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Court of Appeals
Division III
State of Washington

NO. 33093-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CETH HEIDEMAN, et al.,

Appellants,

v.

CHELAN COUNTY, a Washington Corporation, et al.,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES

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I. INTRODUCTION

Between 2004 and 2009, the Department of Social and Health Services (DSHS) Child Protective Services (CPS) unit and the Chelan County Sheriff's Office (Chelan) investigated various reports alleging abuse of Ceth, Keilah, and Danika Heideman (Plaintiffs) by their father and step-mother.[1] CPS and Chelan repeatedly closed their investigations after they uncovered no evidence to corroborate that the alleged abuse had occurred; Plaintiffs, their parents, and their siblings repeatedly denied the allegations; and family members accused each other of fabricating allegations. Then, in 2007 (Ceth) and 2009 (Keilah and Danika), when Plaintiffs disclosed abuse directly to authorities, CPS and Chelan removed them from the home, investigated the referrals, and finally had a basis on which to substantiate abuse. After Plaintiffs disclosed their abuse, they were not abused by their father and step-mother again.

Plaintiffs sued the State and Chelan, alleging *inter alia* negligent investigation. The trial court granted summary judgment on all claims.[2] Summary judgment for the State was proper because the State did not conduct a negligent investigation. First, the investigation was not biased or incomplete. Second, the manner in which the State's investigation was

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[1] For clarity, the State refers to Ceth, Keilah, and Danika as "Plaintiffs" and individually by first name, and to other Heideman family members by first name. No disrespect is intended.

[2] Chelan is filing a separate response brief.

allegedly negligent did not result in - was not the proximate cause of - a harmful placement decision. This Court should affirm.

II. RESTATEMENT OF THE ISSUES ON APPEAL

A. Was the Trial Court's Oral Opinion That DSHS Acted Reasonably Under the Circumstances Immaterial to This Court's Review of Dismissal on Summary Judgment?

B. Did the Trial Court Correctly Dismiss Plaintiffs' Negligent Investigation Claim Against the State Because Plaintiffs Cannot Show That the State Conducted a Biased or Incomplete Investigation of Their Alleged Abuse?

C. Did The Trial Court Correctly Dismiss Plaintiffs' Negligent Investigation Claim Against the State Because Plaintiffs Cannot Show That the State's Allegedly Biased or Incomplete Investigation Resulted in a Harmful Placement Decision, i.e. Was the Proximate Cause of Their Claimed Injuries?

III. RESTATEMENT OF THE CASE

A. The Heideman Family Has a Long History of Conflict

Plaintiffs, Ceth (DOB 12/1/91), Keilah (DOB 5/8/93), and Danika (DOB 12/7/94) Heideman, are the biological children of Theron and Tobie Heideman and the paternal grandchildren of Janice and Ronald Heideman. CP 495 ln. 5-9; CP 496 ln. 8-12. When Plaintiffs were young, their parents separated and Theron entered into a relationship with Juanita (Juana) Ponce, with whom he had four children. CP 771 pg. 20 ln. 6-9.[3]

[3] Clerks papers references include page number where the cited reference is to a condensed deposition transcript containing multiple transcript pages per record page.

The extended Heideman family has a long history with CPS. CP 565-85. Although the State began receiving referrals about Plaintiffs in December 1991, many contained only general concerns. For example, the first referral stated: "There are no specific allegations of CA/N [child abuse/neglect] just concerns that Mom does not know as much as she should about infant care." CP 582. Many other referrals concerned Theron's parents, siblings, and extended family members, not Plaintiffs. CP 574-76. Some referrals relayed third- or fourth-hand information. CP 269; CP 569-70. Many of the CPS referrals were made by Plaintiffs' grandmother, Janice, who repeatedly relayed to DSHS that Plaintiffs told her they were abused by Theron and Juana. But when DSHS investigated those referrals, Plaintiffs denied the allegations and accused Janice of fabricating those and other allegations. CP 506 ln. 5-6; CP 515; CP 748 pg. 132 ln. 16-CP 749 pg. 133 ln. 12; CP 789 pg. 93 ln. 8-CP 790 pg. 95 ln. 8. Some of the later CPS referrals were from Theron, asking for help parenting Ceth, who refused to obey house rules and ran away from home. CP 566-68.

Between 1992 and 2009, Plaintiffs lived at various times with Theron and Tobie, with Theron and Juana, and with Janice and Ron. CP 776, pg. 41, ln. 2-3; CP 724 pg. 34 ln. 19-23. In May 1995, while Theron and Tobie were jailed on drug charges, Janice and Ron were granted

temporary custody of Plaintiffs. CP 580. The next month, Theron and Tobie made a CPS referral alleging that Janice and Ron's home was dangerous. CP 579-80. In later years, Ceth described the relationship between Theron and Janice as "very destructive and messed up" and said that he was "in a constant custody battle" between Theron and Janice. CP 775 pg. 37 ln. 25-CP 776 pg. 38 ln. 2.

B. CPS Investigated Numerous Referrals about Plaintiffs and Their Extended Family and Recommended Services

Between 2004 and 2009, CPS investigated referrals from various Heideman family members, alleging abuse of Plaintiffs by other family members. Plaintiffs denied many of the allegations and told CPS they were not being abused. When CPS was unable to corroborate the allegations, it closed its investigations.

1. The November 2004 Referral

On November 28, 2004, Janice made a CPS referral alleging that Juana physically abused Plaintiffs by hitting them with electrical cords, metal fly swatters and a metal paddle. Janice told CPS that Plaintiffs were "very thin" and "most often" their only meals were school lunches. Janice relayed that Plaintiffs' home was "filthy" and that about a month earlier, she saw mice feces in one of the children's rooms. Janice also claimed that

the children were terrified of Juana and that Theron failed to protect them. CP 571-72; 458.[4]

On December 8, 2004, social worker Tracy Cash interviewed Keilah at her school without her parents present. Keilah said that Juana hit her with a metal paddle *two years earlier* but not since. Keilah also said that now she got along well with Juana and called her "Mom." Keilah said her parents used a reward system and that when she misbehaved, the only punishment she received was a loss of privileges. The next day, Mr. Cash met with Theron and Juana, who denied abusing the children and accused Janice of trying to cause trouble for them. Plaintiffs' parents signed an agreement not to use physical punishment on Plaintiffs. CPS conducted a safety assessment for the family, made a referral to a public health nurse to address the condition of the home, and referred the Heidemans for family counseling. Because Keilah denied recent abuse and the appropriate referrals for services were made, CPS closed its investigation. CP 458.

2. The August 2006 Referral

On August 15, 2006, Janice relayed to CPS a fourth-hand referral (Danika told a friend, the friend told her mother, the mother told a friend, and that friend told Janice), alleging that *sometime during the prior school*

[4] Plaintiffs claim that "DSHS work[er]s noted that the children were becoming noticeably thin and complained of hunger." Plaintiffs' Br. at 35. This is incorrect. That referral shows that Janice - not social workers - made that statement to DSHS. CP 571.

year, Theron had sexually abused Danika. CP 269; CP 454-455. On August 22, 2006, social worker Karen Oyler went to the Heideman home to interview Danika, as school was out. Theron was there; Juana was in the shower. CP 592. Ms. Oyler asked Theron if she could speak to Keilah. He agreed. CP 592. Ms. Oyler believed that Theron had a right to be in the home when the interview occurred because Danika was a minor and his daughter. CP 605 pg. 44 ln. 1-3. While Ms. Oyler and Danika talked, Theron was "just in the house" but "wasn't sitting right there." CP 605 pg. 44 ln. 5-8. Outside Theron and Juana's presence, Ms. Oyler asked Danika if she recalled saying that Theron had touched her. Danika said no. CP 591. Ms. Oyler explained the allegation and gave Danika an opportunity to talk. Danika denied any sexual abuse and said that if anyone touched her, she would tell Theron. CP 591. Ms. Oyler believed Danika was being truthful and answering questions "very matter of fact." CP 605 pg. 45 ln. 8-15. Law enforcement did not interview Danika. Given the lack of evidence of abuse, DSHS closed this referral. CP 454-55.

3. The June 2007 Referral

On June 18, 2007, the mother of one of Keilah's friends made a CPS referral alleging that Keilah said Theron hit her with a stick. CP 569. The next day, social worker Kathie Pete and a Chelan Deputy went to the Heideman home to interview Keilah. CP 616. Theron was not home;

Juana was inside with several children. CP 616. Ms. Pete noted the home was clean, the children appeared fine, and Juana appeared protective of them. CP 447.

Ms. Pete interviewed Keilah by the swing in the yard, outside her parents' presence. Keilah denied being abuse and said when she got in trouble, she was grounded. Keilah also said that none of the children were spanked. Juana came outside, sat on the steps, and said she did not want the interview to continue. The Deputy "went over to" Juana and said that the interview could continue. CP 616. Keilah continued to talk with Ms. Pete at the swing, but made no disclosure of abuse. Based on the lack of evidence of abuse, DSHS closed this referral. CP 446-47.

4. The August 2007 Referral

On August 28, 2007, Chelan arrested Theron for assaulting Ceth and contacted CPS. Social worker John Plotz interviewed Ceth at the hospital. Ceth said that Theron had slammed his head into a wall 4-5 times. Ceth asked to be placed with Janice. When Mr. Plotz told Ceth that a restraining order prohibited such placement, Ceth called the order "bogus" and said Theron had obtained it "unfairly." CP 451-52.

On August 29, 2007, Chelan took Ceth into protective custody and transferred custody to DSHS, which placed Ceth into foster care. CP 621-623. That same day, Ms. Pete interviewed Ceth, who described the prior

day's assault but refused to discuss any prior alleged abuse. CP 36. Ceth told Ms. Pete: "I don't want you guys to tear the rest of my family apart. I want them to be there in peace." CP 43 ln. 12-13. Ceth denied that Danika and Keilah were physically abused. CP 37 ln. 16-25-CP 38 ln. 1-2; CP 43 ln. 14 - CP 44 ln. 2.

Also that day, Ms. Pete and Chelan interviewed Veronica Figueroa, the Heideman's neighbor. She said that three weeks earlier, she saw Theron holding and punching Ceth. Ms. Figueroa said that two days after that assault, she saw a bruise on Ceth's face. Ms. Figueroa said the neighbors were afraid of Theron and did not indicate that she called the police or DSHS to report the assault. Opening Brief of Appellants (Plaintiffs' Br.) at 8; CP 620.

That same day, Ms. Pete spoke with Janice and discussed the possibility of placing Ceth with her. CP 622, 624. Ms. Pete also interviewed Plaintiffs' younger siblings, all of whom denied being spanked by Theron or Juana and said for discipline, they were sent to their rooms. CP 447; 623. The children showed Ms. Pete holes in the bedroom doors and said that Ceth made them. CP 623. Ms. Pete noted a smell of animal urine in Ceth's room. The children said that Ceth kept the dog and cat in his room. CP 623. After that visit, Theron and Juana signed a

voluntary agreement to place Ceth in foster care, signed a Safety Plan, and agreed not to use physical punishment. CP 447.

On September 6, 2007, Ms. Pete spoke with Danika and her vice principal at school, without her parents. Danika said that Theron had an anger problem and that she was afraid of him. She said that Theron hit Ceth but did not say that Theron hit her or allege any sexual abuse. CP 447; 627. Danika asked to have Keilah, who attended a different school, join the interview. Ms. Pete retrieved Keilah. Danika asked Keilah to tell the truth. Keilah yelled and told Danika to stop telling lies about the family. Keilah refused to be interviewed and left. CP 447-48.

On September 11, 2007, Theron signed a Voluntary Services Plan, agreeing to have a Family Preservation Services counselor work with the entire family. CP 448. On October 3, 2007, DSHS sent Theron a letter stating that the August 28, 2007 allegations were founded for physical abuse against Ceth. CP 448.

Also in September 2007, Theron was charged with assaulting Ceth and ordered to have no contact with him. In November 2007, Theron moved out of the home and agreed to family counseling and to take anger management classes. With Theron living out of the home, agreeing to receive counseling and other services, and facing criminal charges, Ceth returned home. CP 448. Because Theron was out of the home, Plaintiffs

appeared safe from abuse, and the family was receiving services, DSHS closed its pending investigations. CP 448-49

Ceth told the prosecutor he did not want to press charges against Theron and asked to have the restraining order lifted. CP 81. The criminal court rescinded the restraining order and in late November 2007, Theron returned home. According to Ceth, Theron and Juana never abused him again. CP 470, ln. 13-16.

5. The February 2008 Referral

On February 11, 2008, Ceth went to Chelan, reported arguing with Theron, and said he was afraid to return home. CP 460. Ceth denied being hurt or abused by Theron. CP 461. Officers took Ceth into protective custody and transferred custody to DSHS. DSHS did not place Ceth into foster care because he denied being harmed, the case did not meet criteria for a dependency action, and his family was receiving services. CP 461. In February 2008, Ceth moved in with Janice, who obtained a restraining order between Ceth and Theron and third-party custody of Ceth. CP 793 pg. 107 ln. 1-19; CP 800 pg. 135 ln. 19-25-pg. 136 ln. 2.

6. The August 2008 Referral

On August 12, 2008, Keilah's probation officer made a CPS referral, relaying that Keilah was afraid to go home. CP 452. Social worker Plotz interviewed Keilah. She said that her father yelled, called

Plaintiffs names, and made them do all of the housework, but also said that she did not believe he would physically hurt her. CP 452. Keilah said she stayed with a friend for two days because she "just needed some space." She also told Mr. Plotz that things at home were "fine" and that she felt safe at home. When asked if DSHS could do anything to make things better for her at home, Keilah said no, other than getting her more freedom to do what she wanted. CP 452. Mr. Plotz also interviewed Danika about this referral. Danika also denied being mistreated by her parents and said that Theron's discipline methods were appropriate. CP 452. Like Keilah, Danika said that Theron yelled but did not physically abuse her. CP 452. Given the girls' denials of abuse and the lack of corroboration of abuse, DSHS closed this referral. CP 452.

7. The November 2008 Referral

On November 20, 2008, Chelan made a CPS referral. Janice told Chelan that Theron had been molesting his daughters for years. CP 461. Chelan Deputy Matheson noted in his report that Janice "has reported similar accusations to CPS several times, 7 times last year, and all were determined to be unfounded" and that "[t]here have been ongoing family disputes dating back years between various Heideman family members." CP 514. Deputy Matheson discussed with DSHS that Janice "has made up

accusations in the past in an attempt to get her grandchildren away from their father." CP 515.

Deputy Matheson interviewed the school counselor who met weekly with Keilah. The counselor said she met with Keilah several times over the past few years, that Keilah never disclosed any abuse, but that Keilah "was aware of her grandmother using law enforcement and CPS to cause problems for her family." CP 514. Deputy Matheson also tried to speak with Danika. When he tried to explain who he was and why he was there, Danika interrupted him, said that her father was not abusing Plaintiffs, and accused her grandmother of fabricating the abuse allegations. Danika said she wanted CPS to "leave us alone" and left the room. CP 515. Keilah also refused to speak with Chelan about Janice's allegation. CP 515. Based on Danika's denial of abuse, Keilah's refusal to be interviewed, Janice's prior false accusations against Theron, and the lack of any evidence of abuse, Chelan and DSHS closed their investigations. CP 461.

8. The September 2009 Referral

On September 14, 2009, DSHS received a referral from Jill Storlie, Keilah's juvenile probation officer, relaying that Keilah had disclosed sexual abuse by Theron. CP 448. On September 21, 2009, social worker

Pete and law enforcement interviewed Keilah, who disclosed sexual abuse by Theron dating back before her eighth birthday. CP 448.

Ms. Pete also interviewed Juana, who said that Keilah told her about sexual abuse by Theron but that Keilah was a habitual liar who lied to try to get her own way. CP 448. Juana said she always had a hard time believing Keilah, partly because she caught Keilah in several blatant lies over the years, especially when Keilah was mad at Theron for not letting her do something she wanted to do. CP 448. DSHS entered a founded finding against Theron for sexually abusing Keilah. CP 448.

C. Plaintiffs Persistently Concealed and Denied Abuse Allegations

1. Ceth's Concealment and Denial of Alleged Abuse

Despite multiple opportunities to do so, Ceth did not disclose abuse by Theron or Juana until August 2007. According to Ceth's 2012 deposition:

> Q: . . . prior to August of 2007, did you report to Child Protective Services that you were being physically abused?
>
> A: Oh, no, are you kidding - I was too afraid.
>
> Q: There was nothing that social workers could have done to make you feel comfortable enough to report any abuse prior to August of 2007?

A: No, no, I told my principal once about it and that was the biggest mistake I ever made in my entire life.

CP 476 ln. 10-18.

Q: So as a result of that incident, you weren't going to tell anybody about what was going on? And there's nothing - and that's "no"; right?

A: No.

Q: And there's nothing that any social worker could have said to you that would -

A: No.

Q: Let me make sure I finish my question. There's nothing that any social worker could have said to you that would make you comfortable in telling them?

A: No . . .

CP 477 ln. 9-19.

Ceth admitted not disclosing abuse to police before August 2007:

Q: I'm asking you I guess more generally. I mean you didn't trust police officers in general?

A: Yeah.

Q: And so you wouldn't have told him –

A: I wouldn't have told him anything.

CP 473 ln. 3-17.

Q: How many times did you report the fact that your dad assaulted you to the Chelan County Sheriff's Office?

A: Me myself? Once, that one incident when I was taken out of the house.

Q: So what was the date of that incident that you talked to the Chelan County Sheriff's Office?

A: August 27, 2007.

Q: And you were taken out of the house after that?

A: Yes, that night.

CP 803 pg. 149 ln. 22-CP 804 pg. 150 ln. 5.

Ceth also testified that once he disclosed alleged abuse to DSHS and Chelan in August 2007, Theron and Juana did not abuse him again:

Q: So just so we are clear, after you go back in the home in October of 2007, neither your father nor Juana physically disciplined you in any way?

A: No . . . .

****

Q: . . . between October of 2007 and February of 2008, your father didn't physically discipline you?

A: No, he did not physically discipline me.

Q: And Juana didn't physically discipline you during that time?

A: No.

****

Q: And since February 2008, . . . you haven't lived under the same roof with your father?

A: No.

Q: Has he hit you or physically abused [you] in any way since then?

A: No.

Q: Have you lived under the same roof as Juana at any point since February of '08?

A: No.

Q: And has she physically abused you in any way since then?

A: No…

CP 470 ln. 13-16; CP 793 pg. 107 ln. 1-6; ln. 10-19.

Ceth denied being sexually abused. CP 474 ln. 8-10. He also denied being abused or neglected while in foster care. CP 469 ln. 6-15. Ceth also denied any knowledge of Theron sexually abusing Keilah. CP 471 ln. 8-25; CP 472 ln. 1-7. In 2007, Ceth told Chelan that Keilah was "a habitual liar, telling lies when she doesn't even have to. It's just something she does."[5] CP 472 ln. 8-15. Ceth confirmed that neither Keilah nor Danika lived with Theron or Juana after September 2009. CP 472 ln. 9-21.

[5] In her 2012 deposition, Danika also described Keilah as a "compulsive liar." CP 509 ln. 4-25.

2. Keilah's Concealment and Denial of Alleged Abuse

Before she disclosed abuse to Ms. Storlie in September 2009, Keilah did not disclose and repeatedly denied that any abuse had occurred. According to Keilah's 2012 deposition:

> Q: How many times did you tell CPS social workers that you *weren't* being abused?
>
> A: I don't remember. *Way too many to be able to count.*
>
> Q: Okay. And how many times did you tell soc – CPS social workers that you were, in fact, being abused before you told Jill Storlie about the abuse?
>
> A: Never.

CP 486 ln. 19-25 (emphasis added).

> Q: . . . So this - this references an occasion where the social worker and someone from the Chelan County Sheriff's Office came and interviewed you at your home outside when your father wasn't around, right?
>
> A: Right.
>
> Q: It continues to read (as read): "This social worker explained to Keilah what this social worker did and about the referral. This social worker asked her if she gets hit by her dad and if he uses a stick. Keilah stated that her dad does not hit her. If she gets in trouble she gets grounded." Did I read that correctly?
>
> A: Correct.
>
> Q: That's what you told Ms. Pete in June of 2007, right?
>
> A: Right.

Q: You didn't tell Ms. Pete about - or that you were being physically abused?

A: Correct.

Q: And you didn't tell her that you -- you were being sexually abused, right?

A: Right.

Q: Were you scared of Ms. Pete?

A: No.

Q: Did you think Ms. Pete would help you if you told her about the abuse?

A: No.

Q: Why not?

A: I - I didn't really believe that there was any help at all.

CP 745 pg. 120 ln. 2-25-CP 746 pg. 121 ln. 1-3.

Q: It continues on, "if CPS could provide any other services to her or her family that would make matters better. She stated there wasn't anything she could think of, other than more freedom to do what she wanted." That's what you told John Plotz in August of 2008, right?

A: Correct.

Q: You didn't tell him about the physical abuse?

A: No.

Q: And you didn't tell him about any sexual abuse?

A: No.

Q: Do you remember a time when Detective Mitch Matheson came to Wenatchee High School to speak with you?

A: I don't know. *I don't remember most of this.*

CP 491 ln. 11-24 (emphasis added).

Q: . . . When you spoke with social workers, though, you weren't truthful with them, were you?

A: No.

Q: You lied to them?

A: Correct.

Q: You lied to them too many times to count?

A: Correct.

CP 490 ln. 8-14.

Q: Did they ask you if your parents abused you?

A: Yes.

Q: Who - who was in the room at the time?

A: Mr. Wilson, the principal; a CPS worker; and I think me and Danika, and that's it.

****

Q: Well, while you were in the room do you know what - did Danika say anything?

A: She told me that it was - she - that it was time to tell the truth.

****

Q: Okay. So while you were in the room and they asked you what happened, what did you say?

A: I told them that I didn't know what she was talking about.

CP 485 ln. 3-7; ln. 15-18; ln. 22-24.

Keilah also admitted concealing abuse from law enforcement:

Q: All right. So how many times do you think a law enforcement officer came out to talk to you?

A: Every time CPS came out.

****

Q: And you think that you - - you talked to CPS or law enforcement ten times in five years?

A: Yeah.

Q: Okay. Did you tell them that you were being abused?

A: No.

Q: Did you tell them that you weren't being abused?

A: Yes.

CP 731 pg. 62 ln. 12-14; ln. 18-24.

Q: Did you ever tell law enforcement to leave you alone and that your grandma was lying when you were at school?

A: Yes.

Q: Was your dad there at the time?

A: No.

Q: And was your stepmom there at the time?

A: No.

CP 731 pg. 63 ln. 9-15.

Q: Okay. How many times did you tell a police officer that nothing was happening, that your parents were not abusing you?

A: Too many times to count.

CP 484 ln. 19-22.

Q: So this references a time in November of 2008 where you refused to speak with Detective Matheson, correct?

A: Correct.

Q: He was there specifically to investigate allegations that you were being sexually abused, and you refused to speak with him?

A: (No response.)

Q: That's correct, isn't it?

A: That's what it looks like.

Q: Are - and you don't remember that incident, I take it?

A: No.

CP 492 ln. 3-13.

Q: . . . Other than your sister Danika and your best friend Allie, did you tell anyone else that your dad was abusing you between the ages of seven and 15?

A: No.

CP 480 ln. 6-9.

Keilah also admitted that even when she confided in Danika, a friend, and that friend's mother, she swore them to secrecy. CP 487 ln. 5-17; 488 ln. 2-6. Keilah testified that she knew her denials of abuse prevented DSHS from taking action:

> Q: All right. Were you removed from the home?
>
> A: No.
>
> Q: Do you know why you weren't removed from the home?
>
> A: Because we told CPS that it wasn't true.

CP 483 ln. 1-4.

Keilah admitted that after she disclosed sexual abuse to Ms. Storlie in 2009, she never returned home and was not abused again:

> Q: So when you told Jill Storlie, that was the first time you told anybody at law enforcement that your dad sexually abused you?
>
> A: Yes.
>
> Q: And from that day forward you never lived with your dad?
>
> A: No.
>
> Q: And from that day forward your dad never sexually abused you?
>
> A: Correct.

CP 482 ln. 14-21.

3. Danika's Concealment and Denial of Alleged Abuse

Danika did not contemporaneously report physical abuse to DSHS and **in her 2012 deposition, denied sexual abuse.** CP 498 ln. 21-23. Danika said that once, Theron asked if he could perform a sexual act on her and she said no. Danika said she told Keilah (two days later) but no one else-not her grandmother, not her step mother, not the police, not CPS. CP 499 ln. 1-20; CP 500 ln. 9-23; CP 501 ln. 2-25. Danika said:

> Q: In between when that happened in 2007 and when you moved out of the house in October of 2009, did you tell anyone about this thing with your dad, this incident?
>
> A: No.
>
> Q: Eventually you told your sister; right?
>
> A: Yes.
>
> ****
>
> Q: So the only person you told between when it happened with your dad in 2007 and when you moved out of the house with your grandmother in October of 2009, the only person you told was your sister?
>
> A: Yes.

CP 501 ln. 1-25.

Danika also concealed physical abuse by Theron and Juana:

> Q: Were you ever physically abused in your dad's house?

A: Yes.

CP 504 ln. 23-24.

Q: Would both your dad and Juanita do this?

A Yes.

Q: Did you ever call the police about that?

A No.

Q: Did you ever tell your grandma?

A: No.

CP 505 ln. 3-8.

Danika also said she witnessed and concealed Theron's sexual abuse of Keilah:

A: . . . And I looked in through my dad's window and I seen my dad on top of Keilah.

****

Q: Was that the only time you saw something like that?

A: That I actually saw him on top of her? Yes . . .

****

Q: When you saw that happening between your dad and your sister, did you call the police?

A: No.

Q: Did you call CPS?

A: No.

Q: Do you know if your sister did?

A No, I don't know.

CP 503 ln. 5-7; ln. 15-16; CP 504 ln. 3-9.

Q: Do you remember speaking to a male social worker at any point in time?

A: No, I don't. I must have spoke [sic] to over a dozen social workers over the years.

Q: Fair enough And you didn't tell any of those social workers that your sister was being sexually abused; right?

A: No.

CP 507 ln. 10-16.

In November 2008, Janice told Chelan that Theron had been sexually abusing Keilah and Danika for years. However, Janice admitted that she did not report the alleged abuse to DSHS or to the girls' school. CP 511-12. Deputy Matheson tried to interview Danika about that allegation:

> When [Danika] first walked into Bowen's office and was introduced to me, she looked skeptically at me and immediately wanted to know what this was about. As I explained my reasons for being there, [Danika] interrupted me and said, ". . . is this about my dad allegedly hurting or touching us? If it is, this is a bunch of shit! Tell my lying grandmother to leave us alone and to stop making up crap about my dad. My dad is not abusing us, so leave us alone . . . .' I asked [Danika] if she has a friend named Taylor. [Danika] said, "Taylor who?" I told [Danika] I did not have her last name but Taylor's grandmother was named Rosalie

> Edwards. [Danika] laughed and said, "That is a friend of my grandmothers. I have not spoken to Taylor for a long time. She doesn't go to this school." [Danika] reiterated, ". . . I want you and CPS to leave us alone." [Danika] then got up and walked out.

CP 514-16.[6]

Danika was asked about that exchange during her 2012 deposition:

> Q: (By Mr. Bauer) I'm going to ask my question again. Danika, this is an occasion where you met with a police officer outside of your father's presence and you didn't tell him what was going on; correct?
>
> A: Yes.
>
> Q: You lied to him?
>
> A: Yes.
>
> Q: And then you walked out of the room?
>
> A Yes.

CP 508 ln. 7-15.

D. Once Plaintiffs Disclosed Abuse to DSHS, They Were Removed From the Home and Not Abused Again

It is undisputed that once Plaintiffs disclosed alleged abuse to DSHS in 2007 (Ceth) and 2009 (Danika and Keilah), they were removed from their home and never abused again. CP 470 ln. 13-16; CP 793 pg. 107 ln. 1-20; CP 497; CP 481 ln. 4-15. In 2009, Janice obtained third-

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[6] In their 2012 depositions, Plaintiffs said that their grandmother Janice often lied, including to police, to get others in trouble. CP 506 ln. 5-6; CP 515; CP 748 pg. 132 ln. 8-14-CP 749 pg. 133 ln. 4-12; CP 789 pg. 93 ln. 8-16, CP 790 pg. 95 ln. 2-5.

party custody of Keilah and Danika, who never lived with Theron or Juana again. CP 5; CP 472 ln. 19-21; CP 481 ln. 4-10.

In January 2010, the Chelan County Prosecuting Attorney declined to file charges against Theron for sexually abusing Keilah. CP 159. The letter to Keilah explaining that decision cited the lack of physical evidence of assault and "some indications from other members of your family who question whether this assault could have taken place." CP 159. In February 2010, DSHS closed its investigation of the sexual abuse allegation involving Keilah because DSHS had already made a founded finding against Theron for abusing Keilah, Janice had legal custody of Plaintiffs, and Plaintiffs were not at risk of further abuse by Theron or Juana. CP 449.

E. Plaintiffs Sued the State and Chelan and the Trial Court Granted Summary Judgment Against Plaintiffs on All Claims

In December 2010, Plaintiffs sued the State in Thurston County Superior Court.[7] In August 2011, Plaintiffs sued Chelan in Douglas County Superior Court. CP 1-7. The cases were consolidated in 2012.

Plaintiffs allege that Theron and Juana physically and emotionally abused them and that Theron sexually abused Keilah. CP 5. But all three

[7] Plaintiffs' designation of Clerk's Papers does not include the Summons, Complaint for Damages, Amended Complaint for Damages, or the State's Answer to Amended Complaint and Affirmative Defenses filed in Thurston County Case No. 10-2-02649-2. However, the State does not dispute that suit was timely commenced and served.

Plaintiffs admitted that before August 2007 (for Ceth) and 2009 (September for Keilah; October for Danika), they never reported abuse by Theron or Juana to DSHS or to law enforcement. To the contrary, Plaintiffs admit that on multiple occasions before their disclosures to authorities, they affirmatively and steadfastly denied that Theron or Juana had abused them, and repeatedly refused to cooperate with any DSHS or police investigations of alleged abuse.

In January 2014, Chelan moved for summary judgment on Plaintiffs' claims, and in May 2014, the court granted that motion. CP 13-214; 412-15. The court denied Plaintiffs' motion for reconsideration. CP 418-34; 444-45. In December 2014, the State moved for summary judgment on Plaintiffs' claims, and in January 2015, the court granted that motion. CP 526-555; 931-33. Plaintiffs appealed. CP 936-38.

IV. ARGUMENT

A. Standard of Review

On review of an order granting summary judgment, the appellate court engages in the same inquiry as the trial court. *Ducote v. State, Dep't Soc. & Health Servs.*, 167 Wn.2d 697, 701, 222 P.3d 785 (2009). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(e). "A material fact is one that affects the outcome of the

litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.,* 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). "An adverse party may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial." *McBride v. Walla Walla Cnty.*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999). But "'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The appellate court may affirm the trial court's ruling on any alternative ground that the record adequately supports. *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008).

B. The Trial Court's Oral Opinion That DSHS Acted Reasonably Under the Circumstances is Immaterial to This Court's Review of Dismissal on Summary Judgment

Plaintiffs argue that summary judgment should be reversed because the trial court opined that "DSHS acted reasonably" during its investigations of alleged abuse of Plaintiffs. CP 935; RP 36. Plaintiffs mischaracterize that oral opinion as "an erroneous factual finding" and the trial court's "sole explanation for granting summary judgment." Plaintiffs' Brief at 29. Plaintiffs' claim fails as a matter of law.

The trial court's comment was merely an opinion, similar to a judge stating that a plaintiff has failed to raise a genuine issue of material fact or meet his burden of proof. The judge's comment was neither a finding of fact nor a conclusion of law on which the summary judgment ruling was based. Further, "findings of fact and conclusions of law are superfluous" when summary judgment has been granted. *Wash. Optometric Ass'n v. Pierce Cnty., City of Tacoma*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968).

Even if the comment was somehow improper, the trial court's decision is subject to review *de novo* on appeal. *Ducote,* 167 Wn.2d at 701. Thus, the trial court's comment is immaterial to this Court's review of the dismissal of Plaintiffs' claims on summary judgment.

C. Plaintiffs' Negligent Investigation Claim Should be Dismissed Because They Fail to Show That DSHS Conducted a Negligent Investigation

1. The Cause of Action for Negligent Investigation of Child Abuse Is a Narrow Exception Requiring a Biased or Incomplete Investigation Resulting in a Harmful Placement

No general cause of action for negligent investigation exists. *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 595, 601, 70 P.3d 954 (2003). A negligent investigation claim is a narrow exception that arises from the State's statutory duty under RCW 26.44.050 to investigate

allegations of child abuse. *Tyner v. State*, 141 Wn.2d 68, 1 P.3d 1148 (2000); *M.W.*, 149 Wn.2d at 601. For a plaintiff to prevail on a claim for negligent investigation, he must prove that 1) DSHS conducted a biased or incomplete investigation and 2) that investigation resulted in a "harmful placement" decision. *M.W.,* 149 Wn.2d at 602. For a "harmful placement decision" to be actionable, it must be preceded by 1) receipt of a report of child abuse or neglect, and 2) a biased or incomplete investigation of that report conducted pursuant to RCW 26.44.050. *M.W.*, 149 Wn.2d at 602; *Petcu v. State*, 121 Wn. App. 36, 58-59, 86 P.3d 1234, *review denied*, 152 Wn.2d 1033 (2004). There is no stand-alone tort for "negligent placement" independent of the tort of negligent investigation based on RCW 26.44.050. *See Petcu,* 121 Wn. App. at 59; *M.W.*, 149 Wn.2d at 602.

Recognizing the narrow scope of this cause of action, Washington courts have repeatedly "rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures." *Petcu,* 121 Wn. App. 36, 59; *see also M.W.*, 149 Wn.2d at 601-02. The narrow claim for negligent investigation is limited to remedying the specific harm contemplated by RCW 26.44.050: the harmful placement of a child. *M.W.*, 149 Wn.2d at 595.

"Efforts to expand this narrow cause of action beyond its statutory confines have been repeatedly rejected by Washington courts." *Gragg v. Department of Social & Health Services,* No. 13-5620, 2015 WL 2360283, *5 (citing *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") and *Roberson v. Perez,* 159 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")).

2. Plaintiffs Cannot Show That DSHS' Investigation Was Biased or Incomplete

Plaintiffs claim that DSHS conducted a negligent investigation because (1) DSHS "frequently" interviewed them in their parents' presence, (2) "no one other than [Plaintiffs] was ever interviewed," (3) DSHS improperly relied on Plaintiffs' denial and concealment of abuse, and (4) DSHS "disregarded" unspecified "prior observations" concerning Plaintiffs. Plaintiffs' Br. at 18, 32, 44.

Plaintiffs' arguments all fail: (1) DSHS had no duty to interview Plaintiffs only outside their parents' presence, but in any event DSHS did interview Plaintiffs outside their parents' presence; (2) social workers spoke with several family members and collateral sources; (3) during its

investigation, DSHS appropriately considered Plaintiffs' statements regarding the allegations of abuse; and (4) DSHS appropriately considered its and Chelan's prior contacts with Plaintiffs and their family during its investigation. Even when the evidence is viewed in the light most favorable to them, Plaintiffs fail to raise a genuine issue of material fact showing that DSHS conducted a biased or incomplete investigation.

a. While DSHS Had No Duty to Interview Plaintiffs Outside Their Parents' Presence, It Did Do So

Plaintiffs claim that the investigation must have been negligent because DSHS interviewed them in their parents' presence. Plaintiffs' Br. at 32. This claim fails for at least two reasons: DSHS is not required to interview alleged victims outside the presence of their alleged abusers, and even if it was, DSHS did interview Plaintiffs away from their parents.

First, Plaintiffs rely on the declaration of Katherine Kent, their standard of care expert, for the assertion that DSHS must interview alleged abuse victims outside the presence of their alleged abusers.[8] CP 915-20. Notably, Ms. Kent's declaration criticized *only* the August 2006 investigation involving Danika, and *only the interview portion* of that

[8] In the interest of providing the Court with a full and complete record, the State recently filed a Supplemental Designation of Clerks' Papers, designating Plaintiffs' Motion to Permit the Declaration of Katherine Kent Pursuant to CR 56(f) and Declaration of Jeffrey R. Caffee In Support of Plaintiffs' Motion to Permit the Declaration of Katherine Kent Pursuant to CR 56(f). *State's Supplemental Designation of Clerk's Papers* (filed Jun. 19, 2015).

investigation. CP 918. To support her opinion, Ms. Kent inaccurately claimed that RCW 26.44.030(10) "required" the State to interview Danika outside her parents' presence. CP 919, ¶ 17. It did not. In 2006 when Ms. Oyler interviewed Danika, the statute did not mandate that such interviews be conducted outside parents' presence, providing:

> (10) Upon receiving reports of alleged abuse or neglect, the department or law enforcement agency may interview children. The interviews **may** be conducted on school premises, at day-care facilities, at the child's home, or at other suitable locations outside of the presence of parents.

RCW 26.44.030 (2006); CP 897-909 (emphasis added). As the trial court correctly found, DSHS was not required to interview alleged abuse victims away from their suspected abusers. RP 35-36. If the legislature had intended such a requirement, it would have used the compulsive word "shall" instead of the permissive word "may," and not given DSHS discretion to decide where and how to conduct interviews.[9]

Second, as a factual matter, Ms. Kent also inaccurately claimed that Danika was interviewed about possible sexual abuse in Theron's presence. CP 919-20. This is also incorrect. When Ms. Oyler interviewed

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[9] Plaintiffs also claim that it is "standard practice for DSHS investigators to interview children outside the presence of their alleged abusers." Plaintiffs' Br. at 16. Regardless of whether such interview techniques were standard practice, internal practices do not create a substantive legal mandate. *Joyce v. State*, 155 Wn.2d 306, 323 119 P.3d 825 (2005) (citing *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990)) ("Unlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law.")

Danika, Juana was in the shower and Theron was "just in the house" but "wasn't sitting right there." CP 605.[10]

Plaintiffs also imply that because this particular referral might have been the first sexual abuse allegation Ms. Oyler investigated, and because she did not conduct her investigation a certain way, her investigation was therefore negligent. Plaintiffs Br. at 5-6; CP 369. But Plaintiffs present no evidence to show that Ms. Oyler's investigation was biased or incomplete, that she was required to conduct her investigation a certain way that she did not, and, most importantly, that had she done so, DSHS would have discovered information leading to a different outcome to the investigation.

The evidence shows that DSHS interviewed Plaintiffs numerous times outside the presence of their parents, and even then, Plaintiffs denied and did not disclose abuse. Plaintiffs fail to show that DSHS's interviews of them resulted in a biased or incomplete investigation.

b. DSHS Spoke With Several Collateral Sources

Plaintiffs also claim erroneously that "no one other than [them] was ever interviewed." Plaintiffs' Br. at 32. This is patently untrue. The evidence shows that when receiving and investigating abuse referrals, DSHS spoke with Plaintiffs and their parents, grandmother, siblings,

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[10] Because Ms. Kent's opinions are based on an incorrect statement of the law, a misunderstanding of the facts, and on assumptions contradicted by the evidence, her opinions are not helpful to the Court and should be given no weight. ER 702.

neighbor, school staff, family friends, and probation officers. Plaintiffs' Br. at 8-9; CP 269; CP 447; CP 454; CP 458; CP 560-61.

Moreover, Plaintiffs offer speculation-but no actual evidence-that had the State contacted some other collateral source, it would have discovered information to confirm the allegations of abuse. In the absence of such evidence, Plaintiffs' claim that the State conducted a biased or incomplete investigation must fail.

c. DSHS Properly Considered Plaintiffs' Denials and Concealment of Abuse

Plaintiffs claim that the State improperly relied on their concealment and denial of abuse. Plaintiffs' Br. at 41-44. The State agrees that a denial of abuse does not relieve DSHS of its duty to investigate alleged abuse. But as the facts thoroughly establish, DSHS did not simply rely on Plaintiffs' denials for the entirety of its investigation. Further, to the extent that DSHS did consider Plaintiffs' repeated denials of abuse during its investigation, that reliance was reasonable and proper.

Plaintiffs' reliance on *Yonker By and Through Snudden v. Dep't of Soc. and Health Servs.*, 85 Wn. App. 71, 930 P.2d 958 (1997) is misplaced. In *Yonker*, three-year-old Joshua made a statement to his mother indicating possible sexual abuse. *Yonker,* 85 Wn. App. 71, 74. When Joshua made no disclosure to the CPS, DSHS closed its

investigation. *Id. Yonker* is inapposite here, for two reasons. First, unlike Joshua Yonker, Plaintiffs did not simply fail to disclose abuse. Plaintiffs for years repeatedly and actively denied abuse to DSHS and to police.

Second, unlike three-year-old Joshua, Plaintiffs were pre-teens and teens when they denied abuse.[11] Plaintiffs' adamant, repeated denials of abuse were information appropriate for DSHS to include in its investigations.

d. DSHS Did Not Disregard Prior Observations of Plaintiffs and Their Family

Without citation, Plaintiffs allege that DSHS "disregarded" its "prior observations," including the bruises Theron and Juana allegedly left on Plaintiffs "which were evident to [their] classmates and teachers." Plaintiffs' Br. at 32, 35. Plaintiffs may be referencing Keilah's deposition testimony: "I couldn't really hide it from my friends. I had bruises all over, you know." CP 730, pg. 60, ln. 21-24. But Plaintiffs present no evidence - through declarations, depositions, or otherwise - to show that classmate or teachers actually saw bruises on Plaintiffs or that if they had,

[11] Keilah was age 10 in December 2004 when she denied any recent abuse, age 14 in June 2007 when she denied that she or her siblings were abused, and age 15 in August 2008 when she said Theron yelled but she did not believe he would physically hurt her. Danika was age 11 in August 2006 when she denied being sexually abused and age 13 in November 2008 when she denied that she and her siblings were abused and accused her grandmother of fabricating the allegations against her father. Ceth was age 15 in August 2007 when he denied that his sisters were physically abused.

DSHS was told and "disregarded" that information during its investigation.

In summary, the evidence shows that DSHS investigated several abuse allegations concerning Plaintiffs (including many labeled information only); interviewed Plaintiffs without their parents present though not required to do so; spoke with Plaintiffs, their family members, and several other collateral sources; reasonably and justifiably relied on Plaintiffs' repeated denials of abuse; and considered its prior contacts with Plaintiffs when conducting its investigation. Viewing the evidence in the light most favorable to them, Plaintiffs fail to raise a genuine issue of material fact showing that the State's investigation was biased or incomplete.

3. Plaintiffs Fail to Show That the State's Allegedly Biased or Incomplete Investigation Resulted in a Harmful Placement, i.e., Was the Proximate Cause of Their Claimed Injuries

Even if Plaintiffs could show that the State conducted a biased or incomplete investigation, they cannot show that the allegedly faulty investigation was the proximate cause of their alleged injuries. "To prevail [on a negligent investigation claim], the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement." *Petcu*, 121 Wn. App. at 56, citing *M.W.*, 149 Wn.2d at 597,

601. Proximate cause is a two-part analysis, consisting of "cause in fact, the 'but for' consequences of an act, and legal causation, whether liability should attach as a matter of law." *Miller v. Likins,* 109 Wn. App. 140, 145, 34 P.3d 835 (2001) (other citations omitted).

Thus, to prove causation, Plaintiffs must prove not only that the State conducted a biased or incomplete investigation, but that *the way in which the investigation was biased or incomplete* resulted in a harmful placement, i.e., was both the factual and legal cause of their alleged damages. Plaintiffs fail to meet this burden: their claim is unsupported by credible, admissible evidence but is instead based solely on speculation and conjecture insufficient to defeat summary judgment.

a. Plaintiffs Fail to Show That the State's Investigation Was the Cause in Fact of Their Claimed Injuries

Cause in fact is the actual "but for" cause of an injury. *Minahan v. W. Washington Fair Ass'n*, 117 Wn. App. 881, 887-88, 73 P.3d 1019 (2003). Cause in fact "does not exist if the connection between an act and the later injury is indirect and speculative." *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). Thus, to prove cause in fact, Plaintiffs must present more than mere speculation. While cause in fact is usually a question for the jury, it can be determined by the Court as a matter of law "if reasonable minds could not differ." *Taylor v. Bell,* 185

Wn. App. 270, 287, 340 P.3d 951 (2014). It is reversible error to deny summary judgment when speculation is required to find cause in fact. *Miller,* 109 Wn. App. at 146-47 (evidence that defendant's actions *might* have caused plaintiff's harm can only be characterized as speculation or conjecture and is insufficient to withstand summary judgment).

(1) Plaintiffs Fail to Show That Had the State Investigated the Referrals Differently, it Would Have Discovered the Alleged Abuse Sooner

Plaintiffs imply that had DSHS conducted its investigation differently, the State would have discovered the alleged abuse sooner. Plaintiffs' Br. at 22. But Plaintiffs offer no reliable evidence, through declarations, deposition testimony or otherwise, showing what, if anything, they or others would have said or done differently had DSHS conducted its investigation another way.

First, the evidence shows that DSHS had contact with Plaintiffs' parents, grandmother, siblings, neighbor, school staff, probation officers, and others regarding abuse referrals. Plaintiffs offer no evidence to show that those individuals would have said or done something else had DSHS conducted its investigation a different way, or that a lack of additional collateral contacts caused DSHS to leave them in their home.

Second, the evidence shows that on numerous occasions, DSHS interviewed Plaintiffs outside their parents' presence. Plaintiffs fail to show that the few interviews they claim were conducted in their parents' vicinity altered their disclosures to DSHS. Plaintiffs claim that they "made numerous disclosures of abuse before 2009 - to people they **trusted**." Plaintiffs' Br. at 36 (emphasis in original). But during deposition, Plaintiffs admitted concealing abuse for years from CPS, law enforcement, friends and close family members - *even from each other* - despite frequent contact with siblings, friends, relatives, teachers, school counselors, neighbors, medical providers, police officers, and social workers, and multiple opportunities to disclose abuse. CP 471-72; 501; 505. Plaintiffs offer no reliable evidence showing what, if anything, they would have said or done differently had social workers asked more or different questions or conducted their investigation another way.

Ceth first disclosed abuse to DSHS and Chelan in August 2007. CP 451-52. In 2012, Ceth testified that there was nothing the State or Chelan could have done to cause him to report abuse sooner. CP 476, ln. 10-18; CP 477 ln. 5-20; CP 473 ln. 3-17.

Keilah first disclosed abuse to DSHS in September 2009. In 2012, Keilah admitted that she knew the consequence of her abuse denials: that she and her siblings remained in the home because they told DSHS they

were not being abused. CP 483 ln. 1-4. Keilah also testified that she did not think DSHS would help her if she disclosed abuse sooner. CP 745 pg. 120 ln. 16-CP 746 pg. 121 ln. 1-3.

Plaintiffs claim that Keilah "***would*** have confirmed the reports of physical, sexual, and emotional abuse in the home had there been an assurance on the part of CPS or [Chelan] that she would be removed from the home." Plaintiffs' Br. at 25. This misstates Keilah's sworn testimony. In 2012, Keilah testified that "***maybe***" if a social worker had told her that she would be removed from the home "right then and there," she ***might*** have disclosed abuse. CP 746 pg. 121 ln. 4-11 (emphasis added).

Keilah's testimony does not establish causation, for two reasons. First, DSHS cannot remove children from homes without a court order, nor promise children certain outcomes, especially those which exceed its statutory authority. RCW 26.44.050. Second, Keilah's statement is mere speculation and conjecture insufficient to support a claim that the State's investigation was the cause in fact of Plaintiffs' alleged injuries. *Miller; White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

Danika first disclosed current abuse to DSHS in October 2009. Plaintiffs submitted Ms. Kent's declaration to support their claim that Danika would have disclosed sexual abuse sooner had DSHS investigated the allegations differently. Ms. Kent's opinions hinge on her mistaken

belief that in 2006, Danika was interviewed in Theron's presence, and thus "was unwilling to disclose sexual abuse by her caregiver father with him present." CP 919-20. Ms. Kent speculated that if Danika had been interviewed differently, she would have disclosed sexual abuse to CPS.[12]

But in 2012, Danika testified that she was never sexually abused by Theron. CP 498 ln. 20-23. Danika's sworn testimony directly contradicts Ms. Kent's unsupported speculation that if DSHS had conducted its investigation differently, Danika would have disclosed sexual abuse by Theron. Ms. Kent's unsupported assertion does not create an issue of fact sufficient to defeat summary judgment *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions, as well as inadmissible evidence that unresolved factual issues remain, are insufficient to create a genuine issue of fact). Other than Ms. Kent's declaration, Plaintiffs present no admissible evidence to show what DSHS should have done differently to cause them to disclose abuse.

[12] Ms. Kent's declaration does not indicate that she interviewed Plaintiffs and thus, she lacks any foundation to make this claim.

(2) Accordingly, Plaintiffs Fail to Show That "But For" the Allegedly Negligent Investigation, They Would Have Been Removed From Their Home Sooner

To establish cause in fact, Plaintiffs must show that DSHS conducted a biased or incomplete investigation *resulting in a harmful placement decision. M.W.,* 149 Wn.2d at 602. Just as Plaintiffs cannot establish that DSHS' investigation was biased or incomplete, they cannot show that the investigation resulted in a harmful placement decision, *i.e.,* the failure to remove them from an abusive home.[13]

The State cannot remove a child from his parents without a court order based on sufficient facts establishing that the child is in imminent risk of serious harm. RCW 13.34.050. "Parents and children have a well-elaborated constitutional right to live together without governmental interference. That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." *Wallis v. Spencer*, 202 F.3d 1126, 1136-37 (9th Cir. 1999)(internal citations omitted). This right is reflected in RCW 26.44's dual goal of parent-child reunification and mitigation of conditions that may result in future abuse or neglect referrals. *See M.W.*, 149 Wn.2d at

[13] Washington recognizes only three types of harmful placement decisions: placing a child in an abusive home; removing a child from a non-abusive home; or failing to remove a child from an abusive home. *Roberson,* 156 Wn.2d at 45.

597; RCW 26.44.020(3). Removing a child without a sufficient legal basis violates the constitution, the parents' statutory rights, and public policy, and would expose the State to liability for the wrongful removal. *Roberson.*

To succeed in their negligent investigation claim, Plaintiffs would have to show that DSHS's investigation was biased or incomplete in a way that caused DSHS to not remove Plaintiffs from their home. Plaintiffs have not-and cannot-make such a showing. Plaintiffs' speculation that DSHS would have removed them from the home had its investigation been conducted differently does not "rise above speculation, conjecture or mere possibility" and is insufficient to defeat summary judgment. *Miller v. Likins,* 109 Wn. App. 140 at 147. Thus, Plaintiffs have failed to raise a genuine issue of material fact showing that that the State conducted a negligent investigation.

Plaintiffs argue *Joyce,* 155 Wn.2d 306, 119 P.3d 825 (2005), and *Hertog v. City of Seattle,* 138 Wn.2d. 265, 979 P.2d 400 (1999), in support of having established proximate cause here, but those cases are inapposite.[14]

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[14] Both cases concerned whether the State negligently supervised offenders who harmed others while on pretrial release or community supervision. In both, the Washington Supreme Court found that a special relationship exists between the State and offenders over whom it "takes charge" and that the State "has a duty to use reasonable care once it takes charge of an offender." *Joyce* at 315, 318. But here, the State did not

Plaintiffs argue that *Joyce* rejected the State's argument that causation was "too speculative" where the State could have sought a court order, based on its knowledge of the offender's drug use, psychotic behavior, and propensity to drive stolen vehicles, and there was testimony that the court order would have issued and the offender would have therefore been in jail at the time he killed plaintiff. Plaintiff's Br. at 33. Here, DSHS did not have knowledge equivalent to what Plaintiffs describe the State having in *Joyce*. DSHS repeatedly investigated and did not uncover evidence establishing that Plaintiffs were being abused. Moreover, for purposes of their negligent investigation claim, Plaintiffs have not established that had DSHS investigated differently, it would have uncovered evidence sufficient to seek a court order to remove Plaintiffs from their home. *Joyce* does not support cause in fact here.

In *Hertog,* the Court found that the probation officer had permission to obtain the offender's medical records but did not do so, raising the question of whether the probation officer "should have known" information he did not obtain. *Hertog* at 283. Plaintiffs attempt to co-opt that standard into this case, arguing that the State "**should have** known of" alleged abuse. Plaintiffs' Br. at 39 (emphasis in original). But unlike the probation officer in *Hertog,* CPS continued to investigate new referrals

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"take charge" of Plaintiffs or their parents. Thus, there was no special relationship which would impose liability on the State.

concerning Plaintiffs and made ongoing efforts to try to determine whether they were being abused. Plaintiffs have offered no admissible evidence to establish that the DSHS investigation was biased or incomplete in some specific respect that raised a question of what DSHS "should have known." Plaintiffs cannot show that, based on their repeated denials of abuse and their confiding in friends they swore to secrecy, DSHS "should have known" Plaintiffs were being abused. Without that evidence, Plaintiffs' claims fall into the category of "negligence in the air." *See Hanson v. Washington Natural Gas Co.*, 95 Wn.2d 773, 779, 632 P.2d 504 (1981); *Moyer v. Clark*, 75 Wn.2d 800, 454 P.2d 374 (1969) (there must be a direct causal connection between the alleged negligence and how the injury occurred).

Plaintiffs also cite *Martini v. Post,* 178 Wn. App. 153, 313 P.3d 473 (2013), which is also inapposite. There, the Court held that a tenant could sue his landlord for negligence, alleging a breach of a statutory duty, once the tenant provided notice of a defective condition and gave the landlord permission to enter to make repairs. But as discussed *infra*, section IV.C.2, Plaintiffs have failed to raise a genuine issue of material fact showing that the State conducted a biased or incomplete investigation and thus breached a statutory duty to them.

In sum, even viewing the evidence in the light most favorable to them, Plaintiffs fail to raise a genuine issue of material fact showing that further or different investigation by DSHS would have yielded a different result. Plaintiffs have not shown and cannot show that the investigation was biased or incomplete in a way that was the cause in fact of their claimed injuries. On the evidence before the Court, reasonable minds must agree that the State's allegedly negligent investigation was not the cause in fact of Plaintiffs' claimed injuries.

b. Plaintiffs Fail to Show That the State's Investigation Was the Legal Cause of Their Claimed Injuries

Even if Plaintiffs could show that the State was the cause in fact of their claimed damages, they cannot show that the State was the legal cause. "The focus in the legal causation analysis is 'whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon mixed considerations of logic, common sense, justice, policy, and precedent." *Schooley v. Pinch's Deli Market, Inc.,* 134 Wn.2d 468, 478, 951 P.2d 749 (1998) (internal citations omitted). "Legal causation . . . rests on policy considerations as to how far the consequences of a defendant's acts should extend. It involves a determination of whether liability *should* attach as a matter of law given

the existence of cause in fact." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). "However, a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation. This would nullify the legal causation element and along with it decades of tort law. Legal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise." *Schooley,* 134 Wn.2d at 479. "Legal cause is a question of law for the court to decide." *Minahan,* 117 Wn. App. at 888.

Plaintiffs fail to present credible evidence to show that, if DSHS had conducted its investigation differently, they would have been removed from their home sooner. Without that evidence, any connection between the State's non-negligent investigation and Plaintiff's alleged injuries is too remote, insubstantial and speculative to impose legal liability on the facts of this case.

Policy does not support extending liability here. RCW 26.44.050 and RCW 74.13, the statutes imposing duties to investigate claims of child abuse and/or to make child welfare services available, do not create a duty to conduct a "perfect" investigation, ignore repeated denials of abuse, or remove children from their home when abuse is not substantiated. Extending liability to the facts of this case would not further the policies

expressed in the child protection statutes. Logic, common sense, justice, policy and precedent require this Court to find no legal causation between the State's investigation and Plaintiffs' claimed injuries.

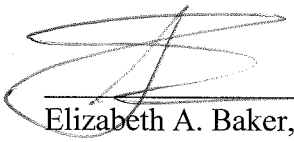
V. CONCLUSION

Plaintiffs fail to raise a genuine issue of material fact showing that the trial court's oral opinion that DSHS acted reasonably was error or is material to this Court's review of dismissal on summary judgment. Plaintiffs also fail to show that the State conducted a negligent investigation. The investigation was not biased or incomplete. The manner in which the State's investigation was allegedly negligent did not result in - was not the proximate cause of - a harmful placement decision.

The trial court properly dismissed Plaintiffs' claims against the State. This Court should affirm the trial court's dismissal of those claims.

RESPECTFULLY SUBMITTED this 24th day of June, 2015.

ROBERT W. FERGUSON



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CERTIFICATE OF FILING AND SERVICE

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