

71317-5

71317-5

NO. 71317-5-I

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

DAN ALBERTSON, as Court Appointed Limited Guardian for L.O. and  
T.J., and TERESA JOHNSON, individually,

Appellants,

v.

PIERCE COUNTY SHERIFF'S DEPARTMENT,

Respondent.

---

APPELLANT'S REPLY BRIEF

---

Lincoln C. Beauregard, WSBA #32878  
Connelly Law Offices, PLLC  
2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100

Kenneth Selander, Jr., WSBA #15030  
Selander O'Brien, PLLC  
3829C South Edmunds Street  
Seattle, WA 98118  
(206) 723-8200

2014 JUL 12 PM 2:57  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

ORIGINAL

## CONTENTS

I.	INTRODUCTION .....	1
II.	LEGAL DUTY: RCW 26.44.050 .....	3
III.	L.O. AND T.J. WERE FORESEEABLE VICTIMS .....	5
IV.	L.O. and T.J.'s DATES OF BIRTH ARE NOT RELEVANT BECAUSE THEY WERE FORESEEABLE VICTIMS UNDER RCW CHAPTER 26.44 .....	8
V.	LEGAL/PROXIMATE CAUSE.....	9
VI.	FACTUAL CAUSATION.....	10
VII.	OSBORN v. MASON COUNTY .....	12
VIII.	TERESA JOHNSON'S CLAIM.....	13
IX.	CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Cases

<i>C.J.C. v. Corporation of Catholic Bishop of Yakima</i> , 138 Wash.2d 699, 985 P.2d 262 (1999) .....	13, 14
<i>Gilbert v. Sacred Heart Medical Ctr.</i> , 127 Wn.2d 370, 900 P.2d 552 (1995).....	4
<i>Harbeson v. Parke-Davis, Inc.</i> , 98 Wn.2d 460, 656 P.2d 483 (1983) .....	9
<i>In re Parentage of J.M.K.</i> , 155 Wn.2d 374, 386, 119 P.3d 840 (2005) ....	4
<i>J.N. v. Bellingham School District</i> , 74 Wn. App. 49, 61, 871 P.2d P.2d 1106 (1994) .....	11
<i>Lewis v. Whatcom County</i> , 136 Wash. App. 450, 452, 149 P.3d 686 (2006) .....	13
<i>McLeod v. Grant School District</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	8
<i>N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints</i> , 175 Wn. App. 517, 307 P.3d 730 (2013) .....	6
<i>Osborn v. Mason County</i> , 157 Wn.2d 18, 134 P.3d 197 (2006) .....	12
<i>Rickstad v. Holmberg</i> , 76 Wn.2d 265, 269, 456 P.2d 355 (1969) .....	6
<i>Schooley v. Pinch’s Market, Inc.</i> , 134 Wash.2d 468, 951 P.2d 749 (1998)	5
<i>State v. Stenson</i> , 132 Wn.2d 715, 940 P.2d 1239 (1997).....	11
<i>Whitlock v. Pepsi Americas</i> , 681 F.Supp.2d 1123 (N.D. Cal. 2010).....	9

### Statutes

RCW 26.44.030(g)(2) .....	2, 4, 5, 10
RCW 26.44.050 .....	3
RCW 4.24.010.....	13, 14
RCW 4.24.020.....	13
RCW 4.24.550.....	12
RCW Chapter 26.44 .....	passim

### Rules

CR 12(b)(6).....	3
CR 56.....	3
ER 703.....	12

## I. INTRODUCTION

Appellants L.O, T.J., and Teresa Johnson submit this memorandum in reply to Pierce County's response brief. This case is simple. Pierce County failed to execute its statutory duties and to conduct an investigation under RCW Chapter 26.44. As a result, Emmanuel Finch was never (1) red flagged by DSHS to prevent him from becoming a foster parent, and/or (2) charged and convicted for raping his naturally born daughters. Finch remained in the community and became L.O. and T.J.'s foster father as a result of Pierce County's dereliction of duties. Based upon the evidence, as of 1996, a reasonable person could *only* conclude that Finch presented a "general field of danger" to other vulnerable children such as L.O. and T.J. Given the facts and law delineated herein, the trial court's erroneous order dismissing these claims should be reversed.

This case was dismissed by summary judgment. The trial court considered, and refused to strike, any of the declarations that were submitted by appellants in opposition to Pierce County's motion. This admissible evidence included the uncontroverted declaration of law enforcement expert Sue Peters. Ms. Peters opined that (1) Pierce County failed to act reasonably and in accord with proper law enforcement

practices, and (2) that Pierce County's shortcomings allowed, and failed to prevent, L.O. and T.J. from being abused by Finch. Specifically, Ms. Peters opined that given the information available to Pierce County, a report should have been provided to DSHS red flagging Finch as dangerous and preventing him from becoming a foster parent in the future.

Contrary to Pierce County's assertions and irrelevant case law, the statutory scheme that gives rise to these claims specifically extends a tort duty to not only the children identified within harm's way, but also a tort duty to those children "at risk" of future harm. *See* RCW 26.44.030(g)(2) (a duty to act exists "if there is reasonable cause to believe that other children are or may be **at risk** for abuse or neglect by the accused..."). Despite this clearly defined legislative duty, Pierce County strains to abdicate this unambiguous Legislative mandate and the corresponding duty owed. Pierce County contends that unless a specific child is already suspected of being abused, there is no duty to act reasonably or to provide protection from foreseeable harm to other children at the hands of a known predator. That is *not* the law. That is *not* the express will or the intent of the statutes that the Legislature enacted under RCW Chapter 26.44.

With regard to these appellate proceedings, Pierce County's response briefing is rife with irrelevant case law citations, but is incredibly short on actual substance. For example, Pierce County drafted basically a

horn book about civil procedure and the distinction between a motion to dismiss under CR 12(b)(6) and a motion for summary judgment under CR 56. For example, Footnote 6 of Pierce County's brief cites six (6) different cases (plus secondary authorities) about this rudimentary civil procedure process. This excessive briefing about the rules of procedure is a red herring because it is agreed that the trial court decided this matter as a motion for summary judgment under CR 56: "*trial court treated the County's motion as one for summary judgment...*"<sup>1</sup> Pierce County engages in the appellate litigation tactic of trying to convince this Court of the correctness of its position by citing to many, many cases -- even when those cases are not supportive or germane.<sup>2</sup>

## II. LEGAL DUTY: RCW 26.44.050

Pierce County attempts to argue that the statutory duty owed to abuse victims under RCW Chapter 26.44 is limited to those children previously identified as victims of abuse within the operative police report.<sup>3</sup> This proposition runs contrary to the express statutory provisions.

---

<sup>1</sup> Pierce County's Brief, Page 6

<sup>2</sup> This is true of Pierce County's excessive briefing about the generally accepted premise that there is no duty to investigate other than that recognized under RCW Chapter 26.44.

<sup>3</sup> Oddly, Pierce County devotes several pages of useless briefing delineating that in a general sense there is no cause of action for negligent investigation while, in the same brief, acknowledges that such a duty exists under RCW Chapter 26.44. Since there is no debate between the parties that the source of law in this case is RCW Chapter 26.44, the superfluous briefing on the other topics about negligent investigations need not be taken into consideration for purposes of this appeal.

The specific reporting requirements codified under RCW 26.44.030(g)(2) establish a duty to protect not only the child subjected to known abuse, but also “if there is reasonable cause to believe that other children are or may be **at risk** for abuse or neglect by the accused...” *Id.* (emphasis added). The legislative intent and mandate to protect other children that might be abused could not be clearer: children “**at risk**” of being abused, such as L.O. and T.J., are owed a duty of care by alerted agencies. *Id.*

In light of any argued ambiguity as to the purpose of the various statutes at issue, “the proper approach is to ‘harmonize statutes’ pertaining to the subject matter and maintain the integrity of the statutes within the overall statutory scheme.” *In re Parentage of J.M.K.*, 155 Wn.2d 374, 386, 119 P.3d 840 (2005).

...The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose...This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question...If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and it is appropriate to resort to principles of statutory construction to assist in interpretation...Strained, unlikely, or absurd consequences resulting from a literal reading are to be avoided...

*Id.* at 846-47; see e.g. *Gilbert v. Sacred Heart Medical Ctr.*, 127 Wn.2d 370, 900 P.2d 552 (1995) (harmonizing conflicting statutes of limitation in favor of preserving claim related to minor). In this regard, RCW

26.44.030 unequivocally extends the duty to “other children [who] are or may be **at risk** for abuse or neglect by the accused...” *Id.* Consequently, the class of children owed a duty encompasses all children placed “**at risk**” of being molested by Finch as a result of Pierce County’s negligent handling of the original abuse report regarding Teresa and Veronica Johnson. *Id.*

Moreover, Pierce County fails to distinguish the reasoning cited in the appellants’ opening brief case, *Schooley v. Pinch’s Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The *Schooley* Court’s opinion states that statutes enacted to protect children should be applied to effectuate that purpose. *Id.* Here, it would be contrary to the purpose of RCW Chapter 26.44 to arbitrarily limit the duty owed to only those children already being abused. The entire purpose of RCW Chapter 26.44 is to prevent future harm to children. Pierce County fails to distinguish this logical and irrefutable premise.

### **III. L.O. AND T.J. WERE FORESEEABLE VICTIMS**

According to law enforcement expert Sue Peters, Pierce County’s obligations included ensuring that Finch was red flagged in such a way that he would be unable to clear DSHS background checks and become a foster parent: “*If the proper reports were conveyed to DSHS about Finch in 1996, he never would have been cleared to become a foster parent. If*

*Finch never cleared a background check, he would not have become L.O. and T.J.'s foster parent and the years of tortuous sexual assaults could have been avoided."*<sup>4</sup> In this regard, Pierce County argues that no duty was owed because it was unforeseeable that L.O. and T.J. specifically would have ended up in foster care with Finch. But that is not the pertinent point of inquiry.

The "pertinent inquiry is not whether the actual harm was of the particular kind which was expectable. Rather, the question is whether the actual harm fell within the **general field of danger** which should have been anticipated." *Rickstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969) (emphasis added). In this case, it was certainly foreseeable that Finch, an identified child molester, would molest other children if provided the opportunity. In this way, L.O. and T.J., or any other children, were potential victims of the precise type of harm that "should have been anticipated" by Pierce County. *Id.* With regard to foreseeability, it is the "danger" that should be anticipated by Pierce County, not the "particular" identity of the future victim. *Id.*; see also *N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730 (2013). "A sexual assault is not legally unforeseeable 'as long as the possibility of sexual

---

<sup>4</sup> Declaration of Sue Peters

assaults...was within the general field of danger which should have been anticipated.” *Id.* at 530.

Pierce County also fails to distinguish the cases cited by Appellants including Division I’s recent *N.K.* opinion. The *N.K.* case involved the molestation of children within a Boy Scout troop. The defending troop had no actual knowledge that the offending scoutmaster posed a danger of molesting children. *Id.* Regardless, this Court held that the defending troop should have anticipated the duty based upon a generalized knowledge of the dangers posed to children via inadequately chaperoned scouting events. *Id.* at 531. “The general field of danger was that scouts would be sexually abused if a stranger newly arrived in town was permitted to supervise them one-on-one in isolated settings.” *Id.* This duty was based upon the foreseeability of harm to scouts generally, and not to the particular scouts that might be abused at the hands of an unsupervised scoutmaster. *Id.*

This Court’s opinion in *N.K.* confutes Pierce County’s entire argument concerning foreseeability. *Id.* *N.K.* illustrates that foreseeability is not dependent upon being able to identify the actual victim who is harmed. *Id.* Contrary to law, Pierce County urges such an analysis arguing that it was unforeseeable that L.O. and T.J. *in particular* were likely to be adopted and then molested by Finch. That is not the relevant

inquiry. “A defendant’s actual knowledge of the particular danger ‘is not required if the general nature of the harm is foreseeable under the circumstances.’” *Id.* at 531. In this case, the originating police report established that Finch molested one natural born daughter and likely molested the other as well.<sup>5</sup> Pierce County had this information in 1996 and then failed to take reasonable steps to prevent foreseeable future harm to other child victims such as L.O. and T.J.<sup>6</sup> When an “investigation” finally ensued in 2010, Finch was arrested, convicted and sentenced.

**IV. L.O. and T.J.’s DATES OF BIRTH ARE NOT RELEVANT BECAUSE THEY WERE FORESEEABLE VICTIMS UNDER RCW CHAPTER 26.44**

As noted, foreseeability turns upon the “general field of danger” that should have been anticipated rather than the identity of the “particular” victim. *McLeod v. Grant School District*, 42 Wn.2d 316, 255 P.2d 360 (1953) (children being assaulted in an unsupervised room is foreseeable). “The sequence of events need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are

---

<sup>5</sup> CP 62-80

<sup>6</sup> CP 62-80

met.” *Rickstad*, at 269. Since it was foreseeable that Finch would molest other children, and that L.O. and T.J. were the other children that ultimately ended up within the “general field of danger,” whether they were born before or after the underlying negligent act is irrelevant. As illustrated in *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), according to the Washington State Supreme Court, a duty can be owed to an unborn victim to the extent that the associated injury was foreseeable and preventable. *Id.*<sup>7</sup>

## V. LEGAL/PROXIMATE CAUSE

Pierce County’s argument that these claims should be precluded for want of legal/proximate cause is directly inconsistent with the intentions evidenced by the Legislature under RCW 26.44.030(g)(2). Under that provision, if a mandatory reporter learns that an adult has been victimized years ago during childhood, the duty to take action remains long after the identified victim has become an adult “if there is reasonable cause to believe other children are or may be **at risk** of abuse or neglect by the accused...” Without clearing or eliminating the risk to children by fulfilling its statutory investigative duties under RCW Chapter 26.44,

---

<sup>7</sup> Pierce County goes to great lengths to try and recast the Washington Supreme Court’s holding in *Harbeson* by citing a district court opinion from California: *Whitlock v. Pepsi Americas*, 681 F.Supp.2d 1123 (N.D. Cal. 2010). Nothing about the Whitlock court’s analysis or holding can amend the State Supreme Court’s precedent in *Harbeson*. Needless to say, California district courts do not set precedent that supersedes or overrules the Washington State Supreme Court.

Pierce County's duty of care endures as long as "the accused" continues to pose a danger to "other children" that "may be at risk..." RCW 26.44.030(g)(2).

In other words, the statutory scheme has no expiration date for the length of time related to this duty. *Id.* In this regard, to the extent that "legal causation" focuses upon issues as "a matter of policy" the Legislature has already enacted a statutory scheme that contemplates a duty extending to future, "other children" who might be "at risk." Pierce County has failed to identify any reason why this case should be treated differently. *Id.* This Court should not overrule the express intent of the Legislature simply based upon the passage of time. *Id.* The focus, as the enacted legislation shows, is on the harmful actor and the risk of continued harm to children. This case cannot be dismissed on proximate cause.

## VI. FACTUAL CAUSATION

The trial court did not strike any portion of the declaration of law enforcement expert Sue Peters: "*The Motion to Strike is Denied.*"<sup>8</sup> It is therefore uncontroverted, per Ms. Peters, that if Pierce County had acted diligently, L.O. and T.J. would not have been abused by Finch. On appeal, Pierce County improperly attempts to reargue the underlying

---

<sup>8</sup> Trial Court Order dated November 27, 2013

motion to strike and to combat the sufficiency of Ms. Peters' declaration. Pierce County's attempt to reargue the motion to strike on appeal is improper because a trial court's determination of the admissibility of expert testimony will not be disturbed absent an abuse of discretion. See e.g. *State v. Stenson*, 132 Wn.2d 715, 940 P.2d 1239 (1997).

"In general, an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue of fact, precluding summary judgment." *J.N. v. Bellingham School District*, 74 Wn. App. 49, 61, 871 P.2d P.2d 1106 (1994) (reversing trial court for ignoring expert testimony under analogous circumstances). Ms. Peters' declaration delineates a clear and admissible theory of liability that was accepted by the trial court. For that reason, Pierce County's arguments about factual causation (coupled with the absence of contrary testimony) are misplaced. Judge McCullough did not abuse his discretion when refusing to strike Ms. Peters' declaration.

Further, Pierce County fallaciously argues questions of fact in relation to Ms. Peters' opinions, claiming that there is no "basis" for the assertion that the 1996 report should have been reported back to Child Protective Services in such a way that precluded Finch from later becoming a foster parent. These challenges to Ms. Peters' opinions on appeal are not proper as the trial court refused to strike any of the

associated testimony: “Based upon the information contained in the 1996 report, and the information that was accessible at the time to the investigator, any report back to Child Protective Services should have indicated that the allegations were “founded” and/or legitimate.”<sup>9</sup> The information within the 1996 report included the information that Teresa Johnson had already admitted being molested by Finch.<sup>10</sup> For that reason, Ms. Peters’ declaration is well grounded upon the facts of the case and in accord with ER 703. Given these undisputed facts, the trial court’s summary judgment ruling was erroneous.

## VII. OSBORN v. MASON COUNTY

Pierce County relies heavily upon *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006) by arguing that *Osborn* stands for the proposition that there are particularized limitations with regard to child sex abuse victims and foreseeability. This is not at all true. In *Osborn*, the Supreme Court ruled that under the sex offender statutes, namely RCW 4.24.550, there was no actionable tort duty owed to the general public to warn about the presence of sex offenders: “The Osborns failed to assert facts sufficient to show Mason County had a duty to warn them of Rosenow’s presence.” *Id.* at 29. In truth, the *Osborn* opinion did not even

---

<sup>9</sup> CP 62-80

<sup>10</sup> CP 62-80

address foreseeability outside the context of the special relationship doctrine. Contrary to Pierce County's specious reasoning, the *Osborn* opinion and analysis lend absolutely nothing to the disposition of issues in this case.

### **VIII. TERESA JOHNSON'S CLAIM**

Pierce County misconstrues Ms. Johnson's claim. While it is true that the complaint *did not* set out a claim for the abuse that Ms. Johnson suffered individually at the hands of Finch, the complaint *did* plead a cause of action under RCW 4.24.010 and RCW 4.24.020 for the injuries that were suffered to her children, L.O. and T.J. Since Ms. Johnson was the victim identified in the original report, she was owed a duty of care even under Pierce County's narrow interpretation of the class that is subject to protection. *See Tyner v. State*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (duty owed to parents under RCW Chapter 26.44); *Lewis v. Whatcom County*, 136 Wn. App. 450, 452, 149 P.3d 686 (2006). Because Pierce County owed a duty of care directly to Ms. Johnson, her claim under RCW 4.24.010 and .020 is proper. *Id.* Of note, Pierce County did not even challenge this argument in responsive briefing to this appeal.

With regard to the statute of limitations, Ms. Johnson's claim for the injury to her children is preserved under well established Washington law: a parent's claim runs at the same time of their children under the statute of

limitations for civil claims based upon childhood sexual abuse. *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999). Since Pierce County owed Ms. Johnson a duty of care under RCW 4.24.010-.020, as to the statute of limitations per *C.J.C.*, dismissal of her claim must be reversed and remanded for further proceedings. This entire matter should proceed on the merits.

## IX. CONCLUSION

For the reasons set forth herein, the trial court's summary dismissal of L.O., T.J., and Teresa Johnson's claims must be reversed and remanded for trial.

DATED this 11<sup>th</sup> day of June, 2014.

CONNELLY LAW OFFICES, PLLC

*Lincoln Beauregard*

By: \_\_\_\_\_  
Lincoln C. Beauregard, WSBA No. 32878  
Attorney for Plaintiffs

SELANDER O'BRIEN, PLLC

*/s/ Ken Selander, Jr.*

By \_\_\_\_\_  
Kenneth Selander, Jr., WSBA No. 15030  
Attorneys for Plaintiffs

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

DAN ALBERTSON, as Court Appointed  
Limited Guardian for L.O. and T.J. and  
TERESA JOHNSON, individually,

Appellants,

v.

PIERCE COUNTY,

Respondent.

No. 71317-5-I

CERTIFICATE OF SERVICE

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

I caused to be served this date the following:

- Appellant's Reply Brief

in the manner indicated to the parties listed below:

Michelle Luna-Green  
Daniel Ray Hamilton  
Pierce County Prosecutor/Civil.  
955 Tacoma Ave. South, Ste. 301  
Tacoma, WA 98402-2160

Hand Delivered  
 Facsimile  
 U.S. Mail  
 Email

2014 JUN 12 PM 2:57

COURT OF APPEALS DIV I  
STATE OF WASHINGTON

Attorney for Respondent (Pierce County)  
[mluna@co.pierce.wa.us](mailto:mluna@co.pierce.wa.us)  
[dhamilt@co.pierce.wa.us](mailto:dhamilt@co.pierce.wa.us)

DATED this 11<sup>th</sup> day of June, 2014.

*Vickie Shirer*

---

Vickie Shirer  
Paralegal to Lincoln C. Beauregard