NO. 48029-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

K.C. and L.M.,

Respondents,

v.

STATE OF WASHINGTON and DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Defendants,

GOOD SAMARITAN HOSPITAL, PATRICK SHEEHY, PhD, and LINDA WILLIAMS, M.S.W.,

Appellants,

and

DONNA JOHNSON,

Defendant.



RESPONSE BRIEF

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## I. INTRODUCTION

Plaintiffs K.C. and L.M. submit this memorandum as their responsive brief to the pending appeal. This is a simple claim: the Good Sam therapists are being sued for recommending that a newly convicted child sex offender, Walter Johnson, have unsupervised access to little girls, K.C. and L.M. The underlying basis for the Good Sam therapists' recommendation is well documented: that 'testicular cancer" and marital "ridicule" were acceptable justifications for Walter Johnson having committed incest with his pre-pubescent daughters. According to Dr. Sheehy and Ms. Williams, if Mr. Johnson just stayed off the alcohol and kept some distance from his ex-wife's ridiculing ways, there was no danger to other little girls. Another treating therapist from the relevant timeframe, H.R. Nichols, PhD, has opined that this recommendation was recklessly negligent. Dr. Nichols' warnings occurred on January 20, 1981:

> I am greatly concerned, however, that Mr. Johnson may molest the little girls who are daughters of his woman friend. He denies desires for them but he also denies his accountability with his own daughters. I therefore highly recommend the following:
>
> 1) that if he is allowed to remain on probation and to seek other counseling, that a detailed account of Mr. Johnson's behavior problems be made available to the therapist;
> 2) that he move his trailer off his woman friend's property and that careful monitoring of this relationship be undertaken including her assistance in his treatment;
> 3) that at no time he be alone with minors including his own children and the children of his woman friend;
> 4) that he spend no overnight visits with a woman with children unless approved by probation service and his therapist.
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> 1

[1] CP 1157-70

Eight (8) months later, on August 10, 1981, Dr. Sheehy and Ms. Williams recommended that Walter Johnson should reside with pre-pubescent girls. As a result, when combined with the negligence of K.C. and L.M.'s mother, Donna Johnson, these women were molested throughout their childhoods. This is case upon which a jury is likely to find that the defense committed gross negligence as to the safety of the little girls that were violated. The trial court did not commit any error when dismissing the statute of limitations defense. This matter should be remanded for further proceedings on the merits.

## II. BACKGROUND

This case arises out of the preventable childhood sexual abuse of K.C. and L.M. The evidence proves that K.C. and L.M. were routinely molested by a known sex offender, Walter "Carl" Johnson, and his son, Kenny Johnson, for a period spanning approximately fifteen years, between 1981 and 1995.[2] In the early 1980s, Walter Johnson was introduced into the lives of K.C. and L.M. by way of their mother, Donna Johnson.[3] K.C. and L.M. were approximately ages 4 and 5 at the time. And it must be noted that when a child herself, Donna Johnson had already been a molestation victim of Walter Johnson -- a man many years

[2] CP 1039-88, 1550-54 & CP 1089-1156, 1457-1549
[3] *Id.*

her senior.[4] For this family of five children and an unemployed mother, Carl appeared a godsend. "He took us in and cared for us." He was a "big man shaped like triangle," who had "huge shoulders, a little waist, green-blue eyes, red hair and a beard." Carl weighed 335 pounds and worked as a truck and bus driver.

As to the material facts, the circumstances giving rise to this case are clear and relatively uncontroverted. On March 26, 1980, Walter Johnson was charged, and later on July 23, 1980 convicted, of molesting his naturally born daughters.[5] The charges included raping Jacqueline Johnson at the prepubescent age of eleven.[6] Walter Johnson's corresponding sentence, dated September 25, 1980, included five (5) years probation, successful sex offender treatment, and to following all "*instructions per the parole officer.*"[7] The conviction required that Walter Johnson remain on probation until September 25, 1985.[8]

Walter Johnson first underwent post-conviction court mandated offender therapy with a gentleman named H.R. Nichols, Ph.D.[9] According to Dr. Nichols, as documented in correspondence to the probation officer dated January 20, 1981, Walter Johnson's attempt at

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[4] *Id.*
[5] CP 492-835
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

counseling was a failure: "*...he had not admitted to himself that he was actually accountable. He blamed his wife and his older daughter for his behavior... What concerned me most was his negative attitude about dealing with the problem with me.*"[10] Dr. Nichols also reported: "*His January 5, 1981 sessions (his last was the most difficult thus far). He reported to me that he had been alone with his woman friend's two daughters [K.C. and L.M.] while she entered her son in school. I told him this was a violation of treatment conditions and tried to learn why he allowed this to happen. He became outraged and justified it by telling me that it was only for a short while in his car outside of the school.*"[11]

Walter Johnson subsequently sought "treatment" at the Good Samaritan Mental Health Center.[12] At Good Sam, the assigned clinicians engaged in "conjoined" counseling sessions with Walter Johnson and Donna Johnson.[13] It must be noted that Donna Johnson understood herself to have established a counseling relationship during the conjoined sessions with the Good Sam clinicians. During those sessions, the Good Sam clinicians negligently advised Ms. Johnson that Walter Johnson had miraculously been cured of his sex offending ways, and that it would be therapeutic to allow cohabitation with the small children, K.C. and L.M.

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

In a pleading filed with this Court on October 13, 2014, Ms. Johnson asserted that "*I had relied upon the assurances that Mr. Johnson was safe to have around children and that belief was misguided.*" Walter Johnson preyed upon K.C. and L.M. for the many years that followed.[14] Based upon the negligent advice that Good Sam provided to Ms. Johnson during the counseling sessions that occurred in 1981, K.C. and L.M. filed this lawsuit.

## III. ARGUMENT RE: STATUTE OF LIMITATIONS

The Supreme Court has noted that the Legislature's purpose in enacting RCW 4.16.340 was to provide a broad avenue of redress for victims of childhood sexual abuse. *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wash.2d 699, 985 P.2d 262 (1999). "The three year statute of limitations on a claim arising from an act of childhood abuse does not begin to run at least until the victim discovers 'that the act caused the injury for which the claim is brought.'" *Miller v. Campbell*, 137 Wash. App. 762, 767, 155 P.3d 154 (2007), citing RCW 4.16.340(1)(c). "Legislative findings supporting this statutory discovery rule state the Legislature's intent 'that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.'" *Id.* "The special statute of limitations, RCW 4.16.340,

[14] *Id.*

indicates that it is not inconsistent for a victim to be aware for many years that he has been abused, yet not have knowledge of the potential tort claim against his abuser." *Id.* at 773. "Indeed, as our Legislature has found, childhood sexual abuse, by its very nature, may render the victim unable to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later." *Cloud v. Summers*, 98 Wash. App. 724, 735, 991 P.2d 1169 (1999).

The interpretive case law weighs in favor of preserving childhood sex abuse claims whenever possible. *See e.g. Hollmann v. Corcoran*, 89 Wash. App. 323, 949 P.2d 386 (1997). In *Hollmann*, the trial court dismissed a similar childhood sex abuse claim premised upon evidence presented by the defense demonstrating that the victim had received therapy related to the abuse and also had been diagnosed with PTSD, on appeal, the trial court was found to have committed reversible error for the dismissal. *Id.* When reversing the trial court for the improper dismissal, Division III noted that victim subjectively continued to claim that "he did not recognize the causal relationship between his present problems and [the abuser's] acts." *Id.* at 333. In relation to the PTSD diagnosis, the Court noted that while the counselor "made an initial diagnosis of PTSD as early as 1989, a jury could find [the victim] did not relate this diagnosis to [the perpetrator's] abuse." *Id.* at 334.

In *Hollman*, over three (3) years before the lawsuit was filed, the plaintiff Mr. Hollman had undergone two separate psychological evaluations and treatment with two treatment providers. *Id.* at 328-29. During the course of each evaluation and treatment, the Plaintiff disclosed he had been sexually molested by the defendant Mr. Corcoran. *Id.* Each provider then treated Mr. Hollman for the symptoms he exhibited. *Id.* Mr. Corcoran then brought the motion to dismiss based on statute of limitation. In reversing the trial court, this Court noted the distinct legislative policies applicable to childhood sex abuse claims:

> The Legislature specifically stated its intent in its findings:
>
> (1) Childhood sexual abuse is a pervasive problem that affects the safety and well-being of many of our citizens.
>
> (2) Childhood sexual abuse is a traumatic experience for the victim causing long-lasting damage.
>
> (3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.
>
> (4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm or damage until many years after the abuse occurs.
>
> (5) Even though victims may be aware of injuries related to the childhood sexual abuse, more serious injuries may be discovered many years later.

> (6) The legislature enacted RCW 4.16.340 to clarify the application of the discovery rule to childhood sexual abuse cases. At that time the legislature intended to reverse the Washington supreme court decision in Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986).

*Id.* at 333.

The higher courts held that legislative policies (4) and (5) are particularly applicable to the scenario where a child sex abuse victim fails to recognize the causal relationship between the victim's present problems and the sexually abusive acts. Therefore, even when a child sex abuse plaintiff discloses having been sexually abused for purposes of treating a mental illness, the disclosure and subsequent treatment in and of themselves, do not necessitate the conclusion that the plaintiff made the causal connection between the abuse and injury.

Another trial court made a similar error in dismissing a childhood sex abuse claim in *Korst v. McMahon*, 136 Wash. App. 202, 148 P.3d 1081 (2006). In *Korst*, Division II engaged in a discussion about RCW 4.16.340, specifically noting that there was no "reasonably should have discovered" portion of the law that applies to the victims bringing claims. *Id.* at 207. "In light of the Legislature's findings, the *Hollman* Court interpreted the plain language of RCW 4.16.340(1)(c) as not imposing a duty on the plaintiff to discovery her injuries in childhood sex abuse cases." *Id.* at 207-8. According to the *Korst* Court, the trial court erred in

that RCW 4.16.340 "does not begin running when the victim discovers an injury." *Id.* at 208. "The legislature specifically anticipated that **victims may know they are suffering emotional harm or damage, but not be able to understand the connection between those symptoms and the abuse**." *Id* (emphasis added).

Further, the *Korst* Court provided illumination to the high burden imposed upon a defending party in establishing, as a matter law, that a victim made the necessary subjective damages connections in their minds supportive of dismissal. In *Korst*, the defense cited to evidence in the form of "a letter that she wrote to her father" illustrating ongoing suffering stemming from childhood sexual abuse. *Id.* at 208. The Court noted that the "letter simply indicates that she resented her father for sexually abusing her, not that Korst understood the effects of the abuse." *Id.* at 209. Moreover, even though the victim had been diagnosed with PTSD, the Court cited approving to trial testimony from the diagnosing health care practitioner noting that "a person with no psychology background would 'simply not have the capacity to link these varied miscellaneous feelings to posttraumatic stress.'" *Id.* at 210. Division II overruled the trial court finding that "[f]rom this evidence, the trial court could not reasonably infer that [the victim] already knew in 1995 that her father's sexual abuse caused her physical and emotional symptoms." *Id.* at 211.

According to the controlling case law, "victims of childhood sexual abuse know that they have been hurt, but RCW 4.16.340 makes it clear that a plaintiff's cause of action does not accrue until she knows that the sexual abuse **has caused her more serious injuries.**" *Korst v*, 136 Wash. App. 202. To meet the heavy burden of getting a case dismissed, the defending party must show that the victims "'discovered that the act caused the injury **for which the claim is brought.**'" *Id*, citing, RCW 4.16.340(c). In this instance, Good Sam failed to meet this burden with regard to either K.C. or L.M.

Judge Hogan did not err in the rulings on the motions for summary judgment regarding the statute of limitations. In accord with RCW 4.16.340, the parties are in relative agreement that Good Sam has the burden of proving, as a matter of law, that as of November 19, 2011, both K.C. and L.M. understood and connected all of their injuries to the childhood sexual abuse. In this regard, in order to have the summary judgment granted, Good Sam needed (but failed) to have submitted evidence from which a jury could only find one way. *See B.R. v. Horsely*, 186 Wash. App. 294, 345 P.3d 838 (2015) (holding that each distinct harm must be identified and evaluated); *Hollman*, 89 Wash. App. 323; *Korst*, 136 Wash. App. 202; *Carollo*, 157 Wash. App. 796. At the trial court level, Good Sam failed to submit evidence from which a jury could ever

find that K.C. and L.M. connected and understood their qualitatively differing injuries prior to November 19, 2011, therefore, as in *Korst*, the statute of limitations defense was properly dismissed entirely.

**K.C.:**

In the attempt to have K.C.'s claim dismissed at summary judgment, Good Sam submitted evidence in the form of (1) an interrogatory response authored by K.C. dated April 28, 2015 and (2) deposition excepts of K.C.'s testimony dated August 12, 2014.[15] In those select pieces of evidence, K.C. admits that the childhood sexual abuse has caused her substantial injury.[16] K.C. even acknowledges that as of the moment of making those assertions on April 28, 2015 and August 12, 2014, she recognized some connection and understanding of some injuries to the childhood sexual abuse. [17] As noted in K.C.'s declaration, these connections and understandings are the product of consultations with health care professionals that occurred between 2012 and 2014:

> *It is my understanding that the defense is attempting to have my case dismissed premised upon statements that I have made during the course of this litigation. Specifically, the defense is relying upon statements such those signed by me on April 28, 2015 indicating "**Everyday that passes I feel like the impact of the abuse increases. I know that I have been traumatized.**" It is my understanding that the defense is also relying upon statements that I made when I*

[15] CP 1366
[16] *Id.*
[17] *Id.*

> *was deposed on August 12, 2014 indicating that my injuries include "coping with life every single day. I mean, I'm a wreck. I just – I'm just a wreck. I just have a hard time coping with life, period. That's why I'm on medication." And the defense is also relying upon other deposition statements indicating that I have troubles in my marital relationship and that the symptoms of my PTSD have been impacting me my entire life for a long time.*[18]
>
> *The statements dated August 12, 2014 and April 28, 2015 about my injuries are all true and accurate. As I explained in my original declaration, these connections, in my own mind, were not drawn until recent events that included interactions with my treating doctors in 2012 and the forensic evaluations with Dr. Wynne dated July 11, 2014. I previously explained, "So when Dr. Markman walked in I asked "what's the difference between depressed and ADHD?" And I said honestly the medication (Vivance) gives me energy but it does not help me with any of my feelings. She then gave me another test to take. In the test I disclosed I was abused as a child and it was like a light bulb moment for both of us. She said I think you have PTSD, she explained a lot of female rape victims have it, she said the stress is so severe it damages the brain and makes an imbalance that you need medication to cope. I was in tears I cried and hugged her and felt relief in sharing and hopefully finding an answer. This was my first step at understanding the impact of the childhood sex abuse on my life." This occurred in 2012 – less than three (3) years before this lawsuit was filed on November 19, 2014.*[19]

As of July 11, 2014, K.C. has also submitted to a forensic examination with Robert Wynne, PhD that inventoried her many injuries.[20]

The key issues before this Court is not *whether* K.C. has an understanding of her injuries, but *when* K.C. developed this connection.

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[18] *Id.*
[19] CP 1550-54
[20] *Id.*

Good Sam filed the underlying motion for summary judgment while glossing over this critical requirement under RCW 4.16.340.[21] The law does not support Good Sam's position. The simple act of recognizing, present tense during litigation, the nature of some injuries retrospectively proves nothing relevant to the statute of limitations analysis. The case law is clear that simply acknowledging the symptoms is not probative as to the statute of limitations:

> In *Korst v. McMahon*, 136 Wash.App. 202, 148 P.3d 1081 (2006), a woman sued her parents for harms caused by her father's rape of her when she was 13. The trial court ruled the action time-barred because the woman had written a letter to her father several years before bringing suit in which she complained about the rape and stated that the abuse was "something that never goes away" and that it had "haunted" her for over 20 years. *Id.* at 209, 148 P.3d 1081. The court of appeals reversed. It noted that the letter did not mention any of the specific physical and emotional harms which the woman complained of in her suit. It also noted that she had supplied evidence that these harms were connected to the rape, and she was only recently aware of this connection. *Id.* at 211, 148 P.3d 1081.

*Carollo*, 157 Wash. App. at 801.[22] It should be noted that throughout Good Sam's entire argument, there is not even a proposed date or moment

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[21] Good Sam offers no date prior to November 19, 2011 at which K.C. connected her injuries.

[22] The undersigned counsel recently had a Thurston County Superior Court reversed for accepting an identical argument. In that case, the Court of Appeals recognized that a victim's statute of limitations is not tolled by such a simple present tense admission during a deposition:

> The Department further contends that S.B. made admissions during her deposition on July 7, 2013, that show she has long been aware that the experience of being

sexually abused while in foster care is a cause of her present disorder. S.B. acknowledged being depressed "all of her life" and noted that she understood that her depression is related to "my abuse."

Q: Okay. Was your depression only related to your friends dying from the '97 accident?

A: No.

Q: What—

A: I've been diagnosed depression all my life.

Q: Okay. For what?

A: My abuse.

This passage shows only that at the time of her deposition, S.B. understood the causal connection. Similarly, S.B.'s deposition testimony relating to her past suicide attempts is not sufficient to demonstrate an earlier awareness:

Q: And I think you already said you've had depression all your life?

A: Yes.

....

Q: I see in your record that you've cut your wrists before?

A: Yes.

Q: When did that occur?

A: When I was—2007, 2008, and then just this last January I slit my wrist.

Q: And what was the reason for that?

A: Bringing all this stuff back up.

Q: Okay. So in 2007 it all came back up again?

> A: No. In 2007 it was just—I just had a low part, was really depressed and everything. This one where I slit that, was just this January.

Q: Okay.

A: That's from all this, just ...

Q: But when you cut on yourself—

A: Did it before.

in time suggested at which K.C. connected her injuries. Based upon Good Sam's complete and utter failure to produce any evidence that K.C. connected and understood her childhood sexual abuse related injuries prior to November 19, 2011, in accord with *Korst v. McMahon*, Judge Hogan proper dismissed the statute of limitations as a matter of law.

**L.M.:**

In relation to L.M., Good Sam submitted even less substantial evidence. In fact, Good Sam did not produce a single shred of evidence in the form of any admissions on the part of L.M. Instead, Good Sam combed through and selected partial counseling records from L.M. counselor, Ana Casillas-Calleros, MFT. The records are representative of "conjoint" martial counseling sessions that involved the contemporaneous participation of L.M.'s husband, Paul:

> *I was legally married to my husband, Paul, as of February 24, 2011. Shortly before the marriage, Paul and I elected to participate in the conjoint counseling sessions with Ana. It is important to note that these were not (as the defense has misrepresented) normally "individual" counseling*

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Q: —it's a result of your history, sex abuse?

A: Yes.

Contrary to the Department's argument, S.B. did not say in the testimony quoted above that when she decided to cut herself in 2007 and 2008, she knew she was doing it because of her history of sexual abuse in foster care. The testimony proves only that she was aware of the connection at the time of her deposition. It does not establish *when* S.B. understood her previous suicide attempts were caused by her abuse.

*P.L. & S.B. v. DSHS*, 184 Wash. App. 1010 (2014).

*sessions, they were "conjoint" meaning that Paul and I participated simultaneously. The records themselves clearly reflect that truth:*

Type: (check one): ☐ Individual ☑ Individual with Collateral support systems
☑ Conjoint ~~☐ Family~~ (members present) ___ Spouse ___ Change in Dx:____ Current GAF: ____

*As I noted in my prior declaration, "Immediately before the wedding, and I believe after our bankruptcy paperwork had been filed, I felt compelled to tell Paul about the abuse that I had suffered as child. That evening we were having sex and I started crying afterwards, he asked me what was wrong and I said nothing. He sat up and held me and said he was here to listen to me and if I was crying he knew something was wrong, because I did not cry often. I cried for about 5 minutes before I could even get the words out. He listened and then he got angry at me and pushed me away. Then he realized what he did and he pulled me back to him and said he was sorry. I had already shut down. I was back on the defensive. I did not feel safe. I said I was fine and I tried to go to sleep." It was this occurrence, around the time that we were married, that prompted the conjoint counseling. I felt compelled to attempt counseling in an effort to make myself more emotionally, and sexually, healthy for Paul.*[23]

The focus of the sessions was the sexual relationship between L.M. and Paul.[24] There was little to no self exploration of the underlying root cause of L.M.'s injuries.[25]

Just as importantly, the counseling records do not reflect L.M.'s thought processes and subjective connections understandings, as required

[23] CP 1457-1549
[24] *Id.*
[25] *Id.*

under RCW 4.16.340, and even the case law relied upon by Good Sam.[26] The counseling records document the impressions and professional interpretations of Ms. Casillas-Calleros, as the counselor, and not those of L.M:

> *I have had an opportunity to review the materials submitted by the defense arguing that prior to November 19, 2011, I had understood the connections between the childhood sexual abuse that I experienced and the injuries for which I am seeking redress in this lawsuit. Nothing could be further from the truth. It is my understanding that the defense is relying upon excerpts of the counseling records from PsyCare, Inc. where my spouse and I received "conjoint" counseling sessions with Ana Casillas-Calleros. The records do not support the conclusion that prior to November 19, 2011 I had an understanding of the injuries that I suffered as a result of being molested throughout my childhood. Within this declaration, I will explain the reasons why to the Court.*
>
> *Prior to reviewing these PsyCare, Inc. records while in the process of completing the declaration, I have never seen the forms/records in completed format. The counseling sessions records documenting what occurred during each session were written by Ms. Casillas-Calleros ("Ana"), and not me. The records were likely drafted after the sessions were completed. The records themselves reflect Ana's thoughts and impressions about the counseling sessions and not what was actually going through my own mind. For example, the very first intake document dated December 10, 2010 that was completed by Ana suggests that I had a history of over-eating that was caused by being molested. I likely did share with Ana that I had a history of overeating. However, I most certainly did not walk in the first day to see my counselor and tell her that the cause of my overeating was the childhood sexual abuse. This was Ana's conclusion, as the counselor, that was not discussed*

[26] *Id.*

> *with me at that time or in any meaningful way to the best of my knowledge and recollection.*[27]

The case law is clear that a sex abuse victim is not properly determined to connect and understand that nature of sex abuse injuries simply as a result of sitting through a few counseling sessions wherein the issues were discussed:

> In *Hollmann v. Corcoran,* 89 Wash.App. 323, 949 P.2d 386 (1997), Mr. Hollmann sued a childhood abuser. Hollmann was later diagnosed with PTSD twice by different counselors. Both diagnoses connected the PTSD with the abuse, but the first therapist did not assist Mr. Hollmann in exploring the causes of the abuse, rather she focused on treatment. The first therapist testified that, at the time of diagnosis, Mr. Hollmann was not capable of connecting the abuse to his symptoms. This was because he felt he had volunteered for the relationship with the abuser. The first diagnosis happened more than three years prior to Hollmann bringing suit. The trial court granted the defendant's summary judgment motion because the plaintiff should have made the connection between the abuse and his emotional problems based on the first diagnosis. This court reversed, holding that the statute does not impose a reasonability requirement on discovery; rather, it is an actual discovery requirement. *Id.* at 334, 949 P.2d 386. The court held that it was a question for the jury as to whether Hollmann related the initial diagnosis to the childhood abuse. *Id.*

*Carollo*, 157 Wash. App. at 801-2. Further, in *Hollmann v. Corcoran*, the victim, Mr. Hollmann, participated in over "20 sessions" of counseling wherein the counselor "explained generally the bases for her diagnosis of

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[27] *Id.*

PTSD, but her focus was on developing a treatment plan, not helping Mr. Hollmann understand the cause of his condition." 89 Wash. App. at 328. Here, it does appear from the counseling records that there was some vague level of discussion predating November 19, 2011 regarding treating L.M.'s childhood sex abuse symptomology. However, Good Sam has not submitted any evidence that L.M. gleaned any meaningful causation related connections and understandings during those early "conjoint" marital counseling occasions.

**Qualitatively Distinct Harms:**

"The legislature intends that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later." RCW 4.16.340 (Intent Section). "Appellate courts have found actions in compliance with the three year limitation of RCW 4.16.340(1)(c) in two sets of circumstances: (1) where there has been evidence that the harm being sued upon is **qualitatively different** from other harms connected to the abuse which the plaintiff had experienced previously, or (2) where the plaintiff had not previously connected the recent harm to the abuse." *Carollo v. Dahl*, 157 Wash. App. 796, 801, 240 P.3d 1172 (2010). (emphasis added). This court recently affirmed this principle in *See B.R. v. Horsely.*[28] The appellate courts have

[28] 186 Wash. App. 294, 345 P.3d 838 (2015)

distinguished injuries such as "anger" at the abuser, ulcers, and as qualitatively distinct: "a reasonable person could not infer that she knew that her father's abuse had caused her ulcers or had caused her to grind her teeth at night." *Korst*, 136 Wash. App. at 209-210. In relation to K.C. and L.M., Good Sam failed to submit any evidence that, prior to November 19, 2011, they submitted a multitude of newly discovered qualitatively distinct harms in connection to the abuse at issue. After a forensic examination with Dr. Wynne that resulted in the reports dated July 11, 2014, K.C. and L.M. identified multiple new and qualitatively distinct injuries that were caused by the childhood sexual abuse:

**K.C.:**

Good Sam failed to demonstrate that prior to November 19, 2011 that K.C. connected her (1) educational impairments, (2) early pregnancy, (3) substance abuse, and other injuries that were called to her attention in Dr. Wynne's report dates July 11, 2014.[29] These are qualitatively distinct injuries. Because Good Sam failed to submit any evidence in this regard, K.C.'s motion for summary judgment to dismiss the statute of limitations was properly granted.

[29] CP 1039-1088, 1550-54

**L.M.:**

Good Sam failed to demonstrate that prior to November 19, 2011 that L.M. connected multiple and additional qualitatively distinct injuries that include (1) childhood risk taking and promiscuity, (2) parenting inabilities, (3) sibling rifts, (4) educational impairments, (5) financial and wage capacity losses, (6) weight gain/control, (7) physical health impairments, and (8) early pregnancy.[30] L.M. actualized many of these injuries for the first time after reviewing Dr. Wynne's forensic examination dated July 11, 2014. Because Good Sam failed to submit any evidence in this regard, L.M.'s motion for summary judgment to dismiss the statute of limitations was properly granted.

**Conclusion Re: Statute of Limitations:**

Good Sam has failed to produce evidence from which a jury could *only* conclude that prior to November 11, 2011 K.C. and L.M. both subjectively connected and understood all of their qualitatively differing injuries. In truth, as to K.C., Good Sam did not submit *any* evidence at all other than K.C.'s present tense recognition that the abuse has caused a life time of suffering. Good Sam wholly failed to identify and point in time pre-dating November 11, 2011 that K.C. achieved this actualization, and also failed to prove that K.C. has not connected qualitatively distinct

[30] CP 1089-1156, 1457-1549

injuries as a result of consultations with her treating physician in 2012 and a professional forensic examination that was authored by Dr. Wynne on July 11, 2014. Good Sam made the same error in relation to L.M. There is no evidence of record proving that prior to November 11, 2011, L.M. subjectively connected any injuries. At best, L.M.'s counselor, as a trained professional, recognized some of these issues. Based upon the absence of evidence, the statute of limitations defense was properly dismissed by Judge Hogan.

## IV. ARGUMENT RE: COLLATERAL ESTOPPEL

On the merits, Judge Hogan's rulings pertaining to the statute of limitations were correct. There is no clear error and collateral estoppel does not bar K.C.'s claim.[31] Under estoppel principles, "the issue decided in the prior adjudication [must be] identical with the one presented in the action in question..." *Nielsen v. Spanaway General Electric Medical Clinic, Inc.*, 85 Wash. App. 249, 253, 931 P.2d 931 (1997). As procedural matter, as documented in the disputed Order dated July 10, 2015, Good Sam failed to even submit the record that was before Judge Stolz for consideration before Judge Hogan so there is no evidentiary basis upon

[31] Good Sam concedes that there is no basis upon which to assert the L.M.'s claim is barred by any form of estoppel principles.

which to evaluate whether or not the issues are identical.[32] Judge Hogan's ruling was based upon a different evidentiary record than that of the DSHS related claim.[33] In that regard, Judge Hogan recognized and ruled that Good Sam failed to present evidence that the injuries at issue in the lawsuit against Good Sam had been discovered more than three years prior to the initiation of the lawsuit. Judge Hogan never had a chance to review the evidentiary ruling upon which Judge Stolz based her earlier decision.[34]

As illustrated in the controlling case law and under RCW 4.16.340, the statute of limitations is calculated based upon the injuries at issue and it is entirely possible for an old claim to be re-tolled upon the recognition of new injuries. *See B.R. v. Horsely*, 186 Wash. App. 294, 345 P.3d 838 (2015). Moreover, Good Sam caused different injuries then DSHS. *See Miller v. Campbell*, 164 Wash. 2d 529, 192 P.3d 352 (2008) (holding the estoppel principles are temporal and not applicable in sex abuse claims under RCW 4.16.340). Typically, the parties should be in "privity with the party to the prior adjudication...." *Id.* at 253. Good Sam and DSHS are different parties, with different legal obligations, and different damages were caused by their differing involvement during the childhoods of K.C. and L.M. Collateral estoppel is a *discretionary* doctrine and Judge

[32] VRP 31 of July 10, 2015; CP 1628-29
[33] *Id.*
[34] *Id.*

Hogan did not err in ruling that the less than informed ruling of Judge Stolz was not binding based upon this differing evidentiary record. *State v. Gary*, 99 Wash. App. 258, 991 P.2d 1220 (2000) (recognizing that collateral estoppel is hard to prove and properly reviewed for abuse of discretion). Judge Hogan most certainly commit an abuse of discretion by refusing, quite appropriately, to apply the doctrine of collateral estoppel as between these differing defendants from differing time periods.

The application of collateral estoppel must not work in injustice. *Nielsen*, 85 Wash. App. at 254. At the trial court level, Judge Stolz was originally assigned to this matter. Judge Stolz made multiple outlandish rulings, including dismissing the DSHS claim, and it was discovered that Judge Stolz had previously acted as a family law attorney for K.C. and L.M.'s father in a custody dispute during the timeframe that they were being molested by Walter Johnson. As an attorney, Judge Stolz also actively litigated against Donna Johnson.[35] A pleading that was drafted by Judge Stolz, then an attorney in 1984, summarizes the interested parties at the time:

[35] Ms. Johnson was added as a party on October 10, 2014, after Judge Stolz ruled on the original motion to recuse.

2. PARTIES: That the Petitioner is DELBERT MELBY, the father of the minor children and who is entitled to summer visitation scheduled to begin two weeks after the end of school (June 27, 1984 pursuant to a Decrre of Dissolution heretofore entered by this Court. That the children's mother DONNA JOHNSON, her current husband WALTER KARL JOHNSON and other parties have concealed and hidden the children with the intention of frustrating Petitioner's visitation.

[36]

Ms. Johnson is the mother of Plaintiffs K.C. and L.M. As an attorney, during the same timeframe that K.C. and L.M. were being molested in the home of Walter and Donna Johnson, Judge Stolz had repeatedly obtained court orders pulling the little girls in and out of the home wherein they were being victimized:

3. WHEREFORE THE PETITIONER PRAYS that the Court Grant an Order directing the Pierce County Clerk's Office to issue a Writ of Habeus Corpus allowing the release of the minor children to their father in order that his visitation may begin. That such an order provide that the appropriate authorities may break and enter any address, abode or place where the children may be concealed in carrying out the mandates of the Writ and Bench Warrant.

DATED this 27th of June, 1984.

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Page One- PETITION FOR WRIT

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[37]

[36] CP 883-896
[37] *Id.*

Judge Stolz took these actions on behalf of Mr. Melby as his legal counsel against Ms. Johnson, a party to this litigation. Not seeing this as a conflict, Judge Stolz attempted to keep ruling upon things until Donna Johnson was added as a party and exercised an affidavit of prejudice to get her off of the case. As a result, there were pending motions for reconsideration of Judge Stolz's rulings that no other trial court was willing to rule upon. Collateral estoppel requires "finality" and there have never been any final rulings on the pending motions before Judge Stolz.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." *State v. Madry*, 8 Wash. App. 61, 68, 504 P.2d 1156 (1972). "The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable

questioning of the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See* Canon 3C(1)(a) Code of Judicial Conduct of the American Bar Association (1972)." *Id.* at 20; *see also Tatham v. Rogers*, 170 Wash. App. 76, 283 P.3d 583 (2012) (noting that a trial court must disclose facts that may implicate bias and compromise the appearance of fairness). It would prove a travesty of justice to require Judge Hogan to adhere to Judge Stolz's rulings given her overt conflicts of interest. In 1984, Judge Stolz was arguing, as an attorney, about the proper home for K.C. and L.M. in which to reside.

Judge Hogan did not abuse her discretion when refusing to apply collateral estoppel as pertained to Judge Stolz's rulings. In truth, the evidentiary record that was presented before Judge Stolz was never presented by Good Sam for review by Judge Hogan. Therefore, regardless of any factual similarities, Good Sam's attempt to invoke collateral estoppel principles is fatally flawed. Furthermore, Good Sam's substantive arguments are without merit. Apply Judge Stolz's rulings to override those of Judge Hogan would prove to be a travesty of justice to these childhood sex abuse survivors.

## V. CONCLUSION

For the reasons set forth herein, Good Sam's appeal is lacking in merit. Judge Hogan correctly dismissed Good Sam's statute of limitations defense. Good Sam failed to identify sufficient evidence upon which a jury could find a merited statute of limitations defense. Judge Stolz's prior rulings did not mandate any form of collateral effect. From a procedural standpoint, it should not be forgotten that L.M. and K.C. are sisters and pursuing these claims contemporaneously. It is entirely possible that once the claims against Good Sam are resolved, L.M. and K.C. will appeal Judge Stolz's ruling related to DSHS. Judge Stolz's ruling was flippantly uninformed and incorrect and will be reversed at some point in these proceedings. It would make no sense to rule in Good Sam's favor and have these claims divided only to have them reunited at a later point in time. As a practical matter, both of these claims against Good Sam need to proceed and be resolved on the merits. Based upon the evidence and argument presented, this matter should be remanded for further proceedings on the merits.

DATED this 15th day of June, 2016.

Respectfully submitted

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

GOOD SAMARITAN HOSPITAL,

Appellants,

v.

K.C. and L.M.,

Respondent.

No.48029-8-II

CERTIFICATE OF SERVICE

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

I caused to be served this date the following:

- Response Brief

in the manner indicated to the parties listed below:

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