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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JENNIFER L. TOBIN et al.,

Plaintiffs-Respondents,

v.

WASHINGTON STATE DEPARTMENT OF EARLY  
LEARNING et al.,

Defendants-Appellants.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

The State cannot be held liable in this case for its role in licensing and regulating day care facilities. The duty imposed on the Department of Social and Health Services (DSHS)<sup>1</sup> by the relevant statutes is a duty to the general public, not to a specific class of persons that includes these plaintiffs. The Tobins are unable to demonstrate any exception to the public duty doctrine and can point to no explicit remedy provided by the legislature. Because there is no private analog to the day care licensing and regulation exercised by DSHS here, there has been no waiver of sovereign immunity for those functions under RCW 4.92.090. The Tobins are unable to identify any other statutory waiver of sovereign immunity.

The trial court erred in ruling that the State could be liable in tort for its licensing of a day care, when the State's waiver of sovereign immunity does not extend to the licensing action at issue, and when the State's conduct did not fall within any exception to the public duty doctrine. As a matter of law, the licensing action at issue cannot give rise to tort liability, and the judgment below should be reversed with instructions to dismiss the complaint.

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<sup>1</sup> Effective July 1, 2006, the newly-created Department of Early Learning took over childcare licensing. *See* RCW 43.215. Prior to that date, and at the time of the events at issue here, childcare licensing was a DSHS function under RCW 74.15. For simplicity, DSHS and the Department of Early Learning will simply be referred to as DSHS in this brief.

## II. ARGUMENT

### A. Counter Statement Of The Standard Of Review

The issues that comprise this appeal fall into two distinct categories: (1) the denial of summary judgment on the issues of duty and sovereign immunity; and (2) the evidentiary and instructional errors that occurred at trial.

An appeal from the denial of summary judgment is governed by a de novo review standard. *Sheikh v. Choe*, 156 Wn.2d 441, 447-48, 128 P.3d 574 (2006). The State's entitlement to sovereign immunity on a negligent licensing claim and the existence of a legal duty are questions of law, subject to de novo review. *Id.* The trial court denied the defendants' motion for summary judgment based on its erroneous interpretation of the law, not because it found that there were any genuine issues of material fact. CP at 3221-26; RP (4/25/08) at 25-33.<sup>2</sup>

Whether Jury Instruction No. 19 is a comment on the evidence in violation of Wash. Const. art. IV, § 16 is also a question of law subject to de novo review. *See State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883

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<sup>2</sup> Contrary to the Tobins' assertion, the denial of summary judgment can be appealed after trial if the decision on summary judgment turned on a substantive legal issue. *See Bulman v. Safeway Inc.*, 96 Wn. App. 194, 198, 978 P.2d 568 (1999); *Reninger v. Dep't of Corrections*, 79 Wn. App. 623, 901 P.2d 325 (1995), *aff'd*, 134 Wn.2d 437, 951 P.2d 782 (1998); *McGovern v. Smith*, 59 Wn. App. 721, 801 P.2d 250 (1990).

(1998) (refusal to give a jury instruction based on a factual dispute is reviewed under an abuse of discretion standard, but a court's refusal to give an instruction based on a ruling of law is reviewed de novo).

The State agrees that the issues that relate to trial court evidentiary rulings (assignments of error 3 and 4) are governed by an abuse of discretion standard.

**B. The State's Assignments Of Error Are Clear And Its Legal Arguments Are Properly Before This Court**

The Tobins incorrectly assert that review of the merits is not appropriate because of flaws in the State's assignments of error. DSHS properly complied with RAP 10.3(a)(3) by concisely assigning error to each of the trial court's rulings it contends were erroneous. *See* Brief of Appellants (Br. Appellant at 8, 14). While parties are required to assign error to erroneous rulings upon which appellate review is sought, an additional assignment of error for every aspect of the harm and prejudice that results from each erroneous ruling is not required. The purpose of the rule is simply to allow the reviewing court to ascertain all errors the parties allege from an inspection of the briefs. *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 299, 261 P.2d 73 (1953); *Ranahan v. Gibbons*, 23 Wash. 255, 261, 62 Pac. 773 (1900).

The legal issues raised in the State's brief are clear. The issues in this appeal are the same as those raised at the trial court. The Tobins understood those issues well enough to devote roughly 70 pages to them.<sup>3</sup>

**C. The Legislature Has Waived Sovereign Immunity Only To The Extent That There Is A Comparable Recognized Cause Of Action Against A Private Entity And The State Remains Immune For Governmental Functions For Which No Private Analog Exists**

It is the legislature that has the constitutional power to delineate when and how the State can be subjected to suit for monetary damages.<sup>4</sup> The legislature exercised that power in enacting RCW 4.92.090, which unambiguously limits the State's "liab[ility] for damages arising out of its tortuous conduct to the same extent as if it were a private person or corporation." The Tobins argue that this language does not mean what it plainly states and does not mean that there has to be a private analogy for tort liability before the State's sovereign immunity can be deemed waived. See Brief of Respondent (Br. Resp't) at 36. In support of this assertion, they point to *Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007).

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<sup>3</sup> Mere ambiguity in legal issues does not prevent appellate review. See *Viereck v. Fibreboard Corp.*, 81 Wn. App. 579, 582-83, 915 P.2d 581, review denied, 130 Wn.2d 1009, 928 P.2d 414 (1996) (noting that RAP 1.2(a) calls for a liberal interpretation of RAP 10.3(a)(3): where the nature of an appeal is clear and the relevant issues are argued in the brief, there is no compelling reason not to consider the merits of the issues).

<sup>4</sup> See Wash. Const. art. II, § 26:

Suits against the State. The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.

In *Locke*, the court simply held that the waiver of sovereign immunity for municipalities in RCW 4.96.010<sup>5</sup> did not preclude the legislature from enacting RCW 41.26.281, which grants law enforcement officers and fire fighters the “right to sue” their employers for damages over the amount received under worker’s compensation. *Locke*, 162 Wn.2d at 481. The court agreed that under RCW 4.96.010 municipalities may not be liable for breaches of duties not generally existing for private entities and held that the right to sue provision in RCW 41.26.281 did not create a new municipal duty not otherwise existing for private parties. *Id.*

The legislature has always been empowered to differentiate between private persons, corporations, and government in creating statutory tort liability. Indeed, even before the enactment of RCW 4.92.090 in 1961, the legislature had selectively waived sovereign immunity for the State in certain limited situations. *See, e.g.*, RCW 73.16.015 (civil action created in 1951 to enforce veteran’s preference rights); RCW 47.60.200-.270 (creating causes of action for ferry system employees and passengers against the Toll Bridge Authority). Even after the general waiver of sovereign immunity in 1961, legislative

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<sup>5</sup> Language limiting the waiver of sovereign immunity in RCW 4.96.010 for municipalities is identical to the language contained in RCW 4.92.090, “to the same extent as if they were a private person or corporation.”

enactments have been construed to create liability that is unique to government. *See, e.g., Tyner v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (RCW 26.44.010, and .050 created tort cause of action negligent investigation of child abuse); *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (RCW 46.61.035 created a tort duty for persons operating emergency vehicles to act with due regard for the safety of others).

The fundamental flaw with the Tobins' analysis is that it confuses the power of the legislature to statutorily create specific liabilities for state and local government with the limitation on the waiver of sovereign immunity in RCW 4.92.090. In waiving sovereign immunity, the legislature did not create any new liability. *J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304, 669 P.2d 468 (1983).<sup>6</sup> The language in RCW 4.92.090 that makes the state liable “. . . to the same extent as if it were a private person or corporation” is a direction to the **courts** not to subject the state to liability for which there is no private sector analog.<sup>7</sup>

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<sup>6</sup> Although *J&B's* holding that a special relationship could arise from an implied assurance has been specifically overruled, its holding that the legislature did not create any new liability has not been overruled. *See Meany v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988); *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 759 P.2d 447 (1988).

<sup>7</sup> The requirement of a private sector analog in order to have liability under the State's waiver of sovereign immunity is well established. *See Edgar v. State*, 92 Wn.2d 217, 226, 595 P.2d 534 (1979), *cert. denied*, 444 U.S. 1077 (1980) (it is incumbent on a person asserting a claim against the State to show the conduct would be actionable if done by a private person in a private setting); *Morgan v. State*, 71 Wn.2d 826, 827, 430 P.2d 947 (1967) (judgment for the State based on RCW 4.92.090 affirmed because

Yet that is the exact error committed by the trial court, subjecting the State to liability for negligent regulation and licensing of a day care, a function for which there is no private sector analogy or private sector liability. The regulation and licensing of day cares is quintessentially the type of governmental function for which the legislature did not waive the State's sovereign immunity. *See Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007) (no duty to license day care for the benefit of those using the facilities).

The position the Tobins advocate—that no analogy to a private function is required under RCW 4.92.090—was tacitly rejected by the supreme court in *J&B*. Justice Utter, concurring in result, criticized the majority's application of the public duty doctrine and the special relationship exception, arguing instead that a general duty analysis should apply. In addressing the legislature's waiver of sovereign immunity, Justice Utter recognized that where a unique public function is involved, drawing an analogy to comparable private functions is impossible; he would have applied standard tort analysis even where no analogy could be

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Morgan did not cite a case where a private individual would have liability for comparable conduct—failure to erect a fence to protect children from wandering onto highway); *Bergh v. State*, 21 Wn. App. 393, 400, 585 P.2d 805 (1978), quoting *Loger v. Washington Timber Products, Inc.*, 8 Wn. App. 921, 928, 509 P.2d 1009 (1973) (citing cases recognizing that RCW 4.92.090 “does contain limitations and that the State is liable only for tortious conduct that would render it liable if it were a private person or corporation”).

drawn to a private function. *J&B*, 100 Wn.2d at 311. No other justice signed Justice Utter's concurrence. Significantly, the majority in *J&B* did not apply a "standard tort analysis." Instead, the court analyzed the issue of duty under the public duty doctrine, as it has consistently done for more than 30 years.

If the explicit limitation on the legislature's waiver of sovereign immunity in RCW 4.92.090 is to be given effect, when a tort lawsuit is brought against the State, the starting point in the court's analysis should be whether the plaintiff can show a waiver of the State's sovereign immunity. *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006). This can be accomplished in one of two ways: either by showing that the legislature has specifically, by statute, created a tort cause of action against government<sup>8</sup>; or by showing that under the common law there is a private entity analog for the liability asserted against the State. The Tobins do not even attempt to argue the existence of a private sector analogy for liability on their theory of negligent licensing and regulation of a day care. There is none.<sup>9</sup>

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<sup>8</sup> RCW 4.92.090 created no new cause of action. *Edgar v. State*, 92 Wn.2d at 228.

<sup>9</sup> See *McMann v. Benton Cy. Angeles Park Cmty. Ltd.*, 88 Wn. App. 737, 946 P.2d 1183 (1997) (landowner does not owe a duty to fence to protect invitees from a pond on adjacent property).

When, as here, the State is performing a regulatory function for which there is no private sector liability, the conduct at issue is outside the State's waiver of sovereign immunity. The trial court erred, failing to grant the state summary judgment based on sovereign immunity.<sup>10</sup>

**D. DSHS' Statutory Authority To Regulate Day Cares Does Not Give Rise To Duties Owed To Individual Plaintiffs**

Although the Tobins devote roughly 70 pages to analysis of underlying statutes and the public duty doctrine, for the most part they fail to address key points raised by DSHS in its opening brief:

- The Tobins fail to respond to DSHS's argument that they abandoned claims based on the special relationship and volunteer rescue because they did not propose jury instructions on those theories of liability. *See Browne v. Cassidy*, 46 Wn. App. 267, 269-70, 728 P.2d 1388 (1986) (plaintiff's failure to propose jury instructions on her partnership liability barred recovery on that theory).

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<sup>10</sup> On page 41 of Br. Resp't, n.8, DSHS is criticized for citing *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). However, the only citations to the *Evangelical* decision, on pages 12 and 13 of Appellants Brief, are in passages quoted from the supreme court and this Court. *Evangelical* specifically notes two limitations on the State's waiver of sovereign immunity: (1) the doctrine of discretionary immunity; and (2) the requirement for a private sector analog. It is the latter that is pertinent to the issue at bar. *See McClusky v. Handorf-Sherman*, 125 Wn.2d 1, 11, 882 P.2d 157 (1994), citing *Evangelical*, 67 Wn. 2d at 252 (under RCW 4.92.090, State government is liable for damages only when conduct is analogous to the chargeable misconduct and liability of a private person or corporation).

- The Tobins fail to explain how the *Bennett v. Hardy* test<sup>11</sup> is applicable since, in the regulatory context, a duty must be explicitly created by the legislature rather than through implication. See *Baerlein v. State*, 92 Wn.2d 229, 231, 595 P.2d 930 (1979).
- The Tobins fail to address the argument that the failure to enforce exception cannot be premised on a regulation, but rather must be based on a statute, a requirement they unequivocally fail to satisfy.
- More importantly, the Tobins fail to address why underlying principles of the public duty doctrine—(1) prevention of excessive governmental liability, and (2) the need to avoid hindering governmental process, *J&B*, 100 Wn.2d at 304—are not controlling here, given that the dual purposes of regulating day cares are to generally improve conditions in the day care industry by regulating to promote safety and also ensure a sufficient number and types of day care facilities.

**1. Whether A Duty Was Owed To Plaintiffs In This Case Is An Issue Of Law**

The threshold determination in any claim of negligence is the existence of a duty owed to a plaintiff. *Taylor v. Stevens Cy.*, 111 Wn.2d at 163. This determination is a question of law. *Donohoe*, 135 Wn. App.

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<sup>11</sup> *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

at 833, citing *Tincani v. Inland Empire Zoological Soc'y.*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994).

The Tobins seek to avoid review by arguing that certain questions regarding the public duty doctrine depend on factual determinations that cannot be reviewed on appeal because of a lack of specific jury instructions or a proper objection to the verdict. This argument is without merit. Whether a duty was owed to the Tobins in this case depends on statutory interpretation and application of case law analyzing the public duty doctrine. It does not depend upon factual determinations by the jury.

While in some instances, factual determinations may be material to establish an exception to the public duty doctrine, those sort of factual questions are not present here. For instance, whether an express assurance gave rise to a special relationship may be a factual question if there is a dispute as to the content of the alleged assurance. By contrast, in this case, the nature of the communication on the DSHS 1-800 referral line is irrelevant because the question is whether generalized information given out on such a telephone line is legally insufficient to form the legal basis of a special relationship exception. Similarly, whether, under the failure to enforce exception, a duty can be premised on a WAC does not turn on how the jury interpreted WAC 388-155-295(5). The source of

the error is not the jury's interpretation, but rather the fact that the jury was allowed to interpret the WAC at all, because interpretation of a WAC is a question of law. *Postema v. Pollution Control Hearings Bd.*, 142 Wash.2d 68, 86, 11 P.3d 726 (2000); *Whidbey Island Manor, Inc. v. Dep't of Soc. & Health Serv.*, 56 Wn. App. 245, 250, 783 P.2d. 109 (1989). Whether a duty was owed to the Tobins in this case depends on statutory interpretation and application of case law analyzing the public duty doctrine. It does not depend upon factual determinations by the jury.

**2. The Legislative Intent Exception Does Not Apply Because RCW 74.15 Does Not Show A Clear Intent To Protect A Narrow And Circumscribed Class**

The legislative intent exception to the public duty doctrine applies when a plaintiff shows that the legislature showed a "clear intent to identify and protect a particular and circumscribed class of persons," rather than the health, safety, and general welfare of the public. *Taylor*, 111 Wn.2d at 166.

The Tobins are unable to point to any language creating an express remedy for any particular class of persons and instead try to treat the underlying statutes as something other than a regulatory scheme. However, the day care licensing scheme at issue in this case is indistinguishable from the licensing scheme applicable to nursing homes

that this Court found did not give rise to a duty under the legislative intent exception. *Donohoe*, 135 Wn. App. at 846-48. As pointed out in DSHS's opening brief, the purpose of both schemes is to generally improve conditions in the regulated facilities through the promulgation of rules and regulations establishing minimum standards that are enforced through licensing and periodic inspections.<sup>12</sup> The Tobins assert that *Donohoe* is "very different" because the purpose of the nursing home regulations is to "promote safe and adequate care" while the purpose of the day care regulations is to "safeguard the health, safety and well-being of children". Br. Resp't at 51. Yet, in the regulatory context, there is no difference between "promoting" safety and "safeguarding" safety.<sup>13</sup> Moreover, neither statute's terminology is mandatory language explicitly creating a remedy as required under the legislative intent exception. *Baerlein*, 92 Wn. 2d at 231.

The Tobins miss the point when they try to distinguish *Donohoe* by suggesting that the purpose of safety supercedes any other purpose in

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<sup>12</sup> Contrary to the assertion raised at Br. Resp't at 51, RCW 18.51 does in fact impose requirements on DSHS and not "the facility" in much the same fashion as RCW 74.15, in that it directs "the department" to engage in various regulatory activities. See, e.g., RCW 18.51.050, .054, .060, .070, .091.

<sup>13</sup> According to Webster's Dictionary, the term "safeguard," as used in this context, means a "precautionary measure." *Webster's II New Riverside University Dictionary* 1030 (1984). "Precaution" is an action taken in advance to protect against a possible danger. The term "promote" means, in this context, "to contribute to the progress" or to "further." In terms of the duties imposed by the legislature, there is no distinction between "safeguarding" for safety and "promoting" safety.

RCW 74.15.010. In analyzing the legislative intent exception, the point is not which of the multiple purposes trumps, but that there are in fact multiple, competing purposes that demonstrate the legislature’s deliberate balancing of the interests of users of day care, their parents, and the “community at large” rather than an intent to create a duty toward one narrow class. *See* RCW 74.15.010(5). *Donohoe* is on dispositive because it demonstrates the application of the public duty doctrine to a regulatory scheme that involves licensing and regulatory oversight.

Furthermore, if the legislature had enacted this legislation for the purpose of guaranteeing the safety of all children who receive out-of-home care, or even if that were the “paramount” reason, as the Tobins assert, the legislature logically would have extended the day care “safeguards” to all facilities where children receive out-of-home care. Under RCW 74.15.020(2), numerous types of facilities or childcare providers are exempt from regulation. Notably, a person can watch a friend’s or neighbor’s child(ren) for compensation as long as it is not done at regularly scheduled intervals for the purpose of engaging in business. WAC 388-155-020(2) and (3)(a).<sup>14</sup> Accordingly, the legislature deliberately chose not to regulate and license all homes where day care is

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<sup>14</sup> *See also* RCW 43.215.010(2)(e), part of the current statutes governing the Department of Early Learning, which exempts nursery and preschool facilities operating less than four hours per day.

provided. Indeed, even for those day care facilities that the legislature chose to regulate, the primary focus of the licensing standards is on the qualifications of the providers. Standards for the actual day care facilities inherently recognize that the responsibility for the day-to-day operation is necessarily left to the providers who must exercise the appropriate skill and oversight to ensure the safety and welfare of the children entrusted to their care. The licensing standards do not purport to supplant the need for close onsite supervision of children in a day care setting. Accordingly, the legislature struck a compromise, making it clear their intent is to license day care facilities but not to guarantee the protection of all children receiving out-of-home care. Had the latter been the legislature's intent, there would be no explanation for the large class of exempted childcare activities.

Unable to point to language creating an express remedy for a narrowly circumscribed class, the Tobins attempt to import the inapplicable *Bennett v. Hardy* test into the regulatory environment.<sup>15</sup> As set forth in Br. Appellant at 26-29, the *Bennett* test does not apply to a

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<sup>15</sup> Under the *Bennett* test, the plaintiffs would have to establish (1) that they fall within the “class for whose ‘especial’ benefit” chapter 74.15 RCW was enacted, (2) that the legislative intent underlying chapter 74.15 RCW “explicitly or implicitly, supports creating or denying a remedy,” and (3) that the damages they seek are “consistent with the underlying purpose of the legislation.” *Id.* at 920-21 (quoted with approval in *Braam v. State*, 150 Wn.2d 689, 711, 81 P.3d 851 (2003) and *Sheikh v. Choe*, 156 Wn.2d at 457).

comprehensive regulatory and licensing scheme because the “legislative intent [in such a scheme] must be clearly expressed, not implied.” *Donohoe*, 135 Wn. App at 844 (citing *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998)).

The Tobins erroneously cite to cases involving statutory schemes intended to remedy a specific type of harm by mandating a governmental response for the benefit of a particular class of people. Accordingly, their reliance on *Yonker By & Through Snudden v. State Dep’t of Soc. & Health Servs.*, 85 Wn. App. 71, 78, 930 P.2d 958 (1997), and *Donaldson v. City of Seattle*, 65 Wn. App. 661, 666-68, 831 P.2d 1098 (1992), is misplaced.

In *Yonker*, the court recognized a claim for “negligent investigation” based on RCW 26.44 by a young girl who had been sexually molested by her father. While a claim for negligent investigation generally is not allowed in Washington, a single exception has been recognized for social workers or law enforcement officials conducting child abuse investigations pursuant to RCW 26.44.050. *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 595-97, 70 P.3d 954 (2003); *Tyner*, 141 Wn.2d at 79-81. Under RCW 26.44.050, DSHS and law enforcement are specifically directed to investigate families where child abuse or neglect has been alleged in order to protect children from the harm that results from abuse and/or neglect. Because the claim for negligent investigation in this

instance originates in statute, it is necessarily limited to remedying the injuries the statute was meant to address: “the use of incomplete or biased information gathered by DSHS social workers that results in a harmful placement decision.” *M.W.*, 149 Wn.2d at 602.<sup>16</sup>

In *Donaldson*, the issue was whether the Domestic Violence Prevention Act (DVPA) imposed a duty on city of Seattle police officers to protect victims of domestic violence. *Donaldson*, 65 Wn. App. at 667. The court held a limited duty was created by language in RCW 10.99.010 that the “purpose of” the DVPA amendments at issue was “to assure the victim of domestic violence the maximum protection from abuse which the laws and those who enforce the law can provide . . . .” *Id.*, quoting RCW 10.99.010. The duty to arrest recognized in *Donaldson* was limited to a four-hour time span specifically provided by the statute.

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<sup>16</sup> Outside the context of child abuse investigations pursuant to RCW 26.44.050, Washington courts have consistently refused to imply actionable tort duties from other child welfare statutes. *Sheikh*, 156 Wn.2d at 447-48. (Social workers do not have the obligation enforceable in a tort action to protect third-party members of the community from the harm caused by dependent children because the statutes were not enacted for that purpose); *Linville*, 137 Wn. App. at 211-13 (no implied legislative intent in day care insurance statutes to create a remedy against the State for child sexual abuse victims who allegedly were abused in licensed day care facilities); *Terrell C. v. State 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); *Blackwell v. State Dep’t of Soc. & Health Servs.*, 131 Wn. App. 372, 378-79, 127 P.3d 752 (2006) (foster parents are not entitled to bring negligent investigation claims based on the removal of foster children from their home); *Pettis v. State*, 98 Wn. App. 553, 990 P.2d 453 (1999) (negligent investigation does not extend to owner/operator of a day care facility because extending the tort of negligent investigation in that context is contrary to legislative intent).

These cases demonstrate the distinction between a statute specifically identifying a class imposing duties to protect that class, and a statutory scheme imposing regulatory duties such as RCW 74.15. The Abuse of Children statute, RCW 26.44, specifically targets those who may be victims of child abuse and/or neglect and their families and directs specific action in the form of an investigation and alternative placement if appropriate. The DVPA specifically identifies a group, victims of domestic violence, and specifically directs that “maximum protection” afforded under the law will be provided. *Donaldson*, 65 Wn. App. at 667-68.

In contrast to those statutes, RCW 74.15 does not identify a specific action to be taken to protect an identified group from identified harm. Rather, like other general regulatory schemes, it seeks to reduce the general risk of harm through application of minimum licensing standards. As a result, neither *Yonker* nor *Donaldson* supports the proposition that the *Bennett v. Hardy* test applies within the context of a public duty analysis.<sup>17</sup>

Even if the *Bennett* test were applicable, its criteria are not met.

The first *Bennett* criterion is not met because RCW 74.15 was not enacted

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<sup>17</sup> The Tobins, in Br. Resp’t at 66, seize on a discussion of RCW 74.15.010(5) in *Sheikh*, 156 Wn.2d at 452, to advance their contention that RCW 74.15.010 was enacted for the circumscribed class of parents and children. In *Shiekh*, a plaintiff sought to hold DSHS liable for injuries incurred when two foster children severely beat the plaintiff, causing permanent brain injuries. The court rejected the argument that RCW 74.15.010 created a special relationship between social workers and foster children, and rejected the claim that this statute, and others underlying foster care, create a private right of action or create a take-charge relationship giving rise to a special relationship upon which a tort action could be based. *Id.*

for the “especial” benefit of the individual plaintiffs. The multiple purposes of the childcare licensing statute include the goal of making day cares safer, while at the same time promoting the availability of day cares for families in need of such services. RCW 74.15.010(1)-(5); *see also Donohoe*, 135 Wn. App. at 846-48. Accordingly, the statute was not created for the “especial” benefit of children in day cares and their parents.<sup>18</sup>

The second criterion is not met because RCW 74.15 contains no language that supports, explicitly or implicitly, creating a cause of action in tort for recipients of day care services. To balance the multiple purposes of the regulatory scheme, the legislature requires DSHS to set minimum licensing requirements—not “best practice” or “maximum safety” requirements—and directs DSHS to grant license applications if those minimum licensing requirements are met. If DSHS decides such requirements are not met, the licensee has administrative appeal rights. RCW 74.15.130.<sup>19</sup>

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<sup>18</sup> State regulation of day care facilities must be in accordance with federal block grant funding requirements. 45 C.F.R pt. 98, subpart J., [http://www.del.wa.gov/publications/research/docs/CCDF\\_Plan\\_2009](http://www.del.wa.gov/publications/research/docs/CCDF_Plan_2009). Any state rules or requirements that cause a reduction in availability of care would be contrary to congressional intent. E.g., requiring automatic sprinkler systems. 57 Federal Record, 34352 at 50-51.

<sup>19</sup> Had the legislature intended to impose upon DSHS tort liability based on its decisions in licensing day cares, it would not have given administrative appeal rights to providers and put the burden on DSHS to have its denial decision upheld on review before an administrative law judge. RCW 74.15.130(4).

The third *Bennett* criterion does not apply either. The monetary damages the plaintiffs seek are not consistent with the underlying regulatory purpose and intent of the statute. It is not intended to be a form of state-funded insurance for harm that occurs while in the care of providers who have allegedly failed to meet licensing standards. See *Donohoe*, 135 Wn. App. at 846 (nursing home statutes did not create tort remedy). Nor is the regulatory statute meant to be a sword for a tort plaintiff to use against the regulating authority. See *id.* at 851, n.20 (legislature did not intend to impose “an actionable duty on DSHS in the nursing home regulatory context”).

In *Braam v. State*, 150 Wn.2d 689,711-12, 81 P.3d 851 (2003) the supreme court held that three child welfare statutes, RCW 74.13.250, 74.13.280 and 74.14.A.050(2), did not create actionable duties owed by DSHS. *Braam* was based on allegations that DSHS violated foster children’s rights because they were subject to multiple placements within the foster care system. The *Braam* court concluded there is “no evidence of legislative intent to create a private cause of action, and that implying one is inconsistent with the broad power vested in DSHS to administer these statutes.” *Braam*, 150 Wn.2d at 712.

The same analysis applies here. Judicially imposing a generalized duty of care for all children in day care by allowing juries to make *ad-hoc*

decisions based on hindsight is contrary to the policy underlying the public duty doctrine, undermines the regulatory scheme, and would interfere with the broad powers vested in DSHS to administer the day care regulatory scheme. For instance, based on jury questions, liability could have been imposed because DSHS failed to require more supervisors (CP at 3820), failed to require electric doors with key pads (CP at 3832), failed to apply the rules to ensure “optimum” safety (CP at 3843), or failed to regulate beyond the minimum licensing requirements (CP at 3805), all of which would interfere with the broad powers to establish and enforce regulations. Tort liability simply cannot be based on a disagreement with the regulatory scheme. Therefore, even under the *Bennett* test, the Tobins’ “negligent licensing” theory fails because there is no remedy implied by statute.

Whether analyzed under the legislative intent exception to the public duty doctrine, or under the *Bennett v. Hardy* test, RCW 74.15.010 does not demonstrate a legislative intent to explicitly, or implicitly, create an actionable tort duty.

**3. The Failure To Enforce Exception Is Not Applicable Because There Is No Statutory Duty To Correct A Known Violation**

“The failure-to-enforce exception applies ‘where governmental agents responsible for enforcing statutory requirements possess actual

knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute is intended to protect.”” *Donohoe*, 135 Wn. App. at 848-49; *Halleran v. Nu West Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004). In the present case, there is no statutory violation or statutorily imposed mandatory duty to act that the Tobins can point to.<sup>20</sup> Instead they allege that DSHS violated its own regulations addressing water hazards and contend that this “regulatory” violation suffices as a statutory violation and that, as a result, DSHS had a mandatory statutory duty to deny a license to Lisa Fish.

The primary flaw in the Tobins’ analysis is that a regulation enacted by an agency to promote health and safety cannot and should not form the basis of tort liability under the failure to enforce exception. In its opening brief, DSHS explained that a regulation cannot be used to support the failure to enforce exception because to do so effectively would allow an agency to set the parameters of its own tort liability. Br. Appellant at 37. The Tobins completely failed to respond to this argument. The Tobins cited no authority for the proposition that a “regulatory” violation is equivalent to a statutory violation, and no such authority exists. Courts

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<sup>20</sup> The Tobins incorrectly assert that they were within the class of persons the statute was intended to protect. *See Bailey v. Town of Forks*, 108 Wn.2d at 262, 737 P.2d 1257 (1987). As discussed at pages 12-21 of this brief, the statute created a regulatory for the general betterment of day cares, which benefits society as a whole, but was not aimed at a particular class.

construe the failure to enforce exception narrowly, and it applies only where there is a mandatory duty to take a specific action to correct a known statutory violation. *Donohoe*, 135 Wn. App at 848-49.

The very proposition of basing the failure to enforce exception on a regulation defeats the purpose of the public duty doctrine by creating a chilling effect on the government's implementation of a regulatory scheme that protects public welfare.<sup>21</sup> *Taylor*, 111 Wn.2d at 171; *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 561-62, 104 P.3d 677 (2004). Indeed, the Tobins' theory of the case illustrates exactly why liability should not be premised on regulations adopted to implement an agency's discretionary authority.

The Tobins' premise liability in this case, in part, on their interpretation of former WAC 388-155-295(5), which provided:

(1) The licensee must maintain the following water safety precautions when the child uses an on-premises swimming pool or wading pool. The licensee must ensure:

(a) The on-premises pool is inaccessible to the child when not in use; and

(b) An adult with current CPR training supervised the child at all times.

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<sup>21</sup> The Tobins' argument that the existence of a duty turns on the factual determination made by the jury, which was allegedly waived because it was not appealed, is meritless. The jury does not determine the existence of a duty and the point is not whether the jury's interpretation of a WAC triggered a duty, but that regardless of the jury's interpretation, a regulation cannot give rise to a duty under this exception. In short, the jury's interpretation is irrelevant to the question of whether there was a duty. The question of duty should have been resolved in favor of DSHS on summary judgment, prior to trial.

(2) The licensee must ensure a certified lifeguard is present during the child's use of an off-premises swimming pool.

(3) The licensee must empty and clean a portable wading pool daily, when in use.

(4) An adequate, department-approved cover or barrier, installed at the manufacturer's specification must be in place to prevent the child access at all times to heated tubs, whirlpools, spas, tanks, or similar equipment.

(5) A five foot high fence with gates, locked when not in use, is required to prevent access to water hazards, such as swimming pools, lakes, streams, or natural or artificial pools.

WAC 388-155-295.

The gist of the Tobins' claim is that because Gabriel made his way to Lake Tapps, he had "access" to a water hazard, and WAC 388-155-295(5) therefore required the erection of a five foot fence in the front yard to prevent such access. However, the Tobins' interpretation is contrary to DSHS's interpretation and is also contrary to the understanding of witnesses with experience in day care licensing. Substantial weight is given to an agency's interpretation of its own regulations. *Whidbey Island*, 56 Wn. App. at 250. Leslie Edwards-Hill, who was responsible for drafting WAC 388-155-295(5), testified both that the rule was never intended to require front yard fencing where the lake is across the street

from the day care, and that she did not read the rule to require a fence in the front yard of Lisa Fish's property. RP at 1229 l. 24 to 1230 l. 8.<sup>22</sup>

In the context of family home day care licensing, the term "access" only pertains to those areas of the facility where day care is to be provided because the regulations assume there will be constant supervision to prevent children from leaving those areas. RP at 1110 l. 13 to 1112 l. 1; 1208 l. 5 to 1209 l. 8; RP at 1219 l. 5 to 1220 l. 22. Every witness with experience in licensing day cares agreed with this point. *See* RP at 514 l. 20 to 516 l. 6 (licensor Cichowski); RP at 624 l. 11 to 626 l. 18 (licensor Berdecia)<sup>23</sup>; RP at 767 l. 3 to 768 l. 24 (licensing supervisor Mary Kay Quinlan)<sup>24, 25</sup>; RP at 866 l. 18 to 867 l. 3 (policy program manager Mary

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<sup>22</sup> Edwards-Hill was the licensing program manager responsible for drafting the day care regulations. RP at 1200 ll. 2-3. She served on a committee made up of family childcare providers, children's organizations, the Department of Health and local health departments, the Fire Marshall's office, and licensors (RP at 1168 ll. 17-26), which met monthly from October 1997 until late 1999 to review and discuss every regulation to determine if the regulation was necessary and if it could be more clearly written. RP at 1167 ll. 3-13; 1168 l. 15 to 1169 l. 14.

<sup>23</sup> The Tobins make much of the troubled employments of Cichowski and Berdecia. But while the licensing checklist form used by Cichowski did not reflect the updated version of the regulations in effect at the time of licensing, the use of the "outdated form" is immaterial because, as a matter of fact, Lisa Fish's home was in compliance with the licensing requirement that existed at the time of licensure.

<sup>24</sup> The Tobins repeatedly referred to Ms. Quinlan as an expert in the interpretation of regulations. *See, e.g.*, RP at 696 ll. 4-20; 733 l. 25 to 734 l. 2.

<sup>25</sup> The Tobins assert at page 14 of their brief that Quinlan called Lake Tapps a "huge hazard," implying that she supported the requirement for a fence at Little Fish day care. That implication is misleading. This statement comes from Quinlan's deposition during which she stated that, while Lake Tapps was a "huge hazard," there are many hazards that exist out the front door of a house, that front yard fencing was not required to guard against any of these hazards, and that supervision was relied upon in order to keep the children where they were supposed to be. CP at 1639-40.

Oakden).<sup>26</sup> Ms. Logan, the Tobins' expert, agreed that children who are supervised do not have "access" to off-premises hazards and only have "access" to the areas of the licensed areas of the day care where childcare is to be provided. RP at 1112 l. 6 to 113 l. 6.<sup>27</sup>

The regulatory scheme did not require front yard fencing because there was a lake across the street, the Puget Sound down the hill, or to prevent a child from encountering any of the myriad hazards which exist outside the front door of every family home day care. RP at 764 l. 4 to 766. *See also*, RP at 1207 l. 21 to 1208 l. 7; 1220 ll. 18-22; RP at 764 l. 9 to 765 l. 6; RP at 1122 ll. 8-4; RP at 764, l. 14 to 765, l. 4. To protect against those hazards, the regulations instead imposed supervision requirements on providers. RP at 871 ll. 1-11. Accordingly, no fence was required in the front of Lisa Fish's property. RP at 766 ll. 16-23.

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Similarly, the assertion at page 24 of the response brief that "Ms. Quinlan told Ms. Tobin that Mr. Berdecia failed to properly apply the regulations" is even more misleading. The Tobins base this assertion on Quinlan's silence during a conversation with Mrs. Tobin after Tobin stated that Berdecia had told her that the water hazard had to be on premises to trigger the fencing requirements. *See* RP at 1747-48. Silence simply does not translate to "telling" Ms. Tobin that Berdecia failed to properly apply the regulations. Furthermore, Jennifer Tobin denied in deposition that Quinlan ever told her that there should have been a fence in the front yard of Lisa Fish's home. CP at 2901.

<sup>26</sup> Ms. Oakden was charged with re-writing the regulations in existence at the time of Lisa Fish's license. This task required that Oakden interpret WAC 388-155-295(5).

<sup>27</sup> The Tobins' other expert, Katherine Kent, gave conflicting definitions of "access." She testified initially that "access" meant "be able to get to it," but after being questioned whether that meant that a day care provider was required to cover all the hot tubs in the neighborhood because a child could "get to it" per WAC 388-155-295(4), Kent changed her definition of "access" to mean "what you can reasonably see from the day care." RP 912 l. 23; 914, l. 8; 917 l. 19.

The Tobins argue WAC 388-155-295(5) must apply to hazards off the premises because it is “clear” that the other four subparts apply to the “premises.” Br. Resp’t at 47. Subparts (1) and (3) address swimming pools and wading pools on the premises. Subpart (2) addresses swimming pools off-premises, to which children would have access on an outing. Subpart (4) addresses heated tubs, whirlpools, and spas to which children might have access on the premises; that subpart cannot reasonably be understood as requiring a licensee to cover all heated tubs, whirlpools, and spas in the neighborhood, even though it does not specify “premises.” Subpart (5) addresses water hazards such as swimming pools, ponds, and streams, without regard to whether they are on the premises or not; because the rules assume children will be supervised to make sure they stay within the childcare area, including a fenced outdoor play area when outside.<sup>28</sup>

The Tobins cite portions of various licensing files that they claim impeach DSHS’s contention that a fence was not required in the front of Lisa Fish’s home. Br. Resp’t at 59. Contrary to the Tobins’ assertion, those exhibits actually provide examples of decisions licensors made in

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<sup>28</sup> *Cf.* former WAC 388-155-320 (requiring provider to maintain fences outdoor play area, to keep preschool children in visual and auditory range when outside, and to keep school-age children in auditory range).

correctly applying WAC 388-155-295(5), and they are consistent with the decision to license Lisa Fish's home.

Several of the exhibits demonstrate application of WAC 388-155-295(5) when there was an ornamental pond on the provider's property.<sup>29</sup> An ornamental pond on the property presents a hazard even to supervised children. RP at 716. As explained by Mary Kay Quinlan (a licensing supervisor described by the Tobins as an expert in licensing regulations, *see, e.g.*, RP at 696), an ornamental pond, even if not in the play area, presents a hazard to a supervised child because, for example, it is accessible to a child walking back and forth to the car during a time in which parents and providers could be having a conversation, which often occurs. RP at 703 ll. 1-25; 769 l. 13 to 770 l. 17; 772.<sup>30</sup> RP at 716. The regulation thus requires a pond located on the property, but outside the play area, to be fenced off by a five-foot-high fence or covered by a grate. RP at 772; 816 ll. 11-14.

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<sup>29</sup> *See* Ex. 60 (Compliance agreement allowed for fencing modifications); Ex. 61 (wood grate over the pond in lieu of building a five-foot-high fence allowed); Ex. 62 (provider required to build a wood grate or a five-foot-high fence to prevent access to a pond); Ex. 82 (the provider and licensor agreed a grate over the pond was sufficient protection); Ex. 83 (a five-foot-high fence needed to prevent access to a pond on the side yard of the provider's property); Ex. 84 (five-foot-high fence required to be built around a pond located on provider's property). Ex. 82 provides an illustration of the balancing a licensor may do to accommodate a day care provider who would have to quit the business rather than erect a five-foot-high fence. Supp. CP at 446-47. The grate prevents access to the water.

<sup>30</sup> In fact, as shown in Ex. 13, which is a Departmental Clarification regarding water hazards, drowning most often occurs when children are supervised and in only a few inches of water. CP at 49.

There are also examples in the record of homes licensed where there was an off-premise water hazard. In each case, WAC 388-155-295(5) was applied to ensure the play area was fenced, not the entire property. Ex. 69 is from a licensed home that had a slough across the street from the day care. In compliance with WAC 388-155-295(5) and consistent with the licensing of Lisa Fish's home, the provider was required to raise the play area fence from four feet to five feet; fencing was not required around the entire property. RP at 773. Similarly, Exhibit 78 involved a reservoir located on the back side of the provider's property, on the other side of a three-foot fence. To bring the provider into compliance, the fence had to be raised to five feet high. RP at 775. Other examples are noted in the margin.<sup>31</sup> These examples show consistent application of WAC 388-155-295(5).

None of the exhibits show a property where a fence was required to be erected in the front yard of a house with an appropriately-fenced

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<sup>31</sup> Ex. 59 (the provider, rather than erect a five-foot fence around a play area that would have washed away during winter floods, opted to eliminate that area of property as a play area and a five-foot-high fence was required only around the designated play area. RP at 771-72); Ex. 74 (a home situated on a lake front where covenants precluded fences more than four-feet-high in the backyard bordering the lake; the provider located the play area in the front yard and was required to have a five-foot-high fence around the play area. Supp. CP at 375); Ex. 80 (a five-foot-high fence was required around the outdoor play area because there was a stream nearby).

The Tobins cite Ex. 77 and suggest that defendant Amy Cichowski required a fence to be erected "between home and a roadway." Br. Resp't at 59. This is incorrect. Ex. 77 simply shows that "[o]utdoor play area needs to be fenced preventing children from getting out the area w/o an adult and exposure to roadway." There was no requirement to fence the entire property because of a roadway.

back yard play area because there was a lake, slough, or stream in the neighborhood.<sup>32</sup> None of the testimony shows that DSHS ever interpreted its own rule to require a fence in the front yard because of a water hazard in the neighborhood where the provider's house had an appropriately fenced back yard play area. The facts in the record support DSHS's interpretation of the rule.

Ultimately, however, the fact that the trial court premised liability based on DSHS's alleged improper interpretation of its own rule implementing its own statutorily-granted discretion, highlights the court's error. DSHS did not fail to enforce any legislative mandate to perform a particular act. To premise tort liability on differing interpretations of a safety regulation adopted in the exercise of an agency's discretion would only serve as a disincentive to adopt safety regulations.

The second reason the failure to enforce exception does not apply is that, even if there had been a violation of former WAC 388-155-295 sufficient to trigger a duty to act, there was no mandatory statutory duty to take specific action in response to the violation. As a preliminary matter,

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<sup>32</sup> Ex. 79 is from a licensing file in which certain documents were created in the months following Gabriel's death. There the provider inquired about putting alarms on doorways and sought to incorporate them into the safety plan even though that was not something the licensor (Berdecia) could enforce. RP at 609-10. Ex. 81 is from a day care out of a home on Mercer Island. Because the cost of complying with the community fencing requirements would have been exorbitant, the provider was granted a waiver to allow the play area to be off-premises. Supp. CP at 442, 444.

this Court should reject the Tobins' contention that Jury Instruction No. 17 established, as the law of the case, that a license must be denied if the minimum licensing standards are not met. Because DSHS is appealing from the denial of summary judgment, the standard of review is de novo and the instructions are irrelevant. Moreover, the law of the case doctrine cannot be used to form the basis of recovery if the law being enforced is erroneous or a party is not legally entitled to recover in the first place. The law of the case doctrine "*does not apply if the record or evidence conclusively shows that the party in whose favor the verdict is rendered is not entitled to recover.*" *Roberson v. Perez*, 156 Wn.2d 33, 44, 123 P.3d 844 (2005), quoting, *Tonkovich v. Dep't of Labor and Indus. of State*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948) (emphasis theirs). Here, the Tobins are not entitled to recover because the regulatory scheme does not create a duty owed specifically to them, but rather runs to the general public.<sup>33</sup>

The Tobins also argue that former RCW 74.15.030(5) imposed a duty to revoke or deny a license if the minimum licensing requirements are not met. The Tobins' argument erroneously transforms DSHS's

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<sup>33</sup> Furthermore, the trial court was well aware that DSHS maintained there was no statute that imposed a mandatory duty to revoke or deny a license if minimum licensing requirements were not met. This was a point of contention during summary judgment, and the trial court ruled that in spite of the menu of sanctions, there was a statutorily imposed obligation to revoke or deny Lisa Fish's license if minimum licensing requirements were not met. CP at 3221-26; RP (04/25/08) at 25-33.

general obligation to exercise the authority granted in the statute into a mandate that licenses be denied or revoked in particular circumstances.

RCW 75.15.030 sets forth the various obligations and duties that DSHS “shall” exercise, one of which is “[t]o issue, revoke or deny licenses pursuant to RCW 74.15 and RCW 74.13.031.” RCW 74.15.030(5). Neither this subsection nor the statutes cited therein mandate that a day care license be denied or revoked if the applicant does not meet the minimum licensing requirements. Contrary to the Tobins’ contention, the legislature specifically directed that DSHS “**may**” deny, suspend, revoke, or modify a license for failure to comply with its requirements. RCW 74.15.130(1). There is no statute that specifically requires DSHS to deny or revoke a license when the applicant fails to comport with “minimum” licensing requirements; the agency is given discretion.<sup>34</sup>

The Tobins suggest that DSHS interpreted the regulations to require it to deny a licensing application if the applicant failed to meet minimum requirements. They insert the word “minimum” into former WAC 388-155-090(1)—a word that was not in that subsection—and then argue that the State, under its own rules, “must” deny a license under

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<sup>34</sup> As mentioned in Br. Appellant at 35, the only statutory mandate related to meeting the minimum requirements directed that a “license shall be granted” if minimum licensing requirements are met. RCW 74.15.100.

WAC 388-155-090(1) if the “minimum” requirements are not met. This is misleading at best and the analysis is flawed.

Former WAC 388-155-090(1) provided that a license must be denied, suspended, or revoked if a person did not “meet the requirements in this chapter.” While former WAC 388-155-090(4) did refer specifically to “minimum licensing requirements,” that subsection provided that DSHS *may* deny, suspend, or revoke a license if the licensor fails “to comply with the minimum licensing requirements set forth in this chapter or any provision of RCW 74.15.” (Emphasis added.) Interpreting subsection (1) as the Tobins suggest would render subsection (4) superfluous.<sup>35</sup> This Court must give effect to all subsections of WAC 388-155-090. *See State Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 57, 50 P.3d 627 (2002).

Thus, even if Little Fish’s had not complied with the fencing requirement, DSHS had discretion to decide what course of action was appropriate.<sup>36</sup> This is dispositive because it is well established that the failure to enforce exception “does not exist if the government agent has

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<sup>35</sup> Moreover, the statute itself recognizes situations in which some type of licensure may be appropriate even though a provider is not in strict compliance. *See e.g.*, RCW 47.15.120 (initial licenses); 47.15.125 (probationary licenses).

<sup>36</sup> Significantly, even if a finding of noncompliance mandated some action, neither subsection in former WAC 388-155-090 mandated a single course of action. Even there, DSHS has discretion. Little Fish’s license could have been suspended, for example, with the length of suspension left to DSHS’s discretion. Denial and revocation are not the only options.

broad discretion about whether and how to act.” *Donohoe*, 135 Wn. App. at 849, quoting *Halleran*, 123 Wn. App. at 714.

As the Tobins point out at page 9 of their second motion for extension to file their brief, this Court would open “a substantial can of worms” in terms of how to instruct a jury on the rules of regulatory interpretation in a tort action where the jury is sitting essentially in appellate review of the agency’s interpretation of their own regulations. DSHS agrees and would point out that the specter of liability created by such a proposition would act as a significant deterrent to the adoption of regulatory standards. The adoption of any regulatory standard could lead to tort liability where a court or a jury later interprets the standard differently from the agency that adopted it.

For all these reasons, the trial court erred as a matter of law in ruling the failure to enforce exception applied.

**4. There Is No Special Relationship Between The State And Those Who Attend Day Care**

**a. There Is No “Express Assurance” Based On Licensing A Day Care, Or Providing A List Of Licensed Day Cares On A 1-800 Referral Line**

The Tobins assert that a special relationship was created based on “express assurances” because Lisa Fish was licensed to provide day care

and because she was listed as a licensed day care on a 1-800 referral line.<sup>37</sup>

The Tobins are incorrect.

In order to establish a special relationship based on an express assurance, a plaintiff must prove (1) there is direct contact or privity between the public official and injured plaintiff that sets the injured plaintiff apart from the general public, (2) there is an express assurance given by the public official, which (3) gives rise to justifiable reliance by the injured plaintiff. *Cummins v. Lewis Cy.*, 156 Wn.2d 844, 854, 133 P.3d 458 (2006). The Tobins cannot satisfy any of these elements.

The Tobins have not met the elements of the special relationship exception because they have no evidence of an express assurance provided to them in response to a direct inquiry made by them. Their attempt to rely on the license, or the 1-800 referral line, as an express assurance is misguided. There is no functional difference between the State issuing a license and the State saying a business is licensed. Neither operates as express assurance that the business is safe, and it is well established that the mere fact of licensing or permitting does not constitute an assurance of

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<sup>37</sup> See Br. Resp't at 37. The Tobins also assert, without arguing, that the "[s]tate had an obligation to ensure that Gabriel was placed in a day care which was safe." *Id.*, citing *Caulfield v. Kitsap Cy.*, 108 Wn. App. 242, 29 P.3d 738 (2001). This is meritless. DSHS had no role in placing Gabriel in Lisa Fish's day care nor did DSHS have any role in the day-to-day supervision of the children in Lisa Fish's home, or any of the children in the thousands of day care homes and centers around the state.

regulatory compliance as the Tobins contend.<sup>38</sup> *Taylor*, 111 Wn.2d at 170-71; *see also Cummins*, 156 Wn. 2d at 855; *Donohoe*, 135 Wn. App. at 836.

*Taylor* disposes of the Tobins' contention that the licensing of a day care constitutes an assurance it is safe. The *Taylor* court overruled *J&B*, which had held that the issuance of a building permit constituted an implied assurance that the building and the construction comply with all requirements. *Taylor*, 111 Wn.2d at 167-71. The court found that the duty to ensure compliance with building codes rests on permit applicants, builders, and developers, not government. *Taylor*, 111 Wn.2d at 168. The *Taylor* court based its decision on a number of policy reasons applicable to this case, including its conclusion that placing such a burden on government officials was unreasonable in light of resource constraints and that the "potential exposure to liability can only dissuade public officials from carrying out their public duty." *Taylor*, 111 Wn.2d at 170-71. Likewise, the court in *Donohoe* held that providing funding and a list of

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<sup>38</sup> The Tobins' various assertions of an "express assurance" are premised, at best, on implication. First, in Br. Resp't at 76, the Tobins assert that since Little Fish's was state-licensed, this "presumptively" meant that Lisa Fish met minimum licensing requirements. However, a "presumption" does not suffice to demonstrate an "express assurance" and amounts to a tacit admission that there is no special relationship through an "express assurance." In fact, in Br. Resp't at 82, when discussing the failure to enforce exception, the Tobins concede that "[i]mplicit in such a referral" to day cares is that the day cares comply with minimum licensing requirements. The Tobins concede the "assurance" is by implication. (DSHS does not concede there is even an implicit assurance).

nursing homes did not create a special relationship with the decedent because:

[T]here was no showing that DSHS expressly promised [the plaintiffs] that it would guarantee [the licensee's] compliance with nursing home regulations or ensure immediate correction of [the licensee's] identified deficiencies. Not only was there no express assurance, but there was also no implied assurance.

*Donahoe*, 135 Wn. App. at 836.

The Tobins' construction of the special relationship exception would effectively overrule *Taylor* and swallow the general rule, as it would apply anytime the State licensed a business or permitted an activity.

Similarly, this Court should reject the Tobins' attempt to rely on RCW 74.15.010(5) as creating an express assurance to the users of day cares that the day cares will be in regulatory compliance. The Tobins cite RCW 74.15.010(5) and assert, mistakenly, that to fulfill the "collateral statutory purposes of promoting day cares" and providing parents with assurances that their children are placed in regulatory compliant facilities, the State operates a referral line; therefore any information provided on this referral line provides "statutorily required assurances." Br. Resp't at 77-78.

The purpose of RCW 74.13.031 and RCW 74.15 is stated in RCW 74.15.010:

(5) To license agencies as defined in RCW 74.15.020 and to assure the users of such agencies, their parents, the community at large and the agencies themselves that adequate minimum standards are maintained by all agencies caring for children, expectant mothers and developmentally disabled persons.

At the root of the Tobins' flawed analysis is their misinterpretation of the word "assure." In this context, "assure" means to give "confidence to," so the general public—the community at large—has confidence that day cares are being regulated.<sup>39</sup> It does not mean that, by informing the public that a particular facility is licensed, the legislature has *de facto* translated such public assurances to an express assurance of safety to particularized individuals giving rise to tort liability.

The Tobins' analysis renders the particularized inquiry required by the special relationship exception meaningless. Just as the act of licensing a day care cannot give rise to a special relationship, neither can the language of the enabling statute itself in this case, because it is not directed to an individual.<sup>40</sup>

Finally, as pointed out in DSHS's opening brief (Br. Appellant) at 22, the Tobins could not justifiably rely on the licensing of Lisa Fish's day care as an assurance that Gabriel Tobin would not, or could not, be harmed

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<sup>39</sup>*Webster's II New Riverside University Dictionary* 132 (1984).

<sup>40</sup> Here again, the statute at issue, RCW 74.15.010, serves competing interests: for example, it promotes "adequate minimum standards" but it also promotes the development of "a sufficient number and variety" of day care facilities available to working families.

if he was placed in the day care—particularly when that harm resulted from a condition of premises of which they were fully aware.

**b. The Regulatory Scheme Does Not Create A “Take Charge” Relationship With The Licensee Of A Day Care**

The Tobins also allege that a special relationship was created based on a discussion between defendant Victor Berdecia and Lisa Fish concerning the security of Lisa Fish’s front door. Br. Resp’t at 75. According to the Tobins, this created a special relationship under both prongs of Restatement (Second) of Torts § 315.<sup>41</sup> Again, the Tobins are incorrect.

There is no special relationship under the first prong of § 315 because licensing statutes do not provide an agency with the necessary authority to control the regulated entity sufficient to give rise to a duty. On this point, this Court reasoned in *Donohoe* that because DSHS, “apart from its general public duty to regulate nursing homes . . . did not employ, supervise, or otherwise oversee [the plaintiff’s] care or treatment [by the licensee.]” 135 Wn. App. at 840. DSHS was not responsible for the “individual daily care” at the nursing home, but only for “monitoring” the

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<sup>41</sup> According to the Restatement (Second) of Torts § 315, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another unless: (a) a special relationship 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 relationship exists between the actor and the other which gives to the other a right to protection. *See Donohoe*, 135 Wn. App. at 836.

licensee's "general, regulatory-compliance status and licensing," and this was a duty owed to the public in general, but not to the plaintiff individually. *Donohoe*, 135 Wn. App at 842; *see also Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988). The Tobins do not attempt to distinguish *Donohoe* or otherwise explain why the rationale in *Donohoe* does not apply here. *Donohoe* controls and resolves the Tobins' contention that a special relationship exists under the first prong of § 315. There is no special relationship.

Similarly, there was no relationship between the State and Gabriel Tobin giving rise to a duty under the second prong of § 315. A central component of the Tobins' argument is that Lisa Fish specifically indicated to DSHS licensing inspector Victor Berdecia that Gabriel Tobin had been walking out the front door of her house. Br. Resp't at 75. Factually, this assertion was contrary to the evidence at trial, as Lisa Fish testified she never discussed with Victor Berdecia that Gabriel was walking out the front door. RP at 1342 l. 11-18; 1313 l. 13 to 1318 l. 24; CP at 1392, 1419. It also is irrelevant because the regulations require that the front door be easily opened from the inside for safety reasons. RP at 765-66. It is because children must be able to open the front door in the event of fire or other emergencies that the day care operator must remain vigilant in supervising the children. In that respect, nothing set Gabriel Tobin apart

from any of the other children in the day care. Furthermore, on the day of the accident, the door was locked, in violation of the regulations, but Gabriel managed to unlock it and slip out the front door. RP at 684, 1319-20. Lisa Fish had no knowledge Gabriel could undo the deadbolt. RP at 1319.<sup>42</sup>

Finally, the Tobins' conclusory assertion that licensors supervise and have control over children in day care giving rise to a duty under the second prong of § 315 flies in the face of reality. At the time this case was litigated before the trial court, there were over 5,000 in-home day cares in Washington, and over 170 homes per caseload. RP at 447. There is no way the regulatory scheme governing day cares creates a "take charge" duty such that the licensors, who are required to visit the in-home day care only about once every 18 months, have a duty to supervise and control children in day care. Nor is there any evidence to suggest that Lisa Fish ever failed in her obligation to supervise the children, or that her failure to supervise on the day of the accident could have been predicted.

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<sup>42</sup> Under WAC 388-155-120(3), it is the responsibility of the childcare provider to supervise children through continuous visual or auditory contact. Under WAC 388-155-320, children playing outside in the play area must be in visual or auditory range. Children who are supervised do not have access to hazards that exist outside the front door.

**5. The Volunteer Rescue Doctrine Does Not Apply Because DSHS did not undertake to come to the aid of the tobins nor was any danger increased**

The elements of the volunteer rescue doctrine are not met because DSHS did not: (1) represent that it would aid or warn a person in danger; (2) engender reasonable reliance either by a person in danger or a third party who refrained from acting due to the representation; and (3) increase the risk of harm to those who are being rescued. *Burnett*, 124 Wn. App. at 564-65; *Osborn v. Mason Cy*, 157 Wn.2d 18, 25, 134 P.3d 197 (2006) (“Reliance is the linchpin of the rescue doctrine”). The State did not assume a duty to come to the aid or warn the Tobins by having a 1-800 referral line listing licensed day care facilities. The persons calling the referral line are not in danger, and the information communicated to the callers is not directed toward any particular person. Mr. Berdecia did not represent to Lisa Fish that he would warn the Tobins of the danger posed if Gabriel was left unattended near the front door. Nor did Mr. Berdecia’s failure to advise Ms. Fish to erect a five-foot fence in her front yard increase any risk of harm or danger. Without some sort of assurance and reliance, no duty to warn is assumed and the volunteer rescue exception does not apply. *Osborn*, 157 Wn.2d at 28.

If the volunteer rescue doctrine applied to licensing inspections and the discussions regulators have with potential and current licensees, then licensors would be well advised to steer clear of providing any advice or engaging in any conversations that could lead them to detect hazards. Such a result would not serve the public interest and would be completely contradictory to the public duty doctrine.

**6. The Cases The Tobins Rely On From Other Jurisdictions Are Not Persuasive**

The Tobins cite two cases from other jurisdictions in an attempt to persuade this Court to adopt their theory of liability. In *Andrade v. Ellefson*, 391 N.W.2d 836, 68 (Minn. 1986), the plaintiffs were physically abused in a day care which had a known history of overcrowding, had been subject to numerous reports over the years, and in which a sexual predator resided. The Minnesota court did not base liability on the constructive knowledge of the sexual predator being in the home, nor the failure to investigate allegations of abuse. Arguably in Washington, both of those facts would have been sufficient to trigger a duty. Instead, in what amounts to a legislative intent analysis, the Minnesota court based liability primarily on the underlying statute, which directed that regulations will “ensure a safe environment for children.” *Andrade*, 391 N.W. 2d at 842. This is much different language than underlies the

statutes creating regulatory oversight in Washington, and nothing about the Minnesota analysis contains a requirement to explicitly provide for a remedy. In fact, subsequent Minnesota cases rejected liability because the specific language in the underlying statutes did not create the same duties. *See, e.g., Radke v. Cy of Freeborn*, 676 N.W.2d 295, 299-300 (Minn. App. 2004), *citing Hoppe By Dykema v. Kandiyohi Cy*, 543 N.W.2d 635 (Minn. 1996). Furthermore, under Minnesota law, MSA 3.736(3)(k) State liability for licensing functions is precluded.

In *Brasel v. Children's Servs. Div.*, 56 Or. App. 559, 642 P.2d 696 (1982), liability was based on the defendants' failure to investigate allegations of child abuse in the facility. *Brasel* is of no use in this case because such a failure in Washington could trigger liability based on RCW 74.15.030(2)(b), which specifically requires criminal background checks to determine if a prospective provider has a disqualifying criminal conviction.

Neither of these cases, both of which were decided in the 1980s, provide persuasive authority to adopt a claim of negligent licensing.

**E. The Court's Refusal To Exclude Irrelevant And Unduly Prejudicial Evidence Of The Post-Death Investigation Was Error**

DSHS assigned error to the admission of evidence and argument regarding alleged negligence in the post-death investigation conducted by

the Division of Licensing Resources/Child Protective Services (DLR/CPS) into whether Lisa Fish was negligent in her supervision of Gabriel Tobin. RP at 1485-88, 1582. There is no cause of action for negligent investigation by DLR/CPS into a licensed facility. The only recognized claim for negligent investigation is based on child welfare statutes requiring social workers and law enforcement officials to conduct investigations into allegations of child abuse. *M.W.*, 149 Wn.2d at 595-97. The Tobins do not, and cannot, dispute this point of law. *See n. 16 p. 14 supra*.

The Tobins argue specific facts that they say demonstrates the investigation was conducted negligently, if not as a cover-up for the alleged misdeed of licensing Lisa Fish. Br. Resp't at 84. But the Tobins offer no explanation regarding how an investigation upon which no causes of action can be based can serve as the basis for liability and a proximate cause of damages. Of course, that is because there is no explanation. The evidence was clearly irrelevant and its admission was an abuse of discretion that constitutes reversible error.

In fact, the Tobins attempt to defend Jennifer Tobin's testimony on this point as harmless. Br. Resp't at 87-88. The error in admitting her testimony and all other testimony on this issue was not harmless. Given the extent of the plaintiffs' case devoted to this issue—testimony of a named plaintiff, a named defendant, several witnesses, and a designated

expert, and a closing argument in which counsel argued vigorously that the State tried to “pull the wool over” the eyes of the community and media (RP at 1924), all resulting in a nearly \$12 million verdict, it is impossible to call this error harmless.

If this case is not dismissed, it should be remanded for a new trial with instruction to exclude this evidence and the argument of counsel related thereto.

**F. It Was Error For The Court Not To Exclude Evidence Or Argument That WAC 388-155-295(5) Was Modified Or Clarified After Gabriel Tobin’s Death**

The State moved to exclude evidence of the re-write of WAC 288-155-295(5) as irrelevant and unduly prejudicial. That motion was denied based on the Tobins’ assertion that the evidence was relevant to the issue of culpability because it showed DSHS re-wrote the WAC to change its meaning.

In their brief, the Tobins reiterate facts regarding their “cover-up” theory, but completely fail to articulate how any re-writing of the WAC bears on alleged negligence occurring in the licensing of Lisa Fish. Their suggestion at page 91 of their brief that it was relevant to the credibility of DSHS’s witnesses is ludicrous. The Tobins advanced their “cover-up theory because nobody—not the licensors, not their supervisors, not the drafters of the regulation, not the members of the various fatality

review teams—had ever interpreted WAC 388-155-295(5) consistent with the Tobins’ unprecedented interpretation. Only the Tobins viewed the regulations as requiring front yard fencing.

Admitting evidence regarding the subsequent amendment of WAC 388-155-295(5) was an abuse of discretion and the error was not harmless. If this matter is not dismissed because there is no duty owed specifically to the Tobins, it should be remanded for a new trial with instruction to exclude this evidence and the argument of counsel related thereto.

**G. The Trial Court Erred In Giving WAC 388-155-295(5) As A Jury Instruction**

DSHS assigned error to Jury Instruction No. 19 because it treated a central issue of fact at trial—the interpretation of WAC 388-155-295(5)—as a matter of law, which is a comment on the evidence. The trial court then failed to provide an instruction that would alert the jury that this regulation was subject to interpretation, and that the interpretation of the agency that drafted the regulation is entitled to deference.

In response the Tobins’ attempt to defend the trial court’s error by reciting a variety of rules governing appellate review of jury instructions and offering a variety of off-point arguments. For example, even though they have acknowledged that it was “unprecedented” to allow jury to

interpret a regulation, RP at 1770, they object to DSHS's argument on appeal on the ground that there is no case law discussing the "unprecedented" ruling. Br. Resp't at 96. It is hardly a surprise that no appellate decision has addressed an "unprecedented" ruling—i.e., a ruling that has not been made before.

The Tobins also assert DSHS's request to provide such an instruction was "preposterous" because of the substantial number of rules that would be required to properly instruct the jury. The Tobins' position is that a jury should be allowed to interpret a regulation to determine if it was violated, but the jury should not be given the rules of statutory construction that courts routinely rely upon because there are too many of them. Of course, this response highlights the folly of allowing a jury to interpret a regulation to determine if it has been violated. The Tobins were right: allowing tort actions such as this will open "a substantial can of worms." See Argument *supra*, pp. 10-11.

The Tobins complain the proposed instruction would have been too tilted in favor of DSHS and was not appropriate because the regulation was not ambiguous. Br. Resp't at 97. They are wrong on both counts. First, the instruction is an accurate statement of the law, and is therefore not tilted in one party's favor. Second, the regulation was ambiguous if for no other reason than the Tobins construed it in a manner in which it

was never before construed. It is precisely because the Tobins raise an unprecedented interpretation of that regulation and the court allowed the interpretation of a regulation to go to the jury that the instruction was necessary.

The Tobins' suggestion that DSHS's interpretation was never clear, or a moving target, ignores the clear testimony of Leslie Edwards-Hill, who drafted the regulation, that WAC 388-155-295(5) did not require front yard fencing because of lakes in the neighborhood, and that Lisa Fish's house specifically did not require a fence in the front yard of her property under under DSHS's consistent interpretation of WAC 388-155-295(5). It further ignores the testimony from virtually every witness that had experience in licensing that the regulations relied on supervision to keep the children where they were supposed to be, and that the term "access" is limited to those areas where day care is provided.

Until this lawsuit, no one working with this regulation had ever understood it to require a fence in the front of Lisa Fish's property. But that, of course, points out the fundamental flaw with this lawsuit: predicating liability on a unique and unprecedented interpretation of a safety regulation enacted as part of a regulatory scheme designed for the public good.

### III. CONCLUSION

DSHS respectfully requests this Court reverse the denial of summary judgment, reverse the jury's verdict, and remand this case to the trial court with instructions to dismiss.

RESPECTFULLY SUBMITTED this 7th day of December 2009.

ROBERT M. MCKENNA  
Attorney General

  
PETER J. HELMSBERGER  
WSBA No. 23041  
Assistant Attorney General

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7<sup>th</sup> day of December, 2009, at

Tacoma, WA.

Rebecca Wright

Rebecca Wright

09 DEC -7 PM 4: 22

STATE OF WASHINGTON

BY           
DEPUTY

NO. 38563-5-II

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

JENNIFER L. TOBIN, as  
Administratrix of the Estate of  
GABRIEL M. TOBIN, deceased;  
JENNIFER L. TOBIN and  
CHRISTOPHER M. TOBIN,  
individually and the marital community  
composed thereof, and as the parents of  
ISABELLE TOBIN, their minor child,

Respondents,

v.

THE STATE OF WASHINGTON;  
VICTOR BERDECIA, in his individual  
capacity, and as an employee of the  
State of Washington; AMY  
CICHOWSKI, in her individual  
capacity, and as an employee of the  
State of Washington; MARY KAY  
QUINLAN, in her individual capacity,  
and as an employee of the State of  
Washington; EAVANNE  
O'DONOGHUE, in her individual  
capacity, and as an employee of the  
State of Washington; and "JOHN DOE"  
and "JANE DOE" 1-10, in their  
individual capacities, and as employees  
of the State of Washington,

Appellants.

CERTIFICATE OF  
SERVICE RE  
APPELLANT'S REPLY  
BRIEF

NO. 38563-5-II

Pierce County Cause  
No. 06-2-12148-7

I, Rebecca Wright, certify under penalty of perjury under the laws  
of the state of Washington that I caused a true and correct copy of the

Appellant's Reply Brief to be served on the following in the manner and  
on the date indicated below:

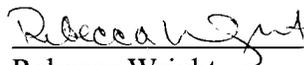
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Via Hand Delivery by Peter  
Helmberger on December 7, 2009

Defendant Lisa Fish, pro se  
1607 NW 3<sup>rd</sup> Street  
Battle Ground, WA 98604

Via USPS on December 7, 2009

DATED this 7<sup>th</sup> day of December, 2009, at Tacoma, Washington.



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Rebecca Wright  
Legal Assistant