a mandatory reporter, and the behavior itself was considered normal behavior. RP (3/5/15) at 75:25-76:14. This ruling was correct and the Plaintiffs did not raise this on appeal thereby abandoning this theory.

Beyond that insufficient evidence, the trial court held that, "there were so many people involved that were handling this prior to the adoption, all of these other voices that were coming in saying, no, there was nothing to show there was any abuse." RP (3/5/15) at 75:24-76:14; 76:3-77:13; 79:3-10; 83:2-12.

On appeal, Plaintiffs do not allege there was a negligent investigation. The trial court's ruling on this aspect should be affirmed.

3. Plaintiffs' theory of liability based on a "special relationship" between social worker and child is contrary to Washington law

As discussed above, Plaintiffs do not allege that there were disclosures of abuse in the Hamrick home that social workers failed to investigate prior to adoption. Nor do Plaintiffs contend the Hamrick home had been improperly licensed. Nor was there evidence that either Hamrick had a criminal background or a history of sexual abuse or the like which otherwise disqualified them from serving as a foster home. There is no suggestion, therefore, that placement in the Hamrick home was improper.

Rather, Plaintiffs contend that social workers had a special relationship with the Plaintiffs such that DSHS can be liable for failing to discover abuse, even where there was no allegations or evidence of abuse or neglect. This legal theory is incorrect and should be rejected.

"As a general rule, there is no duty to control the conduct of a third person to prevent him from causing physical harm to another unless a special relationship exists." *Caulfield*, 108 Wn. App. at 252. One type of special relationship derives from the *Restatement (Second) of Torts* § 315 (1965), which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

> (a) a special relation exists between the actor and the third person which imposes a *duty upon the actor to control the third person's conduct*, or
>
> (b) a special relation exists between the actor and the other which gives to the other a *right to protection.*

Donohoe v. State, 135 Wn. App. 824, 836-37, 142 P.3d 654 (2006) (emphasis in original).[10]

A special relationship may exist "'between the defendant and either the third party or the foreseeable victim of the third party's conduct.'" *Caulfield*, 108 Wn. App. at 253. Here, subsection (a) does not apply as there is no argument that DSHS had any duty to control Scott or Drew Anne Hamrick.

Under subsection (b), a special relationship may apply where the relationship between the defendant and the foreseeable victim is "protective in nature, historically involving an affirmative duty to render aid." *Caulfield*, 108 Wn. App. at 253.

a. The foster care statutes do not create a custodial relationship

In cases where a special relationship has been found, the employer or business entity has essentially exclusive control over the victim's

[10] The other type of special relationship requires proof of an "express assurance" by a government employee in response to a "direct inquiry" from the plaintiff, and the assurance "clearly sets forth incorrect information," which the plaintiff justifiably relied on to his or her detriment. *Taylor v. Stevens Cty*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988). There are no allegations which give rise to this type of special relationship.

surroundings where the harm occurs. These relationships, which have an element of "entrustment" where one party was entrusted with the well-being of the other party, are "typically custodial, or at least supervisory" such as "between a doctor and patient, jailer and inmate, or teacher and student." *Caulfield*, 108 Wn. App. 255. Accordingly, "Washington courts have recognized this type of special relationship, and corresponding duty, between certain individuals and schools, common carriers, hotels, hospitals, business establishments, taverns, possessors of land, and custodial mental institutions." *Donohoe*, 135 Wn. App. at 837.

In the case of social workers and foster children, the statutory scheme governing social workers and foster care placement does not create the sort of control and supervisorial responsibility that results in a situation of "entrustment" for day-to-day well-being. First, the Hamricks passed the foster home licensing process without question and there is no claim based on the licensing of the Hamrick home. Because the statutory scheme grants DSHS the "authority to place the child" in a "foster family home licensed pursuant to chapter 74.15 RCW," (RCW 13.34.130(1)(b)(ii)), the placement of the children in the Hamrick home was proper and cannot form a basis of liability under subsection (b). And, in fact, the Plaintiffs do not assert a claim based on the licensing and the original placement in the Hamrick home.

Second, once in foster care, "The statutory scheme does not contemplate that social workers will supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate services in accord with the child's best interests and the need of the family." *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26-29, 84 P.3d 899 (2004) (citing RCW 13.34.025). Instead, it is the foster parents who have the obligation for day-to-day supervision.[11] *See Aba Sheikh*, 156 Wn.2d at 454-55 (expressly holding that DSHS has no special relationship duty to control dependent children to prevent them from harming others); *Terrell C.*, 120 Wn. App. at 26-29 (same).

Simply put, the statutory scheme governing social workers does not impose the sort of custodial relationship necessary to create a special relationship. Social workers do not have a custodial or supervisorial relationship with foster children and do not stand in the same position with foster children that a school, mental hospital, common carrier, business owner, etc., has with their respective students, patients, patrons and clients.

b. There was no evidence of abuse or neglect

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[11] RCW 74.13.330 provides that "Foster parents are responsible for the protection, care, supervision, and nurturing of the child in placement." *See also* WAC 388-73-014(5) (foster parents are responsible for the "direct care and supervision of children placed in their care); WAC 388-73-312 (same).

A subsection (b) special relationship is based on the past known behavior of a third-party which makes the plaintiff "the foreseeable victim of the third party's conduct.'" *Caulfield*, 108 Wn. App. at 253. Plaintiffs cannot identify any such behavior during their time as foster children which made them foreseeable victims of sexual abuse. A special relationship does not apply in a blanket fashion to all harm that may result in a particular setting.

Plaintiffs' reliance on *Caulfield* is misplaced. The *Caulfield* Court cited to specific facts to show there was an element of "entrustment" between DSHS and the vulnerable adult by virtue of the dependent and protective nature of the relationship. Those facts are simply not present in this case. In *Caulfield*, the case managers assigned were aware that Caulfield was incapable of caring for himself, that his condition was deteriorating, and that they were responsible for making service plans to provide such care to prevent the harm which followed. *Caulfield*, 109 Wn. App. at 256. Thus, these responsibilities "gave rise to a duty to protect Caulfield and other similarly vulnerable clients from the tortious acts of others, especially when a case manager knows or should know that serious neglect is occurring." *Caulfield*, 108 Wn. App. at 256.

Here, there are no facts similar to those in *Caulfield* demonstrating that the social workers had notice of the dangers in the Hamrick home.

All of the children were in regular contact with their social workers, therapists, guardian ad litems, school officials, etc., and their social workers maintained contact with those other professionals. RP (2/25/15) at 56:10-24; 58:10-24; 70:5 – 71:2; 76:2-16; 77:15 – 78:13; RP (3/2/15) at 75:12-17; 110:1-10; 119:9-16; 123:22-25; RP (3/3/15) at 35:25 – 40:16; 48:2 – 49:23; 52:22 – 53:1; RP (3/4/15) at 60:2-25; 62:21 – 63:13; 67:3-20. The social workers for all of the Plaintiffs maintained regular contact with the children, spoke individually with them, and all children reported uniformly a desire to be adopted by the Hamricks and that they were happy in the Hamrick home. RP (3/2/15) at 71:7-17; 72:2-6; 78:2 – 79:3; 84:16-25; 89:17-25; 104:18-24; 118:12 – 119:8; 124:11-22; 125:13 – 126:2; RP (3/3/15) at 51:13-21; RP (3/4/15) at 59:4-22; 66:20 - 67:2.

The Plaintiffs essentially base their entire argument that DSHS breached a special relationship on the allegation that Mary (Wooldridge) Meyer placed the Twins with the Hamricks and then did not see them again for the year before they were adopted. This theory is based on the lack of documented visits as recorded in the DSHS records provided as part of this lawsuit. However, Plaintiffs' assertion regarding the lack of visits by Meyer is not supported by the evidence. Moreover, it is both speculative and implausible that additional visits would have uncovered any abuse.

First, the evidence showed that Meyer did in fact meet with the Twins. Meyer testified that she met with them in May of 2000 – at which time she was invited to a dance recital – in preparation for her May 2000, ISSP. Ex. 114; RP (3/2/15) at 83:22 – 84:15; 89:17-25. She testified she had specific recollection of that event and that event was recorded in her May 2000, ISSP.[12] RP (3/2/15) at 87:8-16; Exs. 113 – 114. Next, Meyer testified that she met with the Twins again to tell them they were in fact going to be adopted at which time they were jumping up and down with excitement (something she could not have said during the May visit because the adoption home study was yet to be completed). RP (3/2/15) at 124:7-18. The GAL Laura Bentle described similar discussions and interactions. RP (2/25/15) at 110:14 – 112:12; 115:3 – 116:8 Accordingly, although unrecorded in any record before the trial court, the evidence is that Meyer met the Twins again at some point after June 21, 2000, when it was concluded that the Hamricks would adopt them. RP (3/2/15) at 124:1-18. Lastly, Meyer met them yet again at the adoption itself at which point she was presented with a drawing from the Twins thanking her for the

[12] Recall that Meyer also testified that she would not provide the Juvenile Court with an updated ISSP without conducting a cotemporaneous Health and Safety visit. RP 3/2/15 114:10-14.

family.[13] Ex. 121; RP (3/2/15) at 125:2 – 126:2. The evidence is that Meyer did in fact maintain contact with the Twins during this period.

Second, the alleged lack of Meyer's visits also fails to establish an issue of fact is because it is a purely speculative argument that two more visits in the summer of 2000 would have unearthed allegations of abuse and neglect that did not surface anywhere for another 11 years, especially given that there were so many professionals involved in these children's lives. Indeed, it flies in the face of reality to suggest that had there been two more visits there would have been disclosure of abuse. Plaintiffs' reliance on expert testimony for this point is completely moot because it is not enough to simply rely on an expert opinion based on speculation to create an issue of fact to overcome a motion based on CR 50. *See Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 252-53, 139 P.3d 1131 (2006).

In *Hungerford*, an expert testified that had DOC done a better job of supervising an offender, he would not have been free to commit murder and in addition argued that even if he had been freed after one violation, he would have committed another crime in the future. *Hungerford*, 135 Wn. App. at 251. This was insufficient to create an issue of fact because it

[13] As mentioned above, Haeli Hamrick testified that her abuse did not start until after the adoption and Staci testified that she did not recognize that the touching was sexual abuse until 2011 when the others disclosed (RP 2/11/15 64:10-16), so it is entirely unclear what would have been disclosed during the extra visits.

was based on speculation. When the plaintiff argued that the offender would have committed another crime in the future anyway, the Court rejected this argument as "rank speculation, and speculation and argumentative assertions are not sufficient to create a genuine issue of material fact. . . and plaintiff's counter-factual world is too speculative to support a lawsuit." *Hungerford*, 135 Wn. App. at 253-54. *See also Estate of Borden v. Dep't of Corr.,* 122 Wn. App. 227, 246, 93 P.3d 936 (2004) (expert's speculative opinion insufficient to create an issue of fact); *Pierce v. Yakima County*, 161 Wn. App. 791, 801, 251 P.3d 270 (2014) (argumentative assertions on remote facts do not create genuine issues of fact); *Davidson v. Metropolitan Seattle*, 43 Wn. App. 569, 575, 719 P.2d 569 (1986) (there is "no value in an opinion where material facts are not present" or, in that case, contrary to the existing evidence regarding the nature of an auto accident).[14]

In this case, the opinion that had there been two more visits there would have been a disclosure of abuse is completely unsupported by any facts, is speculative at best, and contrary to the facts put before the trial court. In addition to the visits from Meyer noted above, there was the adoption home specialist social worker, Shannon Nelson, who also spoke

[14] Although the jury never reached the issue, it is only through speculation that the jury could find causation. There is no evidence or means other than through speculation to conclude that there would have been a disclosure of abuse had there been an additional two visits. The CR 50 dismissal can be upheld on these grounds alone.

with the children, in June, 2001. Nelson testified that the children were interviewed separately from each other and separately from the Hamricks and all reported that they were happy and wanted to be adopted by the Hamricks. Social Workers Amy Page, Lisa Gilman, and Anna Tran, who were all at one point assigned to Kayci and Jessica (who was pre-verbal at this stage), testified that the children were happy and healthy and in fact in March, 2000, Kayci was adamant that she wanted to be adopted by the Harmicks. The children also had Guardian ad Litems and nowhere is there evidence the GALs suspected abuse based on reports by the children. In fact, the contrary is true: the GALs also reported the children were happy in the Hamrick home.

Plaintiffs are in essence arguing that had there been two additional visits in the home, the Twins would have told the social worker the exact opposite of every response and indication they had given to the social workers, adoption home support specialist, GAL, therapists, siblings, etc., and in essence would have painted the exact opposite picture of the picture they presented to Meyer when they were adopted.

As the trial court stated, "there were so many people involved that were handling this prior to the adoption, all of these other voices that were coming in saying, no, there was nothing to show there was any abuse." RP

(3/2/15) at 83:2-12. The trial court properly granted the motion to dismiss the pre-adoption claims.

c. Plaintiffs' other miscellaneous arguments do not warrant a new trial

As part of their CR 50 issue, Plaintiffs raise a variety of other arguments, without explaining why any one or all would be sufficient to warrant a new trial. Nor could they, as they uniformly lack merit. In the interest of completeness, these are addressed here in brief. For example, Plaintiffs imply that they did not get a fair trial because of the trial court's political views which came out during post-break banter before the jury returned. Opening Br. at 33-34. It is difficult to understand how the minor banter about politics would justify a new trial. Is the implication that somebody with either conservative or liberal views – even assuming one could discern that here - would otherwise be unsympathetic to sex abuse victims? This is a pointless thing to point out on appeal.

Similarly, Plaintiffs assert that they were prejudiced because so much of their case was based on the pre-adoption social work that when that aspect did not go to the jury, counsel for the Plaintiffs lost credibility because, the Plaintiffs' assert, the jury thought that the Plaintiffs were wasting their time.

First, this sort of "prejudice" is not a basis to reverse a CR 50 motion. A CR 50 motion is properly granted when there is a lack of evidence to

support a valid claim under the controlling law. *See* CR 50(a). Here, the controlling law does not provide for recovery unless there is a report or evidence of abuse or neglect that DSHS should have investigated. That the Plaintiffs may have been prejudiced to the jury by having the pre-adoption claims dismissed has nothing to do with whether or not the CR 50 motion should have been granted.

Second, per the court's initial instruction to the jury, comments of counsel are not evidence and not to be taken as evidence. Jurors are presumed to follow instruction and, accordingly, there is no reason to suspect the jury ignored this instruction and then failed to decide the remaining two issues on the evidence presented.

Certainly the drafters of CR 50 – well-versed trial and appellate lawyers – must have recognized the possibility that CR 50 motions would be granted and therefore recognized the possibility that in some cases a plaintiff's lawyer would not be able to deliver in closing that which was promised in opening. And yet there is no subsection in CR 50 which provides that it should not be granted if it is going to significantly gut a case. Of course, to hold otherwise would essentially eviscerate CR 50.

B. The Verdict Form Properly Addressed the Issues That Went to The Jury And The Instructions and Verdict Form Regarding *Tegman* Were Appropriate

Jury instructions, including a special verdict form, are generally appropriate if they permit each party to argue its theory of the case, are not misleading, and when read as a whole inform the jury of the applicable law. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378, 380 (2005) (citing *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000)). Errors of law in jury instructions are reviewed *de novo* and an erroneous instruction is reversible if shown to have prejudiced a party. *Id.* Even if a special verdict form misstates the law, which here it did not, an erroneous instruction will not constitute reversible error if no prejudice can be shown. *Nelson v. Mueller,* 85 Wn.2d 234, 236-37, 533 P.2d 383 (1975).

Plaintiffs first argue that the special verdict form did not allow them to argue their theory of the case, because it did not include a place for the jury to consider DSHS' social work during the pre-adoption time period in 1999-2000. This issue was addressed by the court's ruling on DSHS' CR 50 motion, which is discussed in Section A above. The special verdict form simply took that ruling into account and properly informed the jury of the remaining liability issues they were to consider. The trial court was not obligated to allow Plaintiffs to continue arguing, through the

special verdict form, liability theories that had been dismissed on motion.[15]

Next, the inclusion of a place on the special verdict for the jury to segregate any damages caused by intentional conduct, even if erroneous, did not cause Plaintiffs any prejudice. Because the jury determined that DSHS was not negligent, they were therefore not required to, and in fact did not calculate damages at all. In other words, the jury never reached questions on the special verdict form concerning damages, and therefore did not make a determination of how much, if any of those damages to attribute to the intentional conduct of Scott or Drew Anne Hamrick. Accordingly, including a place for segregation of damages caused by the Hamricks' intentional conduct cannot have caused any prejudice. There simply is no basis for speculating that the jury might have been misled by questions it did not have any reason to answer.

Giving an erroneous instruction cannot be the basis for granting a new trial "unless the appellant can establish that he was prejudiced thereby and that the error affected the jury's conclusion." *Nelson*, 85 Wn.2d at 236. An erroneous statement in a special verdict form is not prejudicial if the statement, when read together with other instructions that did state the

[15] The trial court considered and rejected all of the arguments raised here by Plaintiffs, and accepted written briefing on this issue, which was submitted after the close of evidence, and prior to instructing the jury. CP 563-605; RP 3/19/15 3-15.

law on that subject correctly, permitted the jury to make a finding on the correct principle of law. *Ridge v. Kladnick,* 42 Wn. App. 785, 788, 713 P.2d 1131 (1986). Here, Plaintiffs do not argue that the jury was improperly instructed on the law requiring segregation of damages caused by intentional actors in Instruction No. 21, so even if it was erroneous to include a place for that damage calculation on the verdict form, it could not have caused any prejudice to Plaintiffs.

Beyond the fact that there was no prejudice to Plaintiffs, it was entirely proper to include a place on the special verdict form for the jury to record any damages caused by intentional conduct. The inclusion of a place on the special verdict form for the jury to implement the substantive instruction that they segregate damages caused by intentional conduct is entirely consistent with the holding in *Tegman v. Accident and Medical Investigations, Inc.*, 150 Wn.2d 102, 105, 75 P.3d 497 (2003) that:

> damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. They are not jointly and severally liable for damages caused by intentional acts of others.

Plaintiffs argue that all the jury needed to accomplish the task of segregating damages caused by intentional actors was contained in Instruction No. 21, CP at 622, which they do not contend misstates the

law. That instruction informs the jury of the legal principle that requires them, in calculating any damage award, not to include any damages caused by the conduct of intentional actors. Of course Instruction 21 does not, just as other instructions on the law of damages do not, CP at 623, provide a place for the jury to record any damages calculations. That is done, if the jury reaches the issue of damages, on the special verdict form. Consistent with Instruction 21, the special verdict form properly included a place for the jury to perform the task of segregating any damages caused by intentional conduct of Scott and Drew Anne Hamrick from damages caused by the negligence of DSHS. Rather than asking the jury to perform this exercise twice, the special verdict form is simply a tool for the jury to use to apply the law to the facts as given in the substantive instructions. Instruction No. 21 tells the jury that the law requires segregation of damages caused by intentional conduct, and the special verdict form shows them how to perform that segregation, if they make an award of damages.

Plaintiffs argue that *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499 (2009) stands for the proposition that intentional tortfeasors should never be included on a special verdict form. *Rollins* does not stand for this broad proposition. In that case, there were no issues of joint and several liability, and the only intentional actors were

several unknown assailants. The court in *Rollins* made a point to distinguish its holding from *Tegman* explicitly on the absence of any issues of joint and several liability. *Rollins*, 148 Wn. App. at 379. The court found that, under the circumstances of that case, so long as the jury was instructed to segregate any damages solely caused by the acts of the unknown assailants, there would be no risk that the jury would attribute some of the intentionally caused damages to the single negligent defendant. *Id.* Here, there were issues of joint and several liability, namely with Trey and Kelly Hamrick. Further, the instructions to the jury included one similar to the instruction endorsed in *Rollins* which made clear that, if the jury reached the issue of damages, they were to segregate only those damages solely caused by the intentional acts of Scott and Drew Anne Hamrick. CP at 622. In that regard, the substantive instruction given here was entirely consistent with *Rollins.*

The fact that, if the jury awarded damages, it had a place on the verdict form to record damages solely caused by intentional actors is not contrary to *Tegman*. Plaintiffs' suggested approach of omitting any reference to known intentional actors on a special verdict form cannot be squared with *Tegman's* requirement that a jury segregate damages caused by intentional tortfeasors, regardless of whether those damages were partially caused by the negligence of an at-fault defendant. *Tegman*, 150

Wn.2d at 115-16 (segregation of damages must occur regardless of whether the damages are divisible). *See also, Jane Doe v. Corporation of President of Church of Jesus Christ of Latter-Day-Saints, Inc.*, 141 Wn. App. 407, 440-41, 167 P.3d 1193 (2007) (the trial court must instruct the jury "to segregate damages caused by the intentional conduct of a non-party from those damages attributed to the defendant's alleged negligence."). Both *Tegman* and *Doe* provide the necessary authority for the trial court in this case to have included the intentional actors on the special verdict form.

What Plaintiffs suggest is that the jury use only Instruction 21 to mentally set aside some unknown and unstated part of damages caused by intentional actors before beginning the process of assessing damages on the special verdict form. There was no question that the jury would, if it did reach the issue of damages, have to make a determination of how much of Plaintiffs' damages were caused by the intentional acts of their adoptive parents. There was substantial evidence at trial, almost all of it put on through Plaintiffs' damage experts, that the primary causes of their psychological and emotional injuries were the intentional acts of their adoptive parents, Scott Hamrick and Drew Anne Hamrick. RP (2/12/15) at 44-47, 50-51, 56, 67, 71, 74-78, 92, 100-104, 107-108; RP (2/19/15) at 23-24, 26-29, 34-39, 52-55, 57-61. If the jury reached the issue of a damage

award, it would have needed to decide how much of those intentionally inflicted damages, if any, to segregate from the damages caused by negligence.

As a practical matter, it would make no sense for the jury to calculate these intentionally caused damages, set them aside from any damages caused by negligence, and have no place to record those calculations. All that Instruction 21 does is to inform the jury of the legal principle behind segregation of damages caused by intentional conduct, it does not provide the jury with a place to record any findings it makes on that issue. It is necessary to include this on the verdict form, otherwise there would be no way for a trial or appellate court to determine whether *any* damages were actually segregated and attributed to intentional tortfeasors by the jury.

Because *Tegman* requires the jury to segregate damages caused by the intentional tortfeasors from any damages caused by negligence that may be apportioned among any at fault parties, there is no reason to prevent the jury from showing how it segregated the damages caused by intentional tortfeasors. The special verdict form is the only place the jury has to record such a finding.

Neither of the two issues that Plaintiffs raise regarding the special verdict form raise an issue that requires reversal. Whether the jury could

consider DSHS conduct other than its investigation of CPS referrals made in 2008 and 2010 was properly decided by the trial court on DSHS' CR 50 motion, and the special verdict form properly reflected those rulings. It was not error to give the jury a special verdict form that conformed to the trial court's rulings on the legal issues. The fact that Plaintiffs' counsel could no longer rely on legal theories that the court properly dismissed was not the result of a deficiency in the special verdict form. Including places on the special verdict form for the jury to segregate damages caused by intentional conduct was both correct under the law, and could not have caused Plaintiffs any prejudice in this particular case even if it were an erroneous statement of the law, as the jury never reached the issue of damages.

C. The Trial Court Acted Within Its Discretion In Excluding Two Witnesses Who Would Have Testified About The 2009 CPS Referral, Which Was Not A Basis Of Liability

Plaintiffs also assign error to the trial court's exclusion of two witnesses called to testify about the 2009 CPS referral. The trial court excluded these witnesses because they were not timely added to the witness list. The trial court's exclusion of these witnesses should not be disturbed absent a clear abuse of discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 337, 314 P.3d 380 (2013).

The Plaintiffs assert that the trial court did not follow *Jones* in deciding whether to exclude the witnesses, which, in essence, is arguing that the trial court excluded the witnesses without making the findings required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), although Plaintiffs do not actually articulate that argument. The *Burnet* Court held that, when deciding whether to exclude a witness as a sanction, a trial court is to explicitly consider whether a lesser sanction would suffice, whether the violation was willful or deliberate, and whether the exclusion would substantially prejudice the plaintiff. *Jones*, 179 Wn.2d at 338. Although here the trial court did not explicitly state it was applying *Burnet* when ruling, the trial court did rule that the witnesses were identified very late even though there had been a continuance and a prior mistrial, and that their testimony was not really going to add anything at trial. RP (2/5/15) at 20-25. This sort of discussion is sufficient even if the court does not specifically state the *Burnet* case by name because "a colloquy might satisfy *Burnet* in substance even if the judge fails to invoke that case by name." *Jones*, 179 Wn.2d at 344. The exclusion was completely within the trial court's discretion to decide.

Mainly however, a *Burnet* violation is not grounds for a new trial if the error is harmless. *Jones*, 179 Wn.2d at 355-56. A *Burnet*

violation is harmless if the excluded testimony is irrelevant or unfairly prejudicial. Here, that was the case.

The decision to exclude these two witnesses was made on February 5, 2015. On February 9, 2015, Plaintiffs' expert witness, in regards to the 2009 CPS referral, stated that this referral was appropriately referred to law enforcement because this was a "third-party referral" over which CPS had no jurisdiction to investigate and no legal mandate to conduct an investigation. RP (2/9/15) at 78:10-79:9. The trial court dismissed any claim based on the 2009 referral, which the Plaintiffs do not appeal. Therefore, the testimony of these two witnesses in regards to the 2009 CPS investigation was completely unrelated to any valid issue before the trial court, and thus irrelevant and unduly prejudicial. *See Jones*, 179 Wn.2d at 356. Any error—had there been one, which there was not—was harmless.

D. Plaintiffs Fail To Argue or Demonstrate Cumulative Prejudice

Lastly, Plaintiffs assert a new trial should be granted because of cumulative legal errors. However, Plaintiffs refer only generally to various aspects of the trial and fail to provide specific examples of these cumulative errors.

Again, Plaintiffs cite to the trial court's alleged political leanings based on the banter from the bench, although again, there is no real

explanation as to why somebody who apparently became more conservative with age would not give Plaintiffs a fair trial and, of course, there really cannot be such an argument with a straight face.

Plaintiffs also once again refer to the alleged confusing verdict form, but otherwise make no specific argument about which errors added up to warrant a new trial. As such, it is impossible to respond to this issue in any meaningful fashion and as such, this Court should not remand for a new trial on these grounds.[16]

VI. CONCLUSION

For all of the foregoing reasons, the trial court's ruling dismissing certain claims under CR 50, its decision to provide the jury with a special verdict form that included a place to segregate damages solely caused by intentional actors, and its various evidentiary rulings challenged here should all be upheld, and the decision below should be affirmed.

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[16] In any event, the only misconduct below that potentially warranted a mistrial was the plaintiffs' counsel conferring with an excused juror who was let go because of a previously scheduled vacation. *See* RP 3/2/15 4:17-7:25. This occurred after the conclusion of the session on Thursday, February 26, 2015. Even though the trial court repeatedly instructed the jurors not to discuss the case with anybody, plaintiffs' counsel conducted a private voir dire session of this juror a week before the conclusion of evidence and closing argument. This could easily have resulted in a mistrial. *Hobson v. Wilson*, 737 F.2d 1, 49 (U.S. App. D.C. 1984) (overruled on other grounds).

RESPECTFULLY SUBMITTED this 15 day of December, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 15th day of December, 2015, I caused a true and correct copy of this Brief of Respondents to be served via hand delivery by Sharon Jaramillo on the following:

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