NO. 100433-8

SUPREME COURT OF THE STATE OF WASHINGTON

W.M., a Minor, by ERIN OLSON, his Litigation Guardian Ad Litem, and JAMES MANEY,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Plaintiffs cannot show the State conducted a negligent investigation that resulted in a harmful placement decision.[1] The Court of Appeals correctly held that failure is dispositive of their lawsuit, and affirmed summary judgment. *W.M. v. State*, 19 Wn. App. 2d 608, 622-25, 498 P.3d 48 (2021); *see M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). Plaintiffs' attempt to mask the fatal holes in their case by evading, contorting, and, ultimately recasting the long-established elements of their negligent investigation claim, neither presents an issue of substantial public interest nor does it warrant review under RAP 13.4(b)(1)-(2) and (4).

Plaintiffs' claim fails on two fronts. First, Plaintiffs did not show the State's December 9, 2017, decision, which allowed W.M. to remain with his mother in her Washington home, was a "harmful placement decision." As a matter of law, an admittedly

[1] "State" refers to Respondent State of Washington Department of Children, Youth and Families. "Plaintiffs" refers to Petitioners W.M., a minor, by Erin Olson, and James Maney.

correct placement of a child in a home where no abuse has occurred and where the child is not at imminent risk of harm is not a harmful placement decision. RCW 13.34.050; *M.E. & J.E. v. City of Tacoma*, 15 Wn. App. 2d 21, 471 P.3d 950 (2020), *review denied*, 196 Wn.2d 1035 (2021). Here, the State produced expert opinion that the State properly left W.M. with his mother. Plaintiffs' standard of care expert neither disputed nor challenged that opinion. Moreover, Plaintiffs' misrepresentations about a 'phantom placement' of W.M. with Rich do not create a question of fact nor are they sufficient to defeat summary judgment. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) ("a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain"). The Court of Appeals correctly affirmed summary judgment on this legal ground. *W.M.*, 19 Wn. App. 2d 622-23.

Second, and also dispositive of their lawsuit, Plaintiffs failed to establish proximate cause. Because W.M. was properly allowed to remain with his mother and that placement would

have occurred regardless of the negligence Plaintiffs' allege, Plaintiffs cannot show the negligence asserted "resulted" in a harmful placement decision. *W.M.*, 19 Wn. App. 2d at 624-25. Further, Plaintiffs' attempt to mask this critical causation gap with speculation, argumentative assertions and unsupported hypotheticals similarly fails as a matter of law. *White*, 131 Wn.2d at 9.

For each of these reasons, the Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Plaintiffs' expert neither challenged nor disputed the correctness of the State's December 9, 2017, decision that allowed W.M. to remain with his mother in her home. Was summary judgment properly granted where Plaintiffs failed to show that the State's purported negligence resulted in a harmful placement decision?

2. Was summary judgment properly granted where Plaintiffs failed to present any admissible, non-speculative evidence to establish proximate cause?

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III. COUNTERSTATEMENT OF THE CASE

A. W.M.'s Accidental Ingestion of Suboxone

On Saturday, December 9, 2017, the State received notice that W.M. was taken to the hospital after he ingested the medication "Suboxone." The State confirmed there had never been a prior referral concerning this mother or child. The State screened the referral "in" for possible negligent treatment, and assigned social worker Kim Hartnagel to investigate the referral. CP 242, 450. Within two hours of the State's receipt of the referral, Hartnagel drove to Portland, Oregon, reported to Legacy Randall Children's Hospital, and began her investigation. CP 254, 458, 480.

Hartnagel spoke with Katelyn Lawson, W.M.'s mother. Lawson reported they lived with her mother in Ridgefield, Washington. CP 480. She and W.M. went to her boyfriend Sam Rich's house in Troutdale, Oregon, while he was away at work hoping to erect Christmas decorations as a surprise. Rich was not

present when the Suboxone incident took place. CP 480-81.

While there, Lawson briefly left W.M. in the room by himself. Upon her return she discovered that W.M. had climbed onto a stool and accessed an old prescription of Suboxone. Lawson knew W.M. could climb up the stools and usually left them lying down for that reason. But that one time she left the stools upright. Lawson immediately took W.M. to the hospital. CP 480-81.

While certainly a reason for concern and investigation, the accidental ingestion of medication by a young child is not an uncommon occurrence. As Dr. Scannapieco, the State's expert, explained:

> The accidental ingestion of a forbidden medication or other substance by a toddler happens quite often. This kind of unfortunate event frequently happens with two to three year old children who suddenly discover they have newfound abilities to move, climb and access places and items that were previously beyond their reach. And, for children that age, everything they access tends to be put immediately into their mouth.

CP 1143.

Hartnagel studied W.M.'s condition. There were no signs of abuse, and none were reported by W.M.'s medical providers. CP 465. Hartnagel observed the entirely appropriate interactions between W.M. and Lawson. CP 480-81. Lawson reported she had not told W.M.'s father about the incident because she did not have a good phone number for him. Lawson said she would have her divorce attorney tell the father's attorney about the incident the following Monday, December 11, 2017. CP 261.

W.M. was scheduled for release from the hospital on Sunday, December 10, 2017. CP 480. The child's nurse told Hartnagel that hospital staff had no concerns with W.M. going home with Lawson. CP 255. "There was no information in any record that demonstrated W.M.'s ingestion of Suboxone was anything other than accidental…when the hospital determined that W.M. recovered from his accidental ingestion, there was no known active or remaining threat to the safety of the child." CP 1143.

The removal of a child from a parent is a significant action that can, itself, cause considerable trauma to a young child like

W.M. CP 796. Hartnagel determined W.M. was not at imminent risk of harm, and that it was reasonably safe for him to remain with Lawson. CP 481.

On Monday, December 11, 2017, Katie Palmquist assumed the State's ongoing investigation. CP 477. Palmquist scheduled an in-home visit for December 12 at the Ridgefield, Washington, home where W.M. and Lawson resided with Sally Lawson (Sally), W.M.'s maternal grandmother. CP 477, 480.

At that home inspection, Sally confirmed W.M. lived there, a fact Plaintiffs' expert later conceded. CP 1099 ("Lawson was living with her parents and they were caregivers for W.M.") Palmquist observed W.M., inspected the home, and confirmed it was safe for W.M. "[Sally] said this was a one-time incident that has been an eye opener for them and everything has either been thrown away or locked up now." CP 315-17.

Sally reported that she knew her daughter's boyfriend, had been to his home, and shared that his home was a safe environment for W.M. Sally disclosed the boyfriend was previously prescribed

Suboxone to help him get off pain pills he was prescribed following an accident. CP 477-78. Palmquist concluded there were still no "risks that met the safety threshold for removal." CP 793.

The State's investigation continued, and W.M. remained in the custody of his mother until December 18, 2017. There is no evidence W.M. suffered any abuse by Rich prior to that date.

B. Rich's Assault of W.M.

On December 18, 2017, Lawson allowed Rich to babysit W.M. at his Oregon residence. Rich severely physically abused W.M. CP 663. When the child was finally taken to the hospital, he was limp, non-responsive, and had limited to no respiratory effort. CP 660-61.

While her son struggled to survive in the next room, Lawson concocted stories to explain W.M.'s injuries. Lawson first told hospital staff that W.M. fell from his high chair. She later claimed to have witnessed W.M. fall down a series of stairs. The fabricated stories continued until Sally directed her daughter to "tell the truth." Only then did Lawson reluctantly admit she was not present

when W.M. was injured, and the child was injured in Rich's care. CP 662.

C. Events Following Rich's Assault

After Rich's assault, the State learned that approximately six years earlier Oregon Social Services documented a founded finding of abuse by Rich that involved a different child. CP 343. There was no evidence of any abuse by Rich in the intervening six years.

On February 20, 2018, the State issued an updated investigative assessment of Lawson related to both the Suboxone incident and Rich's assault. In it, the State made findings that W.M. was subjected to negligent treatment/maltreatment by Lawson. CP 979. On September 4, 2018, Rich was indicted on multiple criminal counts related to his abuse of W.M. CP 355-56.

D. Procedural History

Below, Plaintiffs did not challenge the State's decision to allow W.M. to remain with his mother at Sally's home. Rather, based on their expert's testimony, they challenged the absence of

a voluntary safety plan while W.M. remained with Lawson:

> Q. Just so I'm clear, I'll ask you the question directly. Do you have an opinion on whether or not [W.M.] should have been removed from [Lawson] at the point of the December 9th, intake?
>
> **A. No. My opinion is, based on--that they needed to do the safety plan which was involved in an assessment of all the adults that was around [W.M.] and then make that decision based on all of the best information they had.**

CP 725.

The parties filed cross motions for summary judgment. The trial court denied Plaintiffs' motion, granted the State's motion, and dismissed the lawsuit. CP 1167. Following the denial of their motion for reconsideration, Plaintiffs appealed.[2] CP 1203-04, 1205.

In a 2-1 published decision, the Court of Appeals affirmed summary judgment because Plaintiffs' could not establish the

[2] The order denying reconsideration properly rejected the third declaration of Plaintiffs' standard of care expert. CP 1203-04. Plaintiffs did not assign error to that ruling below, and do not challenge it here. Accordingly, it is not addressed further.

required elements of their claim. *W.M.*, 19 Wn. App. 2d 622-25. Following established Washington precedent, the court determined that one cannot leave or place a child in an abusive home where there is no evidence the child has been abused or is at imminent risk of being abused. *Id*. (discussing *M.E.*, 15 Wn. App. 2d at 33-34).

The court also affirmed summary judgment because Plaintiffs' proximate cause analysis lacked evidentiary support and was wholly dependent on speculation. As the court explained, unsupported assertions and rank speculation cannot create an issue of fact or defeat summary judgment. *Id.* at 624-25.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Plaintiffs Failed to Establish the Claim Elements Required by Two Decades of Washington Precedent

It is Plaintiffs, not the Court of Appeals, that seek to alter the longstanding elements of their negligent investigation claim. Plaintiffs cannot show the State made a harmful placement decision because, as in *M.E.*, there was no evidence W.M. was

abused in Sally's home or at imminent risk of harm. *M.E.*, 15 Wn. App. 2d at 33-34; RCW 13.34.050. Advancing arguments about the meaning of "harmful placement decision" that are similar to those made to this Court by the unsuccessful petitioners in *M.E*, Plaintiffs seek to circumvent this essential element altogether *Cf.* Pet. at 17-29 and App. at 7-8 (*M.E.* petition for review). Just as this Court denied review in *M.E.* last year, it should deny Plaintiffs' request here.

The Court of Appeals also properly affirmed summary judgment because Plaintiffs cannot show the State's alleged negligence *resulted* in a harmful placement decision. Both holdings follow established Washington law, and do not merit review by this Court.

1. The State's admittedly correct placement of W.M. was not a "harmful placement decision"

a. Later physical abuse does not transform an admittedly correct earlier placement into a "harmful placement decision"

Plaintiffs point to Rich's December 18 assault and summarily conclude the State *must* have allowed W.M. to remain

in an abusive home. According to Plaintiffs, *whenever* a child is later abused, even outside of the home, the earlier placement decision must, necessarily, have been a harmful one. *See* Pet. at 18-19. That hindsight driven analysis conflicts with the holdings of this Court and ignores the statutory and Constitutional limitations on the State's authority to remove a child from a parent.

A claim for negligent investigation under RCW 26.44.050 is a "narrow exception" to the rule that Washington does not recognize a general tort claim for negligent investigation. *M.W.*, 149 Wn.2d at 601. As Washington courts have repeatedly held, the limited negligent investigation claim only protects against incomplete or biased investigations that result in "harmful placement decisions" "such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home." *Id* at 602; *Roberson v. Perez*, 156 Wn.2d 33, 46, 123 P.3d 844 (2005) ("Our interpretation of the statute in *M.W.* unequivocally requires that the negligent

investigation to be actionable must lead to a 'harmful placement decision.'")

Deviating from this standard, Plaintiffs' hindsight analysis improperly assumes that Rich's later abuse of W.M. necessarily means the earlier placement decision was wrong and harmful under *M.W.* However, that abuse later occurs does not mean there was sufficient evidence beforehand to warrant removal of W.M. from his mother. Absent "specific factual information" that shows a child will be "seriously endangered if not taken into custody" and which demonstrates a "risk of imminent harm to the child," the State cannot seek, and no court can order, the child removed from their parent. RCW 13.34.050; *In re Custody of Smith*, 137 Wn.2d 1, 13-15, 969 P.2d 21 (1998) (recognizing parents fundamental constitutional right to raise their children without State interference).

Thus, it was not enough for Plaintiffs to show Rich abused W.M. on December 18. They had to show the evidence reasonably available on December 9 was sufficient to compel a judge to order

W.M.s removal from his mother. *Id*. Here, Plaintiffs' never addressed that burden, largely because they could never satisfy it.

Initially, much of Plaintiffs' argument is premised on their summary conclusion that, because Rich had a finding of physical abuse six year earlier, the State had a duty to prohibit him from having contact with W.M., and, presumably, every other child. There is no legal support for that proposition. Further, Plaintiffs' produced no evidence that Rich harmed W.M., prior to December 18, or that a judge could or would have restricted Rich's contact with W.M based on an administrative finding of abuse of another child from six years earlier.

More to the point, the State's expert opined there were not sufficient grounds to remove W.M. from his mother before December 18. CP 796-97. Even with knowledge of Rich's prior finding of abuse, when directly asked, Plaintiffs' expert did not dispute or challenge that opinion, nor did she opine that W.M. should have been taken into protective custody on December 9. CP 725. Plaintiffs' failure to produce evidence that would have

compelled a court to order the removal of W.M. on December 9 ends the analysis and Plaintiffs' claim against the State. RCW 13.34.050; *Young v. Key Pharm. Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (a complete failure of proof concerning an essential element necessarily renders all other facts immaterial).

The Court of Appeals decision here also follows established precedent. Addressing facts and arguments similar to those presented here, the Court of Appeals in *M.E.* concluded no "harmful placement decision" occurred. *M.E.,* 15 Wn. App. 2d at 33-34. There, in 2011, Tacoma Police Department officers (TPD) performed a welfare check at the residence of M.E. and J.E. after a report that J.E. had vomited from taking some of her mother's medication. *Id.* at 24. M.E. and J.E. lived with their mother *and* her boyfriend. *Id.* at 25. After visiting the residence, the officers did not see evidence of abuse or a basis to remove the children. *Id.* at 24-25. In January 2012, a TPD detective investigated a new allegation that M.E. and J.E. reported a "ghost" "peeking" at them in the bathroom. *Id.* at 25-27. Based

on its investigation and the fact that neither child made any disclosures of abuse, the detective did not take the children into protective custody. *Id.* In 2013, a second TPD detective investigated allegations that the boyfriend sexually abused J.B., whom the boyfriend often babysat while watching M.E. and J.E. *Id.* Although J.B. made disclosures of abuse, there was no information that the boyfriend had abused M.E. or J.E. *Id.* at 28. Two months after the boyfriend was arrested for abusing J.B., M.E. disclosed sexual abuse, claiming it began in the fall of 2012, *after* the first two investigations took place. *Id.* at 29-30.

M.E. sued the City alleging TPD conducted negligent investigations that resulted in a harmful placement–M.E. was left in a home with her future abuser. *Id*. at 23, 30, 33-36. However, M.E. failed to produce evidence that she should have been removed at the time of those earlier investigations. Just as Plaintiffs do here, M.E. sought to retroactively establish a "harmful placement" based on abuse that admittedly happened *after* TPD's 2011 and January 2012 investigations. *Id*.

The Court of Appeals held the absence of evidence of abuse in 2011 and January 2012 and the absence of evidence showing that a different result would have occurred in 2013 at the time of TPD's investigation was dispositive. *Id.* As to the 2011 and 2012 investigations, M.E. could not show a negligent investigation resulted in a harmful placement of leaving a child in an abusive home because there was no evidence of any abuse in the home at those times. *Id.* at 33-34.

The reasoning of *M.E.* controls this appeal. There is no evidence W.M. could or should have been removed from his mother on December 9. CP 725; CP 1141-43; RCW 13.34.050. As in *M.E.*, Plaintiffs cannot rely on Rich's subsequent December 18 assault to retroactively conclude the State's original placement decision was wrong or harmful. *M.E.*, 15 Wn. App. 2d at 33-35.

Plaintiffs' newly minted "hindsight test" cannot withstand close scrutiny. It ignores the statutory and Constitutional limitations on the State's ability to act, conflicts with established

precedent, is not supported by the undisputed facts in this record, and does not merit review.

b. The State never placed W.M. with Rich

On multiple occasions in their petition, Plaintiffs misrepresent that the State placed W.M. with Rich, in Rich's Oregon home on December 9. *See, e.g.,* Pet. at 18-19, 23-24. Plaintiffs' baseless conclusions are not sufficient to defeat summary judgment.

On a motion for summary judgment, the court only considers the evidence and *reasonable* inferences in the light most favorable to the nonmoving party. "[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence." *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065, 1070 (2000), *as amended* (Jan. 8, 2001); *White*, 131 Wn.2d at 9; CR 56(e).

As the Court of Appeals properly held, there is nothing in this record that permits the court to reasonably infer the State placed W.M. with Rich. *W.M.*, 19 Wn. App. 2d at 624. The

State's *only* placement decision allowed W.M. to remain with his mother at Sally's home on December 9. CP 480-81. The State verified that residence at a home study it conducted three days later. CP 477-78. Plaintiffs' own expert acknowledged "Lawson was living with her parents and they were caregivers for W.M." CP 1099. Plaintiffs produced no evidence that Rich lived at Sally's, and no evidence the State ever placed W.M. with Rich, much less at Rich's Oregon residence. Plaintiffs' misrepresentations are not evidence, do not put the undisputed facts at issue, and cannot defeat summary judgment. *White*, 131 Wn.2d at 9.

c. Allowing W.M. to remain in his non-abusive home was not a "harmful placement decision"

Desperate to identify some "harmful placement decision," Plaintiffs now contend that W.M.'s ingestion of Suboxone, even though wholly accidental, established "negligent treatment" by Lawson, thereby rendering any placement with her a harmful one. Pet. at 20-22. Plaintiffs' argument directly conflicts with

Washington law, ignores the undisputed opinion of both parties' standard of care experts, and was properly rejected by the Court of Appeals.

Because the negligent investigation claim is inferred from the duty to investigate in RCW 26.44.050, the test for that cause of action must similarly adhere to the specific harm that statute addresses. Here, the duty to investigate is triggered by, and limited to, reports "involving conduct of abuse or neglect." *Wrigley v. State*, 195 Wn.2d 65, 67, 73, 77-78, 455 P.3d 1138 (2020). The legislature defined the term "abuse or neglect" that is central to RCW 26.44.050:

> "Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety…; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child…

RCW 26.44.020(1)

"Negligent treatment or maltreatment" means conduct evidencing "a serious disregard of consequences of such

magnitude as to constitute a clear and present danger to a child's health, welfare, or safety…" RCW 26.44.020(19). As a matter of law, the simple negligence Plaintiffs attribute to Lawson's involvement in the Suboxone incident is insufficient to show negligent treatment, maltreatment, or abuse. *Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 590-91, 360 P.3d 875 (2015). Construing RCW 26.44.020(1), the Court of Appeals explained:

> Good reason exists to reject a negligence benchmark. A negligence standard could place every Washington parent in jeopardy because what is "reasonable" under a negligence regime varies depending on the situation and actors involved. Such a standard might also implicate a parent's fundamental liberty interest in the care and custody of her children.

Brown, 190 Wn. App. at 593; *see also In re Custody of Smith*, 137 Wn.2d at 13-15.

Instead, to prove negligent treatment/maltreatment Plaintiffs had to produce evidence showing "serious disregard [by Lawson] of consequences to the child of such magnitude that it

create[d] a clear and present danger to the child's health." *Brown*, 190 Wn. App. at 590-91. When this correct legal standard is applied, there is no support for Plaintiffs' assertion.

Lawson briefly left W.M. in a room by himself. Upon her return, she found the toddler had climbed onto a stool, and accessed an old prescription of Suboxone. CP 480-81. Plaintiffs did not produce any evidence challenging these facts, nor did they produce evidence that Lawson was aware Suboxone was even there. Plaintiffs produced no argument or evidence that Lawson demonstrated a "serious disregard of consequences" by briefly leaving her child alone by a kitchen stool. *Brown*, 190 Wn. App. at 593.[3]

Plaintiffs' argument is similar to those made by petitioners in *M.E.* related to the 2011 investigation that followed J.E.'s reported ingestion of his mother's medication and the officer's note that the conditions in the home were not suitable for children.

[3] Although this case was cited below, *Brown* is neither cited nor addressed in Plaintiffs' Petition.

See App. 10-11 (arguing, as to the 2011 investigation, "[t]he City breached its duty to the children leaving them in a home that was harmful to them even if no sexual abuse occurred at that time.") Just as this Court denied review of that argument in *M.E.*, it should deny review of Plaintiffs' argument here.

Plaintiffs also cite the founded finding of negligent treatment the State reached on February 20, 2018, three months *after* Rich's December 18 assault. *See* Pet. at 22. Despite the combined investigations of law enforcement and the State, no additional evidence was produced that showed the December 9 Suboxone incident was anything other than accidental.

The Court of Appeals correctly affirmed summary judgment because Plaintiffs' failed to show the State made a harmful placement decision. *W.M.*, 19 Wn. App. 2d at 622-24.

2. Plaintiffs cannot establish proximate cause

The Court of Appeals also correctly dismissed Plaintiffs' claim because they cannot show the State's alleged negligence

resulted in a harmful placement decision. *W.M.*, 19 Wn. App. 2d at 624-25.

The State's only placement decision allowed W.M. to remain with his mother at Sally's house on December 9. Even with knowledge of Rich's prior abuse finding, when directly asked, Plaintiffs' standard of care expert neither disputed nor challenged that placement decision. CP 725. Thus, Plaintiffs did not show that, absent the negligence alleged, W.M. would been removed from his mother. Because that same placement would have occurred regardless of the negligence they attribute to the State, that negligence could not have "resulted" in a harmful placement decision, and summary judgment was properly affirmed. *M.W.*, 149 Wn.2d at 602; *Roberson*, 156 Wn.2d at 46.

Nevertheless, Plaintiffs contend the State should have implemented a voluntary safety plan that prevented contact between W.M. and Rich. They speculate that such a plan may have prevented Rich's assault. Plaintiffs' argument lacks merit.

Initially, the State does not possess extra-judicial legal

authority to unilaterally issue an enforceable "order" that directs or prohibits any action by a parent. A "safety plan" is a *voluntary* written agreement. It is neither automatically enforceable by a court, nor does the failure to follow that plan necessarily result in removal of the child. CP 1142.

In addition, Plaintiffs produced no evidence that Lawson would have complied with a voluntary agreement that limited contact with Rich. Finally, Plaintiffs produced no evidence that, had Lawson violated such a safety plan, the State could have learned of her action prior to December 18, and had time to petition the court for an order removing W.M. prior to that date. And even if the State could have detected W.M. with Rich in a different state, Plaintiffs produced no evidence that a court would have ordered W.M. placed into foster care prior to December 18 based on nothing more than Rich and W.M. being in the same room and an old prescription of Suboxone. *See* RCW 13.34.050.

Plaintiffs' attempt to support this speculation with the unsupported, conclusory opinions of their expert, similarly fails.

An expert's opinion "must be based on fact and cannot simply be a conclusion or based on an assumption if it is to survive summary judgment." *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019); *Sartin v. Estate of McPike*, 15 Wn. App. 2d 163, 184-86, 475 P.3d 522 (2020), *review denied*, 196 Wn.2d 1046 (2021). The Court of Appeals correctly held the unsupported opinions of Plaintiffs' expert do not satisfy this test, and properly affirmed summary judgment. *Id*.

3. The Court of Appeals' decision is consistent with Albertson

Plaintiffs also erroneously contend the Court of Appeals' decision here conflicts with *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015). Initially, the facts in *Albertson* are distinguishable from this case. Unlike *Albertson*, W.M. was never placed in the protective custody of the State, there were not conflicting medical opinions about whether W.M. should go home with his mother, and the State did not place W.M. in the home of the person who later abused him. *Cf. Id*. at 289-92 and

CP 315-17, 480-81, and 1099. That said, the relevant holding in *Albertson* supports the decision reached by the Court of Appeals here.

Albertson correctly rejected the trial court's instruction that defined the State's duty, holding it was error to allow the jury to find negligence based on the State's failure "to conduct a reasonable investigation." *Id*. at 300-01.

> A plaintiff does not have an actionable breach of duty claim against DSHS every time the State conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures.

Albertson, 191 Wn. App. at 300.

Further, rejecting the argument Plaintiffs make here, *Albertson* held the duty to investigate does not necessarily include an obligation to implement a voluntary safety plan.

> DSHS's statutory duty to investigate a report of child abuse or neglect does not *necessarily* include a duty to, for example, offer and implement a voluntary safety plan for the family or initiate a dependency proceeding or other legal action to protect the child. DSHS's failure to take these actions does not constitute a negligent investigation

> under RCW 26.44.050 absent a faulty or biased investigation that leads to a harmful placement decision under *M.W.*

Albertson, 191 Wn. App. at 301 (emphasis in original).

As demonstrated earlier, Plaintiffs failed to show the State's investigation resulted in a harmful placement decision. *Infra* at 12-24. Furthermore, although not addressed by *Albertson,* Plaintiffs' here failed to produce admissible, non-speculative evidence that the safety plan proposed would have prevented Rich's assault. Thus, although factually distinguishable, the Court of Appeals' decision is entirely consistent with *Albertson's* holding that Plaintiffs cannot base their claim on the failure to implement a voluntary placement plan.

B. Because the Court of Appeals' Opinion Rests on Unique Facts and Settled Law, the Petition Does Not Present an Issue of Substantial Public Interest

Plaintiffs argue that this case raises an issue of substantial public interest that this Court should address. Pet. at 29-30. It does not. As amply demonstrated above, the Court of Appeals'

opinion applied settled law to the unique facts of this case. There is therefore no reviewable issue of substantial public interest in this case.

V. CONCLUSION

The State respectfully asks this Court to deny review.

This document contains 4999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of February, 2022.

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DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding RESPONDENT'S ANSWER TO PETITION FOR REVIEW was filed in the Washington State Supreme Court, according to the Court's protocols for electronic filing.

I further declare that a copy of the preceding was electronically served on all counsel of record, by agreement and through ACORDS, at the following email addresses:

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

M.E. and J.E., minors, through MICHAEL MCKASY,
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Petitioners,

v.

CITY OF TACOMA, a political subdivision of
the State of Washington,

Respondent.

PETITION FOR REVIEW

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Rules and Regulations

Other Authorities

A. IDENTITY OF MOVING PARTIES

J.E. and M.E., girls ages 3 and 5 in 2010, ("the children") and Joshua Eddo, their father, seek review by this Court of the Court of Appeals decision terminating review identified in Part B.

B. COURT OF APPEALS DECISION

Division II filed its published opinion on September 1, 2020. A copy is in the Appendix at pages A-1 through A-19.

C. ISSUES PRESENTED FOR REVIEW

1. Did Division II err in affirming the dismissal of the children's RCW 26.44.050 claim of negligent investigation of potential abuse against the City of Tacoma ("City"), deciding breach of duty as a matter of law, where the City police investigation violated Tacoma Police Department standards and were contrary to proper police practices as documented by the children's expert?

2. Did Division II err in determining that the City had no common law duty to the children to conduct a non-negligent investigation of the children's abuse once its officers undertook an investigation of that abuse?

D. STATEMENT OF THE CASE

Division II sets out the facts generally, op. at 2-9, but there are *glaring* omissions in that factual recitation that are highly relevant to this Court's decision on review. That court's almost dismissive attitude toward the circumstances of the children's abuse is distressing.

City officers came to the girls' home on two occasions. The first contact in 2011 revealed a home that was physically and psychologically harmful for children, a home that was a complete mess, with pornographical materials in the children's view, "a potential red flag for abuse," CP 54-55, medical bottles strewn about, and persons unrelated to the family in residence. CP 43-44. The City's officers did not remove the children from that placement, although the officers were obliged to do so if the children's surroundings were harmful to them. CP 74.

The second contact in 2012 involved allegations that clearly suggested sexual abuse of J.E. by a "ghost." CP 67. Jason Karlan, the mother's live-in boyfriend, was the children's babysitter in the home. CP 68, 157-59. He was the primary suspect for the children's abuse. *Id.* Karlan even self-reported that he had a criminal history, CP 60, 158-59, but the City's officers neglected to perform a background check on him that would have revealed accusations of child molestation against him that likely would have prompted a more intensive investigation of him. CP 58-60, 158-59.[1] TPD's procedural manual required officers to perform a

[1] In another case, DSHS acknowledged that "a home in which a sexual predator resides is dangerous to children." *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 198, 402 P.3d 346 (2017), *review denied*, 192 Wn.2d 1023 (2019). Courts also recognize that evidence of sex crimes is probative of an offender's propensities. *See, e.g., In re Det. of Coe,* 160 Wn. App. 809, 819, 250 P.3d 1056 (2011), *aff'd on other grounds,* 175 Wn.2d 482 (2012); *State v. Herzog*, 73 Wn. App. 34, 50, 867 P.2d 648, *review denied*, 124 Wn.2d 1022 (1994). This is consistent with the available psychological research showing that pedophilia likely cannot be cured and can only be

background check on a suspect like Karlan. CP 71. A national criminal background check is free for Tacoma police and takes just 30 seconds to a minute to complete. CP 60. The City's officers' investigation was incomplete without this cheap and quick investigative step being done for the prime suspect. Yet again, the City's officers did not remove the children from the home.

The third interaction was the most troubling yet. The City's officers learned on April 29, 2013 that Karlan had raped J.B., a child Karlan babysat in the *same house* with M.E. and J.E. CP 82, 130-34. CPS referred the case to the City's police; its referral stated: "Referrer reported that there were previous allegations of sexual abuse of Jason's fiance's daughters [ME and JE]. See intake #2551025." CP 135-37, 152-53, 163-67. In May 2013, Detective Jennifer Quilio was assigned to investigate. CP 83, 122. A felony arrest bulletin for Karlan's rape of J.B. was not issued until August 26, 2013. CP 138. Karlan was arrested thereafter, and released after serving a few days' time, and rearrested in November 2013. CP 83, 85-86, 140-42. Quilio knew Karlan had been released in September 2013. CP 86. After arresting Karlan, Quilio did not interview

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treated in a manner to enable a pedophile to resist his sexual urges. *See generally*, Harvard Medical School, *Pessimism About Pedophilia*, Harvard Mental Health Letter (July 2010), *available* at https://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia (last accessed September 11, 2020). The children's expert on police practices explained this point as well. CP 102-03.

Karlan about potential abuse of M.E./J.E. because she chose to interview him only about J.B., stating: "I really had no stake in investigating the girls." CP 84. Quilio never formally reopened the 2012 investigation of Karlan. CP 84.[2] This was contrary to TPD policy. CP 78.

Karlan had continued to access to M.E. and J.E. after the May 2013 referral to the City's police; Quilio "assumed Karlan was likely still living with Jocelyn Eddo." CP 123. J.B.'s mother told Quilio that Karlan babysat M.E./J.E. CP 81. J.B.'s mother gave Quilio a current address for Jocelyn and Jason, CP 124, and Karlan was arrested at that address. CP 124, 140-42. There is nothing in this record indicating that the children's mother ejected Karlan from the apartment after his arrest; he had access to the children for six months – May-November, 2013. CP 103.

Karlan sexually abused the children after October 2013. It is well documented that this abuse was reported. The October 29, 2013 CPS intake report indicated that one of the children told a school counselor that Karlan "wakes her up in the middle of the night and touches her in the wrong place and has her do things." CP 126, 145, 346, 539, 577, 588-89. Quilio was aware of these reports. CP 126.

[2] It was not until after Karlan's arrest that Quilio asked the girls' mother whether M.E./J.E. reported sexual abuse by Karlan. CP 125. Quilio knew child victims of sexual abuse may disclose abuse "once the abuser is out of the house." *Id.*

Critically, Division II's opinion *nowhere* references the expert testimony adduced by the children on the City's breach of its duty to the children. Susan Peters, a former deputy sheriff, with impeccable investigation credentials, CP 105-08, offered a comprehensive expert analysis of TPD duty as to each of three abuse events, why TPD breached that duty, and how the breach resulted in an adverse placement of M.E./J.E. CP 98-110.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[3]

(1) Introduction

This Court has never addressed the parameters of law enforcement's duty under RCW 26.44.050, a duty that is distinct from that of the Department of Social and Health Services ("DSHS"),[4] or law enforcement's common law duty to abused or neglected children. Moreover, Division II's published opinion dramatically diminishes the

[3] This case was resolved on summary judgment below. As recounted in the children's briefing, the trial court's basis for granting summary judgment to the City was less than clear. Br. of Appellants at 9, 24. In any event, under CR 56 the inquiry is not whether the moving party or the court believes one view of the facts more persuasive than the other. Rather, the question is whether "a reasonable *jury* could return a verdict for the [nonmoving party]." *Keck v. Collins*, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015) (emphasis added). The evidence in the record must be viewed in the light most favorable to the girls as the nonmoving party, and all reasonable inferences from the record must be drawn in their favor. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

[4] *See* CP 997 (chart comparing greater powers afforded law enforcement by statute in child abuse investigations). Under RCW 26.44.050, law enforcement may immediately remove a child at risk from an abusive placement, for example, a power not conferred upon CPS.

protection afforded to possible child victims of abuse or neglect, contrary to Washington's strong public policy upholding the protection of children. This case merits review because it involves issues of substantial public importance. RAP 13.4(b)(4).

But Division II's published opinion also specifically contravenes decisions of this Court and the Court of Appeals on RCW 26.44.050 and law enforcement's common law duty, requiring this Court to grant review to correct Division II's erroneous application of the law. RCW 13.4(b)(1-2).

It is the public policy of Washington that children are to be protected from abuse. The Legislature has said so:

> The children of the state of Washington are the state's greatest resource and the greatest source of wealth to the state of Washington. Children of all ages must be protected from child abuse. Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take appropriate action, and child abusers must be held accountable to the people of the state for their actions.

See Laws of 1985, ch. 259 § 1. This Court has repeatedly said so as well in numerous cases.[5]

[5] For example, this Court in *Tyner v. State Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 76-77, 1 P.3d 1148 (2000) recognized the strong Washington public policy of protecting children from abuse and implied a cause of action to implement it. *Id.* at 81-82. Again, in *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018), this Court

(2) Division II Misapplied RCW 26.44.050, Diminishing the Statute's Protection of Children

Division II acknowledged that the City owed the children a duty, op. at 11 (recognizing that the statute has long recognized a cause of action against law enforcement for negligent investigation), but it seemingly labored under the misconception that allowing children to remain in a harmful setting is not somehow a *harmful* placement decision. Op. at 11-13. That is simply *contrary* to this Court's decision in *M.W.* A "harmful placement decision" includes "letting a child remain in an abusive home." *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601-02, 70 P.3d 954 (2003). If leaving children in the same home as a nonrelative child rapist does not qualify as a harmful placement decision, it is difficult to imagine what would. For this reason alone, review is appropriate. RAP 13.4(b)(1).

Division II concluded that the City was not liable to the children for its negligent investigation under RCW 26.44.050 of their abuse as a matter of law. But the essence of Division II's opinion is that the children failed to establish *breach* of the duty by the City, even though that is an *issue of fact* for the jury. And Division II was simply wrong on breach.

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recognized the State's compelling *parens patriae* interest in protecting the physical, mental, and emotional health of children in Washington, *id.* at 489, justifying intrusion by public officials into family life to protect that interest. This Court recognized a common law duty in tort to children when those officials failed to act to protect children.

RCW 26.44.050, as it existed in October 2011 (*see* Appendix), mandated that law enforcement officers conduct an investigation of child abuse or neglect, and may take a child into custody without a court order if the child is at risk. Under that statute, law enforcement agencies[6] have a duty to children to reasonably investigate reports of child abuse or neglect[7] and they may be liable if they conduct a negligent investigation that results in a harmful placement decision as to the child victim. *M.W.*, 149 Wn.2d at 601-02; *Lewis*, 136 Wn. App. at 460. The duty to investigate is breached if the investigation is either incomplete or biased. *M.W.*, 149 Wn.2d at 602.

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[6] Law enforcement agencies have been found liable for a negligent RCW 26.44.050 investigation. *See, e.g.*, *Rodriguez v. Perez*, 99 Wn. App. 439, 443-44, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000) (action by parents against law enforcement officer); *Thomas v. Cannon*, 289 F. Supp. 3d 1182, 1203-04 (W.D. Wash. 2018) (action against police who illegally removed child from father's custody).

[7] As Division I stated in *Lewis v. Whatcom County*, 136 Wn. App. 450, 460, 149 P.3d 686 (2006):

> Nothing in our previous opinions limiting the rights of alleged abusers to sue for negligent investigation can or should be read to limit the duty of law enforcement to protect children from abuse. In *Yonker*, we held that RCW 26.44.050 creates a duty to children who may be abused or neglected, requiring the appropriate agency to investigate abuse allegations. No court has held that RCW 26.44.050 does not impose a duty to investigate in situations where a child is being abused by someone other than his or her parent or guardian. We hold that law enforcement did owe Lewis, a child victim of alleged sexual abuse by her uncle, a duty to reasonably investigate those allegations. Thus, the superior court made an error of law when it granted summary judgment.

Id. at 460.

But breach of the duty created by RCW 26.44.050, like other instances of a breach of duty in tort law, is ordinarily a *fact question for the jury. Hertog ex rel. R.A.H. v. City of Seattle,* 138 Wn.2d 275, 979 P.2d 400 (1999); *Butler v. Thomsen,* 7 Wn. App. 2d 1001, 2018 WL 6918832 (2018), *review denied,* 193 Wn.2d 1026 (2019) (Division I reverses summary judgment where expert testimony raised question of fact as to breach).

In the specific context of child abuse investigations, courts have reaffirmed that the breach of the RCW 26.44.050 duty is a *question of fact*. *McCarthy v. County of Clark,* 193 Wn. App. 314, 330, 376 P.3d 1127, *review denied,* 186 Wn.2d 1018 (2016) ("Whether an officer has fulfilled the duty to investigate is a question of fact."); *K.C. and L.M. v. State*, 10 Wn. App. 2d 1038, 2019 WL 4942457 (2019) (Division II reaffirms that in negligent investigation action under RCW 26.44.050, breach of duty and proximate causation are jury questions, reversing summary judgment for DSHS).

Ample evidence supported the children's position that the City breached its duty to them. Not mentioned in Division II's opinion anywhere is the fact that the City police investigation violated applicable

procedural guidelines.[8] The TPD Procedures Manual confirmed that its officers must take a child into protective custody if there was "probable cause to indicate abuse or neglect." CP 46. That Manual also directed that officers check criminal histories of suspects. CP 71. The Pierce County Protocol for Child Abuse Investigation ("Pierce County Protocol") echoed the TPD Manual's direction that child abuse victims be taken into custody where abuse was present. CP 50.

The City's officers allowed M.E./J.E. to remain in a placement where a convicted sex offender could have unfettered access to the children.

In the October 2011 incident, J.E. swallowed medicine and vomited. As previously noted, the home conditions for the children were abominable, "not suitable for children," but the officers did not remove them from the home. This was a breach of the standard of care according to Sue Peters, the children's police practices expert. CP 100-01. Division II *ignored* that opinion that created a question of fact and focused solely on whether *sexual abuse* occurred then. Op. at 12. The City breached its

[8] As this Court noted in *Joyce v. State*, *Dep't of Corrections*, 155 Wn.2d 306, 324, 119 P.3d 825 (2005), internal policy statements like TPD's procedures manual or Pierce County's protocol on child abuse investigations "may provide evidence of the standard of care and therefore be evidence of negligence." *See also*, *Tyner*, 141 Wn.2d at 88 n.8.

duty to the children leaving them in a home that was harmful to them, even if no sexual abuse occurred at that time.

The January 2012 "ghost" incident had clearer overtones of sexual abuse of the children and focused on Jason Karlan. Division II's opinion completely ignores the critical fact that the City's officers were aware at that time that Jason Karlan was the children's caregiver and they should have known that he had a criminal history of molesting children. *Nowhere* mentioned in the Division II opinion is the officers' failure to conduct a full background check on Karlan. Op. at 12-13.

The failure to conduct a *full criminal background check* on Karlan at that time was a breach of the standard of care yet again according to Peters. CP 101. ("TPD's response to the girl's [sic] December 2011 disclosures were grossly inadequate, substandard, and violated its own policies.") At that point, the officers *knew* Karlan had a criminal history, making the failure to secure a full criminal background check on him ever the more negligent, as Peters testified:

> Any officer interviewing a suspect who discloses a criminal history should promptly conduct a background check on that individual. A background check on Jason Karlan would have shown his 1997 conviction for lewd or lascivious conduct against a child. A reasonable detective would upon learning this, embark upon a thorough investigation, including ordering forensic interviews of the children and interviewing the suspect about the prior conviction. A background check on Karlan would have

> undoubtedly led to the children being protected from further molestation and abuse in any number of ways; to include, Detective Brooks taking a deeper approach in her investigation, family being alerted to Karlan's prior conviction, a polygraph test of Karlan, and a forensic interview of the children. Significantly, if Joshua Eddo had learned that Karlan was a convicted sex offender he would have taken steps to protect the children, Jocelyn Drayton may have not allowed Karlan to babysit her children anymore, etc. A change in investigative tact [sic] would have led, on a more probable than not basis, to the children being protected from Karlan's continued sexual molestation and abuse of the girls.

CP 102. A more complete background check would have intensified the officers' investigation of Karlan and prompted the children's removal from the home or their separation from Karlan as a precaution. Division II merely *assumed* no sexual abuse of the children by Karlan. Op. at 13.

But perhaps the most appalling and shocking aspect of Division II's opinion is its treatment of the 2013 situation. Op. at 13-14. When yet another young child, J.B., reported in May 2013 that Karlan had sexually molested him, the City's officers were already aware that Karlan lived with, and provided child care for, M.E./J.E. They knew that Karlan was the live-in boyfriend of M.E./J.E.'s mother, and they had investigated at least *two* prior reports of suspected abuse and neglect in the home. There were also aware at the time that J.E. had previously reported a "ghost in the shower" who was "entangled with Jason" peeked at her in the shower and punched her in the back. They had conducted an investigation of

J.E.'s report of abuse by Karlan in January 2012. J.B.'s report of abuse included an allegation that Karlan molested J.B. *in the same home* and while babysitting both M.E./J.E. as well.

A reasonable police officer, given the foregoing facts and upon learning that Karlan had molested J.B., should have immediately notified the caregivers of any other children to which the alleged child rapist, Karlan, may have had access. In fact, the Pierce County Protocol requires a law enforcement officer to notify caregivers of potential additional victims upon learning that there is probable cause a suspect molested another child. While Detective Quilio informed the children's mother, she did not so advise Joshua Eddo, the children's father. CP 85, 125-26. As Detective Muse testified, an officer should notify *all* caregivers in order to protect additional potential victims. CP 75, 79, 674.

Further, a reasonable law enforcement officer would, upon learning that Karlan had molested J.B., re-open the investigation involving M.E./J.E. because there was now new additional information that Karlan could be a serial offender. CP 102-03. The City knew this standard applied, but it is undisputed that the City's officers failed to re-open the investigation into Karlan's abuse and neglect of M.E./J.E.

Instead of leaving the factual issue of breach to the jury, Division II focused upon the fact that there is no report of abuse by Karlan of

M.E./J.E., only J.B. Op. at 13. The court summarily concluded that there was no report of abuse triggering an RCW 26.44.050 duty to investigate. Op. at 14. But this is not a situation like that addressed by this Court in *Wrigley v. State*, 195 Wn.2d 65, 455 P.3d 1138 (2020) of a report of *future possible abuse*. *Rather*, it was a report of *present* abuse of a child who resided in the same home as M.E./J.E. by the very same person who was their caregiver. Moreover, the girls were one of the subjects of the 2013 CPS referral based on Karlan's rape of a child. CP 64-69, 122, 130-38, 152-53, 163-67. Although the referral focused on Karlan's rape of J.B., a six-year-old boy, the referral also mentioned the girls: "Referrer reported that there were previous allegations of sexual abuse of Jason's fiance's daughters." CP 135. The referral then cited the intake number for the January 2012 referral to Tacoma police. *Id.*

Not only was the 2013 report sufficient, in and of itself, to constitute a "report" triggering the officers' duty to investigate, it could be treated as a *continuation* of the 2012 investigation. RCW 26.44.050 does not "limit the officer's required response to certain specified acts or time periods." *Rodriguez*, 99 Wn. App. at 448. Instead, the "statutory language is broad." *Id*. at 449.

It defies reality to think that a reopening of the prior sex abuse investigation of M.E./J.E. by Karlan was not merited. As Peters testified:

> Further, the Tacoma Police Department's conduct fell well below the standard of care when it failed to follow-up and protect the children when another child, J.B., made a clear disclosure of rape in May 2013 perpetuated by Karlan. TPD should have reopened the girl's case while investigating the subsequent J.B. case. A reasonable officer would have known there was ongoing danger of abuse to the children based on what was reported in the J.B. investigation, including that the girls still lived with the alleged child rapist, there were prior allegations of sexual abuse against Jason, J.B. was molested in the Eddo house, Karlan babysat both the girls and J.B., Karlan did not want police involved and never denied allegations to his close friend, and the mother was in denial that Karlan is an offender.

CP 102-03.

Contrary to Division II's contention that a reopening would not have accomplished anything different in the case, op. at 14, it should have resulted in Karlan's separation from the girls until the investigation resolved what had occurred. It would not have allowed Karlan his unfettered access to the children through the latter part of 2013 or his sexual abuse of them.

There was a question of fact on breach of the RCW 26.44.050 investigative duty foreclosing summary judgment. Division II's opinion condones the trial court's apparent intrusion upon the jury's fact-finding

function, particularly given the facts and expert opinion supporting the children's position.[9] Review is merited. RAP 13.4(b)(1-2).

(3) Division II Erred in Failing to Discern that the City Owed the Children a Common Law Duty

Division II expressed an inability to understand precise nature of the children's common law duty argument. Op. at 17-18. The children argued common law duty in two distinct ways – a special protective duty under *Restatement (Second) of Torts* § 315(b) and a duty to exercise reasonable care once law enforcement acts under *Restatement (Second) of Torts* §§ 281, 302(b). Br. of Appellants at 15-16.[10] In this petition, however, the children confine their common law duty argument to the latter basis in this Court.

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[9] Peters testified that the City breached its duty to the children when its officers failed to properly address the initial October 2011 situation, the December 2011 follow up interaction, or the new information on Karlan in May 2013. CP 100-03. She concluded that TPD failed to conduct a prompt and adequate investigation of the children's abuse meeting the appropriate standard of care for law enforcement resulting in the children's prolonged abuse. CP 103. That created a question of fact on breach. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 351-52, 588 P.2d 1346 (1979) (admissible expert testimony on an ultimate issue of fact creates a genuine issue sufficient to preclude summary judgment).

[10] Division II's willingness to simply throw up its hands and decry the lack of precision in the children's common law duty argument that officers must act reasonably once they choose to act is further undercut by the fact that the panel understood the duty argument being presented. Op. at 1 ("And the appellants have failed to adequately argue a common law duty based on affirmative actions."); op. at 2 (noting complaint argued negligent investigation); op. at 10 ("and the common law duty to act reasonable when undertaking an affirmative action."); op. at 17-18. Moreover, a common law duty has been argued by the children throughout the litigation. *E.g.*, CP 658-61 (opposing city's summary judgment motion, noting its statutory and common law duties. The court could have comprehended the duty advocated by the children from the cases cited by them, but it simply chose not to exert itself to analyze the duty.

Washington common law clearly provides that where police officers act, "they have a duty to act with reasonable care." *Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686, *review denied*, 108 Wn.2d 1024 (1987) (emphasis added); *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013) (recognizing liability can attach to public entity for misfeasance under common law principles); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (finding liability where officers negligently served anti-harassment order); *Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 442 P.3d 608 (2019) (common law duty to refrain from causing foreseeable harm in interactions with others applies to law enforcement in exercising deadly force). This is consistent with the principle set forth in comment e to *Restatement* § 302B that a defendant owes a duty of care to anticipate the misconduct of others "where the [defendant's] own affirmative act has created or exposed the [plaintiff] to a recognizable high degree of risk of harm through such misconduct, which a reasonable [person] would take into account."

Here, the City's officers undertook an investigation of the children's abuse, and, as in *Washburn* or *Beltran-Serrano*, the City owed the children a duty of care as to that investigation. In *Washburn,* this Court held that the city was liable because its officers were negligent when they served an anti-harassment order upon an abuser but were oblivious to

its contents. The abuser was present in the same household as the victim who was to be protected by that order, and they did nothing to protect her upon service of the order. When the officers left, the abuser killed the victim who should have been protected by the order. The Court cited *Restatement (Second) of Torts* §§ 281, 302B. 178 Wn.2d at 757-61.

The Court's analysis of the common law duty of law enforcement is similar in *Beltran-Serrano*. There, this Court made clear that every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others, citing *Restatement* § 281. The Court noted that the duty applied in the law enforcement setting, citing *Coffel, supra*, and *Garnett v. City of Bellevue,* 59 Wn. App. 281, 796 P.2d 782 (1990), *review denied*, 116 Wn.2d 1028 (1991).

It is *unambiguous* that under Washington's common law, when law enforcement choose to act, they must do so with reasonable care, and for the reasons articulated *supra* in connection with RCW 26.44.050, there was a question of fact as to whether the City's officers acted reasonably in leaving J.E. and M.E. in a setting where they could be abused by a live-in caregiver with a history of abusing children.

Division II's inability to comprehend the City's common law duty to refrain from causing harm once its officers had investigated M.E./J.E.'s situation was unacceptable, and it could lead others to mistakenly believe

that no common law duty existed. That would diminish the protection of abused or neglect children. Review of the Division II's published opinion is merited. RAP 13.4(b)(1-2).

F. CONCLUSION

The City had a duty to M.E./J.E. under RCW 26.44.050 or by common law to conduct a reasonable investigation of their potential abuse. Division II's published opinion on the statutory and common law duties of law enforcement with respect to abused or neglected children represents a profound step backwards in Washington law that has traditionally been vigorous in its protection of children. Review is merited under RAP 13.4(b).

This Court should reverse the trial court's summary rejection of the children's claims and remand the case to the trial court to allow the children their day in court. Costs on appeal should be awarded to the children.

DATED this 25th day of September, 2020.

Respectfully submitted,

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APPENDIX

RCW 26.44.050 [as it existed in October 2011]:

[U]pon the receipt of a report concerning the possible occurrence of abuse or neglect, the *law enforcement agency* or department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probably cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

Restatement (Second) of Torts § 281:

The actor is liable for an invasion of an interest of another, if:

> (a) the interest invaded is protected against unintentional invasion, and
> (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
> (c) the actor's conduct is a legal cause of the invasion, and
> (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

Restatement (Second) of Torts § 302B:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Filed
Washington State
Court of Appeals
Division Two

September 1, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

M.E. and J.E., minors, through Michael McKasy, as Litigation Guardian ad Litem; and JOSHUA EDDO, individually, Appellants, v. CITY OF TACOMA, a political subdivision of the State of Washington, Respondent.	No. 53011-2-II PUBLISHED OPINION

LEE, C.J. — Joshua Eddo and his two daughters, M.E. and J.E. (collectively, the appellants), appeal the superior court's orders granting summary judgment and dismissing their entire complaint against the City of Tacoma (the City). We hold that the appellants' negligence claim under RCW 26.44.050 fails as a matter of law because none of the City's actions resulted in a harmful placement decision. We also hold that the special relationship in *H.B.H.*[1] does not extend to law enforcement, and therefore, the appellants' claim that there is a common law duty to protect based on a special relationship recognized in *H.B.H* fails. And the appellants have failed to adequately argue a common law duty based on affirmative actions. Accordingly, we affirm the superior court's orders granting the City's motions for summary judgment.

[1] *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018).

FACTS

A. PLEADINGS AND MOTIONS FOR SUMMARY JUDGMENT

In 2017, the appellants filed a complaint against the City alleging the officers and detectives of the Tacoma Police Department (TPD) negligently conducted investigations in 2011, 2012, and 2013, which resulted in M.E. and J.E. remaining in an abusive home. The complaint also alleged that the City "breached its duty when among other things, it negligently hired, trained, supervised, and monitored its personnel." Clerk's Papers (CP) at 5. The City answered the appellants' complaint by denying any negligence and asserting various affirmative defenses.

The appellants moved for partial summary judgment dismissal of the City's affirmative defenses and the City moved for summary judgment dismissal of the appellants' claims that TPD acted negligently. In support of these motions, the parties presented the following evidence and arguments.

1. 2011 Investigation

In October 2011, M.E., age 5, and J.E., age 3, lived with their mother, Jocelyn Drayton, as their primary residential parent and had supervised visitation with Eddo. After a supervised visit, Eddo contacted TPD and reported that J.E. vomited after taking some of her mother's medication. In response to the call, TPD Officers Jennifer Corn and Bret Terwilliger were dispatched to Drayton's residence to conduct a welfare check.

Upon arriving at the residence, the officers learned that Drayton was at work and the children were being watched by Drayton's roommate, Rikki Buttelo. Buttelo told the officers that the children were asleep in their mother's bedroom. The officers visually checked the children for signs of injury, but they did not want to wake the children due to the late hour.

The officers asked Buttelo about J.E.'s vomiting. Buttelo informed the officers that J.E. had been sick all day and had been running a fever. When J.E. vomitted during the day and the vomit was pink, he was concerned, until he learned that she had eaten pink strawberry yogurt.

The officers observed that the floor of the master bedroom was "completely destroyed" with clothing, garbage, and debris covering the floor. CP at 44. It was impossible to walk through the master bedroom without stepping on something. And the officers observed a piece of pornography on the floor of the master bedroom. There were also medication bottles on the floor and dresser. The children's room was "slightly cleaner." CP at 44. But the kitchen sink and counters were covered in food and dirty dishes. The officers checked the refrigerator and pantry and confirmed that there was consumable food available for the children. In her report, Officer Corn stated that she did not "see a need to remove the children[,]" but noted the condition of the home was "not suitable" for children and referred the report to CPS for further investigation. CP at 44.

2. 2012 Investigation

In January 2012, TPD Detective Cynthia Brooks received a referral from CPS regarding M.E. and J.E. The referral was made by Sarah Kier, M.E. and J.E.'s visitation supervisor. Kier reported that on the way back from their visitation with Eddo, the girls told her about a "ghost" that was "peeking" at them in the bathroom. CP at 164. J.E. reported that the ghost came into the shower and punched her in the back. J.E. said that "[t]he ghost is entangled with Jason." CP at 164. Kier believed that Jason referred to Drayton's boyfriend, Jason Karlan. Kier also reported that J.E. was complaining of vaginal pain.

Detective Brooks contacted the assigned CPS investigator, Rocky Stephenson. Brooks and Stephenson arranged to have the children examined at the Child Advocacy Center (CAC) at Mary Bridge Children's Hospital three days later. They also planned to contact Drayton and the children before the scheduled exams to conduct safety interviews with both children.

Prior to the interviews, Detective Brooks contacted Kier. Kier clarified that J.E. did not report vaginal pain when talking about the ghost. Instead, Kier had noticed J.E. grabbing at her vaginal area and noticed an odor when J.E. urinated. Kier also reported J.E. was urinating frequently. Brooks also learned that the girls lived with Drayton and Karlan. Karlan provided care for the girls while Drayton was at work.

Prior to the exams scheduled at CAC, Detective Brooks and Stephenson conducted a safety interview with M.E. at her school. During the safety interview, M.E. made no disclosures of physical or sexual assault. M.E. told Brooks that Karlan had "Jedi powers" and could use them to make the car windows go up and down. CP at 254. M.E. reported that Drayton and Karlan disciplined her by sending her to the corner. M.E. did not report any concerns at home.

After conducting the safety interview with M.E., Detective Brooks and Stephenson went to the home to contact Drayton. Drayton was not home, but Karlan and J.E. were at the home. Drayton arrived at the home approximately 15 minutes later. Drayton explained the girls had a counseling appointment scheduled that afternoon, but she agreed to meet Brooks and Stephenson at the CAC for the exams.

A few hours later, Drayton met Detective Brooks and Stephenson at the CAC. Drayton told Brooks that she had discussed good touch and bad touch with the girls. Drayton also told

Brooks that neither girls disclosed that a ghost hit them or watched them in the shower. Drayton further stated that there was no physical discipline in the house.

Brooks and Stephenson then conducted a safety interview with J.E. J.E. reported that things are good at home and that if she gets in trouble she gets a time out. J.E. explained to Brooks and Stephenson that one day the bathroom door opened and nobody was there. J.E. said that it "freaked" her out. CP at 255. J.E. did not report any concerns at home.

M.E. and J.E. both had a medical examination performed by a registered nurse practitioner, Michelle Breland, at Mary Bridge Children's CAC. Breland conducted an interview with M.E. During the interview, M.E. did not make any disclosures of physical or sexual abuse. Breland also performed a physical examination on M.E. Breland concluded that the exam revealed "a well child" and there were no signs of acute injury or healed trauma. CP at 242.

Breland also conducted a physical examination of J.E. J.E. did not make any disclosures of abuse to Breland during the interview. J.E.'s physical exam did not have any signs of acute injury or healed trauma. However, the exam did reveal a normal variation in the hymenal opening which can cause urine to pool and would explain the urinary odor that was reported.

While the examinations were being conducted at the CAC, Detective Brooks contacted Karlan in the parking lot. As to the specific allegations, Karlan told Brooks that the girls believed he had "Jedi mind powers" because one time he made the car windows go up and down and they did not know how he did it. CP at 255. Another time he turned the lights on and off and the girls did not know it was him. Karlan told Brooks that he primarily used time outs as discipline and did not use physical discipline with the girls. He said that the girls were potty-trained and they could

bathe and dress themselves without his assistance. Karlan denied peeking at the girls in the shower. Karlan also denied hitting or punching either girl in back.

Based on the investigation and the fact that neither girl made any disclosures of abuse, Detective Brooks cleared the criminal investigation and referred the case back to CPS for any follow-up investigation. Detective Brooks did not run a national criminal background check on Karlan.

3. April 2013 Investigation (J.B.'s Allegations)

In April 2013, TPD Detective Jennifer Quilio received a CPS referral regarding allegations that Karlan had sexually abused J.B., who Karlan babysat. After receiving the referral, Detective Quilio contacted Courtney Thorpe, J.B.'s mother.

Thorpe reported she had been friends with Drayton and Karlan but that she had a falling out with Drayton and had not seen them for three months. Prior to the falling out, Karlan often babysat for J.B. while he was watching M.E. and J.E. Thorpe also informed Quilio that Drayton and Karlan had moved and she did not know where they currently lived, except she believed they lived somewhere in Fircrest.

After talking to Thorpe, Detective Quilio reviewed Detective Brooks's investigation into the 2012 referral. Quilio confirmed that after safety interviews and medical examinations, neither girl had made a disclosure of physical or sexual abuse.

Detective Quilio arranged for a forensic interview and medical examination of J.B. at CAC on May 16, 2013. During the forensic interview, J.B. made very clear disclosures of multiple instances of sexual abuse by Karlan. One instance happened at Karlan's house and at least one other instance happened at J.B.'s house. During the forensic interview, J.B. did not make any

disclosures that M.E. or J.E. were abused. After the forensic interview, Quilio had probable cause to arrest Karlan for child rape.

After various attempts at locating Karlan, the officers arrested him in the early morning hours of August 27. CP 141; PDF 147. Karlan agreed to speak with Quilio.

Shortly after midnight on August 27, Detective Quilio spoke with Karlan. Karlan initially denied the allegations made by J.B. Then Karlan claimed he may have been drunk and not able to remember. Karlan was then booked into jail.

On August 29, Detective Quilio spoke with Drayton. Drayton informed Quilio that the safety of her children was of paramount importance and she was prepared to keep Karlan away from the girls until the case was resolved. Drayton told Quilio that she had discussed Karlan's arrest with M.E. and J.E. and the girls did not make any disclosures of abuse by Karlan. Quilio also received a message from Eddo saying that he had also discussed Karlan with the girls and the only disclosure they made was that Karlan would lay on the bed and bounce them in the air.

Detective Quilio also monitored the jail calls between Drayton and Karlan. Drayton told Karlan that she was advised to maintain her distance to protect her custody of the girls. Although Drayton claimed to stand by him, she informed Karlan that she would not visit or accept calls from him. At the end of August, Quilio had no information indicating that Karlan had inappropriate sexual contact with M.E. and J.E.

4. M.E.'s Allegations of Abuse Against Karlan

In October 2013, Detective Quilio received a CPS referral from M.E.'s school counselor. The counselor's referral included information that M.E. had a supervised visit with Eddo the prior weekend, which was her first visit with Eddo in months. The next day, M.E. came to the school

counselor and reported that Karlan would wake her up in the middle of the night and touch her "in the wrong parts and has her do things." CP at 145. The counselor also reported that Drayton arrived at the school, told M.E. that if someone was hurting her they would get to the bottom of it, and asked if M.E.'s father helped her remember. The counselor reported that M.E. responded, "Yes, daddy said I get to see him more if I remember things." CP at 145.

Based on M.E.'s disclosure to the school counselor, Detective Quilio arranged for a forensic interview at CAC. During the forensic interview in October 2013, M.E. disclosed sexual abuse by Karlan. J.E. did not make any disclosures of sexual abuse against Karlan.

Based on the disclosures, the prosecutor charged Karlan with three counts of first degree rape of a child and three counts of first degree child molestation. All the charges were based on a charging period from August 1, 2012 to October 1, 2013.

On August 29, 2014, the State moved to dismiss the charges related to M.E. with prejudice because "based on newly discovered evidence obtained this week, a reasonable doubt has been raised as to whether or not the defendant committed the crimes charged under this cause number." CP at 324. The Pierce County Superior Court dismissed the charges.

5. Appellants' Disclosure Evidence

The appellants' damages expert, Robert Wynne, compiled a report of disclosures M.E. made regarding Karlan's alleged sexual abuse. The report stated that M.E. claimed the abuse began when M.E. was in the first grade in fall of 2012 and ended the summer before she began second grade in 2013. The report regarding J.E. only repeated the disclosures made by M.E. and did not include any independent disclosures from J.E. that Karlan had sexually abused her.

B. SUPERIOR COURT'S RULINGS ON SUMMARY JUDGMENT MOTIONS

At the hearing on the cross-motions for summary judgment, the superior court granted the City's motion for summary judgment to dismiss appellants' negligence claim based on the 2011 and 2012 investigations. The superior court deferred considering the City's motion for summary judgment on the 2013 investigation and the appellants' motion for partial summary judgment on the City's affirmative defenses.

The appellants filed a motion for reconsideration of the superior court's ruling. CP 985; PDF 347. The appellants also filed a second motion for partial summary judgment. The City also filed a second motion for summary judgment on the 2013 investigation.

The superior court denied the appellants' motion for reconsideration. But the superior court granted the City's second motion for summary judgment, dismissing appellants' negligence claim based on the 2013 investigation. Based on its rulings, the superior court dismissed the appellants' complaint against the City.

The appellants appeal the superior court's order granting the City's motions for summary judgment and the order denying appellants' motion for reconsideration.[2]

ANALYSIS

The appellants argue that the superior court erred by granting the City's summary judgment motions and dismissing their claim that the City breached its duty to M.E. and J.E. under RCW 26.44.050, the common law duty to protect based on a special relationship recognized in *H.B.H.*

[2] The appellants do not appeal the superior court's order denying their motion for partial summary judgment.

v. State, 192 Wn.2d 154, 429 P.3d 484 (2018), and the common law duty to act reasonably when undertaking an affirmative action. We disagree.

A. SUMMARY JUDGMENT STANDARD OF REVIEW

We review summary judgment motions de novo. *M.W. v. Dep't of Social & Health Servs.*, 149 Wn.2d 589, 595, 70 P.3d 954 (2003). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions demonstrate the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "'A material fact is one that affects the outcome of the litigation.'" *Boone v. State Dep't of Social & Health Servs.*, 200 Wn. App. 723, 732, 403 P.3d 873 (2017) (quoting *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164-65, 273 P.3d 965 (2012)).

When the defendant files a motion for summary judgment showing the "'absence of evidence to support the [plaintiff]'s case,'" the burden shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact exists for trial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The nonmoving party cannot rely on "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party must present more than "[u]ltimate facts" or conclusory statements to defeat summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017). If the plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that

party will bear the burden of proof at trial,'" summary judgment is proper. *Young*, 112 Wn.2d at 225 (quoting *Celotex*, 477 U.S. at 322).

B. NEGLIGENT INVESTIGATION UNDER RCW 26.44.050

It has long been recognized that RCW 26.44.050 creates a statutory cause of action for negligent investigation against both law enforcement and the Department of Social and Health Services (DSHS). *Tyner v. Dep't of Social & Health Servs.*, 141 Wn.2d 68, 79-81, 1 P.3d 1148 (2000). RCW 26.44.050 provides:

> Except as provided in RCW 26.44.030(11), upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department [of social and health services] must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.
>
> A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.

A cause of action for negligent investigation under RCW 26.44.050 is present when the failure to adequately investigate results in "a placement decision to remove a child from a nonabusive home, let a child remain in an abusive home, or place a child in an abusive home." *M.W.*, 149 Wn.2d at 595. To prevail on a negligent investigation claim, the claimant must prove that the faulty investigation was a proximate cause of the harmful placement. *McCarthy v. County of Clark*, 193 Wn. App. 314, 329, 376 P.3d 1127, *review denied*, 186 Wn.2d 1018 (2016).

Proximate cause includes two elements: cause in fact and legal causation. *Id*. Cause in fact exists when "but for" the defendant's actions, the claimant would not have been injured. *Id*.

Legal causation involves a policy determination as to how far the consequences of an act should extend and is generally a legal question. *Id*.

1. 2011 Investigation

The appellants in this case argue that the TPD officers' failure to remove the children from the home based on the 2011 welfare check resulted in leaving M.E. and J.E. in a home with their abuser. However, the appellants fail to show that there is a genuine issue of material fact that the TPD investigation resulted in a harmful placement decision because, even taking the facts in the light most favorable to the plaintiff, there is no evidence that any sexual abuse occurred in the home in 2011. Therefore, the TPD investigation did not result in leaving the children in an abusive home.

Based on M.E.'s disclosure, Karlan's abuse occurred from the fall of 2012 until the end summer of 2013. Therefore, based on M.E.'s own disclosure, the TPD did not leave her in an abusive home following the welfare check because, at the time, there was no disclosed abuse occurring in the home.

Because there is no genuine issue of material fact as to whether the TPD investigation resulted in leaving the children in an abusive home, the appellants failed to meet their burden. *Young*, 112 Wn.2d at 225. Accordingly, summary judgment dismissal of appellants' negligence claim based on the 2011 investigation was proper.

2. 2012 Investigation

Similarly, the appellants argue that the TPD officers' failure to remove the children from the home based on the 2012 investigation into the "ghost" referral resulted in leaving M.E. and J.E. in a home with their abuser. However, the appellants fail to show that there is a genuine issue

of material fact that the TPD investigation resulted in a harmful placement decision because, even taking the facts in the light most favorable to the plaintiff, there is no evidence that any sexual abuse occurred in the home in early 2012 when the "ghost" referral was investigated. Therefore, the TPD investigation did not result in leaving the children in an abusive home.

Again, based on M.E.'s disclosure, Karlan's sexual abuse occurred from the fall of 2012 until the end of summer of 2013. Therefore, based on M.E.'s own disclosure, the TPD did not leave her in a sexually abusive home following the welfare check because, in January 2012, there was no evidence that sexual abuse was occurring in the home. Because the appellants failed to meet their burden to show a genuine issue of material fact regarding whether the TPD investigation resulted in a harmful placement decision, summary judgment was proper.

3. 2013 Investigation

As to the 2013 investigation, the appellants assert that the City's failure to contact Drayton and Eddo regarding J.B.'s allegations and the failure to reopen the 2012 investigation left Karlan with unfettered access to the children. But the appellants' allegations do not create a genuine issue of material fact regarding whether the TPD investigation in 2013 resulted in a harmful placement decision—leaving the children in an abusive home.

Here, the City did not have a report of sexual abuse concerning M.E. and J.E. The City had a report of sexual abuse concerning J.B. because J.B. made a clear and credible disclosure of abuse against Karlan. Although J.B. disclosed that the abuse happened at M.E. and J.E.'s house, J.B. did not disclose that any abusive conduct involved M.E. or J.E., and J.B. did not disclose that M.E. and J.E. observed any of the abuse.

Also, TPD contacted Drayton about J.B.'s allegations against Karlan, and Drayton told Detective Quilio that neither M.E. nor J.E. made any disclosures of sexual abuse by Karlan. Quilio also contacted Eddo about J.B.'s allegations. Eddo later told Quilio in a message that he had discussed Karlan with M.E. and J.E. and neither child disclosed any sexual abuse by Karlan. Because there were no disclosures of abuse against M.E. and J.E., there was no report of abuse or neglect for the detectives to investigate. Accordingly, a duty to investigate under RCW 26.44.050 was not triggered.

Also based on the record before us, M.E. first disclosed that Karlan was sexually abusing her in October 2013, months after the investigation into J.B.'s allegations and despite having been previously questioned by her parents after TPD informed Drayton and Eddo about J.B.'s sexual abuse allegations. And there is no evidence in the record that J.E. ever disclosed that she was sexually abused by Karlan. Thus, there is no evidence that "reopening" the 2012 investigation would have accomplished anything different than what occurred in this case. Accordingly, the appellants have failed to show a genuine issue of material fact that failure to reopen the 2012 investigation resulted in a harmful placement decision.

The appellants failed to meet their burden to show a genuine issue of material fact existed as to cause in fact that TPD's conduct relating to the 2013 investigation into J.B.'s sexual abuse allegations against Karlan resulted in a harmful placement decision relating to M.E. and J.E. Therefore, the superior court properly granted the City's motion for summary judgment dismissal of the appellants' negligence claim based on the 2013 investigation.

C. COMMON LAW DUTIES

1. Duty to Protect: *H.B.H.*

In *H.B.H.*, our Supreme Court recognized a common law duty requiring DSHS to protect foster children from abuse based on a special relationship exception to the general rule that a party is not required to protect against the criminal acts of a third party. 192 Wn.2d at 178. The appellants argue that under *H.B.H.*, law enforcement had a special relationship with M.E. and J.E. that imposed a duty to protect on law enforcement. We disagree.

In *H.B.H.*, our Supreme Court recognized the general rule that a person has no duty to control the actions of third parties. 192 Wn.2d at 168. However, the court held that in certain circumstances, a special relationship exists between a defendant and a victim that creates a duty to protect the victim from the tortious conduct of third parties. *Id.* at 168-69. In determining that DSHS has a special relationship with foster children, our Supreme Court provided extensive analysis of the legal relationship created between DSHS and foster children when DSHS removes foster children from their parents. *Id.* at 163-68. The Supreme Court concluded:

> In sum, the establishment of a dependency imposes essential rights and duties on the State to care for dependent children. *See, e.g.*, RCW 74.13.010 (duty to protect and care for dependent children), .031(3) (duty to investigate complaints of neglect, abuse, or abandonment of children), (6) (duty to monitor foster care placements), (7) (duty to provide child welfare services to dependent children), (9) (DSHS authorized to purchase care for dependent children). The State becomes the legal custodian of the dependent child, and the State alone controls the services provided to the child and determines where the child will reside. *See* JuCR. 3.8(e); RCW 13.34.130(1)(b)(ii); RCW 74.13.031(7). It is against this statutory backdrop that we consider whether DSHS's relationship with dependent foster children creates a special relationship supporting a common law duty in this case.

Id. at 168.

Our Supreme Court then explained that the legal relationship between DSHS and foster children was a special relationship under RESTATEMENT (SECOND) OF TORTS §315(b). *Id.* at 178. The Supreme Court explained that DSHS is the "'custodian and caretaker of foster children[,]'" and, therefore, DSHS had taken custody of foster children. *Id.* at 170-71 (quoting *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 700, 81 P.3d 851 (2003)). The Supreme Court also stated that the "entrustment for the protection of a vulnerable victim, not physical custody, is the foundation of a special protective relationship." *Id.* at 173. Those relationships are also "'based on the liable party's assumption of responsibility for the safety of another.'" *Id.* (quoting *Niece v. Elmview Group Home*, 131 Wn.2d 39, 46, 929 P.2d 420 (1997)).

Here, the appellants broadly characterize the holding of *H.B.H.* as reaffirming "that where there is a special protective relationship between a public agency and child abuse victims, the agency owes the children a duty of care." Br. of Appellant at 15. But this is not what *H.B.H.* held. *H.B.H.* only addressed whether there was a special relationship between DSHS and foster children. *H.B.H.*, 192 Wn.2d at 178. Nothing in *H.B.H.* indicates that the court considered any broader context. In fact, *H.B.H.* does not even establish a special relationship between DSHS and children who are not in the legal custody of DSHS.

Based on the use of the terms "entrustment and vulnerability," the appellants assert that *H.B.H.* applies equally to law enforcement officer investigating discreet reports for children who are not dependent children. Br. of Appellant at 16. However, none of the justifications for finding a special relationship between DSHS and foster children applies to law enforcement. The Supreme Court's holding analyzed the unique relationship between DSHS and foster children based on the fact that DSHS becomes the legal custodian of foster children once they are the subject of a

dependency action. *H.B.H.*, 192 Wn.2d at 168 ("In sum, the establishment of a dependency imposes essential rights and duties on the State to care for dependent children."). No such relationship exists between law enforcement and a child that may be involved in an investigation. Even when law enforcement officers take a child into protective custody, the law enforcement officer transfers that child to care and custody of DSHS. *See* RCW 26.44.056. And here, M.E. and J.E. were not dependent children. Therefore, the legal relationship that *H.B.H.* recognized between DSHS and foster children does not exist in this case.

We hold that the special relationship creating a duty to protect recognized in *H.B.H.* does not extend to law enforcement agencies investigating allegations of child abuse. Law enforcement agencies do not have any legal relationship that makes them responsible for the protection of children independent of the duty to investigate. Accordingly, we hold that the City had no common law duty arising out of the special relationship recognized in *H.B.H.*

2. Common Law Duty to Act Reasonably

In addition to their references to RCW 26.44.050 and the common law duty identified in *H.B.H.*, the appellants note that "[u]nder the common law, in general, where police officers act, 'they have a duty to act with reasonable care.'" Br. of Appellant at 15 n.10 (quoting *Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686, *review denied*, 108 Wn.2d 1014 (1987). The appellants only make this assertion in a footnote. They do not appropriately define the scope or nature of an actionable common law duty against law enforcement. Nor do the appellants actually apply the assertion to the facts of this case. We will not consider issues that are not supported by argument or citation to authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v.*

Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Accordingly, we decline to consider whether the City owed M.E. and J.E. a common law duty to act reasonably.

D. NEGLIGENT TRAINING AND SUPERVISION CLAIM

The appellants appear to raise an issue regarding the dismissal of their claim that the City "breached its duty when, among other things, it negligently hired, trained, supervised, and monitored its personnel." CP at 5. We decline to consider whether the superior court erred by dismissing the appellants' claim because the appellants do not offer any argument or authority supporting the assertion that the superior court erred by dismissing this claim. Instead, the appellants only present a footnote, noting:

> As befits its cavalier treatment of the issues in this case, the trial court's orders nowhere reflect its disposition of the children's negligent training/supervision theory. They pleaded that issue. CP 5. They specifically mentioned it in responding to the City's motion for summary judgment. CP 656-57. But the trial court's orders do not address this issue.

Br. of Appellant at 9 n.8. However, even though the superior court did not specifically address this claim, the superior court did dismiss all of the appellants' claims, which included a claim that the City "breached its duty when, among other things, it negligently hired, trained, supervised, and monitored its personnel." CP at 5.

The appellants assigned error to all the superior court's orders. But the appellants did not provide any argument or authority to support reversing the superior court's order dismissing a negligent training and supervision claim. We will not consider issues or assignments of error that are not supported by argument or authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy*, 118 Wn.2d at 809. Accordingly, we do not consider whether the superior court erred by granting the City's motion for summary judgment and dismissing the appellants' claim for negligent training

and supervision based on the allegation that the City "breached its duty when, among other things, it negligently hired, trained, supervised, and monitored its personnel." CP at 5.

CONCLUSION

We hold that the appellants' negligence claim under RCW 26.44.050 fails as a matter of law because none of the City's actions resulted in a harmful placement decision. We also hold that the special relationship in *H.B.H.* does not extend to law enforcement, and therefore, the appellants' claim that there is a common law duty to protect based on a special relationship recognized in *H.B.H* fails. And the appellants have failed to adequately argue a common law duty based on affirmative actions. Accordingly, we affirm the superior court's orders granting the City's motions for summary judgment.

Lee, C.J.

We concur:

Worswick, J.

Melnick, J.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division II Cause No. 53011-2-II to the following parties:

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Clerk's Office

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

DATED: September 25 2020, at Seattle, Washington.

/s/ Frankie Wylde
Frankie Wylde, Legal Assistant
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TALMADGE/FITZPATRICK

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Filed with Court:	Supreme Court
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Appellate Court Case Title:	W.M. and Erin Olson, et al. v. State of Washington
Superior Court Case Number:	18-2-04176-1

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