

No. 96830-6

NO. 49612-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JESSICA L. WRIGLEY, et al

Appellants

v.

STATE OF WASHINGTON, DSHS, et al

Respondents.

REPLY BRIEF OF APPELLANTS
RESPONSE TO RESPONDENT'S CROSS-APPEAL

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A. STATEMENT OF THE CASE ON REPLY

The Department has emphasized the events that led to AA being in state care. This case is not about Mr. and Mrs. Wrigley. They acknowledge their other children were determined dependent by court order. But they rectified their parental deficiencies through the dependency process, their children were returned home alive, and the dependency was dismissed.

This case is about the state's failure to protect AA. The state's position comes down to this: The welfare of a child in our care subject to a shelter care order is not within the circle of our concern if placed with the child's parent who lives out of state. Even if the other parent has alleged the out-of-state parent has serious anger and violence issues. Even if the out-of-state parent has had no relationship with the six-year-old child. And even if the child has significant behavioral issues.

The negligence of the state comes down to the fact that, as social worker Watson testified, they sent AA off into the unknown. In retrospect, what DSHS did not know was whether Mr. Viles had the tools—other than his fists—to raise a child with the challenges AA presented.

B. ARGUMENT

I. REPLY TO STATE'S RESPONSE.

A. Tort liability under RCW 26.44.050.

One of the difficulties of this case has been that tort liability has been

dependent upon the language of RCW 26.44.050, which deals only with allegations of “abuse and neglect”. And the dependency was based in part on allegations of abuse and neglect. RCW 13.34.030(6)(b). CP 86. Plaintiffs find themselves limited by the language of RCW 26.44.050. In the face of negligent actions by the state leading to death of AA, it is difficult to just accept “Too bad, so sad.”

1. When the Department alleges a (c) dependency, the court should imply a cause of action against the Department for negligently investigating as to that issue.

The department also based its petition on RCW 13.34.030(6)(c), alleging that there was no parent capable of adequately caring for the child, such that the child was in circumstances which constituted a danger of substantial damage to the child's psychological or physical development. CP 86; *see also*, Appellants’ Brief, at n. 3, CP 178. It would be nonsensical to say the Department has no duty to investigate allegations meeting the language of RCW 13.34.030(6)(c). For that reason, RCW 26.44.050 should be read to include whether there is a capable parent within the meaning of RCW 13.34.030(6)(c)—even if there is no abuse or neglect. Thus, the court should imply a duty to investigate whether there is a capable parent.

“ ‘It has long been recognized that a legislative enactment may be the foundation of a right of action.’ ” *Bennett v. Hardy*, 113 Wash.2d 912, 919, 784 P.2d 1258 (1990) (quoting *McNeal v. Allen*, 95 Wash.2d 265, 274, 621 P.2d 1285 (1980) (Brachtenbach, J., dissenting)).

Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs., 141 Wn.2d 68, 77–78, 1 P.3d 1148 (2000).

A cause of action will be implied from a statute, as follows:

[F]irst, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Tyner v. State Dep't of Soc. & Health Servs., Child Protective Servs., 141 Wn.2d 68, 77–78, 1 P.3d 1148, 1153 (2000) (citing *Bennett*, 113 Wn.2d at 920–21). In footnote 4, the *Tyner* court gave the source of the test:

The *Bennett* test was borrowed from the federal courts and is similar to § 874A of the Restatement (Second) of Torts, which reads:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

Restatement (Second) of Torts § 874A (1979).

Tyner, at 78.

The answer to the three *Bennett* questions is yes. AA was certainly within the class for whose special benefit the statute was enacted. Since RCW 13.34.050 is explicitly mentioned in RCW 26.44.050, legislative intent would certainly imply a remedy regarding failure to investigate within the

meaning of RCW 13.34.030(6)(c). If DSHS investigates abuse or neglect pursuant to RCW 26.44.050 and, though finding none, nevertheless has reason to believe a child may be in circumstances which constitute a danger of substantial damage to the child's psychological or physical development, RCW 13.34.030(6)(c), does the Department investigate or does it just disregard the situation because such investigation is not listed in RCW 26.44.050? The answer is certainly yes and implying a remedy is thus consistent with the underlying purpose of the legislation.

The first amendment of RCW 26.44.050, 1969 ex.s. c 35 § 5,¹ added the following language to the duty of the DSHS: “investigate and provide child welfare services in accordance with the provision of chapter 74.13 RCW.” The reference to chapter 74.13 remains in the statute, and at least means:

The department shall investigate complaints of any recent act or failure to act on the part of a parent or caretaker that results in death, serious physical or emotional harm, or sexual abuse or exploitation, or that presents an imminent risk of serious harm, and on the basis of the findings of such investigation, offer child welfare services in relation to the problem to such parents, legal custodians, or persons serving in loco parentis, and/or bring the situation to the attention of an appropriate court, or another community agency.

RCW 74.13.031(3).

It would appear no case has addressed the references in RCW 26.44.050 to chapters 74.13 and 13.34 RCW.

¹ <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1969ex1c35.pdf>

2. Mrs. Wrigley's allegations.

The Department wants to use the word "referral" as the trigger to their obligation to report, suggesting there is some formal way to make a referral. But the form is not the issue. The issue is whether DSHS receives notice that its duty to investigate is triggered. And that trigger is "receipt of a report concerning the possible occurrence of abuse or neglect". Though he felt limited by his superiors, social worker Watson certainly had concern DSHS was sending AA "off into the unknown." CP 704.

3. Plaintiffs do not concede that RCW 26.44.050 is inapplicable.

The statement quoted in Response/Cross Appeal at 24 that plaintiffs appear to concede DSHS duty under RCW 26.44.050 does not extend to Mr. Viles, Plaintiffs acknowledge that the statement was poorly written and did not intend to waive any claims on appeal. Appellants' Brief at 18. The statement was made in the context of the motion to amend, and did not account for the effect of a duty upon the other negligence-based claims, which should also be reinstated. As to the duty under RCW 26.44.050, *see* discussion above, beginning at page 3.

B. Tort liability based on Shelter Care Order and Petition.

While the Department claims that the shelter care's "boilerplate language" doesn't mean what it says, (and while the undersigned certainly

agrees that orders should not contain meaningless boiler plate language), the answer to the Department's claim is that the appellate court should imply a duty to investigate whether a parent is capable of adequately caring for the child, as noted *supra*. RCW 13.34.030(6)(c). The court should also address the issue as a special relationship exception to the public duty doctrine, which fills any gap left by RCW 26.44.050, if that statute applies only to "abuse and neglect". RCW 26.44.020(1) and (16), 13.34.030(6)(b). The essential issue is the Department should be liable when its negligence hurts children and parents.

C. DSHS' Special Relationship Duty.

Following the Order of Summary Judgment on appeal herein on August 24, 2016, CP 1595–99, and the denial of the Plaintiffs' Motion for Leave to Amend on October 7, 2016, CP 1712–14, and also the Order Denying Reconsideration on the same date, CP 1735–36, the case of *HBH v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016) came down on December 13, 2016. This was addressed at Appellants' Brief at 16–17.

The second special-relationship exception derives from the Restatement (Second) of Torts § 315 (1965), which provides:

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

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Donohoe v. State, 135 Wn. App. 824, 836, 142 P.3d 654 (2006).

The Department first claims that plaintiffs failed to raise the issue to the trial court below. However, as just noted, the case of *HBH* had not been decided as of the time of the first Summary Judgment Order, CP 1595, and of the Order Denying Motion for Reconsideration, CP 1735, and it thus should not be held against plaintiffs for not arguing a case that had not yet been decided. *See also*, CP 1650–51.

Secondly, the Department claims that *HBH* is inapplicable because it dealt with foster care rather than a parent. Response/Cross-Appeal at 28. This argument misses the point completely regarding the special relationship exception. As stated by the *HBH* court:

Caulfield [v. Kitsap County, 108 Wn. App. 242, 29 P.3d 738 (2001)] stands for the proposition that entrustment, not custody, is at the heart of a special protective relationship for purposes of imposing a common law tort duty.

197 Wn. App. 77, 91, 387 P.3d 1093 (2016). The Department had a special relationship with AA. The fact that it placed him in a home where he was beaten to death within 2½ months is certainly evidence that a bad decision was made. However, to accept the Department's argument that the Department's special relationship with a child does not protect the child when his *father* beats him to death creates an absurd distinction. Unlike the case

of *In re D.F.-M.*, 157 Wn. App 179, 236 P.3d 961 (2010), *infra* at 20, where the Department required specific changes in the father's life following a home study, the Department here disregarded its concerns, as stated by social worker Watson, that they were "sending [AA] off into the unknown", and that they did not know "enough about Mr. Viles to send [AA] to him." CP 704.

The Department claims that there was "extensive discussion of [AA]'s behavioral issues and that Mr. Viles answered "Yes" when asked if he was "aware of all this stuff". But nowhere in the record is there any indication that the Department had asked whether Mr. Viles had the ability to care for AA's needs, let alone having provided Mr. Viles with professional assistance in dealing with AA. Social worker Gorder recommended that the ongoing worker (Mr. Watson) do a home study of Mr. Viles for permanency planning. CP 83. There is no evidence Mr. Watson followed her recommendation.

D. Motion to Amend Petition

At the time the summary judgment at issue here was entered, the only exception to the public duty doctrine that applied to DSHS in dealing with investigation and/or placement of children "alleged or found to be dependent", RCW 13.04.030(1)(b), was the legislative intent exception. Now that *HBH* has adopted the special relationship test, for this reason alone, the trial court's denial of the motion to amend should be reversed. However, the

trial court gave no specifics as to what was prejudicial to the state by allowing amendment, though on reconsideration, as noted by the Department at Response/Cross-Appeal at 35, the court added timeliness as an issue. This matter has been adequately addressed in Appellants' Brief, and if the appellate court reverses as requested by the appellants, the issue of timeliness is moot, for there will be a new case schedule at that point. Moreover, the issue of prejudice will also be moot for the same reason.

II. RESPONSE TO DSHS CROSS-APPEAL

In responding to the state's cross-appeal, the issue of duty seems to reappear at every point. The court has commented on this interrelationship as follows.

This court has also noted that the question of "whether liability should attach is essentially another aspect of the policy decision which we confronted in deciding whether the duty exists." *Harbeson v. Parke-Davis, Inc.*, 98 Wash.2d at 476, 656 P.2d 483. Because of the historical imprecision in terminology and the interrelationship of concepts, the rationale in many negligence cases combines aspects of causation, intervening events, duty, foreseeability, reliance, remoteness, and privity. . . . Thus, it may be immaterial whether we analyze the County's and State's liability on the basis of duty or legal causation. Policy considerations and common sense dictate whether the connection of the County and State with the collision is too remote or insubstantial to impose liability.

Hartley v. State, 103 Wn.2d 768, 780–81, 698 P.2d 77 (1985). *Hartley* also discusses the different aspects of proximate cause, which are legal causation and cause in fact. The state claims there is no "cause in fact", but cause in

fact is an issue generally left for the jury. *Id.* at 778. That holds true in this case where the jury should determine, as the trial court implicitly ruled, whether if there is a duty there is cause in fact. *See also, Tyner*, 141 Wn.2d at 82.

A. Cause in Fact Does Exist in this Case.

1. **Protected parent-child relationship.**

The Department claims that the constitutional rights of the parent are such that there is a high threshold for the court to deny a parent custody of the child. And its citations to case law and statutes are certainly accurate and laudable.² If the Department's position were correct in this regard, then the child should have been placed with the father from the beginning, rather than placing him in foster care. About the only thing that happened since the case was filed regarding Mr. Viles was that a criminal background check was apparently done. But there is no constitutional protection for a parent who is not capable of caring for a child such that the child such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development. RCW 13.34.030(6)(c).

² The undersigned has represented parents for many years in dependency court and has seldom if ever heard such enthusiastic support for parents' rights expressed by the Department or its attorneys. Would that such support become commonplace.

2. A jury could find the court would have denied placement.

The DSHS in a dependency case generally controls the flow of information to the court. And the Supreme Court stated, “There is little question that courts rely heavily on the judgment of CPS caseworkers in making dependency determinations.” *Tyner*, 141 Wn.2d at 87.³ As noted above, the AAG misled the court by stating that apart from the lack of a parenting relationship, “the Department has no other concerns.” CP 300, cf. CP 299–303. The context of AAG Collins’ statement shows that the word “other” is surplusage, since she expressed no concerns regarding Mr. Viles. Moreover, the unidentified speaker at CP 301–3 appears to be social worker Watson. For the Department to say it “cannot make a fully informed recommendation one way or another” is a clear indication of its abdication of its obligation to protect AA. As stated in *Babcock v. State*, 116 Wn.2d 596, 609, 809 P.2d 143 (1991), “Because [social workers] controlled the flow of information, they could not escape liability even if they had acted under court order.” Doubtless, as the Supreme Court indicates, the commissioner

³ Footnote 7 in *Tyner* stated: There was expert testimony given at trial that courts “always follow” the recommendations of social workers in dependency proceedings. Verbatim Report of Proceedings (RP) (Oct. 10, 1996) at 148. This testimony was objected to and the objection was overruled. The jury was free to reach the conclusion that in many cases a social worker’s determination will be material to a judge’s decision, which was the issue in this case.

relied heavily on the Department's judgment when it had nothing negative to say about Mr. Viles and had "no recommendation" as to placement.

As noted, *infra* at page 20, CP 704, social worker Watson had significant concerns regarding sending AA to his father in Idaho. CP 704–707. In fact, Mr. Watson's testimony suggests that he and the AAG and his supervisor, defendant Larosa, determined to *not* provide information to the court. As Mr. Watson stated, "[W]e were not to provide any input regarding the decision to place or not place [AA]." CP 706. And again, "[W]e cannot provide any information regarding the placement of [AA] in court or anywhere else. . . .I could not provide any information in court to the court about that." CP 707.

Social worker Watson also withheld from the court, as is discussed below at page 15, the significant violence Mr. Viles perpetrated on Mrs. Wrigley, which she had told defendants Watson, Gorder and LaRosa. CP 878. It appears Mr. Watson and Mr. LaRosa's dismissive treatment of Mrs. Wrigley's concerns of Mr. Viles' domestic violence, *id.*, at the outset of the case were never actually considered by the Department. The Department states, Response/ Cross-Appeal at 44, that the evidence showed that the judge knew about "the domestic violence restraining order obtained by Mrs. Wrigley" (CP 90)". The Department's citation, however, misquotes the record. What CP 90, the Dependency Petition, states in that regard is, "It has

been reported to the Department that there is a current restraining order between mother and Mr. Viles, father of [AA].” By use of the word “between”, there is nothing in the foregoing indicating Mrs. Wrigley obtained an order against Mr. Viles. The word “between” could just as well read that Mr. Viles had obtained an order against Mrs. Wrigley, or that there was a mutual restraining order. Moreover, since the Department was telling the commissioner it had no position on placement of AA on January 30, 2012, if the court even considered this particular language of the petition at CP 90, it would have been logical for the court, relying as courts do on DSHS, to presume that what “ha[d] been reported” to the Department as of the date of filing had now been resolved and represented no problem regarding Mr. Viles.

The Department also claims in its brief on page 44 that the court knew about “Mr. and Mrs. Wrigley’s concern about Mr. Viles’ ‘violent past’ (CP 304).” It is true Mr. Wrigley’s attorney’s made the mild comment that Mr. Wrigley gave her “some information regarding Mr. Viles that - - he had heard from the mother and that their relationship had been violent in the past”. However, the attorney said nothing more. And immediately thereafter, there was a discussion of Bill’s Chicken and Steak House which the Commissioner said was a colleague’s favorite place to eat. CP 304. When the commissioner finally addressed Mr. Wrigley’s attorney’s mild comment, her response was

that since he was not a party, “he can make noise. I don’t know if he can oppose it.” CP 305. The commissioner did say, “I appreciate his perspective”. But since Mr. Wrigley’s attorney gave no specifics, it is not clear what the Commissioner appreciated.

It was at this point, when the Commissioner said that Mr. Wrigley’s step-parent perspective was just “noise”, that social worker Watson should have given, but failed to give, specifics to the court as had been expressed to him by Mrs. Wrigley at the FTDM. Specifically, Mr. Watson should have told the Commissioner that Mr. Viles had threatened to cut Mrs. Wrigley’s head off and kill her, that he tried to run over her, that he dragged her up the stairs by her hair, that he had a reputation for violence in Pocatello, and that Mrs. Wrigley knew several other women who had experienced domestic violence by Mr. Viles. CP 878. By failing to advise the court that there was more than “noise” from Mr. wrigley—someone the Commissioner probably thought might be an abusive step-father, *see* CP 86–91—Mr. Watson, and perhaps AAG Collins, misled the court by omission and certainly controlled the flow of information to the court.

In light of the heavy reliance the court places on the Department, and in light of the Department’s refusal to assess Mr. Viles’ and his home for safety, and in light of the refusal of the Department to obtain and provide information to the court, a jury could find that the Department not only

misled the court that there were no concerns regarding Mr. Viles, a jury could also find that the Department's withholding information from the court controlled the flow of information leading to the court's decision to send AA to his father in Idaho. But as *Tyner* stated,

We hold that a judge's no-contact order will act as superseding intervening cause, precluding liability of the State for negligent investigation, only if all material information has been presented to the court and reasonable minds could not differ as to this question.

Tyner, 141 Wn.2d at 88.

The Department claims that plaintiffs offered no evidence to establish that had DSHS provided other information to the court it would not have sent AA to Idaho. In so claiming, the Department claims that negligent parole supervision cases are "the analogous context" for understanding the present case, citing the case of *In Estate of Bordon v. Dep't of Corr.*, 122 Wn.App 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005). *Bordon* was a case where a parolee caused a motor vehicle accident that killed decedent Borden. The court found no liability because it was speculative as to whether, on the day of the accident, the parolee would have been in jail for parole violations for previous driving citations. *Bordon*, at least, is inapposite. The cases that are more analogous would be those regarding failure to protect and failure to warn. In the case of *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), a woman who had been

beaten up by her husband called the police for civil standby so that she could obtain her possessions from their home. The police said they would come and help. Twenty minutes later, as the woman was sitting in her vehicle awaiting the police, who had not yet even been dispatched, her husband came to her vehicle and shot her to death. The court stated as follows:

[T]he City contends that any connection between the City's acts and the murder is too remote to impose liability, and thus legal causation is lacking. The question of legal causation is a question of whether, as a matter of law, liability should attach given cause in fact, and involves considerations of logic, common sense, justice, policy and precedent. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 756, 818 P.2d 1337 (1991)[(failure to warn of dangers of aspirating baby oil)]. In light of *Chambers–Castanes* [*v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451, 39 A.L.R.4th 671 (1983)], this question has already been decided against the City. That is, the court has already recognized that liability may be premised upon assurances of police protection, and causation found when a municipality breaches its duty to provide that protection and as a result plaintiff is injured by a third party's criminal acts.

Beal, at 787–88. *Beal*, like the present case, also dealt with a special relationship exception to the public duty doctrine, though it did not cite a Restatement. It is noteworthy that the *Beal* court indicated on the facts that “cause in fact” existed. The *Ayers* case cited in *Beal* was a case of failure to warn, which is perhaps the even more analogous case to the present one. In the same way as *Beal* and *Ayers*, cause in fact exists in the present case because had social worker Watson—while standing next to AAG Collins as she misrepresented the facts to the court—advised the court that there were

indeed concerns of significant violence committed *by* Mr. Viles and not just “between” Mr. Viles and Ms. Wrigley, a jury could find that the court would not have sent AA to Idaho at that point. It appears, however, that social worker Watson was just following orders because defendant LaRosa (and perhaps AAG Collins) “told [him] not to say anything” or even “to correct misstatements of fact by the attorney general representing the department”. CP 706.

3. Whether DSHS would have uncovered abuse and neglect.

The Department also claims that plaintiffs offered no evidence that DSHS would have “uncovered abuse or neglect” had it investigated Mrs. Wrigley’s allegations of violence against Mr. Viles. Response/Cross-Appeal at 47. This is another example where a discussion of proximate cause and duty tend to run together. The Department has a stronger case regarding RCW 26.44.050 investigations if the court does not imply a duty to investigate whether a parent is capable of adequately caring for the child. However, the Department’s failure to investigate is more applicable to its duty under the special relationship exception to the public duty doctrine, as addressed in plaintiffs’ Reply, *supra* at page 7.

B. The trial court appropriately did not strike the expert opinion of Sonja Ulrich.

The Department cites *In re D.F.-M.*, 157 Wn.App 179, 236 P.3d 961 (2010), stating that the “procedures” of the ICPC do not apply to a biological

parent. Plaintiffs do not dispute that the ICPC is applicable to a biological parent, such as Mr. Viles in this case. That was explicitly acknowledged by plaintiffs' expert, Sonja Ulrich, CP 966, who stated:

Although it is true that the ICPC process would not be applicable to the case involving [AA], the result of this case is not a failure of the ICPC process, but a failure by the Department staff to adequately assess the risk and safety as well as the well being of [AA], who was in the care and custody of the Department of Children and Family Services (DCFS). Safety is paramount to all of the work done by CA.

In fact, the *D.F.-M.* case supports the plaintiffs because the Department in that case fulfilled its paramount obligation to the child to ensure it would be safe in its father's care.

But in the present case, AA was sent to live with his killer on January 30, 2012, CP 204, less than four months after the dependency was filed on October 5, 2011. CP 85. The Department made virtually no inquiry about Mr. Viles, who had never previously known AA. In fact, AAG Collins told the dependency court at the January 30 hearing, "As to Mr. Viles, other than the lack of pre-existing relationship, the department has no other concerns." CP 300, 703–704. Though he stood by and did not object as the AAG misrepresented the facts to the court, cf. CP 707–707, defendant Don Watson testified at deposition that the AAG did *not* accurately represent his position:

Because I had concerns about sending him off into the unknown. . . . We didn't know anything really about Mr. Viles. Not enough—I didn't feel that we knew enough about Mr. Viles to send

[AA] to him. A child he didn't know, a child who had significant behavioral issues that was demonstrating. To a parent he had never known. That we couldn't kind of maintain any type of follow-up.

CP 704. And six months and one week after the dependency was filed Mr. Viles beat AA such that he died the next day.

Unlike the callous disregard for AA's safety exhibited by DSHS in Clark County, the three-year-old child's welfare was taken seriously in *D.F.-M.*, whose father had not seen his child since he was seven months old. Four months after the dependency was filed in July, the Department had a home study completed, the father was employed, was near completion of a welding degree, his mother was available to provide child care, and he ended a relationship with a questionable girlfriend. By April, he had completed a parenting course, moved in with his mother, completed school, was no longer in contact with his ex-girlfriend, was maintaining his employment while looking for a welding job. By the end of May, he was having weekly phone contact with his son, had acquired a vehicle, obtained insurance, and was in the process of obtaining a driver's license. Thirteen and a half months after the dependency was filed, over the mother's objection, the court allowed the child to live with his father in Oklahoma. *D.F.-M.*, 157 Wn. App. at 184–85. In that case, the court had been provided material information sufficient to make the proper decision.

Sonja Ulrich pointed out the ICPC provided a useful template for DSHS to fulfill its obligation to assess for safety. In this regard, the trial court recognized Ms. Ulrich's expertise (and extensive experience in the social welfare system, CP 977-984) and properly did not strike her declaration.

The Department states somewhat disingenuously that "[t]here is no statute, regulation, policy or standard" that would have required it to contact Idaho for records regarding Mr. Viles. There is also no statute, regulation, policy or standard requiring DSHS to use common sense,⁴ but one would hope that has not been excised from the Department mindset.

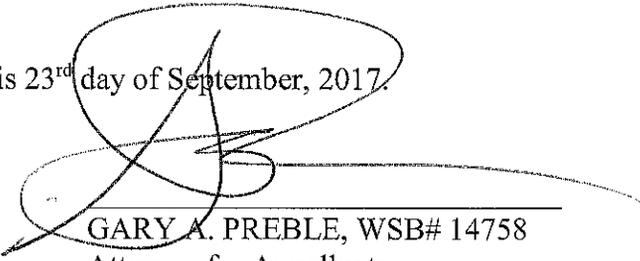
C. CONCLUSION

Based on the foregoing, the plaintiffs request the court to reverse the trial court's ruling on the absence of duty, and apply the rule of *HBH*, the intervening case adopting the Restatement (Second) of Torts, §315(b) that the Department had a special relationship duty to AA. The plaintiffs also request that the trial court's denial of plaintiffs' motion to amend be reversed because

⁴ The plaintiffs do not claim an assessment of an out-of state parent is necessary in all cases. Obviously the ICPC and the Department's safety assessment tool are available to the Department if needed. In the present case, however, the fact that AA was unknown to the father and had significant behavioral issues and needs should alone have led the Department to do more. It was certainly enough for social worker Watson to have been concerned. CP 704. But the additional fact of the father's unusual violence toward the mother CP 869-871, should have left no question in the Department's mind.

the inconvenience to the state is minimal and because, as a practical matter, even if time were an issue, there is now adequate time for the state to address, if necessary, the special duty doctrine. Finally, the plaintiffs request the court to reverse the dismissal of the negligence-based claims identified at CP 1598: wrongful death, all survival actions, negligent investigation, negligent training and supervision, and loss of consortium, and to deny the cross-appeal of the defendants.

Respectfully submitted this 23rd day of September, 2017.



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