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NO. 94529-2

SUPREME COURT OF THE STATE OF WASHINGTON

HBH, SAH, KEY, JDB, and KMH,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

STATE'S SUPPLEMENTAL BRIEF

ROBERT W. FERGUSON
Attorney General

PETER J. HELMBERGER
Senior Counsel
WSBA No. 23041
ALLYSON ZIPP
Assistant Attorney General
WSBA No. 38076
PO Box 2317
Tacoma, WA 98402
(253) 593-5243
OID No. 91105

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I. INTRODUCTION AND ISSUES PRESENTED

Between 1998 and 2003, Scott and Drew Anne Hamrick served as foster parents to a number of children, including five young women who are the Plaintiffs. By 2003, all five were adopted by the Hamricks.

In June 2011, Plaintiffs disclosed sexual abuse by Scott Hamrick that began long after their adoption. They sued the Department of Social and Health Services (DSHS) on two theories: negligent investigation of the Hamricks prior to their adoption, and negligent investigation of CPS referrals in 2008, 2009, and 2010. The case went to trial. At the close of evidence, the court granted DSHS's CR 50 motion, and dismissed Plaintiffs' pre-adoption claims. The jury rejected the remaining claims.

The Court of Appeals reversed dismissal of the pre-adoption claims. The ruling was unprecedented: the Plaintiffs had agreed there was no violation of the statutory duty to investigate under RCW 26.44.050. Therefore, to revive the claims, the court held for the first time that DSHS has a "special relationship" with foster children under the *Restatement (Second) of Torts* § 315(b) (Am. Law Inst. 1965). Section 315(b) describes the duty of a custodian to protect an individual in its charge. The court concluded that a jury might believe that a DSHS social worker had not sufficiently elicited information from Plaintiffs, due to missing a few 90-day health and safety checks during the ten month foster period with the

Hamricks, and thus failed to protect them.

Thus, the issues here are straightforward: (1) Do DSHS statutory services for foster children and families vest DSHS with the custody and control over children that creates a “special relationship” and imposes a § 315(b) protective duty? (2) Where DSHS foster care statutory services do not vest DSHS with custody and control over foster children and have no private sector analog, does the imposition of the § 315(b) duty exceed the scope of the State’s waiver of sovereign immunity to common law tort liability? (3) Did Plaintiffs offer evidence to create a genuine issue of material fact regarding breach of the newly described duty? Pet. for Review at 3-4.¹

Undoubtedly, DSHS statutory responsibilities are serious and concern the lives and futures of our state’s children. Likewise beyond debate, some statutes provide implied causes of action and remedies for negligent conduct by DSHS. This case, however, should be decided based on legislation creating DSHS’s powers and authorities during foster care, which clearly does not impose the custody and control over a foster child that is exercised by a school or hospital. DSHS therefore cannot be charged with fulfilling the duties of

¹ The Court should not be distracted by the numerous irrelevant points made by Plaintiffs. For example, Plaintiffs broadly claim that DSHS violated a “preadoption placement duty” (Ans. to Pet. at 1), which begs the question of what duty they claim exists. (They later concede that their case depends on § 315(b). *See* Ans. to Pet. at 13.). They claim (falsely) that the State denies it ever has any common law duties to children under its care (Ans. to Pet. at 7), which also begs the question of whether § 315(b) applies. And they cite statutory and constitutional duties not presented or preserved. Ans. to Pet. at 7-9, 11, 16.

persons with that daily control and custody. Since Plaintiffs do not rely on any duty created by statute, and the common law § 315(b) duty does not fit, the Court of Appeals' decision must be reversed.

II. STATEMENT OF THE CASE

A. A Comprehensive Statutory System Defines DSHS's Role in the Child Welfare System and Its Relationship with Foster Children

The Legislature created a comprehensive statutory scheme governing every phase of the child welfare system, from investigating reports of child abuse and neglect, to removing children from parents who pose an imminent risk of harm, to placing those children in licensed foster homes so they may live in the most family-like setting until they can return home or be adopted. *See, e.g.*, RCW 13.34, 26.44, 74.13, 74.15. These statutes define DSHS's role in the child welfare system. *Id.*

For example, DSHS (along with law enforcement) has specific duties to investigate reports of child abuse and neglect. RCW 26.44.030, .040. While anyone may make a report, professionals working with children are mandatory reporters who must report to DSHS when they have reasonable cause to believe a child has suffered abuse or neglect. RCW 26.44.030. Upon receiving a report or information that would warrant a report, DSHS must investigate the allegations. RCW 26.44.050.²

² Private individuals have an implied statutory cause of action for damages based on negligence by mandatory reporters and DSHS in investigating reports of child abuse

Depending on the investigation, DSHS may petition the court to have the child removed from the home, or even ask law enforcement to remove the child from the home on an emergency basis. RCW 13.34.050, RCW 26.44.050. DSHS also plays a lead role in gathering evidence for the court's determination of whether the child is "dependent," and whether out-of-home placement is required. RCW 13.34.110. If dependency is established, DSHS social workers "coordinate and integrate" services ordered by the Juvenile Court for the child and parent. RCW 13.34.025. If out-of-home placement is ordered, DSHS is authorized "to place the child" in a "foster family home licensed pursuant to chapter 74.15 RCW." RCW 13.34.130(1)(b)(ii).

Statutes make DSHS the licensing authority for foster homes. RCW 74.13, 74.15. By law, licensing requirements "shall be limited to" particular areas. RCW 74.15.030(2). Statutes require criminal and DSHS internal background checks and disqualify certain individuals who have convictions for "crimes against person." RCW 43.43.830, 74.15.030(2), 74.15.130. Other statutes mandate the characteristics required in a successful applicant for a foster care license. RCW 74.15.030, .130. If licensing requirements are met, DSHS "shall" grant the license.

and neglect. *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 247 P.3d 421 (2011); *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003). This is the cause of action disclaimed by Plaintiffs.

RCW 74.15.100. Licensing actions are subject to judicial review. *Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 194 P.3d 988 (2008).

Once DSHS places a child in foster care, “[f]oster parents are responsible for the protection, care, supervision, and nurturing of the child[.]” RCW 74.13.330.³ DSHS conducts periodic health and safety visits with the child, which during the time relevant to this matter, were required every 90 days by DSHS policy. CP 277-78. Just as it does with parents, DSHS must investigate foster parents if it receives a report of alleged abuse or neglect of a foster child. RCW 26.44.050. When a foster child is adopted, DSHS’s legal relationship with the child under the foster care statutes is severed.

B. Proceedings Below

1. The Superior Court, on CR 50, dismissed Plaintiffs’ claims against DSHS for negligent failure to protect during foster care, because there was no evidence of abuse during the pre-adoption period

As explained by the Court of Appeals, Plaintiffs’ sole remaining claim alleges that DSHS social worker Mary (Wooldridge) Meyer negligently failed to detect abuse while they were in the Hamricks’ foster care. *HBH v. State*, No. 47438-7, slip op. (Wash. Dec. 13, 2016), *as amended on denial of*

³ The Legislature has increased parental authority of foster parents. Under the “reasonable and prudent parent standard,” foster parents may let foster children participate in “normal childhood activities,” including overnight activities of 24-72 hours, “without prior approval of the caseworker, department [DSHS], or court.” RCW 74.13.710(3).

reconsideration (Apr. 18, 2017) (Slip op.) at 1-19. Plaintiffs claim Meyer did not conduct two or more 90-day health and safety visits with SAH and HBH over the roughly ten months prior to their adoption.⁴ If she had, Plaintiffs claim that they might have disclosed to her some information from which she would have had reason to suspect abuse. Slip op. at 18. Plaintiffs claim this makes DSHS liable for failing to protect them from intentional harm inflicted on them years later by their adoptive father, Scott Hamrick.

But even when the evidence at trial is taken in the light most favorable to Plaintiffs, they failed to make any prima facie claim of negligence. SAH testified only that “if I felt safe and knew—and the woman [Meyer] was always there, if I felt safe, I believe I would have said something.”⁵ SAH also conceded that she did not even become aware that Scott Hamrick’s contact with her at the time was inappropriate, until HBH’s 2011 disclosures.⁶ And HBH testified that the abuse by Scott Hamrick did not begin until *after* she was adopted.⁷

In addition, Plaintiffs’ expert testified that DSHS should have suspected abuse would occur in the Hamrick house because therapist records showed SAH and HBH were “sexually acting out together” during the

⁴ RP (2/5/15) at 35:9-17.

⁵ RP (2/11/15) at 32.

⁶ RP (2/11/15) at 64:10-16.

⁷ RP (2/19/15) at 126:10-13

pre-adoption period.⁸ But the lone chart note Plaintiffs' expert relied on shows that the therapist was referring to the girls' *past* history of sexually acting out, not contemporaneous behavior while with the Hamricks:

A safety plan needs to be set up next session for the home environment due to *the past history* of the girls exhibiting signs of abuse by acting out in [sexual] ways.⁹

There was no evidence that SAH and HBH were sexually acting out, together or otherwise, during their pre-adoption period with the Hamricks. Nor did Plaintiffs offer evidence of any other behavior suggesting that DSHS needed to investigate or protect them from Mr. Hamrick.

By contrast, SAH and HBH's Court Appointed Special Advocate guardian ad litem (CASA GAL), who saw them on average every six weeks during their dependency, reported regarding the Hamrick home that "in the five years this CASA GAL has been active in the girls' lives, I have never seen them so happy."¹⁰ In April 2000, SAH and HBH wanted their CASA GAL to promise they could be adopted by the Hamricks.¹¹ At no point did they tell the CASA GAL they were inappropriately touched, or otherwise give any

⁸ RP (2/9/15) at 48-49 (discussing 6/16/2000 therapist record in Ex. 219).

⁹ Ex. 219 (emphasis added), *admitted at* RP (2/25/15) at 136:1-137:9; *also available at* CP 28.

¹⁰ RP (2/25/15) at 107:1, 19-21; Exs. 109, 112.

¹¹ RP (2/25/15) at 138:5-139:19; Ex. 112. The CASA GAL also recalled her subsequent visit where SAH and HBH were very happy when told they would be adopted by the Hamricks. RP (2/25/15) at 138:5-139:19; Ex. 112. At their adoption, the girls presented the CASA GAL with drawings thanking her for the family and the adoption, as they also did for DSHS social worker Meyer. RP (2/25/15) at 111:20-112:17; Exs. 217, 217A, 217B, and 217C.

indication that something would go wrong in the Hamrick home.¹² In the pre-adoption home study, DSHS social worker Shannon Nelson interviewed SAH and HBH, as well as all of the other foster and biological children in the Hamrick home, and all reported they were doing well and looking forward to the adoption.¹³ On October 6, 2000, KMH, HBH, and SAH were adopted.

The trial court, having heard all of the evidence, concluded “there were so many people involved [with Plaintiffs] that were handling this prior to the adoption, all of these other voices that were coming in saying, no, there was nothing to show there was any abuse.”¹⁴ The court granted DSHS’s CR 50 motion to dismiss Plaintiffs’ claim of pre-adoption negligence.

2. The Court of Appeals reversed the CR 50 ruling, finding the evidence sufficient under a previously unrecognized common law special relationship duty to protect foster children

The Court of Appeals found that DSHS had a common law duty to protect foster children that could be breached where there was no evidence of failure to investigate abuse or neglect. Slip op. at 9-19. The duty arose from DSHS’s relationship with foster children, which the court found constituted a “special relationship” under *Restatement (Second) of Torts* § 315(b). Slip op. at 9-16. It ruled that under this duty, Plaintiffs could

¹² RP (2/15/15) at 115:23-116:8.

¹³ RP (2/19/15) at 168:1-8; RP (2/23/15) at 181:15-182: 25; Ex. 115. The home study was completed on June 21, 2000. Ex. 115.

¹⁴ RP (3/5/15) at 83:2-12.

potentially establish breach and causation, saying a jury might find that, had the additional health and safety checks occurred, “SAH or one of the other girls would have disclosed the abuse and the State would have intervened.” *Id.* at 18. The court did not indicate what abuse could have been disclosed under its speculation.

III. ARGUMENT

The Legislature has exclusive authority to “direct by law, in what manner, and in what courts, suits may be brought against the state.” Const. art. II, § 26. Specific legislation may provide a remedy expressly, *e.g.*, RCW 64.40, or implicitly, for example, as recognized by this Court regarding RCW 26.44.050 in *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 70 P.3d 954 (2003).¹⁵ In the tort arena, the Legislature has also waived sovereign immunity, making the State “liable” for “its tortious conduct” to “the same extent as if it were a private person or corporation.” RCW 4.92.090.

Plaintiffs concede they have not established a statute-based cause of action. They rely solely on a duty described in *Restatement (Second) of Torts* § 315(b), which provides that defendants who have a “special

¹⁵ This Court in *M.W.* analyzed: (1) whether the plaintiff was within the class of persons for whose benefit the statute was enacted; (2) whether the legislative intent supports a remedy; and (3) whether the underlying purpose of the statute is consistent with inferring a remedy, applying the test established under *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990). *M.W.*, 149 Wn.2d at 596-602.

relationship” with plaintiffs must protect them from intentional harm inflicted by third parties. This Court should reject that duty for three reasons.

First, the statutes governing DSHS’s role in the foster care system do not create the special relationship required by this Court’s precedent to impose the § 315(b) duty. DSHS does not have the control and custody over foster children that define the special relationship. Second, and closely related to the first, the State’s waiver of sovereign immunity does not subject the State to liability here, because there is no private sector analog for DSHS’s operation of the foster care system. Third, the evidence here does not show the common law special relationship, breach of duty, or that the alleged breach is a proximate cause of Plaintiffs being intentionally harmed by Scott Hamrick.

A. The Legislature Defines DSHS’s Relationship with Foster Children and It Has Not Created—Or Allowed—A Special Relationship Duty Under *Restatement (Second) of Torts* § 315(b)

Imposing a special relationship duty to foster children on DSHS is an unprecedented expansion of this Court’s § 315(b) doctrine. DSHS does not have the degree of custody and control over foster children and their environment required by Washington law to create this special relationship. In particular, the comprehensive statutory child welfare system does not create this type of relationship between DSHS and foster children.

1. To impose the § 315(b) special relationship duty, a defendant must exercise custody and control over the plaintiff and their environment

“As a general rule, there is no duty to prevent a third party from intentionally harming another,” but a duty to protect from such harm can arise where “a special relation exists between the [defendant] and the other which gives the other a right to protection.” *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (internal quotations omitted); *Restatement (Second) of Torts* § 315(b). The essential rationale for why this special relationship creates this duty “is that the [individual] is placed under the control and protection of the [defendant], with resulting loss of control [by the individual] to protect himself or herself.” *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 433, 378 P.3d 162 (2016) (internal quotations omitted). Based on this control, “[t]he defendant may therefore be required to guard his or her charge against harm from others.” *Niece*, 131 Wn.2d at 443 (internal quotations omitted). “Washington courts have recognized this type of special relationship, and corresponding duty, between certain individuals and schools, common carriers, hotels, hospitals, business establishments, taverns, possessors of land, and custodial mental institutions.” *Donohoe v. State*, 135 Wn. App. 824, 837, 142 P.3d 654 (2006).

Washington appellate decisions considering the § 315(b) special protective relationship have determined that whether a relationship is

“special” and gives rise to this common law duty depends on the control and custody the defendant has over the individual and the individual’s environment. *See N.L.*, 186 Wn.2d at 431 (school districts have “duty to protect the students *in their custody* from foreseeable dangers.”) (emphasis added); *Bell v. Nw. Sch. of Innovative Learning*, 198 Wn. App. 117, 391 P.3d 600 (2017) (holding that school *did not* owe duty of care to plaintiff-student after it transferred custody of student to third party).

Thus, control and custody defines a special protective relationship and imposes the corresponding duty to exercise reasonable care to protect against intentional harm by third parties. *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 529, 307 P.3d 730 (2013) (church has duty if molestation “occurs during church activities, when the children are in the ‘custody and care’ of the church”). But absent control and custody, no special relationship—and no corresponding tort duty—exists.¹⁶ *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 729-30, 985 P.2d 262, *as amended* (Sept. 8, 1999) (majority of this Court rejecting the notion that the church had a special

¹⁶ This Court’s analysis in *N.L.* relies on this distinction. The *N.L.* Court clarified that “where a duty arises and a breach of that duty occurs while a student *is in a school district’s custody*, then whether the *scope of that duty extends* to incidents off campus will depend on whether such incidents were foreseeable to the school district.” *Bell v. Nw. Sch. of Innovative Learning*, 198 Wn. App. 117, 123, 391 P.3d 600, 605 (2017) (citing *N.L.*, 186 Wn.2d at 435) (emphasis added). *N.L.* thus confirms that control, via custody, is the determining factor for whether a special protective relationship and corresponding duty arises. Foreseeability of harms then limits the scope of that duty, to the extent it exists.

protective relationship and duty to prevent harm “that occurred as a result of a private, nonchurch-related child care arrangement between members of a church congregation.”) (Madsen, J., concurring/dissenting).

Two cases involving vulnerable adults in need of 24-hour care illustrate how the defendant’s control over the victim’s environment determines the existence of the § 315(b) duty. *Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001) and *Donohoe v. State*, 135 Wn. App. 824. In *Caulfield*, government agents became solely responsible for the hiring and monitoring of an in-home caregiver for the 24-hour care that Mr. Caulfield received in the isolated setting of his private home, after approving him to return home from a nursing facility where he had been receiving 24-hour care. *Caulfield*, 108 Wn. App. at 245-47. In short, Mr. Caulfield’s home was an extension of a nursing facility in which he still needed 24-hour care, operating under the government agents’ direct supervision. Thus, the duty to protect was analogous to the duty held by such nursing facilities. *See Donohoe*, 135 Wn. App. at 838.

In *Donohoe*, by contrast, DSHS did not have a special relationship and duty to Mrs. Donohoe because “it did not employ, supervise, or otherwise oversee [her] care or treatment” at a private nursing home. *Donohoe*, 135 Wn. App. at 840. “[U]nlike the government-supervised, in-home care management arrangement in *Caulfield*,” DSHS was not

responsible for Mrs. Donohoe's individual daily care. *Donohoe*, 135 Wn. App. at 842. Rather, DSHS was responsible only for determining her eligibility for services, and monitoring the general, regulatory-compliance status and licensing of the nursing home. *Id.*

The lower court ignored this distinction. It claims *Caulfield* "stands for the proposition that entrustment, not custody, is at the heart of a special protective relationship." Slip op. at 15. But "entrustment" in *Caulfield* refers to the government agent who took over the role of the nursing home as the sole monitor of Mr. Caulfield's 24-hour care, in the isolated setting of his private home. This Court uses "entrustment" in *Niece* in the same way; stating the duty arises "where one party is entrusted with the well-being of another," then immediately defining "entrustment" by illustration as "responsible for every aspect of [the other's] well-being." *Niece*, 131 Wn.2d at 50 (internal quotations omitted).

Thus, the term "entrustment" is no substitute for examining whether DSHS's specific statutory powers during foster care provide custody and control. And there is no merit to Plaintiffs' claim that *Caulfield* impliedly recognized that all forms of public care impose a protective duty. The existence of the § 315(b) protective duty depends on actual custodial care and control of the plaintiff and their environment.

2. Under the Legislature’s child welfare system, DSHS does not have a special relationship with foster children

The DSHS relationship with foster children and licensed foster homes is markedly different from the custody and control required for a § 315(b) special relationship. When children are removed from their biological home it is due to abuse or neglect in that home. Then they are placed in foster care, where “DSHS is required to ensure that foster care placements are in the least restrictive, most family-like setting available.” *Aba Sheikh v. Choe*, 156 Wn.2d 441, 453, 128 P.3d 574 (2006).

To accomplish this goal of providing a home-like setting of foster care, a comprehensive statutory scheme strikes a balance between imposing appropriate licensing requirements for foster homes and empowering foster parents, while also seeking to maintain a sufficient numbers of foster homes. Specifically, the Legislature authorizes DSHS “to place the child” in a “foster family home licensed pursuant to chapter 74.15 RCW.” *See* RCW 13.34.130(1)(b)(ii). After placement, DSHS’s role is limited, because “[f]oster parents are responsible for the protection, care, supervision, and nurturing of the child in placement.” RCW 74.13.330. Once a child is placed in a foster home, the social worker’s role is to “coordinate and integrate” services ordered by a Juvenile Court. RCW 13.34.025. The statutes do “not contemplate that social workers will

supervise the general day-to-day activities of a child. Rather the social worker's role is to coordinate and integrate" services for the child and family. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26-29, 84 P.3d 899 (2004).

Thus, DSHS's duties in foster care differ from the situation in *Caulfield*, where government agents implemented a nursing home in Mr. Caulfield's apartment. The statutes governing DSHS do not vest it with control over the foster child's daily environment like that exercised by a school, a hospital, or the home care in *Caulfield*. Once DSHS places a child with foster parents, responsibility for the day-to-day supervision of the foster child is turned over to the foster parent, much the way a school turns responsibility back over to a parent at the end of a school day or function.

3. The Court should reject Plaintiffs' arguments for applying the § 315(b) special relationship duty to DSHS foster and placement services

Plaintiffs' answer to the State's petition concedes that the existence of a special relationship between DSHS and foster children is a "necessary predicate" to their claimed duty. Ans. to Pet. 13. Plaintiffs' arguments for extending the special relationship to this context do not withstand scrutiny.

First, they admit that the special relationship duty to protect under § 315(b) arises "in the custodial setting that requires protection of a plaintiff from harm occasioned by third persons." Ans. to Pet. 14 (citing *McLeod v.*

Grant Cty. Sch. Dist. No. 128, 42 Wn.2d 316, 255 P.2d 360 (1953); *Niece*, 131 Wn.2d 39; and *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010)). They claim, incorrectly, that “existence of actual physical control” does not dictate whether a special relationship exists. Ans. to Pet. 14. They miss the point and misinterpret *N.L. v. Bethel School District*.

In *N.L.*, a student relied on the special relationship with her school to invoke the § 315(b) duty, even though she was harmed away from the school campus. The *N.L.* opinion and holding does not eliminate the rule that a special relationship depends on the existence of physical custody and control. It holds only that there can be liability for harm that occurs outside the custodial location if the negligent breach of duty occurs within the ambit of the special relationship. *N.L.*, 186 Wn.2d at 435. Thus, *N.L.* did not change the elements for imposing a § 315(b) duty.¹⁷

Nor is there any merit to the Plaintiffs’ incantation of the State’s *parens patriae* power to establish a § 315(b) duty. As Plaintiffs admit, this term describes the state power to intervene and protect children, in general. Ans. to Pet. 11. But no case has used this attribute of the State’s sovereign

¹⁷ Accordingly, this Court need not reach Plaintiffs’ arguments claiming there is a question of fact on foreseeability. Ans. to Pet. 15. A case does not progress to a trier of fact addressing whether harm is foreseeable if there is no special relationship as a matter of law. *N.L.*, 186 Wn.2d at 422, 435-36. Thus, Plaintiffs’ arguments claiming a jury should determine the scope of the duty are premature because Plaintiffs have not demonstrated the special relationship required by law to create the duty in the first place.

powers to warrant a *per se* rule that the State has a special relationship with all children. Indeed, if merely invoking general *parens patriae* powers were sufficient, then the § 315(b) relationship would exist for every child and citizen, for that government power applies to all.

Finally, Plaintiffs misdirect the Court with arguments that the State is attempting to limit an inadequate investigation cause of action arising from RCW 26.44.050. The State has pointed out limits to that cause of action, described in *M.W.*, 149 Wn.2d 589. However, Plaintiffs' criticisms of the State's arguments about the availability of statutory causes of action are gratuitous and irrelevant to the question of § 315(b) common law duty.¹⁸

In summary, Plaintiffs fail to establish that the "necessary predicate" of a § 315(b) special relationship is met. This case is far different from one in which the issue is whether a school, church, or hospital reasonably protected a plaintiff during a special relationship. Plaintiffs' claims that

¹⁸ Plaintiffs' claims run contrary to the numerous cases holding that Washington does not recognize a broad common law negligent investigation claim. In the years since *M.W.*, Washington courts have repeatedly rejected claims against DSHS based on negligence beyond the duty created by RCW 26.44.050. *See, e.g., Roberson v. Perez*, 156 Wn.2d 33, 46-48, 123 P.3d 844 (2005) (rejecting a request to enlarge the negligent investigation cause of action to include harms caused by "constructive placement decisions"); *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003) (implying a cause of action in RCW 74.14A.050, 74.13.250, or .280 would be inconsistent with the broad power vested in DSHS to administer these statutes); *Aba Sheikh v. Choe*, 156 Wn.2d 441, 457-58 n.5, 128 P.3d 574 (2006) (no private cause of action can be implied from three WAC regulations pertaining to dependent children, citing *Braam*); *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 26, 84 P.3d 899 (2004) (statutes governing social workers do not give rise to an obligation to protect the general public from harm inflicted by client-children of DSHS social workers).

DSHS should be liable for failing to prevent remote, future intentional harms long after the alleged special relationship ends only further confirms how far this case strays from any other § 315(b) case. *Bell*, 198 Wn. App. at 127 (duty to protect did not apply after school transferred custody of student to third party).

Ultimately, expanding the § 315(b) duty to DSHS interactions with foster children and families is as inconsistent with DSHS statutory powers as the duty alleged in *Aba Sheikh*. *Aba Sheikh*, 156 Wn.2d at 453-56 (refusing to impose a common law duty to protect third parties from foster child that does not reflect DSHS statutory powers during foster care). DSHS engages in reviews, visits, assistance, and services directed by statutes and courts. This comprehensive, but statutorily defined, non-custodial power, together with the statutory role of foster homes to provide custody, explains why DSHS does not have a special relationship with foster children. This Court should therefore reverse the Court of Appeals' decision.

B. Imposing a Common Law Special Relationship Duty on DSHS Based on Its Implementation of the Foster Care Statutes Exceeds the Scope of the Legislature's Waiver of State Sovereign Immunity

The waiver of sovereign immunity in RCW 4.92.090 demonstrates no intent to subject DSHS's statutory duties during foster care to a common law duty under *Restatement (Second) of Torts* § 315(b). Through the waiver,

the Legislature directed the State “be liable” for “its tortious conduct” to “the same extent as if it were a private person or corporation.”

RCW 4.92.090. To assert a common law negligence claim against the State:

[T]he plaintiff must show that the State’s conduct would be actionable if it were done by a private person in a private setting. If the plaintiff would have no cause of action against a private person for the same conduct, then the plaintiff has no cause of action against the State.

16 David K. DeWolf, Keller W. Allen, *Washington Practice: Tort Law and Practice* § 15:3 (4th ed. 2017); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157, 162 (1994) (conduct must be “analogous to the chargeable misconduct and liability of a private person or corporation.”).¹⁹ Thus, sovereign immunity has been waived only for state conduct that has a corresponding private sector analog.

Plaintiffs’ claim is directed at DSHS statutory responsibilities in the foster care system that do not have a private sector analog. No private sector entity collects and investigates reports of child abuse and neglect; intervenes in families and removes children from parents; or licenses foster parents, so that removed children can be placed into a natural, nurturing family

¹⁹ See *Edgar v. State*, 92 Wn.2d 217, 226, 595 P.2d 534 (1979) (finding it incumbent on person asserting claim against the State to show the conduct complained of would constitute an actionable tort if done by a private person in a private setting); *Morgan v. State*, 71 Wn.2d 826, 827, 430 P.2d 947 (1967) (affirming judgment for the State based on RCW 4.92.090 because Morgan failed to cite cases showing private individual would have tort liability for comparable conduct).

environment. And, as shown above, DSHS’s statutory responsibilities do not, standing alone, create a § 315(b) special relationship between DSHS and foster children, which would itself be a private sector analog. Thus, sovereign immunity bars imposing the § 315(b) duty on DSHS foster care operation because statutes do not create a special relationship (or any other private sector analog) between DSHS and foster children.

Plaintiffs’ response to these legislatively-defined limits for applying tort liability to state conduct is alarmist and misdirected. Ans. to Pet. 6-9. Their strawman arguments are irrelevant—the State is *not* seeking to avoid statutory duties or constitutional duties, as Plaintiffs claim. Of course sovereign immunity cannot bar statutory causes of action or constitutional claims. That point does not help Plaintiffs, as they have no such claims.

As this Court has recognized, “treating governments the same as private persons or corporations became problematic where statutes and ordinances imposed duties on governments not imposed upon private persons or corporations.” *Munich v. Skagit Emergency Commc’ns Ctr.*, 175 Wn.2d 871, 887-88, 288 P.3d 328 (2012) (Chambers, J. concurring). The judicial branch must therefore take care not to misapply § 315(b) to a statutory relationship. That is the cautionary principle embedded in the limits on the waiver of sovereign immunity.

The prerogative to impose liability for the operation of the foster

care system rests with the Legislature. As this Court has repeatedly acknowledged, the Legislature did so through the enactment of a limited, implied cause of action in RCW 26.44.050. Additional liability should be found in legislative enactments, not in the common law.

C. The Court of Appeals Erred by Remanding When, After Six Weeks of Trial, Plaintiffs Failed to Introduce Evidence Sufficient to Show a Breach of Duty

Even assuming a special relationship exists under § 315(b), the trial court properly dismissed after Plaintiffs' inadequate evidence.²⁰ The Court of Appeals found that a jury might "find that but for the allegedly deficient health and safety checks, SAH or one of the other girls would have disclosed the abuse and the State would have intervened." Slip op. at 18.

It is complete speculation that any additional health and safety visits would have uncovered evidence indicating an abusive home. First, SAH was not aware of inappropriate touching prior to the adoption, and HBH said that the abuse did not start until after she was adopted.²¹ Second, it is undisputed that their CASA GAL believed a very good home had been found for SAH and HBH, and in April 2000 they asked the CASA GAL to promise they could be adopted by the Hamricks.²² It is also undisputed that all of the children reported to the Adoption Home Specialist social worker

²⁰ RP (3/5/15) at 83:2-12.

²¹ RP (2/11/15) at 64:10-16; RP (2/19/15) at 126:10-13.

²² RP (2/25/15) at 85:22-87:21; 106:21-107:3; 107:19-24; 138:5-139:19; Ex. 112.

that they wished to be adopted by the Hamricks.²³ Both Mary Meyer and the CASA GAL recalled the children being excited to be adopted after the adoption plans were finalized.²⁴ On this record, it requires speculation to find Meyer's allegedly missed visits would have resulted in discussions completely contrary to those that undisputedly occurred.²⁵

Lacking evidence of harms or abuse to be investigated prior to adoption, the Plaintiffs focus on a red herring—evidence that a social worker did not document home visits, which they argue is plausible evidence she skipped the visits. But whether home visits were skipped or not documented is not evidence of negligence in this context. It ignores the real problem—that it requires speculation that the social worker needed to form better rapport with the children to elicit reports of pre-adoption abuse. The record showed that the social worker, Mary Meyer, traveled to Alaska with SAH and HBH, was invited to a dance recital by them, and on the day of their adoption was presented with a drawing by them with the caption thanking her for the family.²⁶ In this context, allegations of missed visits are

²³ RP (2/19/15) at 166:1-168:8; 191:25-192:15

²⁴ RP (3/2/15) at 124:1-18; RP (2/25/15) at 138:5-139:19.

²⁵ Plaintiffs also cite CP 267-71, 290-94, 317-20, 33-32, 362-64. Ans. to Pet. 2. But this is not evidence which is part of the CR 50 consideration. These are declarations filed by Plaintiffs in opposition to summary judgment. Plaintiffs also cite to evidence concerning allegations regarding post-adoption harms. Ans. to Pet. 5. But this is irrelevant for two reasons. First, a jury heard and rejected claims about that evidence. Second, post-adoption harms have no bearing on the claim that DSHS was negligent pre-adoption, which is the claim dismissed under CR 50 that they appealed.

²⁶ RP (3/2/15) at 104:18-105, 123:14-16, 121:1-18; Exs. 114, 115.

not evidence from which a jury could infer that SAH or HBH (or another child) would have made a statement or disclosure to contradict essentially everything positive they had been saying about the Hamrick home.

In short, even if there were a duty, Plaintiffs here failed to present a case appropriate for a jury, and the superior court did not err by dismissing that pre-adoption claim under CR 50.

IV. CONCLUSION

The Court of Appeals decision should be reversed and the superior court affirmed. The *Restatement (Second) of Torts* § 315(b) duty is not applicable as a matter of law, and even if this Court were to hold that such a duty exists, Plaintiffs' evidence was insufficient to get to a jury.

RESPECTFULLY SUBMITTED this 6th day of November, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Peter J. Helmberger
PETER J. HELMBERGER
Senior Counsel
ALLYSON ZIPP
Assistant Attorney General

DECLARATION OF SERVICE

I declare that on this 6th day of November, 2017, I caused to be electronically filed the foregoing document with the Clerk of the Washington State Supreme Court, through the Washington State Appellate Courts' Portal, which will also send notification of such filing to the following parties.

Lincoln Beauregard
Julie A. Kays
Connelly Law Offices
2301 N 30th Street
Tacoma, WA 98403

Nelson C. Fraley, II
Faubion, Reeder, Fraley &
Cook, P.S.
5316 Orchard Street West
University Place, WA 98467

Philip A. Talmadge
Sidney C. Tribe
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

By: s/ Kelli Lewis
KELLI LEWIS, Legal Assistant

AGO TORTS TACOMA

November 06, 2017 - 3:18 PM

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Filing on Behalf of: Peter J. Helmberger - Email: peterh@atg.wa.gov (Alternate Email: TorTacEF@atg.wa.gov)

Address:
PO Box 2317
Tacoma, WA, 98401
Phone: (206) 464-5870

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