IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

J.W., an individual, and VIRGIL WEAR, individually and as guardian and on behalf of J.W. Appellants, v. CITY OF TACOMA, TACOMA POLICE DEPARTMENT, Respondents, MAUREEN E. WEAR, an individual; and LEE GILES and MRS. LEE GILES, husband and wife, individually and their marital community, Defendants.	No. 40510-5-II UNPUBLISHED OPINION

Johanson, J. — J.W. and his father Virgil Wear (the Wears) appeal the trial court's summary judgment order dismissing their negligence claims against the city of Tacoma (City).[1] We affirm.

FACTS

[1] The Wears also challenge the trial court order striking several of the exhibits they submitted in opposition to the City's summary judgment motion. Because we hold that summary judgment was proper even if we consider these exhibits, we do not address this issue.

Lee William Giles was a Tacoma police officer from March 1970 until his retirement in January 2000. Maureen Elizabeth Wear, Giles's girlfriend, worked for the City's "Safe Streets" program until spring 1999. Giles and Maureen[2] sexually abused Maureen's son, J.W., for several years. In 2006, the Tacoma Police Department (TPD) discovered the abuse and arrested Giles and Maureen. The State charged Giles and Maureen with several counts of first and second degree rape of a child in which J.W. was the victim. During the investigation, TPD discovered that Giles and Maureen had sexually abused J.W. for several years at Giles's home and that Giles had taken evidence from child molestation and sexual assault cases. Giles and Maureen were convicted of sexually abusing J.W.

In 2006, the Wears sued Giles, Maureen,[3] and the City. The record on appeal does not contain the original complaint.

On December 16, 2009, the City moved for summary judgment. The City argued, (1) it was not "vicariously liable" for Giles's actions because he was acting outside the scope of his employment when he abused J.W.,[4] Clerk's Papers (CP) at 6; (2) J.W.'s negligent supervision claim was "not cognizable because Giles' employment did not facilitate the abuse," and there was no "special relationship" between the City and Giles or Maureen that imposed a duty on the City

[2] Because this case involves several family members with the same last name, we refer to Maureen and Virgil Wear by their first names for clarity.

[3] In March 2010, Giles and Maureen failed to appear for trial. The trial court found them in default and, after hearing evidence and argument from the Wears, entered a judgment against Maureen and Giles for $1,000,375. Maureen and Giles are not involved in this appeal.

[4] The Wears concede that Maureen and Giles were acting outside the scope of their employment and that the City is not vicariously liable for their actions.

to control their behavior or a special relationship between the City and J.W. that gave him a right to protection, CP at 7-8; and (3) Virgil's negligent supervision claim failed because Giles did not "directly injure Virgil." CP at 11. In support of its motion, the City submitted a portion of a deposition in which Virgil (1) characterized his claim against the City as based on police harassment of him, apparently prompted by Giles or Maureen, during his and Maureen's divorce between 1990 and 1997; and (2) denied experiencing any harassment after 2003. The City also submitted a portion of a deposition in which J.W. asserted that if the courts had awarded his father custody when his parents divorced, he would likely not have been sexually abused, would not have post traumatic stress disorder, and would have received help earlier.

The Wears opposed the City's summary judgment motion. They argued that there was a special relationship between the City and J.W. because Giles and Maureen were City employees and the City had access to information suggesting that Maureen was abusing J.W. and knew that she had the "ability to manipulate the [City] to give her an advantage in her custody dispute with [Virgil]," which discouraged him from more aggressively pursuing custody or visitation and prevented him being able to identify that J.W. was being abused. CP at 48. They also asserted that under RCW 26.44.050, the City had a duty to protect J.W. because it had information suggesting that Maureen, who worked for the City in a law enforcement related program, was abusing him.

To support their arguments, the Wears submitted eight exhibits and a declaration from Virgil[5]:

[5] The trial court granted the City's motion to strike exhibits 2, 4, 5, and 8, as inadmissible hearsay.

Exhibit 1: A copy of some of the Wears' interrogatories and requests for production (RFPs) to the City in which they questioned the City about its knowledge of Giles's possession of pornographic materials that had been under TPD's control. The City objected to these interrogatories and RFPs and did not respond further.

Exhibit 2: An October 2006 letter from the Pierce County prosecutor to legal counsel at the National Center for Missing and Exploited Children about a possible amicus brief related to the issue of duplicating child pornography evidence and tapes of sex crimes against children. In the letter, the prosecutor mentions that Giles had taken unspecified evidence related to child sexual abuse cases from unspecified police evidence rooms.

Exhibit 3: The August 2006 declaration for determination of probable cause against Giles stating that (1) in 2006, J.W. had disclosed numerous instances of sexual abuse by his mother and Giles; (2) J.W. alleged the abuse had started when he was 9 years old (in 1997 or 1998) and ended when he was 14 or 15 years old (sometime between 2002 and 2004); (3) TPD found unspecified court exhibits depicting naked children during a search of Giles's home; and (4) during a police interview, Giles admitted to having "grabbed child pornography from drug houses while he was working" for TPD. CP at 64.

Exhibit 4: A page from Giles's presentence investigation report indicating that Giles had stolen "evidence recorded as 'destroyed' from prior sexual investigations for personal use and sexual gratification." CP at 66.

Exhibit 5: A 2006 e-mail to the Pierce County prosecutor from a woman who had lived near Giles as a child in the 1960s, stating that Giles had forced her to pose naked for photographs and that TPD had investigated this incident so there "may be some record of it." CP at 68.

Exhibit 6: An April 1980 TPD interdepartmental communication stating that (1) starting in 1975, Giles's propensity to act the "role of the clown" and engage in "clown/buffoon-like behavior in his daily activities" had started to impact his work performance; (2) Giles had not responded when his supervisors expressed "displeasure" with his behavior; and (3) a recent "crisis" of some unspecified nature during the local Daffodil Parade necessitated a psychological evaluation of Giles. CP at 70. This exhibit also includes reports from the psychologist who had evaluated and treated Giles. These reports repeated the same concerns stated in the interdepartmental communication without providing additional information about the Daffodil Parade incident; concluded that Giles was anxious and depressed and in need

of some counseling; and eventually stated that Giles was fit for work.

Exhibit 7: A 1997 background check for Maureen indicating that she and Virgil had a contentious relationship even though they had divorced in 1992, that Maureen and Virgil had both filed several domestic violence cases against each other, that Maureen was arrested in 1992 for hitting Virgil, and that Virgil was alleged to have gone out of his way to make the divorce difficult and was "dissatisfied with the fact that his ex-wife has worked closely with the [TPD] during her employ [sic] with Safe Streets." CP at 76.

Exhibit 8: A July 22, 2004 City of Tacoma interdepartmental communication regarding an investigation of Maureen's allegation that a police captain had threatened to disclose that the TPD had found pornography on her work computer after she was terminated for "performance issues" in spring 1999 if she continued to pursue a wrongful termination suit against the City. CP at 79. Although exhibit 8 describes Maureen's allegations, it does not include any conclusions or findings, nor does it show that TPD in fact found pornography on Maureen's work computer. CP at 78.

In his declaration, Virgil alleged that (1) he had frequently communicated with the City about "problems" with Maureen and Giles when J.W. was in their custody; (2) Maureen had worked for the Safe Streets program run by the City and had worked with TPD in this capacity; (3) City employees had observed Maureen fail to supervise J.W. during City events; (4) Maureen started dating Giles in 1990; (5) Maureen "frequently engaged in bizarre behavior"; (6) in 1991, he talked to a named City employee about Maureen's behavior, and the employee stated that he "underst[ood]" Virgil's concerns and told him to "take care of" himself; (7) after Maureen obtained custody of J.W., he (Virgil) initially had little contact with J.W.; (8) in 1991, he reported possible neglect to Pierce County Child Protective Services (CPS) and was told that "there had been other inquiries" but no action was taken; (9) in 1990 to 1991, his anger management counselor evaluated Maureen and told him that she "suffered from severe personality disorders,"

and he (Virgil) communicated this information to the police chief and others at TPD; (10) around the time of his divorce, TPD "harass[ed]" him by parking in front of his home, following him, and charging him with stalking; (11) he believed that the police harassment "was because of [Maureen] having a relationship with" Giles, and Virgil communicated this belief to TPD; (12) he talked to a TPD officer who told him he had heard about Virgil being harassed; and (13) in 1998 J.W. acted out sexually with Virgil's stepdaughter and Kitsap County CPS notified Pierce County CPS of this incident. CP at 81.

In its reply, the City again claimed that the Wears had failed to establish any claims against the City. In a supporting affidavit, the City provided information from another civil suit against Giles brought by one of the victims portrayed in evidence Giles had stolen from the Pierce County Sheriff's Department. This documentation established that TPD had discovered evidence from other cases involving child sexual abuse in Giles's home and that Giles had stolen this evidence from the Pierce County Sheriff's Department, but that TPD and the sheriff's department was unaware of this theft until 2006.

The City also submitted portions of a deposition in which Virgil stated that (1) the harassment he experienced occurred from 1990 to 1997; (2) although he had little contact with J.W. from the time J.W. was three to nine years old, he had more access to J.W. when J.W. was nine to twelve years old and at that time noticed that J.W. was having behavioral problems that included acting out sexually; (3) some of this behavior had been reported to Kitsap County CPS, but Kitsap County CPS refused to act because J.W. lived in Pierce County with his mother; and (4) although he suspected that someone was abusing J.W., he never suspected Maureen was

involved.

The trial court granted the City's motion for summary judgment; and dismissed all claims against the City with prejudice. The Wears appeal.

ANALYSIS

I. Standard of Review

> We review an order granting summary judgment de novo. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). We must view all facts, and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

Briggs v. Nova Servs., 166 Wn.2d 794, 801, 213 P.3d 910 (2009).

II. Negligent Supervision

> "Negligent supervision creates a limited duty to control an employee for the protection of a third person, even when the employee is acting outside the scope of employment."[6] *Rodriguez v. Perez*, 99 Wn. App. 439, 451, 994 P.2d 874, *review denied*, 141 Wn.2d 1020, 10 P.3d 1073 (2000) (citing *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997)). Employer liability for negligent hiring, retention, and supervision arises from this duty. "If an employee conducts negligent acts outside the scope of employment, the employer may be liable for negligent supervision." *Rodriguez*, 99 Wn. App. at 451, 994 P.2d 874. *An employer is not liable for negligent supervision of an employee unless the employer knew, or in the exercise of reasonable care should have known, that the employee presented a risk of danger to others. Niece*, 131 Wn.2d at 48-49.

S.H.C. v. Lu, 113 Wn. App. 511, 517, 54 P.3d 174 (2002) (emphasis added), *review denied*, 149

[6] The Wears concede that Maureen and Giles were acting outside the scope of their employment when they injured J.W.

Wn.2d 1011 (2003). Even assuming that the City had a special relationship with J.W. sufficient to establish a duty to J.W. or to Virgil, and considering all of the exhibits submitted by both parties in the light most favorable to the Wears, the Wears failed to establish a question of fact as to whether the City knew or should have known that Maureen or Giles presented a risk of danger to J.W.

As to Maureen, the Wears allege that (1) Virgil had informed the City, apparently around the time of their divorce in the early 1990s, that a counselor he was seeing for anger management issue had diagnosed Maureen with "severe personality disorders," CP at 81; (2) in 1991, Virgil discussed some of Maureen's unspecified "bizarre behavior," with a city employee, who told Virgil that he "underst[ood]" Virgil's concerns and advised him to "take care of" himself," CP at 81; (3) City employees knew or should have known that Maureen did not always closely supervise J.W. at Safe Street functions; (4) the City was aware that Virgil and Maureen were involved in a contentious divorce and that both he and Maureen had been subject to claims of domestic violence against each other; (5) CPS had investigated issues related to J.W. acting out sexually; and (6) the City may have had knowledge that Maureen had pornography on her work computer.[7] Although the Wears presented evidence that while Maureen was a City employee, the City may have had knowledge that she possibly had some unspecified mental health issues, that she was in a

[7] We note that the Wears' exhibit 8 establishes only that Maureen's supervisor threatened to disclose that the City had found pornography on Maureen's work computer if she pursued a wrongful termination suit against the City. Nothing in this documentation established that there *was* pornography on her work computer. Furthermore, even if the City was aware Maureen had pornography on her work computer, the Wears do not present anything establishing whether this pornography in any way related to child sexual abuse or to J.W.

contentious relationship with Virgil, and that J.W. was acting out sexually and there were some CPS reports related to his acting out, nothing the Wears presented in opposition to the City's summary judgment motion suggested in any way that the City had information putting it on notice that *Maureen* was potentially sexually abusing J.W. or that she was responsible for his acting out. We hold that as a matter of law, the evidence before the trial court was insufficient to create a question of fact as to whether the City knew or should have known that Maureen posed a risk of harm to J.W.

As to Giles, the Wears presented exhibits establishing that (1) a neighbor of Giles's from the 1960s was aware that TPD had investigated Giles for a possible sex-related incident in Pierce County in the early 1960s, and she believed that TPD "may" have some record of this investigation, CP at 68; (2) Giles was involved in an unspecified incident during the local Daffodil Parade that resulted in the City requesting that he be evaluated by a psychologist; and (3) Giles stole pornographic evidence during his tenure as a police officer. But these exhibits did not establish that the City knew or should have known about the investigation in the 1960s or that Giles was stealing pornographic evidence until well after Giles retired from the City. And nothing in the record suggests that the 1980 Daffodil Parade incident involved a child or that it was sexual in nature—it is mere conjecture that this incident would have provided any indication that Giles might have been engaged in or likely to engage in any kind of child sexual abuse. Thus, the Wears also failed to establish a question of fact as to whether the City knew or should have known that Giles presented any kind of risk of danger to J.W.

Because the Wears failed to establish a question of fact as to whether the City knew or

should have known that Maureen or Giles presented a risk of danger to J.W., the trial court did not err in granting summary judgment on the Wears' negligent supervision claim against the City.

III. Negligent Hiring or Retention

To the extent the Wears also alleged a claim of negligent hiring or retention,[8] those claims also required that the Wears establish a question of fact as to whether the City knew or should have known of Giles's or Maureen's "unfitness" before the injury occurred. *See Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999), *review denied*, 140 Wn.2d 1022 (2000). Again, as discussed above, the evidence the Wears submitted did not establish a question of fact as to whether the City knew or should have known that Maureen or Giles presented any risk of harm to J.W. Furthermore, although the record suggests there may have been a record of an investigation of an incident involving Giles in the early 1960s, there is nothing in the record showing what kind of information about this investigation was available to the City when it hired Giles in 1970, nor is there anything in the record establishing the nature or extent of the background investigation the City performed before hiring Giles. Thus, the trial court properly dismissed any negligent hiring or retention claim against the City.

IV. No Statutory Duty to Investigate

The Wears also appear to argue that RCW 26.44.050 establishes that the City had a duty to "any child of an employee where the CITY has notice of information tending to suggest the

[8] It is possible that the only claim the Wears brought against the City was the negligent supervision claim. But because we do not have a copy of the Wears' complaint and because the Wears' briefing below and on appeal is difficult to follow, we address this and the following issues in an abundance of caution.

employee may be abusing the child."[9] Br. of Appellant at 8. RCW 26.44.050 provides:

> 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 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.

In effect, the Wears appear to argue that the City breached its duty to investigate possible abuse.

As discussed above, the Wears failed to establish a question of fact as to whether the City knew or should have known that Giles or Maureen was abusing J.W. Thus, even if this statute created a duty, the Wears failed to establish any notice that would have triggered a duty under this statute. To the extent the Wears are arguing that CPS, a State agency, failed to investigate, CPS was not a party to the Wears' tort action and any possible failure by CPS to investigate does not create liability for the City. Accordingly, the trial court properly dismissed any claim of negligent investigation under RCW 26.44.050 against the City.

V. Harassment Claim Barred by Statute of Limitation

As to any claim of harassment by Virgil,[10] any such claim related to actions that allegedly occurred before 2003. Because the Wears did not file this action until 2006, the harassment claim

[9] *See* fn 8 *supra*.

[10] *See* fn 8 *supra*.

is barred by the three-year statute of limitations and the trial court properly dismissed any harassment claim. RCW 4.16.080(2); *see also Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 190, 222 P.3d 119 (2009).

VI. Other Possible Claims

The Wears also appear to allege that the City should have been able to prevent Giles from obtaining child pornography evidence.[11] Although the record shows that Giles obtained such evidence for his own "personal use," CP at 66, there is nothing in the record showing that Giles obtained any of this evidence from the City; establishing how he obtained this evidence; demonstrating whether the City should have been able to prevent Giles from obtaining this evidence; or when, in the exercise of ordinary care, the City should have learned of Giles's thefts. Accordingly, to the extent the Wears are asserting any claims based on Giles's possession of this evidence, they fail to establish a question of fact as to the City's failure to prevent Giles from obtaining this evidence, and the trial court properly dismissed any such claims against the City.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

[11] *See* fn 8 *supra*.

Van Deren, J.

Penoyar, C.J.