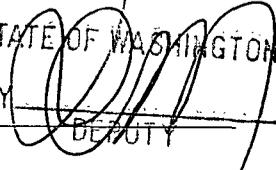


FILED
COURT OF APPEALS
DIVISION II

2016 MAY -9 PM 1:34

STATE OF WASHINGTON

BY 
DEPUTY

NO. 48502-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TAMIKA BOONE, individually, and on behalf of her minor children,
D.B., individually, and D.B., individually,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; and PATRICIA SMITH d/b/a STARCHILD
DAYCARE,

Respondents.

APPELLANTS' OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

Contents

I. INTRODUCTION	1
II. BACKGROUND	3
III. ASSIGNMENTS OF ERROR	15
Assignment of Error 1: The trial court erred by granting a CR 56 motion regarding the State’s obligations to protect the Boone Children.	15
Issue 1: Should this Court reverse the trial court’s CR 56 dismissal of this claim? Assignment of Error	15
IV. ARGUMENT RE: BACKGROUND CHECK MANDATE	15
V. ARGUMENT RE: DUTY UNDER RCW CHAPTER 26.44 FOR CHILD PROTECTIVE SERVICES TO INVESTIGATE	18
VI. ARGUMENT RE: DUTY UNDER RCW CHAPTER 26.44 FOR LICENSORS TO REPORT SUSPECT ABUSE AND NEGLECT AS MANDATED REPORTERS	21
VII. ARGUMENT RE: “NEGLIGENT LICENSING”	22
VIII. ARGUMENT RE: ASSUMPTION OF DUTY	29
IX. ARGUMENT RE: CAUSATION	30
X. CONCLUSION	33

TABLE OF AUTHORITIES

Cases

<i>Bailey v. Town of Forks</i> , 108 Wn. 2d 262, 268, 737 P.2d 1257 (1987)	23
<i>Baughn v. Honda Motor Corp.</i> , 107 Wash.2d at 142, 727 P.2d 655	..... 30
<i>Borden v. Olympia</i> , 113 Wash. App. 359, 53 P.3d 1020 (2002)	..... 29
<i>Caulfield v. Kitsap County</i> , 108 Wash. App. 242, 29 P.3d 738 (2001)	.....29
<i>Doe v. Corporation of President of Jesus Christ Latter-Day Saints</i> , 141 Wash. App. 407, 167 P.3d 1193 (2007)	..... 22
<i>Donaldson v. City of Seattle</i> , 64 Wash. App. 661, 667, 831 P.2d 1098 (1992)	..... 18
<i>Donohue v. State</i> , 135 Wn. App. 824, 142 P.3d 654 (2006)	..... 23
<i>Estate of Shinaul v. DSHS</i> , 96 Wash. App. 765, 980 P.2d 800 (1999)	..... 31
<i>Gilbert v. Sacred Heart Medical Ctr.</i> , 127 Wn.2d 370, 900 P.2d 552 (1995)	..... 27
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978)	..... 25
<i>Hansen v. Friend</i> , 118 Wash.2d 476, 824 P.2d 483 (1992)	..... 31
<i>Hartley v. State</i> , 103 Wash.2d 768, 777, 698 P.2d 77 (1985)	..... 30
<i>Herrington v. Hawthorne</i> , 111 Wn. App. 824, 837, 47 P.3d 567 (2002)	..... 26
<i>In re Parentage of J.M.K.</i> , 155 Wn.2d 374, 386, 119 P.3d 840 (2005)	..... 26, 28
<i>L.O. & T.J. v. Pierce County</i> , 186 Wash. App. 1002 (2015)	..... 21
<i>Lewis v. Whatcom County</i> , 136 Wash. App. 450, 452, 149 P.3d 686 (2006)	..... 18
<i>M.W. v. Department of Social & Health Services</i> , 149 Wash.2d 589, 70 P.3d 954 (2003)	..... 21
<i>McLeod v. Grant School District</i> , 42 Wash.2d 316, 255 P.2d 360 (1953)	..... 31
<i>Mita v. Guardsmark, LLC</i> , 182 Wash. App. 76, 83, 328 P.3d 962 (2014)	..... 16
<i>Pruitt v. Savage</i> , 128 Wash. App. 327, 115 P.3d 1000 (2005)	..... 29
<i>Rickstad v. Holmberg</i> , 76 Wash.2d 265, 269, 456 P.2d 355 (1969)	..... 31
<i>Shepard v. Mielke</i> , 75 Wash. App. 201, 877 P.2d 220 (1994)	..... 31
<i>Tyner v. State Department of Social & Health Services, Child Protective Services</i> , 141 Wash. 2d 68, 1 P. 3d 1148 (2000)	..... 18
W. Keeton, D. Dobbs, R. Keeton, and D. Owen, <i>Torts</i> § 42, at 273 **1184 (5th ed. 1984)	..... 30
<i>Yonker v. Department of Social & Health Services</i> , 85 Wash. App. 71, 930 P.2d 958 (1997)	..... 18

Statutes

RCW 18.51.005..... 23
RCW 26.44.010.....20, 25, 28
RCW 26.44.030..... 13
RCW 26.44.030(g)(2) 22
RCW 26.44.040.....21
RCW 26.44.050.....18, 19, 20, 21, 28
RCW 43.215.005(4)(c)..... 24, 25, 26, 27
RCW 43.215.100..... 29
RCW 43.43.832.....7, 15, 16, 17, 23
RCW 74.13.010.....25, 26, 27
RCW 74.15.010.....24

Rules

CR 56 1, 15

Regulations

WAC 388-06-0130 4, 5, 17
WAC 388-06-0150 5
WAC 388-155-070(c)(ii) 4, 5, 7, 17
WAC 388-155-090(3)(b) 15

I. INTRODUCTION

The Appellants/Plaintiffs (hereinafter “the Boone family”) submit this memorandum as the opening brief to an appeal of the CR 56 dismissal of the State of Washington and Department of Social and Health Services’ (hereinafter “DSHS”) from the underlying proceedings. This childhood sexual abuse matter was wrongfully dismissed on summary judgment. The case arises out of the molestation of two children in a DSHS authorized daycare. On the facts, the primary perpetrator of the sexual assaults at issue, Abdullah Ali, was known to DSHS as the daycare operator’s husband and also the owner and an adult resident of the Star Child daycare facility. This information was provided to DSHS in February of 1995 (and earlier) during an early screening and background process related to the renewal of Star Child daycare license.

The Legislature enacted specific statutory mandated with corollary administrative code requirements mandating appropriate background checks for all individuals with unsupervised access to children in daycares. If the protocol were properly followed, DSHS would have learned that Mr. Ali possessed an extensive criminal history, that included assaulting police officer and patronizing a prostitute, and he never should or could have passed a properly conducted background check. Over the

years, young children in the daycare repeatedly turned up describing instances of being anally violated (Mr. Ali's modus operandi) and assorted Child Protective Services investigations were undertaken, but not completed, in that even then, Mr. Ali's background was never explored. Ultimately, in early 2006, DSHS discovered its own error as was documented in yet another child molestation allegation arising from the Star Child daycare. As that particular Child Protective investigation was underway, DSHS failed to inform the Boone family, but did warn other daycare patrons, that children were being molested within the facility to include more suspicious anal violations. As a result, the Boone children remained in the abusive environment with their abusers until the Star Child daycare was finally shut down for assorted violations that included the failure to have Mr. Ali submit to background checks dating back for well over a decade. Based upon this evidence and the applicable law, the public duty doctrine does not apply, and there is abundant evidence upon which a jury is likely to render a verdict against DSHS. For these reasons, the motion for summary judgment was improperly granted by the trial court.

II. BACKGROUND

By way of background, according to DSHS files, the Boone twins patronized the Star Child daycare between 2004 and early to mid 2006.¹ On November 20, 2006, DSHS confirmed that the twins were abused at the Star Child daycare by Mr. Ali.² In the same report, DSHS confirmed that the abuse occurred as a result of Mr. Smith's negligence:

I. Findings			
SMITH, PATRICIA A		Person ID: [REDACTED]	Role: Subject
Referral ID	CA/N	Findings	
1749056	Negligent Treatment or Maltreatment	Founded	

3

The same documents confirmed that Mr. Ali committed the sexual assaults:

ALI, ABDULLAH		Person ID: [REDACTED]	Role: Subject
Referral ID	CA/N	Findings	
1749056	Sexual Abuse	Founded	

4

DSHS was informed of Ms. Smith's relationships with Mr. Ali during the background check application that occurred between February and March of 1995 as reflected in the application documents:

¹ CP 203-208

² *Id.*

³ *Id.*

⁴ *Id.*

6. ADDRESS NUMBER		STREET		CITY		ZIP CODE	
1909		South M. Street		Tacoma		98405	
7. TELEPHONE NUMBER (INCLUDE AREA CODE)				9. DIRECTIONS FOR REACHING YOUR HOME			
Home: (206) [REDACTED]				Off the freeway to Sprague and 19th St. Make a right on 19th Street. take 19th to M. Street, then make another right on to M Street. third house on the left side of M. Street.			
8. NEAREST ELEMENTARY SCHOOL							
McCarter							
10. PERSONS LIVING IN HOUSEHOLD (INCLUDE SELF) Attach an additional sheet for additional persons.							
NAME		BIRTHDATE		RELATIONSHIP TO APPLICANT(S)		NAME	
a. Patricia A. Smith		[REDACTED]		SELF		d. KENYATTA Alexander	
b. Abdullah Ali		[REDACTED]		husband		e. ISMAIL RAHMAN	
c. Najisha M. Alexander		[REDACTED]		daughter		f. [REDACTED]	

5

Unfortunately, it does not appear as though DSHS ever completed a full background check process in relation to Mr. Ali during any of the licensing inquiries that occurred 1992, 1998, 2001, and/or 2004. See WAC 388-155-070(c)(ii); WAC 388-06-0130. Specifically, the documents that are available from July 13, 1992 reflect that DSHS skipped over conducting a Law Enforcement Support Agency (LESA) check:

	Requested	No Record	Record	Date	Date	Comments
1. Revocation Register	7-13	✓				
2. Central Registry	7-13	✓				
3. State Patrol	7-8	7-14		Employment App only		
4. LESA						
5. Area No. ST () CPS	7-13	✓				
() Other Record	7-13	✓				
CSA	7-13					
✓ Clearance Complete - Date	7-13	(N/A)	14 1992			() Filed, no records found

6

As Ms. Smith's husband, and the legal owner of the home located at 1909 South M Street, Tacoma, WA, the Star Child daycare should not have been permitted to operate absent Mr. Ali passing the appropriate background checks, including the LESA inquiry. See WAC 388-155-

⁵ CP 208
⁶ CP 224

070(c)(ii); WAC 388-06-0130. As reflected by DSHS's own records, a full background check was never completed.

A LESA check is a submission that goes beyond the other checks via South Sound 9-1-1. An inquiry of this nature will provide enhanced information above and beyond that which is identified inquiring only of the State Patrol and Child Protective Services own internal files.⁷ A Washington Criminal History check would have revealed Mr. Ali possessed multiple convictions including Violations of Anti-Harassment Orders and Assault 3rd during 2000/2001.⁸ Child Protective Services files reflect that: "*Mr. Ali's arrest history that includes arrests for soliciting a prostitute, protection orders, violating protection orders, spitting on a policeman and other offenses.*"⁹ In accord with WAC 388-06-0150 which allows for the consideration of all court records when conducting a background, the recognition of any of these convictions should prompted more thorough search of Mr. Ali's extensive court history file that includes the following readily available public information from the Washington State court website concerning other legal involvements dating back to 1990:

⁷ CP 191-202

⁸ CP 228-231

⁹ CP 131-135

Ali, Abdullah DEFENDANT	Pierce Co Superior	00-1-02408-0
Ali, Abdullah DEFENDANT	Pierce Co Superior	00-1-05713-1
Ali, Abdullah DEFENDANT	Pierce Co Superior	00-1-06095-7
Ali, Abdullah DEFENDANT	Pierce Co Superior	00-1-06094-9
Ali, Abdullah PETITIONER	Pierce Co Superior	01-4-00743-5
Ali, Abdullah PETITIONER	Pierce Co Superior	92-2-02975-3
Ali, Abdullah PETITIONER	Pierce Co Superior	00-2-12153-4
Ali, Abdullah PETITIONER	Pierce Co Superior	06-4-00877-7
Ali, Abdullah Defendant	Pierce Co District	7Y766579C
Ali, Abdullah Defendant	Tacoma Municipal	B00144784
Ali, Abdullah Defendant	Tacoma Municipal	B00144778
Ali, Abdullah Defendant	Tacoma Municipal	B00144779
Ali, Abdullah Defendant	Tacoma Municipal	B00144474
Ali, Abdullah Defendant	Tacoma Municipal	B00143192

Ali, Abdullah Defendant	Tacoma Municipal	B00143193
Ali, Abdullah Defendant	Tacoma Municipal	B00212652
Ali, Abdullah Defendant	Tacoma Municipal	621565
Ali, Abdullah Defendant	Tacoma Municipal	621566
Ali, Abdullah Defendant	Tacoma Municipal	914613
Ali, Abdullah Defendant	Tacoma Municipal	644287
Ali, Abdullah Defendant	Tacoma Municipal	B00107639
Ali, Abdullah Respondent	Pierce Co District	Y0604044A ¹⁰

DSHS is mandated to conduct a LESA background check of all the individuals that might have unsupervised access to children in any daycare facility. *See* RCW 43.43.832; WAC 388-155-070(c)(ii). As documented on February 18, 1995, DSHS was informed that in relation to the Star Child daycare facility, these individuals include Mr. Ali. In this regard, it has been confirmed by DSHS that Mr. Ali has possessed disqualifying convictions that should have precluded Ms. Smith from being permitted to

¹⁰ CP 196-197; 241- 563

operate the Star Child daycare facility ever since 1990.¹¹ DSHS records from 2006 reflect as follows:

Investigator spoke with Detective Lindsey Wade and she stated that she had been assigned to the referral. She asked if investigator was aware of Abdullah Ali's history. She stated his name is also Gary Alexander. She reported the the Tacoma Police Department has a history with Mr. Ali. She reported he had been arrested a

12

* * *

number a times for various violations since 1990 and is late as 2005. She was asked what his listed home address is and she reported it was 1909 south M street and that is the only address they had ever contacted him at. She stated the department should contact LESA for a full list of his criminal history. She stated she would speak with the prosecutor and try to see if an interview could be conducted on the child in [REDACTED]. She asked for and was given the child's address and contact information as well as the information for [REDACTED]. She stated she would start by calling the child's mother in [REDACTED].

LESA records was contacted and they will pull the records for the last 15 years and send them to investigator.

13

* * *

DLR/CPS has uncovered information on the provider's husband Abdullah which show a continuing extensive criminal history. Many of the offenses are disqualifying. The Tacoma Police Department shows Abdullah residing at the provider's address since the first offense. Last offense was 2005. Provider has been licensed (this time) since 1998 and Abdullah and [REDACTED] have never been listed on the application. The provider admitted to this licenser and the DLR/CPS investigator that Abdullah resides in her home some of the time. Based on this new evidence, another staffing was held between AAG (Lucretia Greer), DLR/CPS (Ezvanne O'Donoghue and Gerard Lloyd) and licensing (Sheila Jelks and Ingrid McKinney). It now appears the provider now only neglected to list [REDACTED] on the application but has been less than truthful about a number things. She has failed to report the sexual abuse when she was contacted by the referent on 1/24/06, failed to list [REDACTED] and Abdullah on any of her licensing applications, failed to report that Abdullah was residing in the home and failed to submit a criminal background check on him. The Department has concluded that the safety and welfare of the children are now a serious concern. The Department has elected to summary/suspend the license at this time.

14

This documented inquiry that occurred on January 26, 2006 should have already been conducted and revealed by DSHS upon receipt of the first background check inquiry in 1995. Additionally, the assigned DSHS

¹¹ CP 191-222

¹² CP 210-223

¹³ *Id.*

¹⁴ *Id.*

social workers involved in the re-licensing processes from 1998, 2001, and 2004 should have recognized that Mr. Ali has been arbitrarily removed from the re-licensing applications and mandated that background checks be conducted during those years as well. According to DSHS files, the disqualifying information included that “*A police officer had to take out a restraining order on Abdullah in 2000.*”¹⁵ This information should have been discovered during the background review process that occurred in 2004 when Ms. Smith applied for her re-licensing.

The assigned licensors were required, as mandatory reporters, to notify Child Protective Services and prompt a proper investigation upon learning that Ms. Smith was allowing an unqualified individual, Mr. Ali, to have unsupervised access to the children at the Star Child daycare. It is clear that the appropriate background checks were never completed until January 26, 2006 and after the twins had already initially been molested by Mr. Ali starting in 2004. Based upon a failure to inquire of Ms. Smith as to the residency status of Mr. Ali and conduct a LESA background check, DSHS was negligent in permitting children to be placed by their parents, or anyone, at the Star Child daycare facility.

Child Protective Services received referrals alleging unlawful sexualized conduct involving minor children at the Star Child daycare in

¹⁵ *Id.*

May 1, 1992, March 25, 1997 and January 24, 2006. Each of these referrals and the associated investigations should have prompted a review of the background check and renewed inquiry as to the individuals residing at 1909 South M Street within the Star Child daycare facility, including Mr. Ali. As part of these Child Protective Services investigations, the fact that Mr. Ali was the owner of the home and had previously been listed by Mr. Smith as her husband and a resident of the home should have prompted inquiry and resultant background checks during those times. As noted by DSHS on January 26, 2006, Mr. Ali possessed disqualifying arrests and convictions dating back to 1990.¹⁶ The identification of the disqualifying information that occurred on January 26, 2006 should have already taken place in 1992 and 1997 during the Child Protective Services investigations.¹⁷ Based upon the failure to conduct proper investigatory inquiries during the 1992 and 1997 Child Protective Services investigations, DSHS was negligent by failing to identify Mr. Ali as an unqualified childcare provider residing at, and owner of the property, that was the Star Child daycare center.¹⁸

After the sexual assault allegations involving Marcus (mother Royal Princess) dated January 26, 2006, DSHS failed to protect the

¹⁶ CP 210-223; CP 240

¹⁷ CP 191-212

¹⁸ *Id.*

children that remained in the daycare, including the twins, for several months thereafter. The Star Child daycare was closed in May of 2006.¹⁹ DSHS should have initiated a summary suspension and/or immediately informed all of the parents that were patronizing the facility that Mr. Ali was unqualified and that the son, Rahsul Mohammed, was accused of molesting another child within the home. DSHS did send out some notices to certain families in letters dated March 12, 2006 of the concerns at the Star Child daycare:

Dear Ms _____

I am writing in my capacity as a State of Washington, Division of Licensed Resources, Child Protective Services Facility Investigator, to bring the following information to your attention.

A person who lived in the Star Child Day Care was recently accused of child molestation involving a daycare child.

Parents may, understandably, be concerned that a person accused of child molestation was in the same premises as their child's day care. If you would like your child interviewed and/or if your child has indicated, either directly or indirectly (through behavior changes, etc.), that he or she may have been molested, you should contact me so that an interview of your child can be arranged. Also, please feel free to call if you simply have questions you would like answered.

You are encouraged not to discuss the matter with your child(ren). Direct questioning of children who have not previously reported sexual abuse or inappropriate touching, if not handled properly, poses two risks: 1) it can jeopardize investigations of legitimate claims; and, 2) it can lead to claims of abuse when no abuse or touching actually occurred.

Please feel free to contact me at 983-6134 by 3/31/06 if you would like to discuss any questions or concerns that you may have.

Sincerely,
Gerard Lloyd

20

However, the twins' mother, Tamika Boone, was never provided such a

¹⁹ CP 132-142

²⁰ CP 200

notice. As a result, the twins continued to reside in the harmful environment for several avoidable and harmful months with their abusers, Mr. Ali and Mr. Mohammed.

The record also reflects that the Child Protective Services investigation that originated on May 1, 1992 was also handled negligently in that the intake was never fully investigated.²¹ The documents attached to the declaration of Mary Quinlan document the fact that the nature of the allegations and that the investigation was never completed:

WILKINSON, ROBERT, A. (14414)	SMITH, PATRICIA, A. (608411)	Sexual Abuse	Unable to complete invest - No Finding
<p>Describe the nature and extent of the alleged maltreatment or concern: ROBERT WILKINSON (AGE 2 1/2) WAS S/A BY PARTIES UNKNOWN. REFERRENT STATES S/A HAS BEEN SUBSTANTIATED BY PHYSICAL EXAM BY DR. ROSS KENDALL (REGULAR PHYSICIAN IS DR. MCGROARTY). CHILD IS SCHEDULED FOR A PROCTOSCOPY ON MAY 6 TO FURTHER ASSESS RECTUM FOR POSSIBLE DAMAGE. CHILD WOULD NOT COOPER- ATE WITH INITIAL EXAMINATION SO PHYSICIAN WILL SEDATE CHILD AND DO PROCTOSCOPY. ***** CHILD INDICATED TO PARENTS THAT HIS "POO POO" HURT. CHILD DISCLOSED THAT A MAN AND A WOMAN STUCK A STICK UP HIS BUTT. CHILD WOULD NOT DISCLOSE ANY FURTHER INFORMATION. ***** REFERRENT STATES ROBERTS WAS AT PATRICIA SMITH'S DAYCARE, 1909 SOUTH M STREET, PHONE 572-7409. THIS WAS A DAYCARE HOME. REFERRENT STATES CHILD WAS AT THIS DAYCARE ONLY ONE TIME. THAT WAS IN FEBRUARY 1992. IT WAS AFTER THE STAY AT THE DAYCARE THAT CHILD BEGAN COMPLAINING ABOUT HIS "POO POO" HURTING. THE NEXT TIME REFERRENT TOOK CHILD TO STAY AT THAT DAYCARE - THE DAYCARE WAS CLOSED, OUT OF BUSINESS.</p>			

22

These were very serious allegations that should have prompted some sort of disposition other than "no finding" whatsoever.²³ The only investigatory record reflects that the investigator was informed that Mr. Ali was Ms. Smith's husband, and that he purportedly was not home at the

²¹ CP 191-212

²² CP 135

²³ *Id.*

time of the alleged assault: “*Ms. Smith was contacted...Her husband was not home...*”²⁴ A diligent Child Protective Services investigation would have required further confirmation regarding Mr. Ali’s location.²⁵ Moreover, the allegation also should have prompted a full background check to be conducted upon Mr. Ali, but this never occurred.²⁶

The intake dated March 25, 1997 was also negligently handled. As documented the intake indicated that children at the daycare were involved in sexualized that prompted the referral: “CRYSTAL HAS BEGUN CERTAIN ACTING OUT ACTIVITIES THAT ARE SEXUAL IN NATURE...”²⁷ The referral was never referred to Child Protective Services:

SER Text

Patricia Smith personally delivered a letter, August 2, 2006, requesting a copy of the referral alleging sexual misconduct in 1997. 5-day letter has been sent along with a redacted copy of the licensing investigation into the allegations reported on 3/25/97. There was some confusion whether this was a CPS or licensing and based on the C/AN findings of Physical Neglect and Sexual Abuse both None. It appears the referral was referred to CPS and then was referred to licensing. CPS was never involved in this investigation per GUI.

28

This referral and intake was mishandled in violation of the mandatory reporting obligations under RCW 26.44.030.²⁹ Based upon the fact that the allegation involved possible sexual impropriety, the social worker that

²⁴ CP 123-125

²⁵ CP 191-212

²⁶ *Id.*

²⁷ CP 210-223

²⁸ CP 223

²⁹ CP 191-212

accepted the referral was required to send the information to Child Protective Services for investigation.³⁰ That never occurred. Had such an investigation occurred, at a minimum, a diligent investigation should have revealed that Mr. Ali was residing at the Star Child daycare and was not qualified, based upon background data, to have unsupervised access to children.³¹

This is a case of clear negligence. As early as February 18, 1995, DSHS was informed that Mr. Ali was the husband of Ms. Smith and resided at, and owned, the property upon which the Star Child daycare was operated. The DSHS records reflect that a thorough background check was never conducted including a LESA report.³² As of January 26, 2006, DSHS finally realized and acknowledged that Mr. Ali possessed disqualifying information dating back to 1990.³³ There were multiple opportunities for DSHS to have re-visited the background check obligations related to Mr. Ali. Those opportunities included what should have occurred during diligent Child Protective Services investigations and/or the re-licensing process. If, at any of these opportunities, DSHS had exercised due diligence as required by law, the fact that Mr. Ali was a participating member of the Star Child daycare, owner of the property, and

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

resident of the home, should have been discovered.³⁴ Upon discovery, DSHS should have taken actions consistent with WAC 388-155-090(3)(b) to ensure that Ms. Smith was not permitted to operate a daycare facility.³⁵

III. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by granting a CR 56 motion regarding the State's obligations to protect the Boone Children.

Issue 1: Should this Court reverse the trial court's CR 56 dismissal of this claim?

IV. ARGUMENT RE: BACKGROUND CHECK MANDATE

DSHS has a Legislative mandate under RCW 43.43.832 (background checks) to conduct diligent and thorough background checks of individuals that may have unsupervised access to children: "The legislature further finds that the department of social and health services, when considering persons for state positions directly responsible for the care, supervision, or treatment of children or the developmentally disabled or when licensing or authorizing such persons or agencies pursuant to its authority under chapter 74.15 RCW, must consider...adequate information to determine which employees or licensees to hire or engage." RCW

³⁴ *Id.*

³⁵ *Id.*

43.43.832 (effective 1989). The statutory scheme requires that DSHS conduct thorough background checks of individuals that may have unsupervised access to children at daycares. *Id.* The express purpose DSHS mandated responsibility is to protect children in childcare facilities. *Id.* In relation to the existence of a legally recognized “duty” being owed to the Boone children, DSHS failed to raise and/or even identify the associated evidentiary and legal foundation for this claim.

The controlling legal principles provide that a legal duty attaches when a government agency is charged to protect a particular class of individuals:

...where a plaintiff alleges the public entity breached a duty imposed by statute, ordinance, or administrative rule, we must employ the public duty doctrine as a tool analyzing whether the legislative body intended the duty to extend to the general public or a particular class of individuals. *Id.* at 888, 288 P.3d 328. If the public entity owes this legislatively mandated duty to the general public, it does not owe the duty to any particular person harmed by its breach. *See id.* at 888–90, 288 P.3d 328. This limitation ensures the public entity has no greater liability than private entities. *See id.* at 886, 894, 288 P.3d 328. However, the public duty doctrine does not apply where, as here, a plaintiff alleges the public entity breached a common law duty it shares in common with private entities.³ *Id.* at 888, 894, 288 P.3d 328. As a matter of law, the public entity owes this common law duty to a person it should reasonably foresee may be harmed by its breach. *Id.* at 891, 288 P.3d 328.

Mita v. Guardsmark, LLC, 182 Wash. App. 76, 83, 328 P.3d 962 (2014).

In this case, the obligation to conduct background checks under RCW 43.43.832 and also WAC 388-155-070(c)(ii); WAC 388-06-0130 were expressly enacted to protect children in daycares. The regulatory scheme mandates specific actions:

WAC 388-06-0130 Does the background check process apply to new and renewal licenses, certification, contracts, and authorizations to have unsupervised access to children or individuals with a developmental disability?

(1) For children's administration these regulations apply to all applications for new and renewal licenses, contracts, certifications, and authorizations to have unsupervised access to children or individuals with a developmental disability that are processed by the children's administration after the effective date of this chapter...

These duties are owed to the children in child care facilities, and not to the general public. In accord with the public duty doctrine, the duty to conduct background checks is to a circumscribed class of vulnerable individuals, children in daycares. In this regard, the Boone twins fall within the circumscribed class of individuals that the Legislature mandated DSHS to protect. Therefore, DSHS had an obligation to act to protect the Boone children.

**V. ARGUMENT RE: DUTY UNDER RCW
CHAPTER 26.44 FOR CHILD PROTECTIVE
SERVICES TO INVESTIGATE**

“It is well established that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action where the statute is violated and the injured party was one of the persons designed to be protected.” *Donaldson v. City of Seattle*, 64 Wash. App. 661, 667, 831 P.2d 1098 (1992). “If the legislation evidences a clear intent to identify a particular and circumscribed class of persons, such person may bring an action in tort for violation of the statute.” *Id.* The law in Washington is very clear: “RCW 26.44.050 creates a duty to **all** children who may be abused or neglected, regardless of the relationship between the child and his or her alleged abuser.” *Tyner v. State Department of Social & Health Services, Child Protective Services*, 141 Wash. 2d 68, 1 P. 3d 1148 (2000) (actionable tort cause of action against DSHS in relation to duties owed under chapter 26.44 RCW for investigating abuse and neglect); *Lewis v. Whatcom County*, 136 Wash. App. 450, 452, 149 P.3d 686 (2006) (emphasis added); *see also Yonker v. Department of Social & Health Services*, 85 Wash. App. 71, 930 P.2d 958 (1997).

The law and facts of *Lewis* are instructive. In *Lewis*, the duty owed to the plaintiff was triggered when the “Whatcom County Sheriff’s

Department found out that Lewis was likely being molested in December 1991 while it was investigating another girl's sexual abuse allegations against Goldsbury." *Id.* at 452. "Despite these allegations, the sheriff's department did not investigate. Lewis continued to go to Goldsbury's house almost every day, where he allegedly continued to molest her..." *Id.* On these facts, the Court held that a duty was owed and breached by the County Sheriff under RCW 26.44.050. *Id.*

Lewis illustrates that the duty is not limited to only the particular child that is the subject of the originating investigation. *Id.* Instead, the duty is owed to the "class" of individuals that the statute is intended to protect. *Id.* The *Lewis* Court noted that "the legislature intended to extend the statute's protections to children who are abused outside the home by people other than their parents." *Id.* at 455. The individuals owed a duty under RCW 26.44.050 include "all children who may be abused or neglected" as a result of a breach, and not just the particular children identified in a police report. *Id.* at 452. Any other interpretation would defy common sense and would also run counter to the intent of the statutory scheme. *Id.*

The case law pre-dating *Lewis* makes clear that the "class" of victims protected under RCW 26.44.050 is broad, and that the duty extends to all potential victims of a badly botched investigation and/or a

failed mandated reporting. *Yonker*, 85 Wash. App. at 79-80. Both the *Lewis* and *Yonker* Courts heavily referenced the Legislative intent in RCW 26.44.010 in determining the class of individuals that the law was designated to protect. In that regard, under the declaration of purpose codified as RCW 26.44.010, the Legislature stated as follows: “It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort **to prevent further abuses, and to safeguard the general welfare of such children.**” *Id.* (emphasis added). This declaration of purpose makes it clear that the duties owed are broad and extend to all children that are injured as a result of failure to carry out the duties set forth in RCW 26.44.050.

This claim is grounded upon the express duty under RCW 26.44.050 that required Child Protective Services to properly investigate the Child Protective Services referrals from 1995 and 1997 and consequently conduct a background check of Mr. Ali. Additionally, during the 2006 investigation, DSHS also failed to take prompt and appropriate action to protect the other children in the Star Child daycare. The Boone twins remained in the abusive environment as a result. The clear and obvious purpose of this law is to ensure that Child Protective Services prevent children from ending up in a home with dangerous or irresponsible care providers. *See M.W. v. Department of Social & Health*

Services, 149 Wash.2d 589, 70 P.3d 954 (2003). According to *M.W.*, the duty owed expressly extends to children placed into dangerous homes as a result of negligent investigations. *Id.* *M.W.* makes it clear that the “class” protected by the statute includes those children placed into dangerous foster homes as a result of a negligent child abuse investigation. *Id.* Based upon the statutory scheme set forth under RCW Chapter 26.44, DSHS owed a duty to the Boone twins and the motion for summary judgment should not have been granted.³⁶

**VI. ARGUMENT RE: DUTY UNDER RCW
CHAPTER 26.44 FOR LICENSORS TO REPORT
SUSPECT ABUSE AND NEGLECT AS MANDATED
REPORTERS**

According to RCW 26.44.050(1)(a), “When any...employee of the department of early learning has caused to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided under RCW 26.44.040.” “The specific reporting requirements

³⁶ It should be noted that before the trial court DSHS cited to unpublished case law in violation of GR 14.1(a) including *L.O. & T.J. v. Pierce County*, 186 Wash. App. 1002 (2015). Even that case law is supportive. DSHS cites the case law to suggest that the duty to investigate limits the obligations owed to the subject of the intake complaint. The case law that was inappropriately cited actually holds that all of the children in the same home, the Star Child daycare, are owed a duty of care: “if in investigating the alleged abuse of the first child, law enforcement learns, discovers, or suspects that another child is being abused, the other child is then owed the duty to investigate those allegations.” *Id.* In this regard, the Boone twins were in the same home with other children and DSHS should have suspected that they too would be the victims of Mr. Ali. The Boone family objects to DSHS’ attempt to rely upon unpublished authority. However, the case law is actually supportive of the existence of a duty being owed.

codified under RCW 26.44.030(g)(2) establish a duty to protect not only the child subjected to known abuse, but also “if there is reasonable cause to believe that other children are or may be **at risk** for abuse or neglect by the accused...” *Id.* (emphasis added). The intent underlying the mandatory reporting statute is that imposing civil consequences for failures to report motivates mandatory reporters to take action to protect potential child victims of from injury. *Doe v. Corporation of President of Jesus Christ Latter-Day Saints*, 141 Wash. App. 407, 167 P.3d 1193 (2007). There is no debate but that social workers that fail to promptly (mandatorily report) for a proper investigation can be sued and that the Legislature intended an actionable tort duty. *Id.* Upon recognition that Ms. Smith was permitting Mr. Ali to have unsupervised access to children of the daycare, a duty to provide a mandatory report to Child Protective Services attached. On this basis as well, DSHS owed the Boone twins a duty of care and the motion for summary judgment should have been denied.

VII. ARGUMENT RE: “NEGLIGENT LICENSING”

DSHS attempts to characterize this claim as some sort of “negligent licensing” lawsuit. The Boone family is not reliant upon such a claim for prevailing at summary judgment. As noted herein, the Boone

family is predominantly relied upon RCW 43.43.832 and RCW Chapter 26.44 to prevail on this motion, in that DSHS failed to conduct mandated background checks of Ms. Ali. However, it should still be noted that DSHS's analysis of the licensing statutes in relation to the creation of a tort duty that is owed to children in daycares is incorrect. The express intent of the Legislature under RCW Chapters 43.215 and formerly enacted 74.13 and 74.15, and common sense, dictate that such a duty is owed.

1. The case law pertaining to licensing *nursing homes* which was heavily relied upon by DSHS is distinguishable.

At the trial court level, DSHS primarily relied upon *Donohue v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006) which held that there is no actionable tort claim against the State even when a *nursing home* is negligently licensed. In so holding in relation to the existence, or nonexistence, of a claim under the public duty doctrine, the *Donohue* Court accurately noted that the “legislative intent exception applies ‘when the terms of a legislative enactment evidence and intent to identify a particular and circumscribed class of persons.’” *Id.* at 844, citing, *Bailey v. Town of Forks*, 108 Wn. 2d 262, 268, 737 P.2d 1257 (1987). Then, the *Donohue* Court analyzed the Legislative intent of the *nursing home* statutory scheme codified under RCW 18.51.005 (Legislative intent of

nursing home licensing statutes) and determined that DSHS's statutes limited the licensing obligations in the *nursing home* context as being somewhat passive and regulatory, to “**promote** safe and adequate care and treatment of individuals therein” and went on to recognize that the Legislature evidently intended that, in the nursing home context, DSHS's role was limited “to **promote**, but not guarantee, safe care and treatment for residents.” *Id.* at 846 (emphasis added).

By contrast, in relation to children placed in child care facilities, the Legislature specifically dictated that DSHS's role is more active and controlling, to “**safeguard** the health, safety, and well-being of children” and noted that the statutory scheme specifically applies to children that are “receiving care away from their own homes.” RCW 43.215.005(4)(c); RCW 74.15.010 (Legislative intent of child care licensing statutes). The Legislature's choice to use the word “**safeguard**” as applies to children and child care facilities (versus simply “promote” as applies to *nursing homes*) evidences a clear intent to create an active and actionable duty on the part of DSHS to actionably protect children placed in licensed child care facilities. *Id.* Based upon this important difference in phraseology, to

“safeguard” versus just “promote”, *Donohue* is distinguishable, and DSHS is not shielded from liability by the public duty doctrine. *Id.*³⁷

2. Appellate precedent holds that that when the Legislature employs the active term “safeguard” in relation to the protection of children that an actionable duty is intended.

It should additionally be noted that in the context of the interrelated and tortuously actionable duty on the part of DSHS to conduct appropriate abuse and neglect investigations set forth under chapter 26.44 RCW, the appellate courts have already determined that usage of the term “safeguard” in relation to children, their parents, and child caretakers gives rise to an actionable tortuous duty of care and Legislatively intended exception to the public duty doctrine. RCW 26.44.010 (“to **safeguard** the general welfare of such children”) (emphasis added); *Yonker, supra* (noting intent to “prevent further abuses, and to **safeguard**” provides for actionable duty); *Tyner, supra* (holding that Legislative intent of chapter 26.44 RCW (“to **safeguard**”) is to create actionable duty of care). Beyond that, RCW 26.44.050 expressly references “chapter 74.13 RCW” in relation to the duties owed during abuse and neglect investigations, and

³⁷ DSHS also relied heavily upon *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978) to illustrate that regulations do not always create an actionable tort duty. In *Halvorson*, the Supreme Court analyzed the issue in relation to the Seattle building codes and held that those building regulations did not give rise to a claim against the City’s building inspectors. *Halvorson* stands for the holding that a persona cannot sue the City of Seattle building inspectors for ensuring that structures are not up to code, and nothing else. Here, the specific statutes, RCW 43.215.005 and RCW 74.13.010, to determine if a duty was owed by DSHS to the Boone family.

the Legislative declaration of purpose set forth under RCW 74.13.010 also notes that the purpose of the licensing statutes is to “**safeguard**, protect, and contribute to the welfare of children...” Moreover, RCW 43.215.005(4)(c) and RCW 74.13.010 specifically explain that the interrelated child care laws cannot be read in isolation or with artificial distinction in that the purpose of the assorted child care laws is to provide a “comprehensive and coordinated program of public child welfare services.” *Id.*

According to Washington law and rules of statutory interpretation, if a statute is unclear or ambiguous, courts apply rules of statutory construction to determine the legislature’s intent and purpose. *Herrington v. Hawthorne*, 111 Wn. App. 824, 837, 47 P.3d 567 (2002). In light of any argued ambiguity as to the consistency of purpose as between the assorted statutes at issue, “the proper approach is to ‘harmonize statutes’ pertaining to the subject matter and maintain the integrity of the statutes within the overall statutory scheme.” *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386, 119 P.3d 840 (2005).

...The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose...This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question...If, after this inquiry, the statute can reasonably be interpreted in more

than one way, then it is ambiguous and it is appropriate to resort to principles of statutory construction to assist in interpretation...Strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided...

Id. at 846-47; *see e.g. Gilbert v. Sacred Heart Medical Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995) (harmonizing conflicting statutes of limitation in favor of preserving claim related to minor). Based upon the fact that it has already been determined that the “**safeguard**” phraseology in relation to the interrelated statutory scheme set forth under chapter 26.44 RCW pertaining to abuse and neglect investigations provides for an actionable duty (and recognized exception to the public duty doctrine) there is no room for legitimate debate – DSHS owes the children and parents that patronize daycares a Legislatively recognized duty of reasonable care to ensure that those facilities are indeed safe. *Id.*

3. Holding that the there is no duty to carry out the interrelated licensing, as compared to investigatory duties, is completely illogical and would be an absurd interpretation of the law.

It is important to recognize that the same DSHS social workers that conduct abuse and neglect investigations also overlap with and/or are the same as the DSHS social workers that handle child care facility licensing. These two subdivisions (DLR and CPS) of interrelated DSHS social workers constitute the “coordinated program of public welfare services” identified under RCW 43.215.005(4)(c) and RCW 74.13.010 for carrying

out the Legislatively dictated duties set forth under chapters 26.44, 74.13, and 74.15 RCW each of which interchangeably notes a Legislative intent to “safeguard” children. See RCW 26.44.010 (“to safeguard”), 43.215.005(4)(c)(“to safeguard), 74.13.010 (“to safeguard”), and 74.15.010 (“to safeguard”). When interpreting statutes, “[s]trained, unlikely, or absurd consequences resulting from a literal reading are to be avoided...” *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386, 119 P.3d 840 (2005). In this context, it would indeed be “absurd” to hold that the same DSHS social workers that are conducting the same interrelated responsibilities in relation to child care facilities under the interrelated child care and protection statutes have differing legally recognized duties in relation to the protection of children. *Id.* Moreover, were the law to be as DSHS claims it to be, then, in order to avoid the Legislative mandates of chapter 26.44 RCW, the DSHS bureaucrats could simply call any abuse and neglect intake referral a “licensing” function (as DSHS transparently attempts to do here) rather than what it is, an “investigation” concerning potential abuse or neglect, and avoid the duty of care which the Legislature intended to attach under RCW 26.44.050. *Id.*; see *Yonker, supra*.

Based upon the express will of the Legislature and when employing practical applications of the law, DSHS owed the Boone family

a duty of care in accordance with the child care statutory scheme set forth under chapters 43.215, 74.13 and 74.15 to ensure that the Star Child daycare was safe for children, and this claim is not precluded by the public duty doctrine. By law, the Legislature intended to make safeguarding and protecting children of paramount importance. *See* RCW 43.215.100. In this regard, to the extent that the “negligent licensing” argument is at issue, mandating that DSHS properly conduct background checks at daycares – it is the intent of the controlling law.

VIII. ARGUMENT RE: ASSUMPTION OF DUTY

At common law, “[a]s a general rule, one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance.” *Borden v. Olympia*, 113 Wash. App. 359, 53 P.3d 1020 (2002); *Pruitt v. Savage*, 128 Wash. App. 327, 115 P.3d 1000 (2005). Here, DSHS assumed responsibility for conducting background checks, overseeing daycares, investigating child abuse allegations, and warning families of the ongoing abuses (except the Boone family) in relation to the overt indications that Mr. Ali should not be near children. This assumption of duty created a special relationship exception to the public duty doctrine. *See e.g. Caulfield v. Kitsap County*, 108 Wash. App. 242, 29 P.3d 738 (2001). By

accepting these duties, DSHS was required to execute these obligations in a manner that was not negligent and in such a way as to protect the children placed in daycares.

IX. ARGUMENT RE: CAUSATION

“Negligence and proximate cause are ordinarily factual issues, precluding summary judgment.” Tegland and Ende, 15A Washington Practice: Washington Handbook on Civil Procedure Section 69:20, at 581 (2012 ed.). Proximate cause is an essential element of any negligence theory; it consists of two elements: (1) factual or “but for” causation and (2) legal causation. *Baughn v. Honda Motor Corp.*, 107 Wash.2d at 142, 727 P.2d 655; *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Factual causation is established between a defendant's act and a subsequent injury only where it can be said the injury would not have occurred “but for” the defendant's act. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Torts* § 42, at 273 **1184 (5th ed. 1984). As noted in *Baughn*, 107 Wash.2d at 142, 727 P.2d 655: “Cause in fact refers to the ... physical connection between an act and an injury.” The existence of factual causation is generally a question of fact for the jury. *Baughn*, at 142, 727 P.2d 655 (1986).

According to a landmark case from the Washington Supreme Court, “[w]hether foreseeability is being considered from the standpoint of

negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of the particular kind which was expectable. Rather, the question is whether the actual harm fell within the general field of danger which should have been anticipated.” *Rickstad v. Holmberg*, 76 Wash.2d 265, 269, 456 P.2d 355 (1969); *see also Shepard v. Mielke*, 75 Wash. App. 201, 877 P.2d 220 (1994) (duty owed to those that cannot protect themselves); *Hansen v. Friend*, 118 Wash.2d 476, 824 P.2d 483 (1992); *McLeod v. Grant School District*, 42 Wash.2d 316, 255 P.2d 360 (1953) (children being assaulted in unsupervised room foreseeable). “The sequence of events need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are met.” *Rickstad*, at 269.

Washington case law is clear in that DSHS is liable for participating in decisions that lead to the negligent placement of children in dangerous homes. *See Estate of Shinaul v. DSHS*, 96 Wash. App. 765, 980 P.2d 800 (1999). In *Shinaul*:

...Parsons recommended that Shinaul be placed at New Directions, but Shinaul's doctors and guardian made the decision to place him there. In other words, Parsons—like

the CPS caseworker in *Tyner* —submitted a recommendation, but did not actually make the decision. Following the reasoning in *Tyner*, if Parsons breached her duty to Shinaul by, for example, supplying materially misleading or incomplete information to Judy Sanderson and Shinaul's doctors as they contend that she did, then her recommendation would be a legal cause of Shinaul's death...

...If the Estate can establish that Parsons gave materially misleading information that caused Shinaul to be placed at New Directions inappropriately, a rational trier of fact could find “but for” causation and legal causation will lie. Accordingly, the trial court erred by concluding that the Estate could not establish legal causation as a matter of law.

Id. at 805-6. The causation principles in this case are similar to those in *Shinaul*.

In this case, causation is straightforward. DSHS should have conducted a proper background check of Mr. Ali in 1995-2004 during the multiple Child Protective Services investigations and re-licensing processes. These inquiries were mandated and DSHS failed to adhere to the law. A proper inquiry at any point in time between 1995 and 2004 would have revealed disqualifying information in relation to Mr. Ali.³⁸ As a result, Ms. Smith's daycare license should have been revoked for permitting Mr. Ali unsupervised access to the daycare children.³⁹ Proper

³⁸ CP 191-562

³⁹ *Id.*

DSHS intervention would have prevented the abuse that was suffered by the Boone twins.⁴⁰

X. CONCLUSION

Based upon the evidence and law cited herein, it is clear that DSHS owed the Boone family a duty of care to conduct background checks of Mr. Ali. DSHS failed to do so. Therefore, DSHS' motion for summary judgment was improperly granted.

DATED this 2nd day of May, 2016.

Respectfully submitted

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⁴⁰ *Id.*

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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

TAMIKA BOONE, individually, and on behalf
of her minor children, D.B., individually and
D.B., individually,

No. 48502-8-II

Appellants,

CERTIFICATE OF SERVICE

v.

STATE OF WASHINGTON, DEPARTMENT
OF SOCIAL AND HEALTH SERVICES; and
PATRICIA SMITH d/b/a STARCHILD
DAYCARE,

Respondent.

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellants Opening Brief

in the manner indicated to the parties listed below:

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